Published December 2014

Judicial Profile

by Danielle C. Lesser and Latisha Thompson

Hon. Colleen McMahon
U.S. District Judge for the Southern District of New York

The most important letter that Judge Colleen McMahon, U.S. district judge of the Southern District of New York, ever received sits in a frame on her desk and has since 1991. The envelope is addressed "To Mom Frum Katie." Inside the envelope is a note that says: "Dear Mom, I wish you would help me but you wote help me. Love Katie." Judge McMahon keeps this letter on her desk to remind her of the importance of her family in her very busy and accomplished life. After speaking with Judge McMahon, her commitment to and love for her family and the law are clear. Judge McMahon's career reflects these two overriding priorities.

Judge McMahon grew up in Ohio, where her paternal grandmother ran a farm until the day she died and her maternal grandfather was an old-fashioned grocer in a quaint country town. The daughter of a lawyer and a stay-at-home mother, Judge McMahon, her sister, and their four brothers enjoyed an idyllic suburban upbringing outside Columbus. She likens her family's dynamic to "The Waltons," the wholesome 1970s television family whose members closed each episode with a chorus of "good nights" from every bedroom. She attended parochial school and the local public high school, where she was best known as the accompanist for the senior concert choir and a perennially winning extemporaneous speaker. She was voted the girl most likely to succeed by her graduating high school class. Ironically, the boy voted most likely to succeed ended up as a senior auditor at the Administrative Office of the U.S. Courts!

Judge McMahon attended the Ohio State University, from which she graduated *summa cum laude.* She started as a theatre major but quickly changed her focus to international relations. She was enrolled in the Arts and Sciences Honors Program, which, at that time, allowed its students to fashion their own curricula. During college, Judge McMahon acquired the first of her many mentors, a graduate student and U.S. Army captain, who was creating a primitive (and ahead of its time) simulation of the national security decision-making process. She helped write his simulation scenarios and manuals, and he helped shape her curriculum—and,

Danielle C. Lesser is the co-head of the litigation department at Morrison Cohen LLP and chair of the Women in Law Committee of the Southern District of New York Chapter. Latisha Thompson is a senior counsel in the litigation department of Morrison Cohen LLP and a member of the Southern District of New York Chapter.

in cahoots with the judge's father, steered her away from graduate school in political science and toward law school. Like nearly everyone who mentored the judge, this young officer (now a retired colonel) remains in her life as a friend. Their friendship whetted her lifelong interest in the law of war and military affairs; the former led to a teaching stint at Cardozo Law School a few years ago, while the latter came in handy when she had to analyze uncommon issues in *United States v. Santiago*[1]—a case in which a veteran was charged in the Southern District with offenses for which he could, and should, have been court-martialed.

In her first foray out of Ohio, Judge McMahon matriculated to Harvard Law School. Unlike many lawyers, she recalls law school fondly, with classmates who were fascinating and brilliant young people from different walks of life. While in Cambridge, she pursued her passion for singing; rather than compete for a spot on the law review, Judge McMahon auditioned for and won parts in musical comedies. Singing has been a life-long passion of hers and remains a hobby in which she actively and enthusiastically participates. Judge McMahon settled in New York, in part, because her childhood dream was to be a Broadway star.

Judge McMahon's first job after law school would forever change the course of her life, although she almost didn't even interview for it. Put off by Paul Weiss Rifkind Wharton & Garrison's reputation as a "sweatshop," Judge McMahon was reluctant to interview with the firm. However, the brother of that military mentor was an associate at the firm. After meeting the judge, he told his brother that she was "a Paul Weiss person." Prodded by her mentor, she signed up for what she was sure would be a *pro forma* interview. The rest, as they say, is history. In 1976, Judge McMahon became an associate in the litigation department of Paul Weiss. Eight years later, she was the first woman litigator to be elected to partnership in a firm known for its storied litigation practice.

