

IN THE DISTRICT COURT FOR THE VIRGIN ISLANDS
Division of St. Thomas & St. John

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, *et al.*,

Defendants.

Case No. Civ. 16-0038

Action for Declaratory and Injunctive Relief

PLAINTIFF'S MEMORANDUM ON PERMANENT INJUNCTIVE RELIEF

Separation of powers cases sometimes present complex, challenging issues, requiring a court to undertake a nuanced analysis and to draw fine lines of demarcation. This is not one of those cases. This case involves an encroachment by the Governor upon the independence of the Virgin Islands judiciary of the clearest and most egregious sort. It involves an abuse of executive power that must be restrained and remedied by this Court.

THE FACTS

I. Evidence at Hearing on Temporary Restraining Order.

Plaintiff Michael C. Dunston was appointed to his first term as Superior Court judge by then-Governor John P. de Jongh, Jr. in 2007, upon the advice and consent of the Virgin Islands Legislature. (Exhibit 5.) His 6-year term was set to expire on September 25, 2013. (*Id.*) On July 24, 2013, Governor de Jongh, by letter to the President of the Thirtieth Legislature of the Virgin Islands, re-nominated Judge Dunston to a second 6-year term and, separately, nominated Plaintiff to be Presiding Judge of the Superior Court, replacing the prior Presiding Judge, Darryl Dean Donohue. (*Id.*) The Legislature confirmed these appointments by unanimous vote. (*Id.*) Plaintiff received a commission as "Presiding Judge of the Superior Court of the United States Virgin Islands effective September 26, 2013-September

26, 2019,” to hold that office “Pursuant to title 4, Chapter 5, Sections 71 and 72 [of the] Virgin Islands Code.” (Exhibit 1.) Plaintiff’s annual salary as Presiding Judge was and is \$162,000. (Exhibit 3.) The Presiding Judge’s salary is higher than that of regular Superior Court judges (\$152,000).

By letter hand-delivered June 17, 2016, Governor Mapp purported to remove Plaintiff from his position as Presiding Judge and replace him with Superior Court Judge Harold W. L. Willocks, effective June 26th. (Exhibit 4.) This followed a telephone conversation in which the Governor expressed his displeasure with Plaintiff’s political opposition to the Court Unification Bill.

Plaintiff testified that he does not recognize the legitimacy of the Governor’s action. Plaintiff categorically refuses to vacate his position in the absence of a court order. He will not capitulate.

No proceedings challenging Plaintiff’s conduct in his capacity as Presiding Judge, or as Superior Court judge, are currently pending before the Virgin Islands Commission of Judicial Conduct or its predecessor, the Commission on Judicial Disabilities. Nor have there ever been. No person ever filed a complaint with either Commission claiming any type of judicial malfeasance, misfeasance, nonfeasance or judicial disability on the part of Plaintiff. Indeed, former Governor de Jongh, in his nomination letter to the Thirtieth Legislature of July 24, 2013, acknowledged that “Judge Dunston served honorably and with distinction since being confirmed to the bench on May 29, 2007.” (Exhibit 5.)

Plaintiff testified, in substance, that the Governor’s now-challenged edict has caused chaos in the administration of the Superior Court’s affairs, casting his essential authority to hold the office and discharge its duties into doubt. Employees have expressed concerned regarding whether they are accountable to Plaintiff, or instead to Judge Willocks; and whether Plaintiff’s policies and procedures remain in effect. Plaintiff further testified that his essential authority to represent the Court in legislative budget proceedings, and to protect its critical fiscal interests, have been drawn into question, as has his statutory authority to execute certain contracts on behalf of the Superior Court. Further, Plaintiff testified, in essence, that the current situation, involving an unseemly competition between two claimants

to the highest office of the Superior Court is damaging to the public confidence in the Superior Court as a stable, apolitical institution.

Plaintiff testified, in summary fashion, regarding his duties as Presiding Judge, including all adjudicatory duties of a regular Superior Court judge, plus basic supervisory and administrative functions, critical court budget responsibilities, judicial policy-making, and related matters.

These duties and functions, prescribed by statute and court rule, are now set forth in more detail.

