

2019 LAWYERS OF THE YEAR

MICHAEL B. KEATING Foley Hoag

When Michael B. Keating appeared before the Supreme Judicial Court on June 26, 2019, he faced the daunting task of convincing the justices to reverse the unanimous decision they had made two months earlier.

The court had suspended District Court Judge Shelley M. Richmond Joseph without pay on April 25, the day federal indictments were issued against the judge and her court officer for allegedly preventing an Immigration and Customs Enforcement agent from taking into custody a man who appeared in her courtroom in 2018.

In Keating's view, the suspension of a judge's pay based solely on a charge — in a case that itself threatened the independence of the state judiciary — “struck right to the core of any judge's ability to function independently.”

Alongside colleague David A. Kluff, he filed a motion for reconsideration asking the SJC to reinstate Joseph's pay and assign her to administrative duties.

“The real challenge from a lawyer's point of view was getting the court to change its mind, recognizing that they had considered all of these issues and unanimously decided to issue the suspension without pay,” Keating says.

The Boston lawyer met the challenge, convincing a majority of the bench that an indictment was no substitute for an actual finding of misconduct, which had been the basis for prior judicial suspensions without pay.

On Aug. 13, five justices concurred in a

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decision to restore Joseph's pay, though they declined to assign her to non-judicial duties.

The federal case against Joseph and former court officer Wesley MacGregor, who retired before the indictments were issued, is now before U.S. District Court Judge Leo T. Sorokin, who is considering motions to dismiss filed by the defendants last September.

At oral argument, you called the effect the suspension would have on judicial independence the “cornerstone” of your argument. What was at stake if the court did not reinstate her pay?

In our view, which I think Chief Justice [Ralph D.] Gants and the majority accepted, there was a significant risk that a district attorney, for instance, could indict a judge and the judge automatically would lose her income.



I was informed that there was a concern within the judicial community that their pay could be suspended if for some reason a district attorney took an adverse view.

Judicial independence was a cornerstone of the argument, but it's also a cornerstone of our democratic form of government. We're one of the few states where judges are appointed, not elected. Anything that touches their remuneration goes right to the heart of their independence, because you certainly don't want judges to make decisions based on whether they might lose their salary if somebody is displeased.

You've argued before the SJC a number of times in your career. What was different about this experience?

This procedure was interesting because it was entered under “OE [original entry] 140,” meaning it was only the 140th case since the beginning of the SJC that the court had initiated on its own as opposed to receiving an appeal. When we considered what we could do here, the most logical thing to do was to ask them to reconsider the order. An unusual aspect of this case was that there was nobody arguing the other side at oral argument, and I thought several of the justices took that role on themselves.

Knowing a fair amount about dispositions in cases before the Commission on Judicial Conduct, we had never run into a case where a judge's pay had been suspended without some determination by a body like the CJC or factual finding of culpability. We asserted that suspension without pay is a recognized sanction in Massachusetts and it was unprecedented to effect a sanction without such a determination.

This case involved a constitutional question of whether the SJC had the authority to suspend a judge's pay. You told the justices they could avoid having to answer that by choosing not to do so in this case. Why did you pursue that argument instead of the constitutional one?

I wanted to give the court a path to a resolution that would be acceptable to them. This is not an easy case for the court. They had very serious concerns about a judge

being indicted and what that would do to the confidence in the judiciary. There was also the Trial Court manual that said if a court employee was indicted they lost their salary. I was arguing that judges stood in a different position, and I think the justices accepted that judges were not subject to the manual in that regard. I tried to construct a path for the court to reach a fair resolution of the case without having to confront the very difficult issue about judicial independence and whether the court under any circumstances could suspend a judge's salary, short of removal of the judge by the Legislature.

In his dissent, Justice Frank Gaziano said the decision to reinstate Joseph's pay “smacks of preferential treatment.” Might the public see it that way?

I think there's a risk that they might. It may be hard for the public to distinguish why the court officer, had he not retired, would have lost his pay and Judge Joseph would not have. But I think that this is such an important principle in our constitution. Even though it looks perhaps a little strange, frankly judges stand in a very different position from court officers or other court personnel.

I would have preferred if the court had assigned her to administrative duties as we had urged, because I think it might have eased the public's concern about her getting paid for not doing any work. I think the court may have felt that, consistent with suspending her from judicial duties, it would be hard not to suspend her from other work in the courthouses around the commonwealth.

Gaziano also said nothing had changed since the court's original order. What do you say to that?

I think one thing that changed was Judge Joseph had a lawyer representing her and arguing on her behalf. The justices' original order was entered ex parte, and Judge Joseph did not have counsel who appeared before the court on this issue. One of the lessons that I take away from this case is the importance of giving parties an opportunity to be heard with counsel, which is what happened here.

— Matthew Cove