Interview with Supreme Court Justice Glenn E. Kelley

Interviewed by Margaret Robertson
Minnesota Historical Society

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in the Saint Paul offices of the Minnesota Supreme Court

MR: You grew up in Nebraska. Tell me a little bit about that.

GK: Well, in 1921, my father was the superintendent of schools in the small northeast town of Saint Edward. Before her marriage, my mother had taught school. On April 25th, I, their child, was born. Within a couple of years, we moved out to the panhandle of the state to Bridgeport on the North Platte River--and, incidentally, on the old Oregon Trail. Later, in 1931, we again moved--this time back to eastern Nebraska to the town of Madison, where my father was likewise superintendent of schools. During my "growing up years," my father was working weekends and during summer vacations on his Ph.D., which he was awarded in 1937. After that, he became a college professor in South Dakota. Thus I was graduated from both high school and college in Aberdeen, South Dakota. My undergraduate college is now known as Northern State University. I entered the army from there in 1942 and served until 1945. When I came out, I went to law school.

MR: Where did you serve in the service?

GK: In the Eighth Air Force in Europe.

MR: When you left the service, where did you go to law school?

GK: The University of Michigan.

MR: What made you choose the University of Michigan?

GK: Several things. For one, when I was in high school, two of my favorite teachers were University of Michigan graduates. Knowing I wanted to and intended to go to law school, they kept encouraging me to go there. That was one reason. The second reason was that I was discharged from the Army in the fall of 1945, but most of the law schools had already started before I got out. I was admitted to several law schools, including the University of Michigan. Because Michigan was on a trimester plan, the fall semester did not commence until November 4. Technically speaking, I was still in the army when I started law school, but I was on terminal leave.

MR: Now when you were growing up did you have an early interest in the law?

GK: Yes.

MR: Where do you think that came from?

GK: Well, in those days we didn't have television like we have today. We didn't have a lot of things we have today, so a lot of our entertainment was reading. I always enjoyed reading history, and particularly American constitutional history. Of course, most of the founders of our republic-- the so-called founding fathers--were lawyers or legally trained. I think that's when I first developed my interest in law. I always had it, at least from junior high school on.

MR: You also had an early interest in politics, I understand. You played in the Alf Landon pep band? [Laughter]

GK: Yes, it was kind of a funny thing. One of my friends was scrounging around in a dump in Madison one day, when he founded a bunch of discarded music. The music happened to be for an old style little German band. Using that music as our stock in trade, we formed a little German band. Somebody heard us and asked if we would play for an Alf Landon rally that was going to be held in the town. We did. After that, we were asked to play two or three other times. We were a pretty raunchy band, I'm afraid. [Laughter]

MR: Were there some professors who influenced you at Michigan law school?

GK: Oh, yes, I'm sure most of them had some influence one way or another. There were some excellent professors I had there whom I enjoyed very much.

MR: And then when you graduated, you moved to southeastern Minnesota to practice in Austin. What drew you there?

GK: Well, if you think back--way before your time, of course--in the 1930s, the Midwest--particularly the prairie states--suffered very greatly from drought and depression. I remember as a boy growing up that we would take trips. While the tumbleweeds were blowing all across the roads in South Dakota and Nebraska, it seemed to me at the time that when one got to Minnesota, the crops were green.

MR: So for a Nebraska boy like you, it looked pretty good?

GK: It looked pretty good, you're right. And then when I was in law school, I had a classmate who, before going to law school, had taught school in the school system in Austin. He kept talking about what a great community that was. That's what got me interested in going down there. I was fortunate to land in such a progressive community.

MR: Now, did you have a solo practice, or did you practice with other attorneys?

GK: No, I practiced with a small firm. When I first went with it, there were five lawyers, and when I left it was five or six lawyers.

MR: What kind of cases would you handle?

GK: Well, we had a general practice, but even though we were a small firm, we tried to specialize to some extent. It fell to me very shortly after I went with the firm, after one of the senior partners who did most of the litigation work became ill, that work was "dumped" on my shoulders. For the next twenty years or so, I handled ninety-five percent of the firm's litigation. I was actually in court all the time.

MR: And was this both civil and criminal?

GK: It was both, but it was, on a percentage basis, very little criminal. Maybe less than ten percent.

MR: What drew you to join the district bench in '69? Was there something in particular that prompted you to do that?