II. Law Creating, Defining Functions, of Presiding Judge.

Section 72b of Title 4 of the Virgin Islands Code, subsection a, provides that “the presiding judge of the Superior Court shall be the administrative head of the court.” 4 V.I.C. § 72b(a). The Presiding Judge generally is to “supervise and direct the officers and employees of the court in the performance of their duties.” (*Id.*). He or she is responsible for assuring conformity by the Superior Court with applicable court rules (*id.*);¹ and for assigning cases to individual judges (*id.*). Other subsections of Section 72b grant the Presiding Judge certain contract authority, §72b(b); and broad fiscal management authority “as he deems appropriate to obtain maximum quality of judicial services from the appropriations made to the Superior Court in any fiscal year” (subject to line-item restrictions). 4 V.I.C. § 72b(d).

The Presiding Judge is given supervisory authority (albeit limited) over Superior Court judges. Under Superior Court Rule 14, “[a]ny aggrieved litigant or attorney may petition the Presiding Judge in writing for administrative resolution of any matter involving observance by judges or other judicial

¹ Section 72b(a) contains an outdated reference to rules promulgated by the “district court.” Section 83 similarly provides that the Superior Court may prescribe rules “[s]ubject to the approval of the district court.” 4 V.I.C. § 83. These provisions giving the District Court a role in Superior Court rulemaking predated the creation of the Supreme Court of the Virgin Islands and were of course superseded by implication, in pertinent part (only), by Section 32 of the Title 4—enacted in 2004 and amended in 2007—which provides: “The Superior Court shall adopt the rules of court for the Superior Court of the Virgin Islands consistent with section 21(c) of the Revised Organic Act of the Virgin Islands.” 4 V.I.C. § 32(f)(1); and see Section 21(c) of the Revised Organic Act, 48 U.S.C. § 1611(c) (as amended, 1984) (c) (“The rules governing the practice and procedure of the courts established by local law and those prescribing the qualifications and duties of the judges and officers thereof ... shall be governed by local law or the rules promulgated by those courts.”); and see *V.I. Coal. of Citizens with Disabilities, Inc. v. Gov’t of Virgin Islands*, No. CIV. 167/2004, 2006 WL 1084299, at *7-8 (V.I. Super. Mar. 10, 2006) (stating that the district court-approval requirement of Section 83 was superseded by the amendments to the ROA).

personnel of the Court's Rules of Practice and Procedure or the prompt dispatch of the Court's business.”
Id. The Presiding Judge is to “review the matter and take such administrative action as is deemed appropriate.”² The Presiding Judge’s approval is also required for any change of venue. 4 V.I.C. § 78.

The Presiding Judge has very substantial authority with respect to the Magistrate Division of the Superior Court, including the power to hire support personnel that he deems “necessary for the proper administration and performance of the duties and functions of the division.” 4 V.I.C. § 121.³ He or she has the power to *appoint* magistrates to a 4-year term, from a list of nominees submitted by a “magistrate selection panel,” as confirmed by a vote of a majority of Superior Court judges. 4 V.I.C. § 122(a) & (e); Super. Ct. R. 314. The Presiding Judge has mandamus powers over magistrates to compel performance of their duties, or to restrain acts outside their jurisdiction. Super. Ct. R. 322.11. He or she has the power to reconsider, on direct review, a bail decision of a magistrate. Super. Ct. R. 322.2(b). The Presiding Judge decides whether a magistrate’s written opinion may be published. Super. Ct. Rule 324. Under Superior Court Rule 321, the Presiding Judge has the discretionary authority to approve or disapprove the exercise by a magistrate of the powers of a Superior Court judge to conduct a civil trial (jury trial or bench trial) by consent under 4 V.I.C. § 123(d). (Cf., 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.)

Pursuant to Superior Court rules promulgated under 4 V.I.C. § 126, the Presiding Judge has the additional power, upon the recommendation of the Magistrate Disciplinary Board, to discipline a magistrate, and even to *remove* a magistrate, with the consent of a majority of Superior Court judges (subject to appellate review by the Supreme Court). Super. Ct. Rules 319(b), (c) & (d); 319.2(b) & (c).

