

**IN THE DISTRICT COURT FOR THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**HONORABLE MICHAEL C. DUNSTON,
in his official capacity as Presiding Judge
of the Superior Court of the Virgin Islands,**

Plaintiff,

v.

**HONORABLE KENNETH MAPP, in his
official capacity as the Governor of the
Virgin Islands; and the HONORABLE
HAROLD W.L. WILLOCKS, strictly as
interested party;**

Defendant.

Case No. Civ. 16-0038

**Action for Declaratory and Injunctive
Relief**

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

AND PRELIMINARY INJUNCTION

COMES NOW Michael C. Dunston, by and through his attorney undersigned, and pursuant to Rule 65(b), Federal Rules of Civil Procedure hereby moves the Court for a temporary restraining order, and subsequently a preliminary injunction, against Defendant Kenneth Mapp, prohibiting said Defendant from removing Plaintiff from his position as Presiding Judge of the Superior Court of the Virgin Islands, *pendente lite*.

Governor Mapp has indeed purported to unilaterally remove Plaintiff as Presiding Judge of the Superior Court, effective midnight June 25, 2016, in an egregious abuse of executive power—a misguided and ill-conceived action that fundamentally violates separation of powers principles, and grossly interferes with the independence of the Virgin Islands judiciary, all in violation of the Revised Organic Act, 48 U.S.C. §§ 1541, *et seq.*

Background

The facts of this matter are straightforward and incontrovertible. They are set forth in the attached Affidavit of Michael C. Dunston, the salient points of which are now summarized.

Plaintiff was nominated as Superior Court Judge by then-Governor John P. deJongh and unanimously confirmed by the Legislature of the Virgin Islands in 2007. When his initial term of 6 years expired (4 V.I.C. § 73), Judge Dunston was reappointed by Governor deJongh—this time as Presiding Judge—and once again unanimously confirmed by the Senate. The term of his appointment was, and is, for the statutory period of 6 years (September 26, 2013-September 26, 2019). (Appointment Letter, embedded Exhibit 1 to Affidavit.) His salary as Presiding Judge was set at \$162,000 per annum. (*Id.*)

On or about June 16, 2016, Governor Mapp advised Plaintiff by telephone call that he (Governor Mapp) was removing Plaintiff from his position as Presiding Judge and replacing him with the Honorable Harold W. L. Willocks. By subsequent letter Governor Mapp stated that Plaintiff's termination from the Presiding Judge position was to be effective 11:59 p.m. on Saturday, June 25, 2016. The Governor has, in the press, publicly cited the issue of delay in the Superior Court as the basis for Plaintiff's removal as Presiding Judge, attributing the docket backlog—without a good faith factual basis—to some putative lack of work ethic on the part of the judges of the Superior Court. The Governor has also personally expressed his displeasure on Plaintiff's political stance on the now-pending Court Unification Bill (proposing to merge certain administrative functions of the Superior Court with the Supreme Court).

There are no pending judicial or quasi-judicial proceedings of any nature challenging or questioning Plaintiff's conduct or fitness to serve as Presiding Judge. There never have been. Judge Dunston has an impeccable judicial record; he has never been disciplined, censured or even

reprimanded in any way, shape or form as a judge (presiding or otherwise). No proceedings—even so much as an preliminary investigatory screening—have been initiated with the Virgin Islands Commission on Judicial Conduct (formerly, the Commission on Judicial Disabilities, *infra*).

Governor Mapp’s action amounts to a lawless and heavy-handed arrogation of executive powers, in derogation of judicial independence.

Subject Matter Jurisdiction

This matter arises out of the Revised Organic Act of 1954, 48 U.S.C.A. § 1541 et seq., enacted by Congress pursuant to the Territorial Clause of the Constitution. Section 3, art. 4, Const. U. S. (“The Congress shall have power to dispose of and make all needful Rules and Regulations respecting [a] Territory....”); *Miller Properties, Inc. v. Gov’t of Virgin Islands*, 313 F. Supp. 2d 524, 527 (D.V.I. 2004) (“The entire territorial government of the Virgin Islands—the executive, the legislature, and the judiciary—are wholly the creation of Congress under [the Territorial Clause].”).