Judge McMahon refers to her 19 years at Paul Weiss as a special time in her life, when she worked alongside a very special group of people. Of all the institutions that have influenced her development, Judge McMahon credits Paul Weiss with being the most important. She thrived on the remarkable camaraderie at the firm and thoroughly enjoyed the practice of law, especially trying cases. Many of her colleagues at the time have remained close friends, including Judge Lewis A. Kaplan, Magistrate Judge Andrew J. Peck, New York Court of Appeals Associate Judge Robert S. Smith, and senior Paul Weiss litigators Martin Flumenbaum and Les Fagen. Judge Kaplan in particular was another of her mentors—she refers to him as "my big brother"—and he strongly influenced her professional development. They worked together frequently and were constantly in and out of each other's offices talking about their cases. This practice continues; they often serve as each other's trusted sounding boards now that they sit on the same court.

Life in a large law firm in the 1980s and 1990s suited Judge McMahon, and she excelled, but she was equally committed to family. Judge McMahon married in 1981 and had her first child in 1983. She recalls that some people questioned her decision to become pregnant when she did, during the time she was being considered for partner. But she saw no reason why a woman should have to "time" starting a family when the men she worked with did not. As it turns out, she did not suffer for her decision; while she was recuperating in the hospital from daughter Katie's birth, an IV still in her arm, storied Paul Weiss partner (and mentor) Arthur Liman came to visit and told her that the litigation department was going to nominate her as its first woman partner. Judge McMahon was elected to the partnership on May 22, 1984—the very day, she wryly notes, that the U.S. Supreme Court decided *Hishon v. King & Spaulding*,[2] the first case to hold that a woman stated a claim for relief when she alleged that she failed to make partner in a law firm because of gender discrimination.

Life in a large law firm in the 1980s and 1990s suited Judge McMahon, and she excelled, but she was equally committed to family. Judge McMahon married in 1981 and had her first child in 1983. She recalls that some people questioned her decision to become pregnant when she did, during the time she was being considered for partner. But she saw no reason why a woman should have to "time" starting a family when the men she worked with did not.

During her first four years as a partner, Judge McMahon had two other children, Patrick and Brian. There was no part-time option in those days, and her husband was not Mr. Mom, but a busy investment banker; both were carrying full loads. After taking a brief leave of absence to consider her options, Judge McMahon returned to work full time—perhaps a little too full time. Katie, Judge McMahon's first child, was in the second grade when she wrote the letter that sits on her mother's desk today. After reading it, the judge decided that she needed to be more present in the lives of her three children, which was the principal reason why she left the law firm she loved and went to the other side of the bench. She served as an acting justice of the New York State Supreme Court for three-and-a-half years, trying felony cases in Manhattan. When appointed to the federal bench, she volunteered to preside in White Plains, which was close to her Westchester home. But while Judge McMahon is grateful that she had the opportunity to work closer to home during her children's teen years (she sat in White Plains for nine years and still handles some cases there), she readily (and a bit ruefully) admits that her three children voted

unanimously in favor of her continuing to work outside the home.

During her two decades of private practice, Judge McMahon was active in the bar and other activities—especially the Association of the Bar of the City of New York, where she served, among other roles, as chair of both the Committee on State Courts of Superior Jurisdiction and the Committee on Women in the Profession. In the latter, she superintended the production of its groundbreaking report on the glass ceiling at large law firms. She also served as counsel to the zoning board of her village and vice chancellor of the Episcopal Diocese of New York, in which capacity she drafted canonical guidelines for dealing with allegations of clergy misconduct. She served for many years as a warden and vestryman at her parish church and even ran two Episcopal searches and elections.

