

Donald E. Kelley

by Larry L. Bohning



1908–95

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Thanks to Melissa Hart, Kelley's granddaughter, for providing all of the photographs used in this profile.

Donald E. Kelley began his education in a one-room Nebraska grade school. He would go on to hold some of the highest positions in the legal profession. Kelley was born on January 29, 1908 in McCook, Nebraska. His mother, Elsie Asten Kelley, was of Dutch–English ancestry, and his father, Charles Kelley, had English–Irish ancestry.¹

The Nebraska Years

Kelley walked approximately one and one-half miles each way to attend a one-room grade school in Red Willow County, Nebraska. Frigid winters and outdoor latrines were the norm for Kelley and his fourteen classmates. When he was in the sixth grade, Kelley entered Kearney Military Academy. Kelley rose to the rank of corporal at Kearney and his grade point average of 94 for three years merited him a gold pin.² He went on to McCook high school to win red-and-white “M” letters in football and basketball before graduating in 1925.³

Growing up, Kelley worked as a farmhand for his father, and as a law office assistant for his grandfather, John E. Kelley, a lawyer in McCook. John Kelley had a profound influence on Don. In the summer of 1924, his grandfather took him to Cleveland for the GOP convention, which nominated Calvin Coolidge for U.S. President. Don Kelley later would say: “I suppose I was influenced by that time and that experience but I like to think now I became a registered Republican as the result of sound thought and reflection.”⁴

Law School and Private Practice

Kelley studied pre-law at the University of Nebraska and received an LLB from the University of Nebraska College of Law in 1930. On June 21, 1930, he married Georgia E. Pyne from St. Paul, Nebraska. They would have two children, John M. (Mike) Kelley and Donald (Tarz) Pyne Kelley.⁵

In 1930, Kelley returned to McCook, and under the guidance of his grandfather, started a general law practice. It was the period of the Great Depression in the United States, and times were tough, especially for young lawyers. Kelley later recalled that his law practice “was not lucrative. . . . Sometimes you got paid with a chicken or eggs.”⁶

Assistant Nebraska Attorney General

In 1939, Kelley moved to Lincoln, Nebraska. He worked as an assistant attorney general for the state of Nebraska until 1941.

During this time, Kelley argued a case before the U.S. Supreme Court and helped persuade the high court to reverse a decision of the Nebraska Supreme Court and also overrule a previous U.S. Supreme Court decision.⁷ He also was active in Republican politics in Nebraska and was credited with starting that state’s Young Republicans organization.⁸

In 1941, he went back to private practice at McCook and finished the term of Red Willow County Attorney Joe Callahan, who had been called into the service. Kelley then was elected to a four-year term as Red Willow County Attorney.

Move to Colorado

In 1945, Kelley resigned his position as county attorney and moved his family to Denver, where they lived at 20 South Dexter and attended St. John’s Episcopal Cathedral. Kelley maintained a general law practice, with offices in the First National Bank building, until 1953. In Denver, Kelley continued to be active in Republican politics.

U.S. Attorney for Colorado (1953–59)

Republican Dwight D. Eisenhower was elected U.S. President in November 1952 and sworn into office on January 20, 1953. It was, and still is, customary for U.S. Attorneys to submit their resignation when a President of another political party is elected. However, the U.S. Attorney for Colorado, Democrat Charles S. Vigil, who had been appointed to that position by President Harry Truman in 1951, had other ideas. Vigil refused to resign even after getting a call from the office of U.S. Attorney General Herbert Brownell in Washington, asking him to submit his resignation.⁹ On November 19, 1953, White House press secretary James C. Hagerty issued a statement to the press saying that Eisenhower was removing Vigil and appointing Donald Kelley as U.S. Attorney. Hagerty noted that Vigil, who recently had gained federal convictions against Denver’s notorious crime family members Eugene “Checkers” Smaldone and his brother Clyde “Flip Flop” Smaldone, had “declined to resign.”¹⁰

Kelley was sworn in as U.S. Attorney for Colorado on November 24, 1953 by U.S. District Judge Lee Knous.¹¹ On November 29, it was announced that Kelley had named Robert Swanson as an assistant U.S. attorney, whose salary was still being negotiated, because U.S. Attorney General Herbert Browning recently had ruled that U.S. Attorneys and assistants must devote full time to their federal jobs.¹²

Kelley hired several distinguished attorneys to work in the U.S. Attorney's Office. Among them were Robert (Bob) Wham, who would go on to become Denver City Attorney; Robert (Bob) Inman, who would later become his law partner; and Richard Matsch, who would become a distinguished federal district court judge.