Because a federal question is presented, this Court has subject matter jurisdiction under 28 U.S.C. § 1331. *Kendall v. Russell*, 572 F.3d 126, 131, n.4 (3d Cir. 2009) (“As the [Revised Organic Act] is a federal statute, the District Court had federal question jurisdiction in this case pursuant to 28 U.S.C. § 1331.”); and see *Luis v. Dennis*, 751 F.2d 604, 607 (3d Cir. 1984) (“The Governor’s claim is essentially that the challenged [Virgin Islands] Act encroaches upon his powers of appointment, as conferred by the Revised Organic Act of 1954, 48 U.S.C. § 1597(c) (1982). Thus, his claim properly ‘arises under’ federal law.”).

With further regard to subject matter jurisdiction: Plaintiff has obviously satisfied the requirements of Article III standing. Loss of Plaintiff’s position is obviously a cognizable injury-

in-fact. Cf., *Stehney v. Perry*, 101 F.3d 925, 930 (3d Cir.1996) (finding loss of employment to constitute sufficient injury for standing purposes). The injury is directly attributable to Governor Mapp's violation of the Revised Organic Act, and is redressable by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is redressable by the Court through an appropriate declaratory judgment and ancillary injunctive relief. Declaratory Judgment Act, 28 U.S.C. § 2201, et seq.

Requisites of Temporary Restraining Order, Preliminary Injunction

Plaintiff seeks a temporary restraining order. The test for issuance of a temporary restraining order is the same as that applying to preliminary injunctive relief. E.g., *Bieros v. Police Chief Nicola*, 857 F.Supp. 445, 446 (E.D.Pa.1994). In exercising its discretion on whether to issue a preliminary injunction, the District Court is to consider the following familiar factors:

- (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Noorhasan v. de Jongh, No. 11-CV-0021, 2012 WL 1153285, at *2 (D.V.I. Mar. 31, 2012), quoting *Iles v. de Jongh*, 638 F.3d 169, 172 (3d Cir.2011).

Factor 1: Success on the Merits

This case implicates separation of powers issues, and the most basic historic traditions and constitutionally-enshrined principles of independence of the judicial branch of government. These principles are incorporated into the Revised Organic Act, which is the functional equivalent of a constitution in the Virgin Islands. *Kendall v. Russell*, 572 F.3d 126, 135 (3d Cir. 2009), citing *Brow v. Farrelly*, 994 F.2d 1027, 1032 (3d Cir.1993)

The ROA divides the power to govern the territory between a legislative branch, 48 U.S.C. § 1571, an executive branch, *id.* § 1591, and a judicial branch, *id.* § 1611. By organizing the government in that manner, Congress “implicitly incorporated the principle of separation of powers into the law of the territory.”

Kendall v. Russell, 572 F.3d at 135 (quoting *Smith v. Magras*, 124 F.3d 457, 465 (3d Cir. 1997).

“[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design.” *Miller v. French*, 530 U.S. 327, 350, 120 S. Ct. 2246, 2260, 147 L. Ed. 2d 326 (2000). Such principles are designed to, among other things, insulate and protect judges from tampering and encroachment by the executive branch.

This is of course deeply rooted in American history, including events predating the Constitution, with antecedents even in English law. “One of the great landmarks of British liberty is the stipulation in the Act of Settlement of 1701 that judges should not be removed except upon address of the Houses of Parliament.” Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 570 (1996). These constraints were not observed in colonial America. Indeed the abuses of King George III in the arbitrary removal of colonial judges who failed to do his bidding were one of essential reasons for the Revolution.

The American colonies ... fought the battle for judicial independence as a guarantee against executive oppression. King George III made tenure of colonial judges dependent upon royal pleasure, claiming that “the state of learning on the colonies was so low that it was difficult that men could be found competent to administer the judicial offices.” The Declaration of Independence lists the King's making judges “dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries,” high on the list of grievances justifying the colonies' revolt.

