

Weinfeld Award Acceptance Speech (delivered October 25, 2022)

Thanks to my dear friend, Janet DiFiore, for her warm words. It was very important to me that I could look out my study window at the height of the COVID crisis and see Janet working away at her dining table -- and know that I had a sister in the fight. That said, the challenges she faced were far greater than those we had at the Mother Court; and when the dust settles, and someone writes the history of this episode, she will be recognized for the intelligent and courageous way in which she steered the New York State courts through the pandemic -- as well as for her intelligent and courageous jurisprudence over six years as Chief Judge of our state.

I want to take this opportunity to remember a great public servant and a good man, Sterling Johnson, on the day of his burial.

I figure that I am getting this award for the accidental fact that I was Chief Judge during the pandemic -- a real pandemic, not the one for which we planned when no one understood what that word meant. Nothing in my life prepared me for the task of keeping our court open when the world closed down -- except being a working mother, because, as all working mothers know, our job is to think ahead and plan for all possible contingencies. So the people you really ought to reward for getting our court through the pandemic are my wonderful children: Katie Spletzer, Patrick Sica and Brian Sica, the greatest joys of my life. Gratitude is also due to my husband, Frank Sica, for a lifetime of supporting me in my professional endeavors, which culminated in our being apart for 42 of the first 56 weeks of the pandemic so I could do my job. That qualifies as sacrifice above and beyond.

I get way too much credit for the fact that the Southern District continued functioning at the height of COVID -- and, if I may brag a bit, for the fact that we did a better job of it than most other courts. Our success was really due to the extraordinary work of our Unit Executives -- Clerk of Court Ruby Krajick, District Executive Ed Friedland, Chief of PreTrial Scott

Kowal and recently retired Chief of Probation Mike Fitzpatrick. It was the unparalleled creativity of these leaders and their staffs that kept the doors of the courthouses open at the height of the crisis, and that allowed us to readmit the public at the earliest opportunity. I was truly nothing more than the wind beneath their wings – as shown by the fact that, when I stepped down as Chief Judge, the only thing that changed was the Chief’s phone number.

Our court’s accomplishments were equally, however, the product of the collegial nature of our technically non-collegial bench. Unlike my friend Janet, who occupied a position of almost unparalleled power, the Chief Judge of a federal court is truly *primus inter pares*; she can do little more than set the tone. It would have been impossible for us to carry out our constitutional obligations if my colleagues had insisted on running their own shows, by their own rules, as soon as they wanted, as though nothing had changed. That happened in some courts, but it did not happen in the Southern District of New York. Every judge bought into such previously unthinkable concepts as centralized trial scheduling and assigning facilities to specific tasks rather than specific judges. As a result, we held our first in-court hearing with witnesses in July 2020; held the first jury trial in the country in September 2020; and conducted 120 jury trials by the end of calendar year 2021 – without having to disband a single jury due to COVID. We picked our 117th jury of 2022 this morning, surpassing the pre-COVID year of 2019. I am proud to have been the Chief of a court that performed so magnificently.

Finally, I want to give a shout out to our colleagues at the US Attorney’s Office, the Federal Defenders, the Bureau of Prisons and the US Marshal’s Service, who worked with the court to find ways to move prisoners and hold remote criminal proceedings and facilitate attorney visitation -- something for which our system was entirely unequipped, legally, physically and psychologically. Two of those people are here today, and I am proud to thank them, not just for this, but for everything they have done to prove that the true administration of justice is the firmest pillar of good government: Geoff Berman and Audrey Strauss. In

addition the legal community should be grateful for the efforts of, among others, Laura Berger, Jeff Oestericher, David Patton, Jennifer Brown, Deirdre Von Dornum, Ralph Sozio, John Csakany, James Kamrowski, Kevin Gutowski, Chris McShea, Kenneth Hyle, Adam Johnson and Nicole McFarland. You've never heard of most of them; I, however, will never forget any of them.

The administration of justice involves doing justice, and in this regard, too, I need to acknowledge those who have assisted me in that endeavor over the years.