In an interview of Kelley when he was the U.S. Attorney, a reporter noted that "this quiet University of Nebraska law school graduate with silver gray hair and a wisp of a mustache looks like a state department diplomat."¹³ His colleagues recall that he was a very handsome man.¹⁴

Prosecuting the Communists

Some of the most high-profile cases during Kelley's tenure as U.S. Attorney involved alleged communists who were prosecuted by his office in federal court under the Smith Act of 1940.¹⁵ The Cold War was at its height during the 1950s. In 1950, General Dwight Eisenhower warned in a kickoff speech for the Crusade for Freedom at the Denver City Auditorium that "the Reds seek to enslave America."¹⁶ Plans to build the North American Aerospace Defense Command (NORAD) complex near Colorado Springs were formulated in the 1950s.¹⁷ NORAD was designed to house U.S. and Canadian military personnel so they could safely monitor a nuclear attack on the United States by Soviet bombers. In 1951, Julius and Ethel Rosenberg were convicted of passing nuclear weapons secrets to the Soviet Union. In 1953, they became the first American civilians executed for espionage.¹⁸

In 1954, a federal grand jury indicted seven alleged communists for conspiracy to violate the Smith Act by teaching and advocating the overthrow of the government and helping to organize the Communist Party for that purpose.¹⁹ U.S. Assistant Attorney General William F. Tompkins, boss of the Internal Security Division of the Justice Department, told Denver reporters that the trial of the seven "top regional Communists" was the most serious case the Justice Department had pending in the whole country.²⁰

Federal Judge Jean Breitenstein,²¹ who had been assigned to hear the case, called on the "large" Denver law firms (in 1954 that meant ten or more lawyers) to provide attorneys to represent the seven defendants, all of whom asserted indigency. Eleven Denver law firms agreed to provide a lawyer, some agreed to send partners, and others said they could provide only an associate. The eleven attorneys ap-

pointed to represent the accused communists consisted of some of Denver's finest trial lawyers: William V. Hodges,²² who served as chief counsel for the defense team; William A. Bryans III; John L. Ferguson; Robert H. Harry; Robert E. More; William Naugle (later an Arapahoe County District Court judge); Forrest C. O'Dell; Luis D. Rovira (Colorado Supreme Court justice, 1979-90);²³ John Shafroth;²⁴ Jay Tracey; and Arthur Underwood.

Although he was assisted by Thomas J. Mitchell, special assistant to the U.S. Attorney General, Kelley was the chief prosecutor for the trial.²⁵ After a vigorous prosecution during a ten-week trial, all seven defendants were found guilty. Their convictions eventually were reversed by the U.S. Tenth Circuit Court of Appeals. Six of the defendants were convicted in a retrial in 1959, and their convictions were again reversed by the Tenth Circuit Court of Appeals.²⁶

City Hall Bombshell

On June 15, 1959, Kelley announced that a federal grand jury had indicted Denver City Councilman C. Paul Harrington for income-tax evasion. It was the day before the run-off election for Denver City Council. Harrington was regarded as a solid citizen and leader of the conservatives on the council. He was a senior member of the council and a veteran of twenty-six years. Until the indictment, he was thought to be virtually unbeatable. The indictment had to be acted on by Kelley, because June 15 was the final day within the statute of limitations for bringing charges.²⁷ The indictment altered the make-up of the Denver City Council, causing Harrington and three other favored council candidates to lose the election. George Kelly, one of the successful council candidates and later council president, wrote: "It may have been the only time in U.S. municipal history that federal action drastically reshaped a local legislative body overnight."²⁸

Golfing With Ike at Cherry Hills

One time, when Kelley was still the U.S. Attorney and President Eisenhower was in Denver, Kelley drove him to the Cherry Hills



Golf tournament at Cherry Hills Country Club, 1951. Left to right: Lincoln Coit, Grand Junction; Darwin Coit, Denver; Donald E. Kelley, Denver; George Buch, Kansas City.

Country Club for a round of golf. Ike commented on Kelley's less than sterling performance on the golf course: "Kelley, you must be a great U.S. Attorney, because I can see you don't spend any time on the golf course!"²⁹

Denver City Attorney (1959–61)

In 1959, Mayor Richard (Dick) Batteredton,³⁰ the last Republican-elected mayor of Denver, appointed Kelley to be Denver City Attorney. In taking the post, Kelley took a salary cut from the \$16,500 he earned as U.S. Attorney to \$12,000 a year, as provided by the Denver charter.³¹ In an interview, Kelley explained that he was willing to take the position at lesser pay because "Dick Batteredton is a rather persuasive fellow. I admire him and I like what he is trying to do. I want to help him accomplish it. . . . [T]he city has a lot of problems and I want to be on Batteredton's team."³²