Id., at p. 570, citing THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); see also Richard S. Arnold, *Trial by Jury: The Constitutional Right to A Jury of Twelve in Civil Trials*, 22

Hofstra L. Rev. 1, 14 (1993) (noting that Colonial judges were “appointed and removed by royal governors, who insisted on verdicts they favored in order for the judge to remain on the bench”).

The Constitution of Massachusetts, drafted by John Adams in 1780, states:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.

Mass. Const. pt. 1, art. XXIX, quoted in Wm. T. (Bill) Robinson III, *Justice in Jeopardy: The ABA Perspective*, 46 Ind. L. Rev. 7 (2013).

Separation of powers became a bedrock principle of government under the Constitution. It is the “central mechanism” through which the three coordinate branches define and function within their respective roles. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Independence of the judiciary is a core tenet of separation of powers under Article III. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 3255, 92 L. Ed. 2d 675 (1986) (“Article III, § 1 ... serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, ... and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government.”) (*internal citations, quote marks, omitted*).

An extension of the principle of judicial independence is that the executive power to appoint a judge *does not imply the power of removal*. Judicial independence presupposes freedom from removal by executives with their own agendas, who may be displeased with a policy or decision of a judge, or who may prefer a different judge due to political or personal alliances. “[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.” *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 55 S. Ct. 869, 874, 79 L. Ed. 1611 (1935).

There is a long history of Presidents attempting to remove (non-Article III) judges, or those serving in a quasi-judicial capacity, who were appointed by their predecessors in office. In *Marbury v. Madison*, James Madison, as Secretary of State under Thomas Jefferson, of course refused to deliver the commission under which John Adams appointed Marbury as judge of the District of Columbia (one of Adams' "midnight appointments"). Although it was clear that the president had the power to *appoint* Justices of the Peace in the District, the Chief Justice John Marshall held that the president did not thereby acquire the power of removal. "[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed." *Marbury v. Madison*, 5 U.S. 137, 162, 2 L. Ed. 60 (1803). Under Virgin Islands law, no Superior Court judge, including a presiding judge, is removable at the will of the governor (*infra*).

In *Humphrey's Estate*, a member of the Federal Trade Commission who was appointed by President Hoover upon the advice and consent of the Senate to a term of 7 years was purportedly removed by Franklin D. Roosevelt (without "cause" as defined by the governing statute). President Roosevelt stated that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection." 295 U.S. at 612.

The Supreme Court observed that the FTC was "nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative." 295 U.S. at 624. "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave

and, in the contemplation of the statute, must be free from executive control.” *Id.* at 628.

Moreover:

The power of removal here claimed for the President falls within this principle [of independence], since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

295 U.S. at 630. And further:

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime.

Humphrey's Ex'r, 295 U.S. at 629. This rule obviously applies *a fortiori* to the appointment of a true judge (as distinguished from a quasi-judicial officer), such as Presiding Judge Dunston.

Another federal case of historical note along this same line—a case similarly involving a successor executive’s failed attempt to purge a non-executive appointee of a predecessor executive—is *Wiener v. United States*, 357 U.S. 349, 349, 78 S. Ct. 1275, 1276, 2 L. Ed. 2d 1377 (1958). There, the petitioner had been appointed by President Truman as a member of the War Claims Commission, to adjudicate claims for injury and property damage suffered at the hands of the enemy in World War II. Congress, in constituting this body, made no provision for removal of members. When Eisenhower was elected, he sought to replace the petitioner because, the President said, “I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection.” *Wiener*, 357 U.S. at 350.

The War Claims Commission, like the FTC, was a quasi-adjudicatory body entitled to freedom from executive encroachment.

Justice Frankfurter, relying upon the principles of *Humphrey*, emphatically held that President Eisenhower's discretionary power to *appoint* the Commission member did not imply any corresponding discretionary power to *remove* the member.

[W]hat is the essence of the decision in *Humphrey's* case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' 295 U.S. at pages 625—626, 55 S.Ct. at page 873, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. 'For it is quite evident,' again to quote *Humphrey's Executor*, 'that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.' 295 U.S. at page 629, 55 S.Ct. at page 874.