I have long said that three institutions made me the person I am today: the McMahan Family, the Roman Catholic Church and Paul Weiss Rifkind Wharton & Garrison. I thank my old friends from the Firm who have come here today; I will always be, and be proud to be, a "Paul Weiss person."

Next, there are my beloved law clerks, past, present and even a couple of futures, who have worked hard to make me look good, and who give me hope that the legal profession will be left in honorable and capable hands when I am gone. I am lucky to have so many of them with me today, from all over the country.

If anything gets done in my chambers it is due to Mariela de Jesus, my deputy clerk, who keeps me sane and keeps both the calendar and my life running smoothly.

And finally to Jim O'Neill, for being my good right arm and my good left arm for the better part of three decades. Jim is the person who taught me how to be a judge when he was my Part Clerk at 111 Centre Street. Since joining me at the Mother Court in 2001, he has handled my criminal docket, both legally and administratively, while settling my civil cases -- some of them cases even Layn Philips and Ken Feinberg couldn't resolve. And while I was Chief Judge, he was my eyes, ears and adviser on dozens of critical issues. Kevin Duffy used to refer to his wife Irene as "The Real Judge Duffy;" well, Jimmy is the real Judge McMahan. And to those of

my colleagues who have enviously asked me how they can “get a Jimmy”—sorry, but in all the world, there’s only one.

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Some of you may have noticed that I am wearing a tee shirt, which is not my usual mode of professional dress. This tee shirt happens to be one of my favorite articles of clothing. Someone gave it to me back in 2020, and I wear it frequently. It says, “I am an essential worker, so basically I’m kind of a big deal.”

Until quite recently, I took it for granted that those of us who labor in the vineyard of the law were essential workers – if only because respect for the rule of law is the bedrock and the essence of our national compact, which is kind of a big deal.

Then came COVID. And I learned that we were not such a Big Deal after all.

Did you know that New York State did not designate court employees as “essential workers” during the pandemic? And aside from permitting criminal proceedings to be held remotely, Congress did precious little, especially in the way of providing funding, to ensure that courts would be able to carry out their constitutional functions during this unprecedented crisis.

The Third Branch did not have the option to stand down, so we found safe and fair ways to provide our essential services. But like the Little Red Hen, we had to do it ourselves.

And I ask myself: How could this have happened? How could the courts have counted for so little – been overlooked amid the welter of functions that were somehow deemed more important than a co-equal branch of our government? And what does that say about respect for the rule of law and its foundational place in our national life?

Well, I think it says quite a lot. I think it is just another piece of evidence that there are pretty big cracks in that foundation.

A friend of mine, a lifelong public servant, once wrote that Liberty, rightly understood, is “the product of an essential but fragile social compact, imposing reciprocal obligations to society on the part of those enjoying it, and demanding a modicum of political patience and self-restraint.” He was, of course, correct. True liberty is not the freedom to do exactly what we want; it is an ordered liberty, under which every citizen submits to laws that protect our fundamental rights while placing some constraints on absolute individual freedom for the good of the commonweal. But our fellow Americans will not prefer ordered liberty to absolute freedom unless they understand and respect how important the rule of law is to a functioning society. And as we know too well, recent polls show a significant loss of popular respect for courts, and skepticism that we really are the nation of laws we profess to be.

It’s not all that hard to figure out why.

Respect for the rule of law rests on judicial neutrality – on judges who put aside their resumes and personal beliefs as the price of taking the job. This is the first and most important principle; and I want to go on record as saying that most people who become judges do precisely that. But over the course of my life, the public’s belief that judges truly are neutral has been undermined -- by politicians, who promise that the judges they choose will decide issues in a particular way; by legislators, who refuse to confirm qualified nominees simply because they were put forward by the other party; and by the media, which implies that judges will be wedded to the political agendas of whoever appointed them. Judges of all political stripes and philosophies do not help matters when they step out from behind the anonymity of the robe -- whether by engaging with openly factionalist organizations, or making speeches and giving interviews that rip away any pretense of neutrality, or failing to discourage cults of personality that transform jurists into celebrities.