Kelley hired Bob Wham to be the chief deputy city attorney. Kelley hired Richard Matsch as a deputy city attorney to handle Denver annexation cases. Richard Matsch said of Kelley: "He had great integrity, was a true gentleman, never raised his voice, and was very cordial with everyone, friend and foe. He taught me to be an effective advocate, and to show respect for my opponent."³³

Kelley, Inman, and Flynn Law Firm

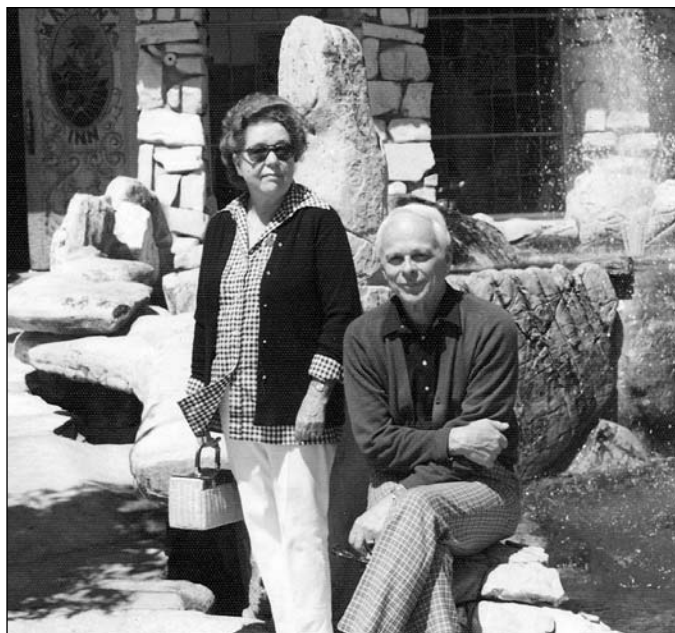
Don Kelley resigned as Denver City Attorney in July 1961 and joined John Flynn and Bob Inman to form the law partnership of Kelley, Inman, and Flynn. Their offices were on the eighth floor of the Majestic Building at 16th and Broadway in Denver. When Melvin Coffee joined the firm later, the firm became Kelley, Inman, Flynn, and Coffee.³⁴

After experiencing some administrative growing pains, the firm began using a profit formula developed by a Boston law firm and printed in an American Bar Association publication. The formula provided a method for divvying-up profits based on a partner's work and the clients they brought to the firm. The formula worked well for the firm for many years. Inman did most of the litigation for the firm; Flynn concentrated on in-office work, doing contracts and scheduling and attending meetings; Coffee specialized in tax work for the firm; and Don Kelley was the firm's primary "rain-maker." Through his contacts in city government, Kelley was successful in getting the firm one of its best clients in the firm's early years—the Metropolitan Sewage Disposal District.³⁵

Colorado State Senate

Kelley was elected to a four-year term to the Colorado State Senate in 1962.³⁶ During his tenure in the Senate (1963–67), he served as chairman of the Senate Judiciary Committee; in 1964 he was appointed by Governor John Love to the Governor's Committee on Fair Housing. Love had appointed the committee to rewrite Colorado's Fair Housing Law of 1959, which had been declared unconstitutional, in part, by the Colorado Supreme Court.

Jerry Kopel, who served a total of twenty-two years in the Colorado House of Representatives, remembers Don Kelley fondly for the even-handedness he displayed in dealing with fair housing legislative proposals that were major issues in the 1965 legislature. Kelley's proposed Senate bill followed the committee recommendations and would have continued to exempt owner-occupied housing. Kopel wrote:



Georgia and Donald Kelley.

As reporter Charlie Roos wrote about in 1965, "An owner who puts his house up for sale may discriminate against Negroes or any other prospective buyer as long as the owner is still in the house."

The Fair Housing bill I introduced in the House deleted this exemption and also included civil penalties. Kelley could have used his political muscle in the Republican-majority Senate to "stifle" my bill from passage. He did not. Instead, he worked with Senator George Brown to reach consensus on language which provided Fair Housing protection in all areas except room rentals in single-family owner or lessee occupied residences.³⁷

Judicial Merit Selection Campaign

When Kelley was in the Colorado State Senate, he co-sponsored legislation to put a proposed constitutional amendment on the statewide ballot that would provide for a judicial merit selection of Colorado judges. The legislation fell one vote short of the necessary two-thirds for passage.³⁸ After the legislation was defeated, Kelley helped initiate a petition campaign to put judicial merit selection on the ballot. The petition drive succeeded by collecting more than 47,000 signatures. Amendment 3, which provided for judicial merit selection, was placed on the 1966 election ballot by initiative.³⁹

Bar and Community Service

Kelley served on the Colorado Bar Association (CBA) Board of Governors and Denver Bar Association (DBA) Board of Trustees. He also served on a number of CBA and DBA committees, including the DBA Unauthorized Practice of Law, Judiciary, Fellowship, Law Day, Judicial Selection and Benefits, and World Peace Through Law Committees; and CBA Judiciary, Ethics, Law Day USA, and Education Against Communism Committees. He served as President of the Denver Chapter of the Federal Bar Association and as regional vice-president of the National Institute of Municipal Law Officers.