Wiener v. United States, 357 U.S. at 353. To overstate the obvious: The office of Presiding Judge is obviously not a part of the Virgin Islands executive branch. It is part of the judicial branch. It is a position "whose tasks require absolute freedom from executive interference." *Id.*

Numerous state court cases adhere to these fundamental tenets and hold that a governor's discretionary power to appoint a judge in no way implies the discretionary power to *remove* (or demote) that judge. E.g., *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419, 435 (Tenn. 2007 (stating that while "the Governor alone is empowered to make appointments to fill such [judicial] vacancies," he "has no authority to control, in any way, the 'manner and means' by which judges perform their official duties. Nor does the Governor ... have the power to demote or terminate a state court judge"); *State ex rel. Deering v. Harmon*, 115 Me. 268, 271-72, 98 A. 804,

805 (1916)(“The Governor has no authority, either alone or with the advise [*sic*] of the Council, to remove a judicial officer whose term of office is fixed, except on the address of both branches of the Legislature.”);¹ *Com. ex rel. Specter v. Vignola*, 446 Pa. 1, 6-7, 285 A.2d 869, 871-72 (1971) (“We hold that Judge Walsh was appointed, by the Governor, President Judge of the Traffic Court for a fixed five-year term with fixed tenure ..., and that he cannot be removed by the Governor ... ‘at pleasure’ ... or under the general-removal-power provision in Article VI, Section 7.”); *State ex rel. Vail v. Draper*, 48 Mo. 213, 214-17 (1871) (“After the governor had issued his commission, and [the judge] had qualified and been inducted into office, it was incompetent for any subsequent governor, upon any evidence whatever, to attempt to nullify or revoke that commission and devolve the office upon another.”); and *id.* (“[T]he act of the Governor in issuing the order of revocation and cancellation of the commission made, executed, and delivered to the respondent [judge], under which he qualified and was serving, is without legal force and effect.”); *State v. Rowe*, 149 Okla. 240, 300 P. 727, 727-37 (Okla. 1931) (“There is no case presented and we know of none where, under a constitutional provision such as contained in section 1, article 4 [of the Oklahoma constitution], it has been held that an executive could, by reason of a statute, or independent of statute, recall an appointment to office in an independent branch of government....”); *Terr. ex rel. Wade v. Ashenfelter*, 4 N.M. 93, 102-103, 146-147 (N.M. 1887) (Governor of the territory had no power, either inherent in the office of Governor, or under the organic act of the territory, to remove a judicial officer holding office for a fixed term, before the expiration of the term.).

¹ Interestingly, the “address” of the legislature language in this, and in other state statutes, appears to be borrowed from the pre-U.S. Constitution, British Act of Settlement of 1701.

In the Virgin Islands, a governor has bare *appointment* power (subject to the advice and consent of the Senate) over judges, including presiding judges. 4 V.I.C. § 71 (“The Governor shall designate one of the judges of the court to serve as presiding judge of the court to preside for such term, perform such duties, and exercise such authority as may be otherwise provided by law, or by rules of the court.”); 4 V.I.C. § 72(a) (“The judges of the Superior Court shall be appointed by the Governor with the advice and consent of the Legislature. Judges so appointed shall continue in office until their successors are appointed and confirmed or until they are renominated and confirmed.”); 4 V.I.C. § 73 (“The judges of the Superior Court shall hold their offices for a term of six years unless sooner retired or removed in accordance with the provisions of this title.”)

There is, naturally, no explicit power whatsoever in any Virgin Islands statute conferring upon a governor the power to remove a Superior Court judge (or remove a judge from his position as presiding judge), or to demote a presiding judge, or even to reduce his or her salary. Under Section 73 of the Judicial Code, 4 V.I.C. § 73, Plaintiff was subject to removal only as provided for in Title 4 of the Virgin Islands Code; e.g., 4 V.I.C. § 656, providing for removal (or involuntary retirement) by the Commission on Judicial Disabilities upon a finding defined types of malfeasance, misfeasance or nonfeasance as judicially confirmed by the District Court; *abrogated, Kendall v. Russell*, 572 F.3d 126 (3d Cir. 2009) (*infra*). Moreover, Section 72 specifically provides that “[n]o judge's compensation shall be reduced during his term of office without his consent.” 4 V.I.C. § 72(c). In fact Plaintiff as Presiding Judge is compensated at a rate approximately \$10,000 higher than other Superior Court judges, and Plaintiff of course does not consent in any way to his demotion or his pay-cut that would result from his illegal removal as Presiding Judge.