Respect for the rule of law rests on consistency of interpretation -- specifically, in a common law country, on the stability of traditional common law interpretive principles. Those principles were known to and understood by the Founders, who had no reason to think that future judges would fail to apply them. But today *stare decisis* and other time-honored precepts of constitutional and statutory construction are increasingly honored in the breach, while recently-devised “judicial philosophies,” the product of ivory towers and think tanks, are employed -- when it suits -- to upend precepts thought to be long settled. The image of judges as umpires, calling balls and strikes, doesn’t convince when the umpires no longer agree on the strike zone.

Respect for the rule of law also depends on consistency of compliance – most especially, on leaders who conform their actions to law, interpreted fairly and logically. But over the course of my career, politicians from both parties have employed twisted legal reasoning to justify policies that run counter to our history, our values, and sometimes even to the words on the pages of the United States Code. Too often those same leaders -- again from both parties -- have demonstrated open contempt for the law when it constrains their behavior, or when they don’t feel like enforcing it. Little wonder that our fellow citizens are developing a similar insouciance; after all, those at the top set the tone.

There are many other reasons why respect for the rule of law is eroding. The communications revolution of the past three decades, poorly understood and badly managed, has undermined social discourse to the point where – sorry, Senator Moynihan -- it is no longer the case that you can have your own opinion but not your own truth. I fear that my generation -- which not for nothing was called the “me” generation -- went overboard in glorifying the prerogatives of the individual at the expense of developing common values. And our schools’ failure to teach civics – the cause to which our friend Bob Katzmann devoted so much of his last years – means our citizens do not learn at an early age how fundamental the rule of law is to our functioning as a nation.

One wonders what Judge Weinfeld would have made of all this. I never heard him referred to as a “Truman Judge;” while he graced the bench, no one identified judges with their appointers. As his former law clerk, Professor William Nelson of NYU, wrote, the Judge rendered decisions in controversial cases that were universally viewed as fair and apolitical; he did so relying Blackstonian rules of construction, such as avoidance of contentious issues and strict application of precedent, not on any result-oriented “judicial philosophy.” He believed in truth, and I believe he would have given short shrift to any effort to manipulate the rules of decision to justify some preferred conduct or result. He had no celebrity and he sought none. Judge Weinfeld spoke through his opinions, not to reporters; and I suspect the very idea of a mug or tee shirt with his picture on it would have given him apoplexy.

Yet Edward Weinfeld is the person we all aspire to be -- precisely because he embodied to the core of his being the qualities of neutrality, consistency, compliance, respect for tradition and modesty – qualities that encourage respect for the rule of law, which he cherished, and which it was his lifelong ambition to serve.

I too cherish the rule of law. Like all of you, I long ago swore to preserve, protect and defend the Constitution of the United States from all enemies, foreign and domestic. As my clerks know, I emphasize those last two words whenever I administer the oath. I do so because I truly believe that only we Americans can fatally undermine the Constitutional order. Sadly -- and I never thought I would say this – as respect for the rule of law becomes increasingly fragile, that outcome is no longer unthinkable to me. Calvin Coolidge may not have said much worth quoting, but he said one thing that genuinely resonates with me: “Our success in establishing self-government is predicated on our being a law-abiding people.” If that crumbles, it follows as the night the day that our great national experiment will crumble as well.

So make no mistake: we who labor in the vineyard of the law are indeed essential workers – because the work that falls to us is the most essential work of all: finding ways, in our fractured and fractious society, to restore public confidence in what is literally the cornerstone of our Republic. The evidence of crisis is everywhere we look, and the lesson of the pandemic is clear: if those of us in this room don't find ways to promote respect for the rule of law, no one else will do it for us.

I admit that the task appears impossible. But to paraphrase what John F. Kennedy said when speaking of another seemingly impossible task, we Americans choose to take on impossible tasks, not because they are easy, but because they are hard; because they organize and measure the best of our energies and skills; and because the challenge they present is one that we are willing to accept, one we are unwilling to postpone, and one which, if we are to keep our Republic, we have no choice but to win.