But of all her many extracurricular activities, as she calls them, Judge McMahon is proudest of having served as chair of the Jury Project and principal author of its important report. At a very busy time professionally, she was asked to superintend a serious effort to reform jury service in the New York State Courts by yet another mentor. Newly appointed Chief Judge Judith S. Kaye had been monitoring Judge McMahon's career for many years at the behest of a former client—who was a roommate of the judge's father when they were young lawyers. Nearly all of the Jury Project's 82 recommendations—for changes to how jurors were qualified, called, and treated during their service—were enacted, either by law or administratively, and its report was lauded by the editorial board of *The New York Times.* (A copy of the editorial, framed, hangs on Judge McMahon's chambers wall). Before running the editorial, the *Times* asked Chief Judge Kaye who really wrote the report—its editorial board members did not believe the document was authored by a lawyer. Twenty years later, when the judge was summoned to jury service, she was delighted to see that the reforms set in motion were now embedded in the system. Another long-term consequence of the Jury Project was that both Chief Judge Kaye and Judge McMahon acquired their own mentee—a newly minted attorney named Roberta Kaplan, who served as counsel to the committee and who would eventually go on to fame as the lawyer who dealt the death-blow to laws against gay marriage in *United States v. Windsor.*[3]

President Bill Clinton nominated Judge McMahon to the federal bench in May 1998 on the recommendation of Sen. Alphonse D'Amato (R-N.Y.), during the halcyon years when New York's senators worked together to send candidates to the district court bench, regardless of which party was in the White House. The U.S. Senate confirmed her on October 21 of that year as part of the "Class of '98," which brought four judges—two suggested by a Democratic senator, and two by a Republican senator—to the Southern District bench on the same day. She has been on the federal bench ever since.

For Judge McMahon, the best thing about being a judge is "mixing it up" with really skilled lawyers. Whether at a conference, during oral argument, or at trial, she looks forward to debating issues with well-prepared lawyers who push back and challenge her views with persuasive arguments. Her advice to lawyers who appear before her is to be very well prepared and confident enough to challenge her conclusions; she appreciates the challenge and bristles at the thought of blind deference simply because she wears the black robe.

Judge McMahon is a tough judge who thinks that the only ideology that has any place on the bench is a commitment to the law and legal precedent. She does not believe that being a judge is license to vindicate a particular ideology or political agenda; her judicial philosophy is to try to come up with the right decision based on the facts and the law as interpreted by the Supreme Court and the Second Circuit. But while Judge McMahon does not believe that judges should legislate from the bench, she thinks that district judges can, and should, tee up difficult issues for consideration by higher courts or the legislature—especially where she believes that existing law is either unclear or misguided. She has done just that in several notable cases, including the "Newburgh Four" domestic terrorism case and *The New York Times*/American Civil Liberties Union case, both of which are discussed below.

Judge McMahon understands that applying the law can lead to painful results, but she is very clear about her role in the process. When a criminal defendant is found guilty, she recognizes that her job is to punish the defendant, not necessarily to rehabilitate him. The judge says, "I am not a social worker; it is not my job to forgive or to provide absolution." In Judge McMahon's view, victims forgive, judges do not.

Judge McMahon has had a number of what she calls "one off" cases—cases with unique or unusual facts. These include *United States v. Mitlof,*[4] in which a ferry accident on the Hudson River off Nyack, N.Y., led to the first prosecution in a century under the Seaman's Manslaughter Act; and *United States v. Cullen,*[5] in which the defendant was convicted of illegally importing raptors in violation of the Wild Bird Conservation Act.[6] She also includes in that group *Pippins v. KPMG LLP,*[7] a recent civil case in which she ruled that junior associate accountants are not entitled to overtime pay under the Fair Labor Standards Act[8]; and *Shaw Family Archives, LTD. v. CMG Worldwide, Inc.,*[9] where she had to delve into the circumstances surrounding the probate of the late actress Marilyn Monroe's will to determine whether her right of publicity in certain iconic photographs had ended with her death. These cases, which present difficult factual scenarios and implicate important and challenging legal issues, have led to some of Judge McMahon's very noteworthy opinions.

It is impossible to summarize the depth, breadth, and detail of Judge McMahon's jurisprudence in only a handful of opinions, but the two summarized below exemplify her commitment to the law and legal precedent and

meticulous factual analysis.