² Superior Court Rule 14 does not confer the power to “review rulings of the trial court on legal questions.” *In Re Fleming*, 56 V.I. 460, 2012 WL 917315, at *4 (V.I. 2012).

³ Virgin Islands magistrates themselves have considerable judicial powers. They have the jurisdiction to issue arrest warrants and search warrants; to conduct probable cause hearings; to set bail in all criminal cases; to issue restraining orders in domestic violence matters; to try misdemeanor criminal cases punishable by less than 6 months imprisonment; to conduct forcible entry and detainer proceedings (without limitation); and they have plenary probate jurisdiction. 4 V.I.C. § 123.

The Presiding Judge has the authority under Section 74a of Title 4 to appoint a former Superior Judge to serve as judge *pro tempore* on a per diem basis.⁴ He or she also has the express power to appoint, and to remove at will, a court administrator. 4 V.I.C. § 91 (“The Director [of the Office of Administrator] shall be appointed by the presiding judge. He shall serve at the pleasure of the presiding judge....”). The court administrator acts under the “supervision and direction of the presiding judge,” and has a broad range of subordinate duties relating to the efficiency and effectiveness of the judicial system, fiscal and logistical management, and “such additional duties as may be assigned by rule of the presiding judge of the court.” 4 V.I.C. § 93.

The Presiding Judge also has the power to appoint the Clerk, 4 V.I.C. § 86; the Superior Court Marshal and Assistant Marshals, 4 V.I.C. § 79(b); and probation officers, 4 V.I.C. § 79(c)—all of whom work under his or her supervision and control. 4 V.I.C. §§ 79(b) & (c); 351(b), 411.

The Presiding Judge also has rulemaking powers. The Presiding Judge in fact routinely issues promulgation orders adopting or amending a variety of Superior Court Rules.⁵

⁴ The Supreme Court has questioned whether this specific power to appoint a “Senior Sitting Judge” may have been repealed by implication. *In re Connor*, 61 V.I.273, 2014 WL 4804729, at *2, n.1 (V.I. 2014). However, and even though the Supreme Court has redundant powers to re-enlist a retired trial court judge for temporary service (4 V.I.C. § 24(b)(3)), Section 74a remains on the books, and has been exercised by the Presiding Judge on numerous occasions. E.g., *People v. de Jongh*, No. ST-15-CR-309, 2016 WL 310422, at *4 (V.I. Super. Jan. 26, 2016); *People v. Ventura*, No. SX-2012-CR-076, 2014 WL 3767484 (V.I. Super. July 25, 2014); *Der Weer v. Hess Oil Virgin Islands Corp.*, No. SX-2005-CV-274, 2014 WL 1387371 (V.I. Super. Mar. 21, 2014); *Javois v. Culusvi, Inc.*, No. SX-03-CV-513, 2011 WL 3875293 (V.I. Super. July 30, 2011).

⁵ E.g., *Jean-Baptiste v. Virgin Islands Taxicab Comm'n*, No. ST-15-CV-539, 2016 WL 3105038, at *5 (V.I. Super. May 24, 2016) (“Super. Ct. R. 15(a) [relating to review of administrative agency adjudications] is a procedural rule drafted and promulgated by the Presiding Judge of the Superior Court”); *In re Order Promulgating Rules for Superior Court*, 2008 WL 10596428, at *1 (V.I. Super. Apr. 11, 2008) (amending Rules to remove provisions relating to the regulation of the Bar); *In re Order Promulgating Rules for Magistrate Div. of Superior Court*, 2008 WL 10596429, at *7 (V.I. Super. Mar. 19, 2008) (adopting series of rules implanting new magistrate statute); *In re Adoption of Superior Court Rule 20*, 2016 WL 1383737, at *1 (V.I. Super. Feb. 15, 2016) (adopting panel system for indigent criminal defense appointments and related matters). The Presiding Judge also has the power to adopt or reject the provisions of Fed.R.Civ.P. 16 in the Superior Court. Super.Crt. 38.

A Presiding Judge is an *ex officio* member of the Judicial Council—a legislatively-created policymaking body that includes, *inter alios*, Supreme Court justices and that, *inter alia*, recommends substantive law reform and the development of rules of civil procedure. 4 V.I.C. §§ 211, 212.