Kelley was active in community service organizations. He was chairman of the executive committee of the Colorado Division of the American Cancer Society from 1963 to 1965; in 1975, he was elected as an Honorary Life Member. He served as an alternate delegate to the Republican National Convention from Colorado in 1964, and served on the Governor's Commission on the Status of Women. He was a 32nd degree Mason, achieving the rank of Knight Commander of the Court of Honor; a Shriner; and a member of the Rotary Club of Denver, serving on its board of directors from 1969 to 1971.⁴⁰

Colorado Supreme Court

On July 5, 1966, Kelley announced in a letter to Howard Propst, Republican State Chairman, that he would seek a place on the Republican ticket for the election to the Colorado Supreme Court that fall.⁴¹ During his campaign for election to the court, he also made campaign speeches in support of the judicial merit selection proposal. On November 8, 1966, Kelley was elected to the Colorado Supreme Court, and would be among the last group of Colorado judges elected in a partisan judicial election. In the same election, the voters of Colorado approved the constitutional amendment that Kelley had so vigorously supported by a vote of 293,771 to 261,558. The amendment eliminated partisan judicial elections and provided for the merit selection of judges.⁴² It represented a sea-change in Colorado history that reverberates today.

Kelley would serve twelve years on the Colorado Supreme Court, including service as Deputy Chief Justice from 1970 to 1979. Hon. Edward Pringle was Chief Justice. Kelley successfully stood for retention in 1976.

A comprehensive review of the numerous decisions Kelley wrote or participated in while on the Supreme Court is beyond the scope of his article. However, in an interview after announcing his retirement, Kelley said that during his time on the court there had been some "subtle doctrinal changes in the court's opinions . . . with

changes in position occurring in the court's interpretation of governmental immunity and in some areas of water law." In the same interview, he noted that "the court has attempted to improve consistency in its rulings in the last few years . . . and in criminal law has maintained a sort of middle-of-the road stance."⁴³

Kelley's most widely cited opinion was one setting new personal injury law in 1971. It eliminated former requirements that a landowner's duty to maintain safe property varied depending on the type of person who entered the premises—a trespasser, for example; instead, it held that the landowner must keep his or her property reasonably safe.⁴⁴