In *New York Times Company v. U.S. Department of Justice,*[10] the plaintiffs filed Freedom of Information Act (FOIA) requests to obtain information relating to the tactic of targeting and killing persons deemed to have ties to terrorism, some of whom may be American citizens. The FOIA requests sought legal opinions or memoranda that addressed the legality of the targeted killing of people suspected of having ties to al-Qaida or other terrorist groups, including legal advice provided to the military, the CIA, and other intelligence agencies. In her opinion, Judge McMahon conducted a thorough and fascinating analysis of the constitutional and statutory issues implicated in executive branch targeting of U.S. citizens who were suspected of being terrorists, including the Due Process Clause, the Treason Clause, the Fifth Amendment, the National Security Act, the CIA Act, various privileges, the limits of the powers of the executive branch, and the separation of powers between the executive and judicial branches. Judge McMahon quoted Montesquieu, James Madison, and Alexander Hamilton and explained concepts embraced by the framers of the U.S. Constitution. Judge McMahon said that, "constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States."

Judge McMahon went on to explain:

> The Alice-In-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret. But under the law as I understand it to have developed, the Government's motion for summary judgment must be granted.[11]

Ultimately, the Second Circuit reversed Judge McMahon's decision, but only because the facts changed between the time she issued her opinion and the decision on appeal.[12] Judge McMahon's opinion received extensive press attention, and in the weeks that followed its issuance, senior government officials leaked confidential information and made certain previously confidential matters public, including a white paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operation Leader of Al-Qa'ida or an Associated Force." The Second Circuit stated: "Whatever protection the [government's] legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the Department of Justice White Paper."[13] In sum, Judge McMahon's analysis was sound and her opinion was reversed largely as a result of a government leak, the statements of government officials, and the release of the DOJ white paper, all of which undercut its argument about the need for secrecy.

One of the most troubling cases to come before Judge McMahon, and certainly one of the most widely covered in the news media, was one in which four men—James Cromitie, David Williams, Onta Williams, and Laguerre Payen—were convicted of planning and attempting to carry out acts of domestic terrorism involving a plot to launch missiles at an Air National Guard base at Stewart Airport in Newburgh, N.Y., and bomb two synagogues in the Riverdale section of the Bronx. The case, *United States v. Cromitie,* would spawn a number of decisions by Judge McMahon addressing the issue of whether the government violates a defendant's rights when, as part of a sting operation, it both engineers the crime and provides the means and opportunity to carry out the criminal conduct.[14] Specifically, at issue in *Cromitie,* was whether the government's conduct either constituted entrapment as a matter of law or was so outrageous that it warranted dismissal of the indictment against the defendants. Judge McMahon ultimately concluded that Second Circuit precedent (the correctness of which she questioned) compelled her to rule that the government's deeply troubling actions did not rise to the level of a due process violation.

When asked about her legacy, Judge McMahon hopes that she will be remembered for having an impact on what she characterizes as the "astonishing group of young people who circulate through her chambers" as law clerks and interns. She hopes that the members of her "clerk family" believe they are better lawyers for having spent time working with her and that she arms them with the skills necessary to be really effective advocates and solid ethical professionals.

The evidence in *Cromitie* demonstrated that the government, through the use of a confidential informant, Shahed Hussain, conducted an elaborate sting operation as part of its efforts to root out terrorism. In 2008, at the government's direction, Hussain began attending services at a mosque in Newburgh. Following services one day in June 2008, the lead defendant, Cromitie, approached Hussain and the two men engaged in a conversation in which they discussed the violence in

Afghanistan. During this conversation, Cromitie identified himself as Abdul Rehman; falsely indicated that his father was from Afghanistan; stated that he would like to travel to Afghanistan; advised that he wanted to die like a martyr and go to paradise; and that he wanted "to do something to America."[15]

Cromitie and Hussain had several more meetings thereafter in which Cromitie spewed bigoted, anti-Semitic comments, but in which no firm plan to commit terroristic acts was formed. Over the course of several months, the informant repeatedly engaged Cromitie in discussions concerning potential terrorist activity and even offered Cromitie as much as a quarter of a million dollars to participate in a "mission," to no avail. Indeed, at some points Cromitie appeared disinterested and would go for long periods of time avoiding contact with Hussain. However, in April 2009, following the loss of his job at Walmart, the impoverished Cromitie contacted Hussain and agreed to move forward with a "mission." While Cromitie protested that he did not want to be a martyr, he began actively participating in Hussain's terrorist plot. Cromitie recruited his co-defendants as lookouts, followed Hussain's instructions on how to carry out the plot (down to which devices to use and which targets to select), went on several surveillance trips with Hussain, and ultimately placed fake bombs (which Cromitie believed were real) outside of two synagogues in the Bronx. The defendants were immediately arrested.