In sum, the Presiding Judge as “administrative head” of the Superior Court (4 V.I.C. § 72b(a)) possesses—in addition to the baseline powers of a regular judge exercising the Superior Court’s general original jurisdiction (4 V.I.C. § 76)—very substantial authority and responsibility over a broad spectrum of affairs that are integrally important to the basic institutional functioning of the Court, including those that are inherently judicial and even purely adjudicatory in nature.

LEGAL ARGUMENT

Governor Mapp contends that the Presiding Judge serves at his pleasure and is removable “at will.” In effect the Governor contends that the Presiding Judge is his subordinate. That legal position defies three centuries of legal tradition, bedrock constitutional principles of judicial independence, and basic provisions of the Revised Organic Act of 1954. It is a position utterly bereft of legal merit.

I. This Court Has Subject Matter Jurisdiction and Must Exercise It.

A. Federal Question: Revised Organic Act of 1954, Separation of Powers

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 (Section 3, art. 4, Const. U. S.), establishing a tripartite structure of government and incorporating separation of powers principles. *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].”); *Smith v. Magras*, 124 F.3d 457, 465 (3d Cir.1997) (“The Organic Act of the Virgin Islands created three branches of government in the Virgin Islands. ... Congress therefore implicitly incorporated the principle of separation of powers into the law of the territory.”).

A separation of powers dispute under the Revised Organic Act creates federal question jurisdiction under 28 V.I.C. § 1331. *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.”); *Kendall v. Russell*, No. CIV. 2007-126, 2008 WL 219762, at *2 (D.V.I. Jan. 16, 2008) (“This Court has jurisdiction because [the question of the legislative power to remove a judge] implicates the ROA, a federally-enacted statute”) (Gómez, J.); *aff'd*, *Kendall v. Russell*, 572 F.3d 126 (3d Cir. 2009); and *id.*, at 131, n.4 (“As the ROA is a federal statute, the District Court had federal question jurisdiction in this case pursuant to 28 U.S.C. § 1331.”).

The Court has supplemental jurisdiction over related—and very much secondary—questions of the interpretation of Title 4 of the Virgin Islands Code under 28 U.S.C. § 1367. Section 1367, codifying the pendent jurisdiction principles of *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), grants federal district courts having jurisdiction over federal claims the additional power to adjudicate local law claims that “derive from a common nucleus of operative facts.” *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1505 (3d Cir. 1996), quoting *Gibbs*, 383 U.S. at 725, 86 S.Ct. at 1138.

B. Abstention Doctrines.

“Abstention from the exercise of federal jurisdiction is the exception, not the rule.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S. Ct. 2321, 2327, 81 L. Ed. 2d 186 (1984), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). In general, a federal court has an “unflagging obligation” to exercise the jurisdiction given to it. *Mata v. Lynch*, — U.S. —, 135 S.Ct. 2150, 2156, 192 L.Ed.2d 225 (2015).

Defendant Mapp has failed to timely raise any abstention argument, and in fact has allowed the proceedings on temporary restraining order to go forward without any abstention objection. It is too late

to raise one now. Defendant should not be allowed to sandbag, strategically awaiting a decision on the TRO before asserting this discretionary defense. Defendant should be deemed to have waived any abstention argument after an adverse ruling on the merits. Cf., e.g., *Cradle of Liberty Council, Inc. v. The City of Phila.*, 2010 WL 68874, at *3 (E.D. Pa. Jan. 6, 2010), citing *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 480, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977).

Three of the five abstention doctrines—*Colorado River*, *Younger* and *Burford*—presuppose contemporaneous state (territorial) proceedings involving the same subject matter, and are entirely inapposite for the simple reason that there are no parallel Virgin Islands proceeding now pending or even on the horizon. COLORADO RIVER: *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir. 1992) (federal court may stay or dismiss action under *Colorado River* when state litigation is concurrent and “parallel”), citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); YOUNGER: *Matusow v. Trans-Cty. Title Agency, LLC*, 545 F.3d 241, 248 (3d Cir. 2008) (“*Younger* abstention cannot be invoked in the absence of any on-going state proceedings.”), citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). BURFORD: *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 104 (3d Cir. 1999) (“federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies” where, *inter alia*, timely state court review available), citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1971). To reiterate: No local duplicative proceedings, including any administrative proceedings before any Commission, exist; nor is there the slightest suggestion in the record that any are contemplated.