The Virgin Islands legislature earlier provided for a mechanism for discipline or removal of judges under the Virgin Islands Commission on Judicial Disabilities established by Act 3876

and codified at 4 V.I.C. §§ 651-59, but that statutory scheme purported to place the responsibilities of direct judicial review of the findings and conclusions of the Commission on Judicial Disabilities upon the District Court, in excess of its lawful subject matter jurisdiction. *Kendall*, 572 F.3d at 132 (“Despite laudatory intention, the Legislature of the Virgin Islands cannot expand the jurisdiction of the District Court.”)

That previous statutory scheme was, as noted, nullified in *Kendall*.² In response to *Kendall*, the Supreme Court of the Virgin Islands established the Commission on Judicial Conduct as an adjunct of the judiciary, and codified by rule an elaborate scheme to investigate and adjudicate complaints on judicial unfitness or misconduct (expansively and meticulously defined), with an array of due process protections for the judge facing allegations of impropriety or disability. PREAMBLE, Virgin Islands Rules for Judicial Disciplinary Enforcement; VISCR 209, *et seq.* Those Rules were promulgated under authority of “section 21(c) of the Revised Organic Act of 1954, as amended, the inherent authority vested in [the Supreme] Court, and title 4, sections 32(b), 32(e), 32(f)(2) and 34(a) of the Virgin Islands Code.” *Id.*, PREAMBLE.

No proceedings for judicial disciplinary enforcement of any nature are now pending against Presiding Judge Dunston, nor have there ever been. There are no mechanisms, other

² In its concluding remarks, the Third Circuit in *Kendall* stated:

The territorial judiciary has inherent authority to regulate the conduct of its judges, the limits of which authority we do not now consider. Similarly, because the issue is not before us, we do not now consider whether the Commission Act would pass muster under the ROA if Commission orders were subject to review by the Supreme Court of the Virgin Islands, though we do encourage the Virgin Islands' Legislature to take up the question of how appeals from such orders should be handled.

Kendall v. Russell, 572 F.3d 126, 139 (3d Cir. 2009).

than those created by Supreme Court Rules, for the removal of a judge (or removal of a judge from his position as presiding judge) in the Virgin Islands.³

Whether the Supreme Court Rules are or are not sufficient to meet the requirements of the Revised Organic Act as developed in *Kendall* has not been decided by any court. However, and regardless of that point, one thing is abundantly clear: The Governor has no power to remove, demote, or cut the pay of a sitting Virgin Islands judge. The separation of powers principles incorporated into the Revised Organic Act—chief among them being judicial independence— forbid such arbitrary, dictatorial actions by a governor. A governor cannot purge the appointees of his predecessor, substituting in their place those from whom he expects personal or political allegiance or perhaps favorable results in court decisions, and he cannot hold out the threat of replacement as veiled leverage. “[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.” *Wiener*, 357 U.S. at 353, (Frankfurter, J., quoting *Humphrey's Executor*, 295 U.S. at 629.) A sitting judge should never face the prospect of a governor’s improper influence or intimidation. Judges must be loyal to their office; not to the politician appointing them.

In sum, the Governor’s action against Presiding Judge Dunston was outrageously illegal, and dead flat wrong. His obstructive intermeddling in the judicial affairs of the Territory must be stopped by this Court.

³ This essential point obviates the necessity of any discussion of *Younger* abstention. There is no “ongoing state [or territorial] proceeding” triggering abstention principles. *Kendall*, 572 F.3d at 131, citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Matusow v. Trans-Cty. Title Agency, LLC*, 545 F.3d 241, 248 (3d Cir. 2008) (“*Younger* abstention is appropriate only if ... there are ongoing state proceedings that are judicial in nature....”).