As Judge McMahon specifically noted, the driving force behind the plot was clearly the government:

> The Government indisputably "manufactured" the crimes of which defendants stand convicted. The Government invented all of the details of the scheme—many of them, such as the trip to Connecticut and the inclusion of Stewart AFB as a target, for specific legal purposes of which the defendants could not possibly have been aware (the former gave rise to federal jurisdiction and the latter mandated a twenty-five year minimum sentence). The Government selected the targets. The Government designed and built the phony ordnance that the defendants planted (or planned to plant) at Government-selected targets. The Government provided every item used in the plot: cameras, cell phones, cars, maps, and even a gun. The Government did all the driving (as none of the defendants had a car or a driver's license). The Government funded the entire project. And the Government, through its agent, offered the defendants large sums of money, contingent on their participation in the heinous scheme.[16]

Each of the defendants was convicted following a jury trial.

In *Cromitie I,* the defendants filed post-trial motions seeking dismissal of the indictment on the ground that the government "created the criminal, then manufactured the crime," which actions amounted either to entrapment or to outrageous government misconduct. Judge McMahon agreed that there was "some truth to that description" of the government's role in the crime, and that "that there was something decidedly troubling about the [g]overnment's behavior *vis a vis* Cromitie"—especially its dangling a quarter of a million dollars before an impoverished man to induce him to commit a crime that was not his idea in the first place. But the judge ultimately denied the defendants' motion to dismiss the criminal charges. Discussing the various tactics the government had employed *vis-a-vis* Cromitie, the judge noted that each had previously been challenged as constituting outrageous governmental misconduct but found not to rise to that level. She further noted that in every instance except one (a 1978 case out of the Third Circuit that had never been followed) "courts have denied these challenges, concluding that the Government's activity did not cross the line between appropriate and inappropriate law enforcement behavior."[17] The Second Circuit unanimously affirmed this conclusion.[18]

Judge McMahon also refused, reluctantly, to set aside the jury's conclusion that the government's conduct did not amount to entrapment. She believed this conclusion was compelled by the Second Circuit's decision in *United States v. Brand*[19]—a decision she had difficulty squaring with the Supreme Court's most recent pronouncement on entrapment, *Jacobson v. United States*.[20] The Second Circuit affirmed this decision as well, but by vote of 2-1, with former Chief Judge Dennis Jacobs dissenting on the issue of whether Cromitie, but not his co-defendants, "was entrapped as a matter of law."[21]

In yet another decision in the Newburgh Four case, *Cromitie II,* the defendants sought a downward departure from the mandatory minimum sentence of 25 years they faced, arguing that the government's conduct amounted to "sentencing manipulation" or "sentencing entrapment." They argued that "the Government devised the plot to fire a Stinger missile toward Stewart AFB—for the sole purpose of making sure that, in the event of a conviction, the court could not sentence the defendants to less than 25 years"; Judge McMahon agreed that "this is exactly what happened."[22] However, she concluded that she had no authority to get around the Congressionally mandated minimum sentence, stating:

> The bottom line is that I do not believe that I have any discretion to sentence the defendants to less than 25 years in this case, even though I think it highly likely that the only reason the Government introduced the missile element into this case was to prohibit me from sentencing the defendants to less time than that. What this means, of course, is that the doctrine of sentencing manipulation (if it exists at all) is effectively a dead letter in cases where there are statutory mandatory minima. I see no way around that conclusion.[23]

On appeal, the Second Circuit praised her "well-reasoned analysis" and "meticulous review of the evidence."[24] The Supreme Court has denied *certiorari*. [25] Judge McMahon claims never to have worked so hard on a single case.