The two remaining abstention doctrines, *Thibodaux* and *Pullman*, are similarly inapplicable. The first is dispensed with easily. *Thibodaux* counsels abstention from exercising diversity jurisdiction “to avoid deciding an unclear and important issue of state law bearing upon sovereign prerogative.” *Aurelius Capital Master, Inc. v. MBIA Ins. Corp.*, 695 F. Supp. 2d 68, 73 (S.D.N.Y. 2010), citing

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). This doctrine is applied *strictly* to diversity cases, and is therefore entirely inapposite. *Zoom Elec., Inc. v. Int'l Bhd. of Elec. Workers, Local 595*, 989 F. Supp. 2d 912, 924-25 (N.D. Cal. 2013), *aff'd* 617 F. App'x 677 (9th Cir. 2015).

Finally, *Pullman* abstention—“allowing federal courts, in rare cases, to abstain from deciding a case if a state court's resolution of a state law issue would obviate the need for the federal court to reach a *federal constitutional* issue,” *Artway v. Attorney Gen. of State of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996) (*emphasis added*)—is “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it [that] can be justified ... only in exceptional circumstances.” *Id.*, quoting *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244.⁶

This Court is being called upon to interpret and enforce the Revised Organic Act of 1954, which is of course a *federal statute*—not a true constitution—that is *completely dispositive* of the issues *sub judice*, and which prevails over any local law to the contrary under the Supremacy Clause and by its own terms. *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 238 (3d Cir. 2000) (ROA authorizes the Virgin Islands legislature to enact only such territorial laws that are “not inconsistent with ... the laws of the United States made applicable to the Virgin Islands”), quoting 48 U.S.C. § 1574(a). Therefore, it really does not matter what the Virgin Islands Code says. If Governor Mapp's conduct violates the Revised Organic Act (as clearly it does), it must be enjoined.

Finally, abstention would cause extremely prejudicial delay in Plaintiff's ability to vindicate his right to the office of Presiding Judge, and result in protracted disruption of the internal governance of

⁶ The Court would, in lieu of *Pullman* abstention, presumably certify any difficult, doubtful, and dispositive issue of local law *in a proper case* to the Virgin Islands Supreme Court under V.I.S.C.T.R. 38(a). See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75, 117 S. Ct. 1055, 1073, 137 L. Ed. 2d 170 (1997) (“Certification today covers territory once dominated by a deferral device called ‘*Pullman* abstention’....”). The Title 4 issues in this case case—while never settled by any caselaw specifically on point—are neither difficult nor doubtful. And they are not dispositive because the ROA is independently determinative (*infra*).

the Superior Court. See *Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 515 (D.N.J. 1995), *aff'd* 99 F.3d 101 (3d Cir. 1996). The acute time-sensitivity of this matter militates strongly against any type of abstention, which is of course a discretionary determination.

C. Standing.

The Governor's action poses a substantial, direct, and immediate threat to Plaintiff's entitlement to office (including its enhanced salary), and further interferes with his ability to discharge his statutory duties as Presiding Judge. Plaintiff obviously has standing. E.g., *Abrahamson v. Neitzel*, 120 F. Supp. 3d 905, 916 (W.D. Wis. 2015) (state supreme court justice had Article III standing to assert due process claim challenging intervening change of law resulting in her loss of position as chief justice).

II. Separation of Powers, Independence of Judicial Branch.

"The Organic Act of the Virgin Islands created three branches of government in the Virgin Islands. See 48 U.S.C. § 1571 (legislative branch); *id.* § 1591 (executive branch); *id.* § 1611 (judicial branch). Congress therefore implicitly incorporated the principle of separation of powers into the law of the territory." *Smith v. Magras*, 124 F.3d at 465; accord, *In re Richards*, 213 F.3d 773, 783 (3d Cir.2000) (citing *Magras*); *Kendall*, 2008 WL 219762, at *2, n. 8 ("[T]he principle of separation of powers ... applies in the Virgin Islands by virtue of the ROA's establishment of three distinct and separate branches of government....").

