

Judicial Profile

BRIAN P. BIALAS

Hon. Paul J. Kelly Jr.

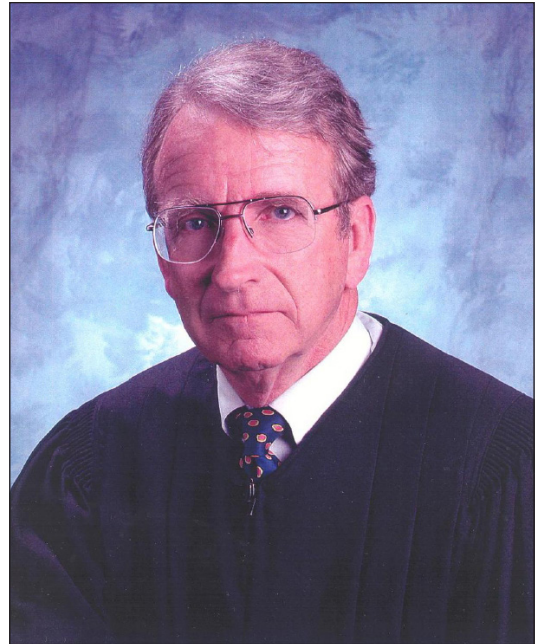
U.S. Circuit Judge, U.S. Court of Appeals for the Tenth Circuit

A FEW MONTHS ago, I picked up a copy of the *Almanac of the Federal Judiciary* to gather intelligence on a judge for a new case that I was litigating. Anyone who has seen the *Almanac* knows that it generally provides information about a judge's

background, anonymous comments from lawyers who have appeared before that judge, and maybe even some information about a judge's hobbies and personal life to inform practicing lawyers about a judge's style, demeanor, and legal views. While flipping through the *Almanac*, I wondered about the details that inevitably would be missing from such short profiles—that is, the types of details that tell the reader about a judge's life experiences. While I had the copy of the *Almanac of the Federal Judiciary* in my hands, I decided to look up the federal judge for whom I had clerked: Judge Paul J. Kelly Jr. of the U.S. Court of Appeals for the Tenth Circuit. He always struck me as a man with a great story and a man of honor and integrity who has served his community as a lawyer, politician, judge, and volunteer. As I suspected, lots of details were missing from the *Almanac's* entry for Judge Kelly. I decided to fill in some of those missing details in this judicial profile.

Judge Kelly's story begins when he was born a year and a day before the attack on Pearl Harbor. His father, Paul J. Kelly, was a judge of New York's Supreme Court in Nassau County, but the junior Kelly never really thought much about becoming a judge. He wanted to be a lawyer, but a lawyer on his own terms and outside his father's considerable shadow. His opportunity came in the mid-1960s when, while attending evening classes at Fordham University School of Law and working full time as a law clerk at a prominent law firm in New York City, he half-jokingly asked local counsel from Roswell, N.M., whether they needed any new lawyers out there. To his surprise, local counsel said they did and asked Judge Kelly to fly out for an interview. Judge Kelly accepted the invitation and brought his wife, Ruth, to see the Land of Enchantment.

It was quite an interview. Judge Kelly attended a reception held in his honor and met many lawyers practicing in Roswell, not only at the firm at which he was interviewing but also at other firms. At the end of his visit, Judge Kelly discreetly broached the



subject of the firm's reimbursement of his travel expenses. He was under the impression that they were covered, but no one had discussed the details. The senior partner made a deal with him: if the firm offered him a position and he accepted, all of his expenses would be reimbursed. If he turned down the offer, half of his expenses would be reimbursed. Without much money at the time and with young children at home, when the offer came, Judge Kelly's decision was easy: he was going to New Mexico.