GK: Well, I've always felt that the judicial area was extremely important. When the opportunity came in 1969, I was quite anxious to go on the bench, and I thoroughly enjoyed it. The litigation process, of course, is an adversarial process, whereas a judging process is more of a trying to adopt the most equitable arguments to resolve the case. You're not an advocate anymore; you're trying to reach a solution. That appealed to me.

MR: I know that you heard some highly publicized cases. Are there some that particularly come to mind?

GK: You mean cases I heard as a trial judge?

MR: Yes.

GK: Yes. Of course, there was the Don Howard murder case where Don Howard hired some people from Illinois to come up and kill his wife. It resulted in two trials. The one of Don Howard, of course, which was tried in Hastings, and the other of the fellow he hired was tried in Austin. That was a rather notorious case; it wasn't a great case so far as legal questions were concerned.

Then another case was one involving the Miller family in Winona. It went back over a period approximately from the time of World War I up until 1970, involving a family of immigrants who came over here and did very well and made a lot of money. Then some of the brothers got to fighting over the money. That case took twelve weeks to try, and another month or so to make the findings and make the decision. It was a very important case involving a number of important and novel legal issues that eventually came up to the Supreme Court, which sustained my rulings.

So that was a very interesting case. You could write several novels just based upon how this immigrant Russian Jew came over here and by hard work the family built up a very sophisticated plastics business. They make the powders that go into the resins for the nose cones of these space vehicles and so forth. It's a fantastic story. So those were two important cases.

Then I had another case, not of quite such a magnitude, involving a farmer who felt that some dogs were bothering his cattle. He then chased them with his snowmobile and shot them with a high-powered rifle. The owner of these hounds--they happened to be coon hounds--sued for their value. We tried that case for a week, and it was a riot, trying to figure out the value of coon hounds. [Laughter] That was fun.

MR: In 1981, you were appointed by Governor Al Quie to the Supreme Court. What made you decide to accept that assignment?

GK: Well, it wasn't so much a matter of acceptance. I applied for it. I think that a good many--not all, certainly, but a good many--young people start law school, with some kind of vague hopes in the back of their minds of becoming a judge some day on the state's highest appellate court, although they realize the odds are quite strong against it. I had entertained those same aspirations. It would be a great thing to be a part of the state's highest court and pass upon the development of the law for the state as a whole. So I did apply when there was a vacancy, and was appointed in 1981, as you say.

MR: You're quoted in an article about that time that you thought you'd miss the drama of being on the district bench.

GK: Well, that's true. That's still true. It's much more "fun" being a district court judge because you're constantly dealing with people on a daily basis--with court personnel, jurors, lawyers, witnesses, probation agents, welfare agents, and what have you. It's an action-packed arena.

Up here, one feels as if he or she is in some sort of monastery. Originally, when I joined the court, it was composed of nine persons. Now, of course, there are seven. One's communications by necessity are confined to few people. There were days when the only person I would see was my secretary. Instead of constantly dealing with people as a judge must do on the trial court, your hours are spent reading records and briefs. More human drama surfaces in the trial court--no question about it--than in the appellate court.

MR: In interviewing Justice Amdahl, he said that you almost felt like you had some rare disease because people would avoid talking to you. You really are almost like a monk in that sense.

GK: That's right. It is quite a switch. I'm not sure I ever quite got over it.

MR: What do you think of the public perception of the court? Has it changed over the years?

GK: I don't think I'm qualified to say. I think it has, but it's one of those things you can't prove. There's just been a tremendous amount of change since I started practicing law in 1948. If a lawyer who had died in 1948 came back to earth today, he wouldn't even recognize the system, there have been so many changes. I think the changes have been for the better, and I think the public--while they may not appreciate all the technical changes and their consequences--generally has this feeling that, "Well, the courts are doing a reasonably good job of trying to be modern, to stay up to date, to do things better, more efficiently and effectively." But I can't prove it.

MR: So you feel that the court has become more responsive?

GK: Well, I'm sure the court has become more responsive to some kinds of criticism--for example, about the delay in getting cases resolved after they're first started. There have been tremendous advances in that area. Where it used to maybe take two, three, or four years to get matters disposed of, now most places in the state you can get them disposed of, from beginning to end, in something around a year. And certainly the appellate courts have been greatly speeded up by our initiative in 1982 to establish the Court of Appeals. That has really given a boost to the concept of getting swift justice.

MR: Justice Scott is fond of saying, "Justice delayed is justice denied." You feel that the court operations have improved in that respect?

GK: Well, that's an old saw.