"The division of government powers among three branches of government, each separate but all coordinate, is fundamental to the United States constitutional structure and to the government of the United States Virgin Islands." *Gov't of Virgin Islands v. Warner*, No. 2005-28, 2009 WL 2340692, at *4 (D.V.I. July 22, 2009). "The general rule is that [no] department may invade the province of the other and [none] may control, direct, or restrain the action of the other." *Warner* at *4 quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601 (1923).

Integral to the separation of powers is an independent judiciary. “[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).

Basic to the constitutional structure established by the Framers was their recognition that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. “The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976) (per curiam).

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.

N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58, 102 S. Ct. 2858, 2864, 73 L. Ed. 2d 598 (1982). The Constitution “commands that the independence of the Judiciary be jealously guarded....” *Id.*, 458 U.S. at 60, 102 S. Ct. at 2866.

The independence of the judiciary is a value deeply rooted in centuries of legal tradition. “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). The Constitution of Massachusetts, drafted by John Adams nearly a decade before the U.S. Constitution, provided (and *still* provides): “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.” Mass. Const. Pt. 1, art. XXIX.

People fought and died for an independent judiciary in the American Revolution. Indeed, as described by the late Professor Cox, colonial Americans protested the servile deference of colonial judges to the unrestrained will of King George III. Colonial courts served not as a check against his power; but rather as an instrument of its abuse. Individual rights were lost. Justice suffered.

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.... 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).

The imperative of an independent judiciary is indeed recognized in the United Nations Universal Declaration of Human Rights, Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal....").⁷ And further: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."⁸

III. The Executive Cannot Directly or Indirectly Control the Judiciary.

A. The Power to Remove Is the Power to Control.

Governor Mapp has in this case argued that the Presiding Judge serves at his pleasure—that he may remove the Presiding Judge at will. If he were right, then by extension he would have the ultimate power to direct and control the Presiding Judge in every aspect of his duties. That is a truism. "The power to remove is the power to control." *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1039 (9th Cir. 1991) ("The

⁷ Universal Declaration of Human Rights, G.A. Res. 217(111) A, U.N. Doc. A/RES/217(111) (Dec. 10, 1948); http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited 7/3/16).

⁸ Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Basic Principles on the Independence of the Judiciary, at 60, U.N. Doc. A/CONF.121/22/Rev.1 (1985); available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (last visited 7/3/16).

power to remove is the power to control.... [R]emoval power need not be exercised to exert effective control....”); *Bowsher v. Synar*, 478 U.S. 714, 726, 106 S. Ct. 3181, 3188, 92 L. Ed. 2d 583 (1986) (“Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510, 130 S. Ct. 3138, 3162, 177 L. Ed. 2d 706 (2010) (“The power to remove officers at will and without cause is a powerful tool for control of an inferior.”) (*internal quote marks, citation, omitted*); *Humphrey's Executor v. United States*, 295 U.S. 602, 629, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935) (“[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.”).

Contrary to Defendant Mapp’s apparent misconceptions, the Presiding Judge does not conduct his affairs in “fear” of the Governor. The Presiding Judge does not “obey” the Governor. The Presiding Judge is not an “inferior” of the Governor.

Correlatively: The Governor cannot be given power to *remove* the Presiding Judge *precisely because* he must not be given the power to *control* the activities of the Presiding Judge. The Presiding Judge is not a functionary of the Governor, nor in any way subservient to him. The Governor does not and cannot control such things as judicial case assignments, decisions on discipline or discharge of magistrates, mandamus rulings in probate cases, administrative orders issued against Superior Court judges, promulgation of local rules, policy recommendations on legal reform, hiring and firing of the court administrator and other key personnel, expenditure of court funds, or the protection of the Court’s existential fiscal interests in budgeting process *vis-à-vis* the legislature.

It is preposterous to contend otherwise.