Thus began Judge Kelly's service to the legal community in Roswell. He was only the seventh or eighth lawyer to join a firm that would grow to one that had 100 lawyers in three states by the time he took the bench in 1992. His varied practice at the firm included all types of criminal and civil matters, and eventually the judge became particularly proficient in disputes involving the oil and gas industry and regulation of public utilities. He also became active in Roswell politics and in the Chaves County Republican Party. In 1976, local leaders encouraged him to run for state representative. Although his district encompassed approximately 22,000 people at the time and consisted of twice as many registered Democrats as Republicans, he won the election—primarily as a result of his efforts in the evenings and on weekends knocking on doors. He covered the entire district twice. He did all

of this while maintaining his law practice.

The New Mexico legislature is a part-time commitment and requires 30 days of full-time service in Santa Fe in even-numbered years and 60 days in odd-numbered years, with time served on committees in between legislative sessions. During his tenure in the state House, Judge Kelly chaired the Consumer and Public Affairs Committee and was a member of the Judiciary Committee and the Rules Committee. When a coalition took control of the House, Judge Kelly became the parliamentarian, a position to which he was elected because both parties trusted him to interpret and advise the House on its rules of procedure in a nonpartisan manner.

When I asked Judge Kelly about his experience in the state legislature and how it affects his perspective as a circuit judge, he told me that the biggest lesson he learned is that it is difficult—if not impossible—to be both a good politician and a good lawyer simultaneously. It simply takes too much time to do both. Luckily for the federal courts, Judge Kelly decided that he would remain a lawyer. He did not seek reelection to a third term in 1980 and went back to his full-time law practice in Roswell.

In 1983, Judge Kelly's firm decided to open an office in Santa Fe, and he was chosen to be the managing partner of the new office—a move that proved to be propitious for the judge. In 1985, President Ronald Reagan elevated Judge Bobby R. Baldock from Roswell from his position as a district judge to a seat on the Court of Appeals for the Tenth Circuit, and, for political reasons, it would have been highly unlikely for another person from Roswell to be appointed to the circuit court bench when the next vacancy opened up. Judge Kelly's practice in Santa Fe took off, and he was as busy as ever in the state capital.

One evening in fall 1984, Judge Kelly was on his way home on the outskirts of Santa Fe when he came upon an automobile accident. After making sure that all the occupants of the car were all right, he began to direct traffic around the wreck until help arrived. Judge Kelly was still directing traffic when the volunteer firefighters came to secure the scene. One of them gave him an orange vest and asked if he was a volunteer firefighter. When Judge Kelly replied that he was not, the firefighter asked if he would like to become one. Seeing this as another opportunity to serve his community and experience a second childhood, Judge Kelly naturally said yes. To this day, he remains a volunteer firefighter and an emergency medical technician with the Hondo Volunteer Fire Department. He even was chief of the department for three years until he had to step down when he became a judge.

Judge Kelly's life of service to his community eventually led to his being considered for a federal judgeship—twice. By the late 1980s, he was thinking about becoming a judge and expressed interest to the state Republican Party with which he was still involved.

His first opportunity came in the late 1980s, when there was a vacancy in the District of New Mexico. Unfortunately, he simply had too many family financial obligations to absorb the pay cut required to take the position. He was very disappointed, of course, knowing that such opportunities are rare, and that they even more rarely come twice. In 1991, however, the U.S. Congress passed a bill sponsored by then Sen. Joe Biden (D-Del.) that created two new judgeships in the Tenth Circuit, and President George H.W. Bush asked Judge Kelly if he would like to be nominated to be one of the "Biden judges." The timing was right for Judge Kelly's family, and he accepted the President's offer enthusiastically, was confirmed by the Senate, and took his oath in 1992.