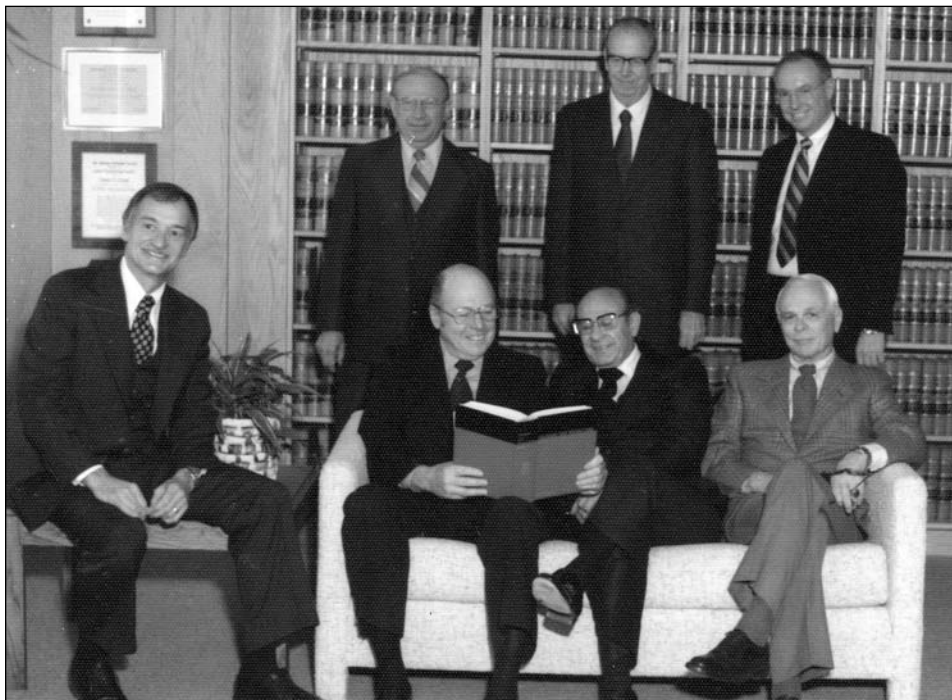
The Flag Desecration Case

Kelley wrote the decision for one of the most controversial cases that went before the Colorado Supreme Court while he was on the Bench. It dealt with the issue of flag desecration versus free speech. The case involved a young man, David Vaughan, who was arrested on a public street in Boulder for wearing a pair of blue jeans on the seat of which a portion of the American flag had been sewn. Boulder District Attorney Stan Johnson charged Vaughan with mutilating, defacing, and defiling an American flag, and he was found guilty by Boulder District Court Judge Rex Scott.⁴⁵

Judge Scott was reversed by the Colorado Supreme Court on October 1, 1973. In his decision, Kelley wrote:

Just as some citizens paste flag decals on their car windows to indicate their support of certain political philosophies, defendant adorned the seat of his jeans with a flag to indicate his contempt for those things which the flag symbolizes.

The ideas expressed by defendant's conduct may seem to some to be juvenile and inarticulate, but this does not strip his "speech" of constitutional protection. The First Amendment is not the exclusive property of the educated and politically sophisticated segment of our population; it is not limited to ideas capable of precise explication. . . .



Informal photo, circa 1976, of Colorado Supreme Court Justices. Seated, left to right: Jim R. Carrigan; Paul V. Hodges; Edward E. Pringle; and Donald E. Kelley. Standing, left to right: James K. Groves; Robert B. Lee; and William H. Erickson.

The state can no more censor ideas on the basis of their intellectual or artistic merit than on the basis of their political content. . . .

The section challenged, in effect, limits the expression of ideas about the flag to patriotic expressions acceptable to those charged with the enforcement of the criminal law. It attempts to impress a symbolic orthodoxy upon the people of Colorado . . . in direct conflict with the fundamental values protected by the First Amendment.⁴⁶

Years later, Kelley showed the reporter interviewing him a “court file three or four inches thick” that held “the few favorable comments and the overwhelming number of adverse comments the court received about the flag desecration case. I was un-American and all the nasty words, unpatriotic, whatever,” Kelley said, recalling the letters.⁴⁷ In writing about the case, veteran Colorado lawmaker Jerry Kopel said that “Justice Kelley’s decision was one which showed great courage, and preceded a similar U.S. Supreme Court decision by 16 years.”⁴⁸

Ironically, the first U.S. Supreme Court decision dealing with flag desecration laws⁴⁹ arose in Kelley’s home state of Nebraska and upheld the constitutionality of flag desecration laws. However, in the 1989 case of *Texas v. Johnson*,⁵⁰ which involved a man who burned a flag during the 1984 Republican Convention, in protest of Ronald Reagan’s policies, the U.S. Supreme Court essentially struck down all flag desecration laws.⁵¹ The political firestorm still rages, and a number of attempts have been made in Congress since 1990 to overrule the U.S. Supreme Court’s decision.⁵²

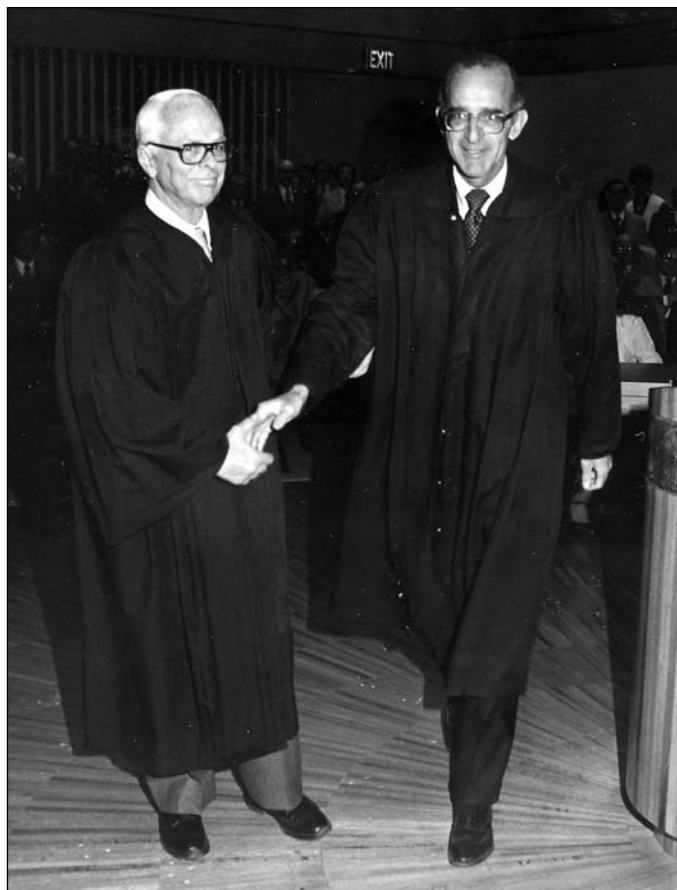
A Lasting Legacy: Advocate for Court Reform