MR: It sure it is. That's an old saw, but it's one of his favorites. [Laughter]

GK: It's been around for many years, and like any other old saw, it's got about as many exceptions to it as it has virtues. I don't completely buy that, but it's certainly true that justice should not be delayed for all kinds of delaying tactics that don't have anything to do with or bear upon the merits. But there are certain kinds of cases, certain specific cases, where they can be handled too rapidly, too fast, and as a result that justice is denied. While that's a good rallying cry for certain kinds of court reform, it's not always necessarily true.

MR: How has the development of the state Court of Appeals changed the operations of the Supreme Court?

GK: Well, before the advent of the Court of Appeals in 1983, everybody had a right of one appeal. Usually that was to the Supreme Court. We were being swamped with cases, almost two thousand or so in 1982. If you figure that out-- why, that's about disposing of a case every five minutes in the course of a year. We just couldn't handle it. We were on the verge of breaking down. We decided everything. We decided all those

cases that the Court of Appeals has now, plus some others, one way or the other. And, actually, we weren't giving them the kind of consideration they should have had.

But with the advent of the Court of Appeals, everybody has the right to appeal from the district court to the Court of Appeals. They take all those cases. A good many of them involve traffic offenses and things like that. They handle those. None of those come here anymore unless we decide to take them. We became a Supreme Court, doing what a Supreme Court is supposed to do--and that is to deliberate and consider the development of the law for all the people of the state on important legal questions, constitutional questions, statutory construction, and so forth. That has allowed us time to study and allowed us to put out a much better product, I think. It's worked very well. It exceeded our highest expectations, it really has. One reason is that we had some good people who started up the Court of Appeals, and it got started off right. It's working well.

MR: Are there some cases that the Supreme Court heard that are especially memorable to you over the years?

GK: Oh, yes, there's a lot. Too many probably to discuss here today, but yes.

MR: Are there a couple in particular that come to mind?

GK: Well, there are a series of cases that started about 1983, '84, along in there. One of them was a Pine River bank against somebody, in which the attorneys were starting to attack the so-called "at-will employment" doctrine in Minnesota. Involved in that series of cases was not only the Pine River case, but a case down in Rochester. I forget the name of the case, although I wrote the opinion. I believe it involved IBM, but I'm not sure.

Then we had another case, Lewis v. Equitable Life Insurance Company, for which Justice Amdahl wrote the majority opinion and I wrote a dissent. The Lewis case really extended the rights of the employee in the at-will employment context far beyond what almost any other court in the country had done. That's the reason for my dissent, which didn't carry and which still hasn't carried, and I still think I was right. [Laughter] That was an important consideration of one phase of the law. It opened up an avenue for employees who feel that they've been unjustly treated--terminated, in particular--for some redress.

We had a number of cases skirting the so-called abortion issue, not really directly involved in it so much as some of the principles involved . One of them was State of Minnesota v. Soto. You may recall that was the case where the woman was eight and a half months pregnant. A drunk went through a red light and hit her car, and the fetus was destroyed. The question was whether the drunk could be prosecuted for motor vehicular homicide. Well, that gets around to the question of when does a fetus become a person. Because the criminal law says "a person." We had to decide, then, whether an eight-and-a-half-month fetus was a person. But, consistent with twenty-nine other states, we upheld

it was not, and the legislature in the next session changed the law to create a new crime called "feticide."

Under that new law, a case from Rochester was heard, about which you may have read in the paper. It was disposed of just this week. In that case a man had shot the woman he was living with, and neither the man nor the woman knew she was pregnant. And the fetus, the zygote, whatever it was--there's argument about that--was destroyed. The majority wrote an opinion sustaining that feticide statute, although they were rather uneasy about it. I wrote a dissent again. I held it was too vague and indefinite and suggested the legislature start over again, but they didn't. But that's an important decision.

Then we had a decision this past year on the superfund on whether the companies that polluted should be responsible for pollution done ten or twenty years ago, or whether the liability insurers of those companies at that time, even though there was no superfund liability, would be responsible to pay those damages, which are astronomical--in the millions. And, again, a split court said that the insurers had to pay. And, again, I dissented. So those are just some of the interesting cases, but there were many, many more.

MR: Was it a challenge that you've enjoyed over the years?

GK: Yes, it was a challenge, but one I enjoyed very much. Most jobs have advantages and disadvantages, and judging is no different. However, I've always enjoyed research. American law primarily has its roots in history, so there is much historical research. Additionally, the work demands consideration of philosophy, economics, sociology, and all human endeavor--all of which have been of life-long interest to me.