Although Judge Kelly has been a part of the decisions handed down in many challenging cases, he told me about two that are particularly notable: one required him to stand up for what he believed in the face of controversy, and the other involved a man who is infamous in American history. The first case, *United States v. Sonya Singleton*, took place in 1998, when Judge Kelly wrote for a unanimous panel that reversed a defendant's conviction for money laundering and conspiring to distribute cocaine based on the prosecutor's violation of a statute that prohibits anyone from giving, offering, or promising anything of value for or because of testimony in court. Judge Kelly held that the prosecutor had violated the statute when he offered leniency to a co-defendant in exchange for truthful testimony, and that the co-defendant's testimony should have been suppressed. Obviously, the case received attention nationwide, particularly in Congress and among the community of criminal lawyers, because prosecuting attorneys had a long-standing practice of offering leniency for a defendant's testimony. The Tenth Circuit vacated the panel's decision, reheard the case en banc, and affirmed Ms. Singleton's conviction. Only Judge Kelly and the other two panel members from the original decision dissented. Dissenting was a matter of principle because, as Judge Kelly wrote, "courts must apply unambiguous statutes as they are written."

Judge Kelly was used to the public attention his decisions received, however, because in 1997 he was assigned to hear the appeal from Timothy McVeigh's conviction after the Oklahoma City bombing in 1995. The case is noteworthy not only because of the difficulty it posed on the merits but also because of the security precautions the U.S. marshals took in getting Judge Kelly to and from Denver to hear the appeal. The marshals picked him up at his house to escort him to the Albuquerque airport (the airline personnel thought he was a prisoner), sat next to him on the plane, and took him everywhere in Denver. In fact, when Mrs. Kelly found out that U.S. marshals would not provide security for her at home while the judge was gone, she insisted on going to Denver with him! When the marshals brought the judge and his wife

back to Santa Fe, the marshals swept the house for bombs and then left. Judge Kelly and his wife were then left alone, after all those precautions.

These days, after almost 20 years on the bench, Judge Kelly is as active as ever. When he is not in Denver hearing cases or at the courthouse in Santa Fe, he spends many summer days on his 46-foot trawler on Long Island near the place where he was born. Even though the East Coast is far from his chambers in New Mexico, Judge Kelly keeps a computer and printer on-board so that he can keep current with what is going on in his district. As he likes to brag, his chambers have no backlog and his opinions are issued in a timely manner. He sits by designation as a district judge in the District of New Mexico, carrying about a quarter of the load of cases that a senior district judge normally would carry while also serving as a full-time circuit judge.

Judge Kelly and his wife have five grown children located throughout the country and 12 grandchildren whom he sees frequently. Judge Kelly also has been the president of the Oliver Seth American Inn of Court in Santa Fe since it was founded in 1994. He is active at law schools in several states: he was a jurist-in-residence at Boston College Law School in 2006 (where I first met him), has served on the Fordham University Law School's board of visitors, and will participate in a trial moot court competition endowed in his honor at Fordham later this year. He has served on several committees of the Judicial Conference of the United States, including the Committee on the Judicial Branch and Civil Rules Advisory Committee, and currently is a member of the Committee on Codes of Conduct. Judge Kelly could have taken senior status and reduced his workload five years ago, but he loves

what he does too much to cut back.

One lawyer's comments about Judge Kelly in the profile found in the *Almanac of the Federal Judiciary* perhaps sum up the judge best in just one sentence: "He is professional." Judge Kelly has always strived to do great work and to serve his community, whether as a lawyer, politician, judge, emergency medical technician, or father. Judge Kelly also has been a mentor to many new attorneys like me who have clerked for him over his almost 20 years on the bench. We all hope that he will serve on the bench and serve his community for many more years to come. **TFL**

Brian P. Bialas is an associate at Foley Hoag LLP in Boston, where he has litigated cases involving professional liability, trademarks, insurance recovery, breach of contract, and trade secrets, among other commercial disputes. In addition to being a member of Foley Hoag's Litigation Department, Bialas is a member of the firm's Labor and Employment Department; Trademark, Copyright, and Unfair Competition Group; and Security and Privacy Group. He also is the editor in chief of the Federal Bar Association Intellectual Property Section's newsletter, The IP Legal Browser. Bialas served as a law clerk for Judge Kelly from 2007 to 2008. © 2011 Brian P. Bialas. All rights reserved.