

DOJ Swerve On Mass. Judge Indictment Leaves Attys Queasy

By **Chris Villani**

Law360 (September 23, 2022, 7:17 PM EDT) -- The sudden dismissal of criminal charges against a Massachusetts judge who allegedly helped an undocumented immigrant evade federal agents left some attorneys fearing that politics played an outsized role in the controversial case from start to finish.

Newton District Court Judge Shelley Joseph will face the state's Commission on Judicial Conduct, rather than a federal jury, as part of her agreement with prosecutors. The obstruction case was brought in 2019 by a Trump-appointed U.S. attorney and politically charged from the outset, drawing sharp criticism from retired judges, defense attorneys and academics.

The fact that the U.S. Department of Justice under the Biden administration decided not to go forward with the prosecution creates a scenario in which the only difference in the case appears to be the person in the Oval Office, said Hinckley Allen partner Michelle Peirce.

"When people think you are going to be prosecuted or not depending on who the president is at the time, I think you've dealt a serious blow to the system," Peirce said. "We all know politics enters into some decisions, but you hope someone is not going to be prosecuted or not prosecuted based on who happens to be president."

Peirce called it a "very dangerous setup" to have cases rise and fall based on who's in charge at the U.S. Department of Justice and hoped it would rein in prosecutors from letting politics influence decision-making.

"Regardless of the administration, I'd like to see them not push these cases that are so politically charged," she said. "It creates this setup where the next administration might undo it."

Judge Joseph, who was charged along with her former court officer, Wesley MacGregor, tried to scotch the case pretrial by arguing that she enjoyed judicial immunity. But the First Circuit ruled in the government's favor, finding that she could not duck the case before it went to a jury.

Noting the midcase appeal, Nixon Peabody LLP partner Brian Kelly told Law360 he was surprised by the government's decision not to go forward with the prosecution.

"Usually when the First Circuit affirms your legal theory and there's no factual defects, you let the jury decide," Kelly said. "Here they chose to take a different path, apparently."

He added, "You'd like to think cases are brought based upon the facts and the law, but sometimes politics plays a role. There is no doubt about it."

With the shift from the Trump administration to the Biden White House and a new Massachusetts U.S. attorney has come a marked change in the officeholder's opinion when it comes to courthouse arrests by U.S. Immigration and Customs Enforcement.

Trump-appointed U.S. Attorney Andrew Lelling said in the past that he had no issue with civil arrests in courthouses, calling it a relatively rare occurrence. Current U.S. Attorney Rachael Rollins, a Biden appointee, brought a federal suit in her prior role as Boston's district attorney seeking to end those arrests in courthouses.

The Biden administration's new guidance has largely curtailed the practice except for certain circumstances where public safety or national security might be at risk.

Under Lelling, the government alleged that Judge Joseph violated both the rules of court and federal immigration policies when she told the ICE agents in her Newton, Massachusetts, courtroom to leave and then ordered a clerk to shut off a recording of the proceedings.

During the 52-second break in the audio, prosecutors say Judge Joseph and the immigrant's defense attorney in effect hatched a plan to let the man leave through the downstairs lockup, as opposed to walking out the front door. The agents were not able to arrest the immigrant that day, although he was picked up about a month later.

Because of Rollins' past suit and a potential conflict of interest, the matter was handed to Rhode Island U.S. Attorney Zachary Cunha, who decided after a review to dismiss the case and said that he thought the matter belonged "before the body that oversees the conduct of Massachusetts state court judges, rather than in a continued federal criminal prosecution."

Court officer MacGregor, who retired, got a deferred prosecution agreement on a perjury count.

In a statement Thursday, Lelling said that he respected Cunha's "thoughtful decision-making," but noted that the statement of facts Judge Joseph was required to admit to as part of her deal "carefully avoids" requiring her to confirm or deny that she intentionally conspired to help the defendant evade federal officials.

The current Jones Day partner suggested Judge Joseph was the one who may have let her own politics influence her actions on the bench.

"A federal grand jury concluded that she [conspired to let the defendant evade capture], and that would be a serious, politically-motivated abuse of her position," Lelling said. "It would be in the public interest for the Judicial Conduct Commission to get to the bottom of that question and proceed accordingly, whichever way it comes out."

Nate Mendell, a partner at Morrison Foerster LLP, was Lelling's top deputy and acting U.S. attorney after Lelling left for private practice. He pushed back on the notion that politics was the driving force behind the decision to bring, or to dismiss, the charges against Judge Joseph.

"It's very tempting to see everything as being the product of politics because politics are so intense right

now," Mendell said. "But I don't think, from its inception to its conclusion, that this was the process of political decision-making."

Mendell acknowledged that Judge Joseph's case was "the object of political fascination," and that Boston federal prosecutors knew the case would generate some pushback when they brought it in 2019.

"It was clear it would be a lightning rod, but we thought it was also clear it was the right decision, and not for political reasons," he said.

An attorney for Judge Joseph, Tom Hoopes of Libby Hoopes Brooks PC, disagreed, saying Thursday that the case was "a patently political indictment, grounded in prosecutorial ambition."

Experts said Judge Joseph's case is a novel one, which left Peirce of Hinckley Allen hoping that politics, or even the perception of a political leaning, would not influence any future cases.

"I don't expect it to be part of a trend," she said, "nor do I want it to be."

The government is represented by Dustin Chao and Christine Wichers of the U.S. Attorney's Office for the District of Massachusetts.

Judge Joseph is represented by Thomas M. Hoopes and Douglas S. Brooks of Libby Hoopes Brooks PC and Elizabeth N. Mulvey of Crowe & Mulvey LLP.

The case is U.S. v. Joseph et al., case number 1:19-cr-10141, in the U.S. District Court for the District of Massachusetts.

--Editing by Jill Coffey and Emily Kokoll.