B. Executive’s Implied Removal Powers Restricted to Executive Branch.

There is a substantial body of federal caselaw recognizing that the President’s removal power—*exercised within its proper sphere*—is constitutionally-mandated and constitutionally-protected. *Myers*

v. *United States*, 272 U.S. 52, 176, 47 S. Ct. 21, 45, 71 L. Ed. 160 (1926) (striking down Congressional attempts to limit President’s power to remove Postmaster General); also, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, *supra* (holding that restrictions imposed by Congress on presidential removal power over Public Company Accounting Oversight Board created by Sarbanes-Oxley Act violated separation of powers).

Yet presidential removal powers—at least “at will” removal powers, as distinguished from removal “for cause” (which presupposes judicial review)—emphatically do not extend even to *agency* officials having even *quasi*-judicial roles. Quoting Justice Frankfurter:

[*Humphrey’s Executor*] 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,’ ... 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.’

Wiener v. United States, 357 U.S. 349, 353, 78 S. Ct. 1275, 1278, 2 L. Ed. 2d 1377 (1958).

The sum and substance of *Humphreys* is that the need for institutional independence in the adjudicatory process trumps executive powers. That is fundamental.

C. Even If the Presiding Judge’s Duties Were Purely Non-Adjudicative, the Governor Would Still Lack Power to Remove Him.

Plaintiff’s detailed explanation herein of the duties specific to the Presiding Judge position reveals that many of them are quintessentially *judicial* in nature (e.g., case assignments, disciplinary powers over magistrates, court rule-making, Rule 14 power to compel Superior Court judge adherence to certain rules and standards); and some of them purely *adjudicative* (e.g., exclusive trial-level mandamus jurisdiction over magistrates under Superior Court Rule 322.11; power of review of bail decisions of magistrate under Rule 322.2(b)-concurrent jurisdiction with assigned trial judge).

But even assuming *arguendo* that the Presiding Judge’s duties were strictly administrative—i.e., even if he served solely as a glorified court administrator—the Governor would *still* have no business interfering. A well-reasoned line of case authority emphatically so holds. E.g., *Mowrer v. Rusk*, 95 N.M. 48, 618 P.2d 886 (N.M. 1980) (striking as violative of state separation of powers municipal ordinance placing authority over personnel, fiscal and related matters in a court administrator hired and controlled by the executive branch; “courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source”) (quoting *Smith v. Miller*, 153 Colo. 35, 384 P.2d 738 (1963)).⁹

The Virgin Islands Superior Court must have autonomous internal governance, free from any domination, control or interference by the Governor, even as to its purely administrative functions.

D. The Governor Has No Power to Remove Any Judge under the ROA.

This Court’s decision in *Kendall v. Russell* (as affirmed) provides the analytical template for the resolution of this entire case. There, a Superior Court judge successfully challenged the authority of the Judicial Disabilities Commission—a *nonjudicial* body created by the Virgin Islands legislature by delegation of its purported powers—to conduct proceedings to remove him from the bench. This Court held that the legislature had no authority to remove a judge under the Revised Organic Act, and that under separation of powers principles of the ROA the legislature was prevented from usurping inherent judicial powers. These holdings apply with full force to the present case, which involves the attempt to remove a Presiding Judge by the *executive* (as opposed to the legislative) branch, and a substantial encroachment by the *executive* (as opposed to the legislative) branch upon the judicial branch.

⁹ Accord, e.g., *Massie v. Brown*, 9 Wash.App. 601, 513 P.2d 1039, 1040 (1973) (“The placement in the commission of control of the incident[ts] of employment of personnel directly connected with the operation of the municipal court is improper as an invasion of the independence of the judiciary.”); *Halverson v. Hardcastle*, 123 Nev. 245, 261-262 & n. 28 (Nev. 2007) (“[T]he judiciary ... [has the] inherent authority to administrate its own procedures and to manage its own affairs....”); *Jefferson County Court Appointed Emples. Ass’n v. Pa. Labor Rels. Bd.*, 603 Pa. 482, 500-501 (Pa. 2009) (“[I]t is the Judiciary’s constitutional duty to allocate [budgeted] funds to administer justice. This procedure ... maintain[s] the Judiciary’s independence, thereby allowing it to exercise its constitutional right to hire, fire, and supervise its employees.”).