Despite being actively engaged in partisan politics much of his career, Donald Kelley was a tireless advocate for adoption and implementation of the judicial merit selection system in Colorado. From 1957 to 1966, Kelley was a member of the CBA Board of Governors, during which time the merit selection system was debated and formulated. He actively supported adoption of the merit selection system. After it was passed, he continued to write and speak widely to explain the merit system to the public and to community leaders. He participated on a number of panels in Colorado and around the country that spoke on behalf of the merit selection process. In 1974, he wrote a script and arranged to have a film produced and financed by the American Judicature Society called “A Judicial Nominating Commission Interview,” to help better explain the merit selection process. The film was shown to a number of local civic organizations; on KMGH-TV 7 to an estimated audience of 35,000; and at conferences in Chicago, Boston, Philadelphia, and Phoenix.⁵³ Looking back after five years of experience under the relatively new method of judicial selection, Supreme Court Justice Kelley wrote:

[T]he merit system does produce competent and well-qualified judges [and has] a wholesome effect on the judicial performance of the holdover judges as well. . . . The new system contemplates that judges shall devote full time to their vocation. Current day case loads require no less. . . . Under the partisan political system, a judge was a Democrat or a Republican first, last and always, and was not permitted to forget it between elections.⁵⁴

When he retired from the Colorado Supreme Court, an editorial in *The Denver Post* read:

Justice Donald Kelley will retire from the Colorado Supreme Court January 31 after a long and distinguished career on the



Retiring Justice Kelley and incoming Justice Luis Rovira, Feb. 1979.

bench. Kelley perhaps made his strongest mark in pressing for the merit system of selecting judges and in supporting the centralization of administration that has made state courts more responsive. He has offered continuing quiet and thoughtful support for the administrative reforms since the system was centralized by constitutional amendment in 1967. The nation’s court systems need judges like Kelley to provide stability and sensitivity on the bench.⁵⁵

In 1981, the American Judicature Society awarded Kelley the Herbert Lincoln Harley Award for his outstanding support and efforts to improve the judicial system in Colorado by advocating for the nonpartisan selection of judges.⁵⁶

Retirement From the Supreme Court

Over a year before he would reach the mandatory retirement age of 72, Justice Kelley announced his retirement—effective January 31, 1979—in a letter to Governor Richard Lamm.⁵⁷ In an article reporting on Kelley’s retirement, it was noted he was “looking almost as fit and trim as he did 33 years ago when he moved to Denver from his native Nebraska.”⁵⁸ Kelley said he was resigning to “write, travel with his wife and try to build the public’s understanding of the court system. I’ve had groups of high school students touring the Supreme Court and they ask me where the jury sits. There’s a great lack of understanding.”⁵⁹

When Kelley retired, Chief Justice Paul Hodges was the only remaining member of the seven-member court who had been elected under the partisan election system. An emotional joint cer-

emony was held at the State Judicial Building on February 1, 1979 for Kelley's retirement and the swearing-in of his replacement. The ceremony was tinged with some irony. To fill Kelley's vacancy, Governor Lamm appointed Luis Rovira,⁶⁰ who so many years before had been one of the attorneys appointed to represent the seven communists prosecuted by Kelley in 1955. Rovira became the first Colorado Supreme Court justice sworn into office in the State Judicial Building at 2 East 14th Avenue in Denver. The controversial judicial building, along with the current Colorado History Museum located in the same block at 1300 Broadway, is now destined for demolition. It will be replaced by a new state justice center—to be called the “Ralph L. Carr Justice Complex”—that will cover the entire block.⁶¹

Summing Up Donald Kelley

At Kelley's retirement, former Chief Justice Edward Pringle delivered the farewell address to Kelley. Summing up Kelley's philosophy, Pringle said:

He believed that stability is the life of the law. He believed that the citizenry had a right to rely on precedent. He was in the tradition of the great common law judges. He had a healthy respect for the separation of powers, a belief nurtured by his service in all three branches of government. He was aggressively forward-looking and believed in judicial economy. . . . [Donald Kelley] evidenced a sweetness in a world where brusqueness and lack of grace are so evident.”⁶²

Notes

1. Much of the biographical information in this profile derives from Colorado Historical Society vertical files, Biographical Data: Donald E. Kelley, at 3 (undated); and Pattridge, “U.S. Attorney Donald Kelley Product of One-Room School,” *The Denver Post (Empire Magazine)* 39C (Sept. 11, 1955).