Although the life of a judge can be isolating, Judge McMahon loves the job. There are strict rules about, for example, staying away from social media (which has the perverse result of isolating her from understanding a significant social development that is reshaping communication), and she cannot have the same kind of interaction with fellow lawyers as she did while in practice. Judge McMahon sometimes misses that, but accepts the compromises her position entails. She regularly recuses herself from Paul Weiss cases so that she can socialize with lawyers in a place where, as she puts it (paraphrasing "Cheers") "Everybody knows my name—and it isn't judge."

Now that her children are grown, Judge McMahon takes advantage of all that New York City has to offer. She enjoys going to the theatre, opera, concerts, ballet, museums, and Yankees games. She is a rabid sports fan, especially of Ohio State football. She also sings several evenings a week and performs in concerts with prominent chamber choirs and her church choir. She studies voice with Beverly Myers and even gives the occasional private voice recital. Judge McMahon finds singing to be the perfect thing to do at the end of a long and tiring day; it is both therapeutic and an enjoyable way to round out her very busy schedule.

When asked about her legacy, Judge McMahon hopes that she will be remembered for having an impact on what she characterizes as the "astonishing group of young people who circulate through her chambers" as law clerks and interns. She hopes that the members of her "clerk family" believe they are better lawyers for having spent time working with her and that she arms them with the skills necessary to be really effective advocates and solid ethical professionals. Judge McMahon treasures her opportunity to influence these individuals, whom she believes will one day be leaders of the bar. ⊙

Endnotes

[1]*United States v. Santiago,* No. 13 Cr. 039(CM), 2013 U.S. Dist. LEXIS 180050 (S.D.N.Y. Dec. 19, 2013).

[2]*Hishon v. King & Spaulding,* 467 U.S. 69 (1984).

[3]*United States v. Windsor,* 133 S.Ct. 2675 (2013).

[4]*United States v. Mitlof,* 165 F. Supp. 2d 558 (S.D.N.Y. 2001).

[5]*United States v. Cullen,* No. 04-CR-00878 (S.D.N.Y. Feb. 2, 2006).

[6]16 U.S.C. §4902.

[7]*Pippins v. KPMG LLP,* 921 F. Supp. 2d 26 (S.D.N.Y. 2012).

[8]29 U.S.C. § 201, *et seq.*

[9]*Shaw Family Archives, LTD. v. CMG Worldwide, Inc.,* 589 F. Supp. 2d 331 (S.D.N.Y. 2008).

[10]*New York Times Company v. U.S. Department of Justice,* 915 F. Supp. 2d 508 (2013).

[11]*Id*. at 515-16.

[12]*New York Times Company v. U.S. Department of Justice,* 752 F.3d 123 (2d Cir. 2014).

[13]*New York Times Company.,* 752 F.3d at 141.

[14]*See United States v. Cromitie,* 781 F. Supp. 2d 211 (S.D.N.Y. 2011) ("Cromitie I"); *United States v. Cromitie,* No. 09 Cr. 558(CM), 2011 U.S. Dist. LEXIS 71821 (S.D.N.Y. June 29, 2011) ("Cromitie II").

[15]*Id.* at 682.

[16]*Id.* at 220-21.

[17]*Id.* at 222.

[18]*United States v. Cromitie,* 727 F.3d 194 (2013).

[19]*United States v. Brand,* 467 F. 3d 179 (2d Cir. 2006).

[20]*Jacobson v. United States,* 503 U.S. 540 (1992).

[21]*Cromitie,* 727 F.3d at 227 (Jacobs, C.J., dissenting).

[22]*Cromitie,* 2011 U.S. Dist. LEXIS 71821 at *5.

[23]*Id*. at *13.

[24]*United States v. Cromitie,* 727 F.3d 194, 209, 216 (2d Cir. 2013), cert denied, __ U.S.__, __ S.Ct. __, 2014 U.S. LEXIS 5036 (Oct. 6, 2014).

[25]*United States v. Cromitie*, 2014 U.S. LEXIS 5036 (Oct. 6, 2014).