MR: If you would, would you comment on the relationship among the justices? I think there's an interest in the discussions that go along with settling a case.

GK: All right. I'm sure you understand this, but when we send a case down for oral argument--and that's something we do in most of the cases since we established the Court of Appeals. Before we had the Court of Appeals, it was just the opposite. We had very few oral arguments. When we come out of oral arguments, at that point all of us have read the briefs of the parties, and we've heard the attorneys argue their points. We go into the conference room, and we discuss it. One justice is assigned to report the case and make a recommendation to the others, and then by seniority, we go around and each judge is given the opportunity to present his or her viewpoints on the issues involved.

Sometimes those discussions get a little bit heated. But I've said this many times--and it's absolutely true--that I've been most fortunate being on a court where they can disagree without being disagreeable. Very seldom does personality get involved in it, or politics, or anything like that. We argue the merits of the case, and most of these issues, if they get this far, do have two sides to them.

When all have spoken and after a preliminary vote has been taken, we leave the conference room. Anything there said is left therein. We have gotten along well even though each of us entertained different philosophies about the law--where it goes and where it should go. But during my terms on the court, I'm convinced that at all times, my colleagues have operated in good faith. We have been so fortunate to operate in that way. A number of Supreme Courts of sister states do not operate in that collegial manner.

For example, in a couple of neighboring states--I'm not going to name them--but the judges don't even speak to each other. They don't even speak to each other on the street or anything else! I think that would be a horrible way to live and to function as a court, but it happens. Up to now, at least, Minnesota has been fortunate that its judges practice our concept of collegiality.

MR: Absolutely. Some of the other justices have mentioned the Supreme Court as an influence on Minnesota's law schools and continuing legal education.

GK: One of the three state law schools, at least, is beginning to offer a course in domestic relations, if not making it a required course. At least the school informs the students that they're going to be examined on it at the time they take the bar examinations, so if they want to take the course they can. But that is just one case where our decisions did force the law schools change their curriculum a little bit.

There have been more subtle influences. For example, in the area we were talking about earlier, employment law. The employment-at-will doctrine has been part of the common law of England and most of the states of the United States for 400 years or more, and it's starting to change. It's starting to change in areas of tort law, these asbestos and toxic tort cases, and things of that nature. They're changing the rules of tort law, and, naturally, the courses in the law schools have to change to teach the students about the changes that are in the wind. And schools have done so. So the courts do have an influence on the schools, yes.

MR: What about changing expectations of lawyers? Are lawyers being held to higher standards in terms of discipline?

GK: I can't say yes. We have more disciplinary cases now in terms of volume, but we also have a lot more lawyers. We've been admitting something in the neighborhood of 700 to 1,000 new lawyers each year. When I started practicing law in Minnesota in 1948, it was estimated that there were about 3,000 lawyers in Minnesota. Now it's over 15,000. The population hasn't changed all that much. Of course, the type of economy has changed a great deal, but the population hasn't changed that much. So we have more lawyers, and having more--why, we're bound, I suppose--to have more "bad eggs." The volume is up.

However, the rules of conduct have also changed. It used to be, not too long ago, that any kind of attorney advertising was considered malpractice and subject to discipline. Now, all you have to do is watch TV or pick up a newspaper or go through the yellow pages in any small Minnesota town to see all these Minneapolis law firms advertising, primarily for personal injury and some domestic relations cases. So now lawyers do not have that constraint upon them.

The practice of law, it seems to me, has come to be more of a business than it is a profession, as it was years ago. A lot of the courses the lawyers attend are courses involving accounting and office practices--things to reduce overhead and increase profit and so forth. We have lost some of the professionalism and ideals that we had just a few years ago. But on some things, the rules have remained rather constant--about basic honesty and basic promptness in handling client affairs and so forth. In Minnesota at least, I think we have one of the best disciplinary procedures in the nation. Maybe I say that because I was so closely associated with it, but I think it's very true.

MR: Several of the justices I spoke to talked about the fact that the law is changing and that technology is forcing the law to change--for example, in right-to-die cases and abortion law and so forth. Do you see that trend?

GK: Oh, yes, very much. Over the last forty years we have things that I never dreamed of, or nobody dreamed of forty years ago. These asbestos cases, the Bhopal case in India, all these different drug cases, the Dalkon shield, etc. They've created whole new problems, not only in what we call substantive law--that is, who can recover and the rules that are going to govern that--but also in procedural law. These class action cases, for example, were almost unheard of in tort litigation only twenty, twenty-five years ago. Now it is very common to bring one lawsuit on behalf of hundreds or thousands of claimants.