Factors 2 and 3: Balancing of Harms

Presiding Judge Dunston, in his Affidavit, has established in considerable detail the extraordinary disruption of the administrative affairs of the Superior Court that would take place if he were precipitously replaced by another judge (particularly one having no prior substantial familiarity with such matters). Prominent among the critical, and time-sensitive, obligations of Presiding Judge Dunston is his scheduled appearance before the Committee on Finance of the Thirty-first Legislature on Thursday, June 30, 2016, in order to present the Court's justification for its proposed fiscal year 2017 budget. Presiding Judge Dunston has also been actively and substantially engaged in critical infrastructure upgrades, dealing with contractors for physical improvement to certain facilities, and to the development and implementation of an electronic case management/filing system. Things will inevitably become far more problematic than would be expected in an ordinary, non-compelled transition of such responsibilities, inasmuch as Plaintiff will emphatically defy (as he *should* emphatically defy) the illegal edict of Governor Mapp. Plaintiff will refuse to capitulate to this illicit power-play, and will not step down from his position in the absence of an order from a court of competent jurisdiction. This is a recipe for chaos. How is the office of Presiding Judge to function in an orderly and efficient manner given this state of affairs? And would an illegally-appointed Presiding Judge possess the actual, legal authority to bind the Superior Court to a contract?

This is quintessential "irreparable harm," in that money damages would be futile as a form of redress, and belated equitable relief would be similarly ineffectual (the harm would be compounded and exacerbated by *two* transitions in the Presiding Judge position). E.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Barrow v. Graham*, 124 F. Supp. 2d 714, 716 (D.D.C. 2000) ("The Court ... finds that [the public employee-

plaintiff] will suffer imminent and irreparable harm if the Court does not grant his motion for a TRO. He will lose his job today without the benefit of any due process protections whatsoever.”).

A temporary restraining order (and preliminary injunction) is essential to avoid an imminent crisis in the power structure and administration of the Superior Court, and to preserve the status quo pending an orderly judicial declaration and determination of the Governor’s powers (and lack thereof) in the premises. *That*, after all, is the essential function of *pendente lite* relief. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439, 94 S. Ct. 1113, 1124, 39 L. Ed. 2d 435 (1974) (purpose of TRO is to “preserv[e] the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer”); *Bradshaw v. Veneman*, 338 F. Supp. 2d 139, 141 (D.D.C. 2004) (stating that the “purpose of a temporary restraining order is to preserve the status quo and prevent imminent harm pending fuller briefing and a hearing on the request for injunctive relief”).

The standard preliminary injunction/TRO analysis, as stated, requires the Court to consider the countervailing potential harm to the non-moving party. But what *cognizable* legal harm could Governor Mapp credibly claim? The inability to carry out his illegal plans? The inability to compromise the integrity and independence of the Superior Court? Even assuming *arguendo* that Defendant Mapp could mount *some* colorable claim of entitlement to replace the Presiding Judge as part of his executive powers, the harm to Governor Mapp resulting from a *minor delay* in effectuating those plans would be *de minimis*. It would be far better *for all concerned*—Presiding Judge Dunston, Governor Mapp, and Judge Willocks—to freeze the status quo until the legality of the replacement can be assessed and evaluated in an orderly manner.

As it stands, *nobody* would benefit from appointing a replacement Presiding Judge who has no a legitimate claim to the office, and who would lose the position upon a full adjudication of the issues.

The balance of harms clearly militates in favor of *pendente lite* equitable relief.

Factor 4: Public Policy

The separation of powers issue here *sub judice*—the “checks and balances” on government powers known to every schoolchild—militate overwhelmingly in favor of a temporary restraining order. The principle of judicial independence is fundamental to democratic government. “Judicial independence ... has long been recognized as the best protection against executive oppression.” Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 571 (1996).

Conclusion

For the foregoing reasons the Court should set an *immediate* hearing and thereupon enter a temporary restraining order directing Governor Mapp to cease and desist from his illegal attempts to remove Plaintiff as Presiding Judge.