2. Pattridge, *supra* note 1.

3. *Id.*

4. *Id.*

5. Georgia E. Pyne Kelley died February 18, 2002, and was entombed at the Fairmount Cemetery Mausoleum in Denver. John M. (Mike) Kelley was born June 12, 1932, and died of esophageal cancer in Mesa, Arizona on May 17, 2000. Donald P. (Tarz) Kelley was born September 13, 1939, and currently maintains residences in Denver and Arizona.

6. Pattridge, *supra* note 1.

7. *Id.*

8. “Donald E. Kelley, high court justice, set to retire Jan. 31,” *Rocky Mountain News* 6 (Nov. 23, 1978).

9. Miller, “Washington Asks U.S. Attorney Vigil to Quit; He Balks,” *Rocky Mountain News* 5 (Sept. 5, 1953).

10. Roos, “Ike Fires Vigil In Press Notice—Kelley Named,” *The Denver Post* 1 (Nov. 19, 1953); Amole, “Charles Vigil, U.S. attorney who prosecuted Smaldones,” *Rocky Mountain News* 14B (May 13, 1999).

11. “Kelley Succeeds Vigil at \$2,500 More a Year,” *Rocky Mountain News* 18 (Nov. 25, 1953); Rothgerber, “Six of the Greatest: William Lee Knous,” 14 *The Colorado Lawyer* 1172 (July 1985).

12. “Kelley names Robert Swanson as Assistant,” *Rocky Mountain News* 10 (Nov. 29, 1953).

13. Pattridge, *supra* note 1.

14. Interview with Denver attorneys Ralph Clark, Joe Shoemaker, and Bob Wham in Denver, Colorado (May 9, 2008). Clark was active in Republican politics; Wham succeeded Kelley as Denver City Attorney; and Shoemaker eventually became Chairman of the Colorado Joint Budget Committee.

15. The Smith Act (Act) was passed by Congress as the Alien Registration Act of 1940. The Act made it an offense to advocate or belong to a group that advocated the violent overthrow of the government. In 1951, in *Dennis v. United States*, 341 U.S. 494, the U.S. Supreme Court upheld the convictions of eleven Communist Party leaders and found that the Act did not “inherently” violate the First Amendment.

16. Severson, “General Urges ‘Big Truth’ to Fight ‘Big Lie,’” *The Denver Post* 1 (Sept. 5, 1950).

17. See en.wikipedia.org/wiki/North_American_Aerospace_Defense_Command. See also Hill, “NORAD,” *5280 Magazine* 125 (Oct. 2007); www.norad.mil.

18. See en.wikipedia.org/wiki/Ethel_and_Julius_Rosenberg. The Rosenberg spy case included an alleged meeting of some of the spies in a Denver movie theatre to exchange purses containing espionage information. See Nizer, *The Implosion Theory* 134, 269 (Doubleday & Co., Inc., 1973).

19. Roos, “Russian—Model Plot Charged To 7 Suspects,” *The Denver Post* 1 (March 28, 1955).

20. Stolberg, “Denver Trial of Reds to Be Top Justice Case,” *Rocky Mountain News* 6 (Aug. 11, 1954).

21. McWilliams, “Six of the Greatest: Jean Sala Breitenstein” 25 *The Colorado Lawyer* 3 (July 1996).

22. Silverstein, “Six of the Greatest: William V. Hodges,” 14 *The Colorado Lawyer* 1174 (July 1985).

23. See www.state.co.us/courts/sctlib/84.htm.

24. Shafroth, “Six of the Greatest: John Franklin Shafroth,” 33 *The Colorado Lawyer* 15 (July 2004).

25. “FBI Spy Says Reds Used Racial Barriers,” *Rocky Mountain News* 7 (May 29, 1955); Roos, “Red Party Line Shift Reviewed in Trial Here,” *The Denver Post* 3 (April 1, 1955).

26. For more information on communism in Colorado, see “Colorado Communists” at the Denver Public Library, Western History and Genealogy, vertical files; Goodstein, “Denver in Our Time, Volume one: Big Money in the Big City” 424–27 (New Social Publications, 1999); Fletcher, “Seeing Red,” *Westword* (Feb. 19, 1998), a story about how one of the accused communists, Patricia Bell (Blau) Blawis, spent her last days in a Lakewood nursing home across the hall from Denver gangster Clyde Smaldone, available at www.westword.com/1998-02-19/news/seeing-red/full.