Yes, there's been a great change, and it's creating a great deal of debate amongst those in the profession as well as in legislatures, about whether the tort system is equipped to handle that mass litigation. There are all kinds of proposals in Congress and various law journals to address that problem. Then, of course, we have the wrongful death and wrongful birth issues, the right-to-privacy issues and things of that nature. Yes, there has been a great deal of change. You don't see very many of the old-fashioned tort actions anymore. They are these big cases.

MR: You've mentioned the legislature several times. What do you think the relationship is between the Supreme Court and the legislature in Minnesota, and how has that impacted on the law?

GK: Well, I think, on the whole it's been very good, better than some states, and I'm not prepared to say it's any worse than some states. I think that our court has been particularly sensitive to not only giving lip service to the separation of powers doctrine, but to following it. If we feel the issue is something that belongs in the realm of the

legislative area, frequently we make known our position and invite the legislature to address this problem. Or, like in the Soto case, which I wrote, we held that "person" meant "born alive." The legislature promptly moved in to enact a specific feticide statute--as a matter of fact, in essence, we told them in the Soto case that if they wanted to have a feticide statute, why, they could do so. And they did.

On occasion, the court will give the legislature warning that the court feels that the action the legislature has taken verges on being, in the court's opinion, unconstitutional. In doing so, the court may sustain a particular law, but it is giving warning that there may be constitutional limits beyond which the legislature may not go without risking reversal. In general, I don't think it can be said that our court has impinged on legislative prerogatives, but I would concede that in the past, the court has been zealous in resisting legislative attempts to impinge on the court's sphere. For example, generally speaking, the courts have inherent power to formulate rules for the operation of the courts. Once in a while, the legislature wants to step in and formulate some of the rules, and we remind them that there is such a thing as the doctrine of separation of powers. But it's all on a friendly basis--it's not an adversarial, knock-down, drag-out basis or anything like that. It's been a rather pleasant relationship as well, in my opinion.

MR: Some of the justices I interviewed had a specific theme in mind during their tenure. For example, Justice Scott said he was always concerned about the little guy, while Justice Amdahl was concerned about court operations and how the system could be made to be most expedient and most efficient. Was there a specific theme as you look over your career?

GK: Well, I didn't have any specific agenda when I came up here. However, I do rather strongly believe--did, and still do--that the appellate courts are not a super legislature. It's a court. And it's our job to see what the legislature meant, or what the founders meant when they wrote those documents, and not what we think that they would've meant had they lived here today. We may think it's silly, but, nonetheless, if that's what they meant, then it's up to the legislature or the people to change it, not the court. That has been one of my principles. Sometimes they refer to that in the popular press as being a "strict constructionist." If that's what it is, so be it. I'm one of them.

Another issue is that in a state such as Minnesota, where approximately half of the people live in the metropolitan area and the other half live in so-called Greater Minnesota, the problems--in terms of logistics and economics and so forth--can be dramatically different from one half to the other. I think it's important that this court realizes it's a court making rulings that are going to affect the entire state, not just the metropolitan area.

For example, in the Twin Cities, they have police departments of several hundred officers, as compared to Benton County out in western Minnesota where they have one elected sheriff and a part-time deputy. What the police must and must not do without violating rights might vary quite a bit in those two scenarios. So I think it was important

that we tried to keep in mind that what we do affects all people--in Baudette, Caledonia, Luverne, or wherever.

MR: One final question--now that you have retired, is there a way that you'd like to see your career on the Supreme Court remembered?

GK: Well, I don't know just how to answer that question. I think people recognized--lawyers in particular--that I was not on the bench with an agenda to try to get through, and that I was a so-called strict constructionist. I was a man, and I'd like to be remembered as one who stood up for the rights of the individual citizen in criminal cases as against the power of the government, no matter how reprehensible the conduct of that citizen might be. Because inasmuch as we treat that citizen one way, you or I might be treated in the same way. We have to create equal justice for our people. I'm very much impressed about the ends to which the people who formed our constitution back in 1858 were cognizant of the power of the government vis-…-vis the individual citizen who happens to get into trouble. They were much more conscious of it, in my opinion, than were the framers of the United States constitution one hundred years earlier. So I'd like to be remembered that way, I guess. Maybe I'm kidding myself, maybe I wasn't that way, but that's the way I'd like to be remembered.

MR: Thank you, Justice Kelley.