RESPECTFULLY SUBMITTED this 22nd day of June, 2016.

/s/ Edward L. Barry

Edward L. Barry

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AFFIDAVIT

I MICHAEL C. DUNSTON, having been first duly sworn on oath, make the following declaration under penalty of perjury.

1. I am a resident of the Virgin Islands, am of legal age, and make this Affidavit based upon my personal knowledge of its contents.
2. I am the Presiding Judge of the Superior Court of the Virgin Islands.
3. I was nominated by the Hon. John P. deJongh, then Governor of the Virgin Islands, for my first term as a Judge of the Superior Court and unanimously confirmed by the Legislature of the Virgin Islands in 2007.
4. When my first term as a judge expired in 2013, I was again nominated by Governor deJongh, this time to be the Presiding Judge of the Superior Court. Once again I was unanimously confirmed by the Legislature on September 26, 2013.
5. A few weeks later I received formal correspondence dated October 10, 2014, from Governor deJongh, reading, in pertinent part, "Upon the recommendation of the Governor, you are hereby appointed Presiding Judge in the Superior Court of the Virgin Islands...effective on and after September 26, 2013, **up to and including September 26, 2019.**" (emphasis added) (**Exhibit 1** hereto).
6. I have served in that capacity ever since.
7. The Hon. Kenneth Mapp assumed the position of Governor of the Virgin Island in January, 2015.
8. On the afternoon of June 16, 2016, the Governor called me in my chambers. The Governor began that conversation by indicating that he favored the Court Unification Bill, which he knew I opposed. He also made reference to his earlier comments regarding the backlog of cases in the Court. He then informed me that he had decided to exercise his authority under Title 4 Virgin Islands Code Section 71 to replace me as Presiding Judge of the Superior Court with the Judge Willocks effective 11:59 p.m. on Saturday, June 25, 2016.
9. The Governor then had a "Notice of Reassignment" dated June 17, 2016, delivered to my chambers purporting to reassign me from Presiding Judge of the Superior Court to Superior Court Judge. (**Exhibit 2**).
10. The Court continues to make a committed effort to reduce its backlog of cases and to reduce the number of pretrial detainees housed in the Golden Grove Correctional Center, decreasing that number significantly in the past few months.
11. The Superior Court and I would suffer irreparable harm were the Governor not enjoined from effectuating this illegal replacement of the Presiding Judge in at least the following respects, without limitation:

Affidavit of Michael C. Dunston
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- a. Because the Governor does not have the authority to replace the Presiding Judge, I do not intend to relinquish the Presiding Judgeship on June 26, 2016, such that there will be substantial confusion regarding the ultimate authority to direct the business and affairs of the Superior Court, and disruption of its operations;
 - b. The staff of the Superior Court has expressed great concern to me regarding the purported replacement of the Presiding Judge, stating in substance that the replacement would interfere with their ability to devote their fullest attention to the work of the People of the Virgin Islands;
 - c. The Superior Court is scheduled to appear before the Committee on Finance of the Thirty-first Legislature on Thursday, June 30, 2016, in order to present its justification for its proposed fiscal year 2017 budget, a matter to which I have devoted substantial effort and acquired intimate familiarity;
 - d. The Superior Court is currently engaged in a substantial surveillance and security improvement project under the direction of the Presiding Judge, including the installation of security cameras and a pending application for a building permit for the erection of a security booth at the perimeter entrance to the Court facilities on St. Thomas, a matter to which I have devoted substantial personal attention;
 - e. The Superior Court is at a critical stage in the selection of a vendor for a new electronic case management and e-filing system, which is similarly a matter to which I have devoted substantial time and attention through the Court's change management committee, which I chair;
 - f. I have met with the architect designing the proposed annex to the Superior Court building on St. Croix and have devoted substantial time and attention to the design of that facility;
 - g. The Superior Court is currently engaged in numerous other upgrades, improvements, maintenance, and repairs of Superior Court facilities, all of which matters have received and continue to require substantial personal attention on my part;
 - h. As Presiding Judge of the Superior Court, I am an ex officio member of several boards and commissions, including the Peace Officers Standards and Training Commission and the Virgin Islands Academic and Cultural Awards Endowment, and the Judicial Council of the Virgin Islands, all of which have meetings scheduled within the next few weeks;
 - i. During the Court's recess period from July 11 to July 22, 2016, the Court will conduct a health and wellness symposium under the direction of the Presiding Judge;
 - j. I am currently scheduled to attend a Trial Court Leadership Academy in September, 2016, as the Presiding Judge of the Superior Court.
12. By contrast, Judge Willocks has had no substantial direct involvement in the budget process; in the security booth project; in the selection of and contracting for a vendor for a Superior Court electronic case management/e-filing system; in the design of the St. Croix Annex; or in numerous other ongoing and time-sensitive administrative responsibilities unique to the Presiding Judge position.
13. The Governor's actions in attempting to replace me as Presiding Judge, on a de facto basis, would grossly interfere with my personal duties as Presiding Judge