27. Robert (Bob) Wham, who had worked for Colorado Attorney General Duke Dunbar before Kelley hired him, presented the case to the grand jury that indicted Harrington. Interview with Bob Wham, in Denver, Colorado (May 9, 2008); for a brief history of the incident, see Kelly, “The Old Gray Mayors of Denver” 112–15 (Pruett Publishing Company, 1974).

28. Kelly, *supra* note 27 at 115.

29. Telephone interview with Gordon W. (Skip) Netzorg (April 17, 2008). Netzorg clerked for Don Kelley one year when Kelley served on the Colorado Supreme Court. Kelley was Of Counsel to Netzorg's law firm after Kelley retired from the Supreme Court. See nmkb.com/html/netzorg.html.

30. For a twenty-seven-year history of six Denver mayors, beginning in 1923 and including Richard (Dick) Batterton, see Kelly, *supra* note 27.

31. Margolin, “Donald E. Kelley Named City Attorney by Batterton,” *Rocky Mountain News* 5 (July 21, 1959).

32. *Id.*

33. Telephone interview with Hon. Richard Matsch, U.S. District Court, District of Colorado (April 21, 2008). Judge Matsch was a Referee in Bankruptcy, District of Colorado from 1965 to 1973, and in 1974 was nominated by President Richard Nixon to be U.S. District Court Judge. He was confirmed by the U.S. Senate on March 1, 1974.

34. The successor law firm is now known as Inman Flynn Biesterfeld & Brentlinger, P.C. The firm's website is available at www.inmanflynn.com.

35. Interview with Robert (Bob) Inman, in Denver, Colorado (April 18, 2008); telephone interview with Bob Inman (May 11, 2008).

36. Kelley had announced that he was a candidate for the Colorado State Senate in 1960 when he was still Denver City Attorney. See “Background on Candidates,” *Rocky Mountain News* 46 (Oct. 26, 1960).

37. See former Rep. Jerry Kopel’s website for articles on Colorado history and politics at www.jerrykopel.com/c/Donald-Kelley.htm.

38. Green, “Kelley Active Campaigner For Non-Political Judges,” *The Denver Post* C44 (Nov. 23, 1978).

39. For a history of the Colorado merit selection system, see Hobbs, Jr., “Colorado Judicial Merit Selection—A Well-Deserved 40th Anniversary Celebration,” 35 *The Colorado Lawyer* 13 (April 2006).

40. Colorado Historical Society vertical files, Biographical Data: Donald E. Kelley, at 3 (undated).

41. “Kelley Bids for Seat On Supreme Court,” *The Denver Post* 17 (July 6, 1966).

42. Hobbs, *supra* note 39.

43. Green, *supra* note 38.

44. *Id.*; see also Kirksey “Ex-Supreme Court justice Kelley dies at 87,” *The Denver Post* 9B (Sept. 22, 1995).

45. See *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

46. *Id.* at 1322-23.

47. Green, *supra* note 38.

48. Kopel website, *supra* note 37.

49. *Halter v. Nebraska*, 205 U.S. 34 (1907) involved a bottler named Halter who sold a bottle of beer with an American flag pictured on the bottle, which was used as an advertisement.

50. *Texas v. Johnson*, 491 U.S. 397 (1989).

51. For a good history of U.S. flag-burning laws and court decisions relating to flag-burning laws, see civilliberty.about.com/od/freespeech/p/flag_burning.htm?p=1.

52. See en.wikipedia.org/wiki/Flag_Desecration_Amendment.

53. Biographical Data: Donald E. Kelley, *supra* note 40 at 3.

54. Hobbs, *supra* note 39, citing Kelley, “Selection and Tenure in Colorado,” 55 *Judicature* 155-56, 158 (Nov. 1971).

55. “Justice Kelley led the way” editorial, *The Denver Post* 31 (Nov. 26, 1978).

56. Colorado Bar Association 83rd Annual Convention, Special Awards, 10 *The Colorado Lawyer* 2825-26 (Nov. 1981).

57. “Donald E. Kelley, high court justice, set to retire Jan. 31,” *supra* note 8.

58. *Id.*

59. *Id.*

60. See jaginc.com/Pages/Rovira.html.

61. See Senate Bill 08-206, Sixty-sixth General Assembly (2008), State of Colorado, available at www.statebillinfo.com/bills/fiscal/08/SB206_r1.pdf. On June 4, 2008, Governor Bill Ritter signed Senate Bill 08-206, approving the construction of the Ralph L. Carr Justice Complex.

62. Melrose, “Justice Kelley retires from Supreme Court,” *Rocky Mountain News* 60 (Feb. 2, 1979). Donald Kelley died in 1995 at the age of 87 and was entombed in the Fairmount Cemetery Mausoleum. ■