Affidavit of Michael C. Dunston
Page 3 of 3

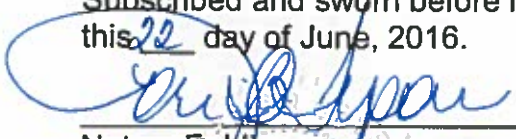
and would be extremely disruptive to the orderly administration of the Court's affairs, particularly when such action would likely be temporary and reversible due to the apparent illegitimacy of the Governor's actions.

14. The Governor has made certain misleading and offensive public statements suggesting that unnamed members of the judiciary fail to show up for work.
15. In fact, I am not aware of any Judge or Magistrate whose work attendance is questionable, no one other than the Governor has ever made that statement to me, and neither the Governor nor anyone else has ever provided to me any evidence to support that statement.
16. In fact, my personal work schedule and those of my fellow Judges and Magistrates routinely greatly exceed 40 hours per week.
17. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.
18. Further affiant sayeth not.



Michael C. Dunston
Presiding Judge of the Superior Court
of the Virgin Islands

Subscribed and sworn before me
this 22 day of June, 2016.



Notary Public

My commission expires on AT The pleasure of the
Presiding Judge



Government of the Virgin Islands
Charlotte Amalie, Virgin Islands 00802

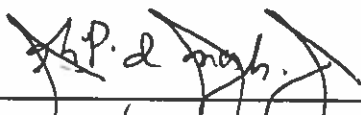
October 10, 2013

Honorable Judge Michael C. Dunston
Superior Court of the Virgin Islands
P. O. Box 70
St. Thomas, VI 00804

Dear Judge Dunston:

Upon the recommendation of the **Governor**, you are hereby appointed **Presiding Judge** in the **Superior Court of the Virgin Islands**, Government of the Virgin Islands with pay at the rate of **\$162,000** per annum (**\$6,230.77 bi-weekly**), effective on and after September 26, 2013 up to and including September 26, 2019.

Sincerely,



(Signature of Governor
(or Acting Governor))



THE UNITED STATES VIRGIN ISLANDS

OFFICE OF THE GOVERNOR
GOVERNMENT HOUSE

Charlotte Amalie, V.I. 00802
340-774-0001

June 17, 2016

VIA Hand Delivery:

Hon. Michael C. Dunston
Presiding Judge
Superior Court of the Virgin Islands
St. Thomas, U.S. Virgin Islands 00802

Re: Notice of Reassignment

Dear Judge Dunston:

Pursuant to the authority provided in 4 V.I.C. § 71, I am hereby designating Superior Court Judge Harold W. L. Willocks to serve as its Presiding Judge effective June 26, 2016. Accordingly, you are hereby notified of your reassignment from the post of Presiding Judge to Superior Court Judge effective 11:59 p.m. A.S.T., Saturday, June 25, 2016. This reassignment does not affect your continued service as a duly appointed Judge of the Superior Court

I thank you for your service as Presiding Judge, and I trust that you will cooperate in facilitating a smooth transition.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Mapp", is written over the word "Sincerely,".

Kenneth E. Mapp
Governor