This Court in *Kendall* meticulously examined the ROA for any indication that Congress conferred powers to remove a judge on the legislature. It found none. 2008 WL 219762, at *9. When it came to the intent of Congress on this score, absence of evidence was deemed evidence of absence, so to speak. It was unlikely, this Court reasoned, that the omission of such a legislative power in the ROA was a result of oversight, when in several other contexts in the ROA Congress specifically provided for mechanisms for removal of other officials. *Id.*, citing *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)

A review of the ROA similarly reveals that there is no provision whatsoever for removal of a local judge by a Governor. This too must be seen as a conscious and deliberate omission by Congress. The ROA explicitly confers upon the Governor the general supervision and control of all departments and instrumentalities of the “*executive branch*,” and grants the Governor the power to remove “*heads of executive departments*” (with no explicit “for cause” requirement). *Kendall*, 2008 WL 219762, at *9, quoting 48 U.S.C. §§ 1591, 1597(c) (*emphasis added*). The ROA also makes specific provision for the removal of a *district court* judge “for cause” by the President of the United States. *Kendall*, at *9, citing 48 U.S.C. § 1614(a). But it says nothing about a Governor removing any judge.

“Given the significance of the power to remove officials from public office ... that authority is not to be lightly inferred.” *Kendall*, at *10. “Indeed, the exercise of the Legislature's authority to remove judges must be grounded in some source.” *Id.* There is no “source” upon which Governor Mapp’s removal of Plaintiff from the position of Presiding judge may be “grounded.” None whatsoever. Under the ROA the Governor’s removal powers—a tool for exercising supervision and control—are (as one would naturally expect) circumscribed in scope to departments and agencies within the *executive branch*. They do not—to overstate the obvious—grant the Governor dominion over the judicial branch.

The Third Circuit, in affirming *Kendall*, held: “Because the Legislature purported to authorize the Commission to exercise the power to remove judges without itself having such power, we agree with the District Court that [Chapter 36 of Title 4] violates the separation of powers principles inherent in the ROA.” *Kendall v. Russell*, 572 F.3d 126, 138 (3d Cir. 2009).¹⁰

E. Local Law Does Not Grant Removal Power to the Governor.

Title 4 of the Virgin Islands Code is not susceptible of mathematical precision in its interpretation. But one thing that may be said with absolute certainty: The Code confers no express authority upon the Governor to remove *any* judge (presiding or otherwise).

A governor has bare *appointment* power, subject to the advice and consent of the legislature, 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.”).

Judicial tenure—i.e., the “term ... otherwise provided by law” referenced in Section 71—is prescribed by Section 73 (and in no other statute): “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.” 4 V.I.C. § 73. Chapter 36 of “this title” (Title 4)—establishing the now-abrogated Virgin Islands Commission on Judicial Disabilities, now supplanted and superseded by the Commission on Judicial

¹⁰ The Court noted, parenthetically, the constitutionally-prescribed role of the U.S. Senate in removal of a judge, while concluding that Congress did not choose to grant this power to the Virgin Islands legislature. A number of state constitutions also provide for impeachment or—following the English Act of Settlement of 1701(prohibiting removal of a judge except upon the “address” of Parliament)—provide that a governor may seek the removal of a judge by an “address” to the legislature, on grounds less stringent than needed for impeachment. See G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 Harv. J.L. & Pub. Pol’y 643, 650 (2012).

Conduct Commission created by Supreme Court Rules 209, *et seq.*—contains the *only* statutory provisions relating to the removal or involuntary retirement of a judge. 4 V.I.C. §§ 651-659.¹¹ The Supreme Court rules (mirroring the substantive provisions of annulled-Chapter 36) provide that a judge may be removed or involuntarily retired only for specified malfeasance, misfeasance, nonfeasance, or incapacity. 4 V.I.C. § 656; VISCR 209.6. No person has asserted such grounds against Plaintiff Michael C. Dunston before any Commission. Ever.

A governor's removal power under the ROA should not be "lightly inferred" and must be "grounded in some source." *Kendall*, 2008 WL 219762 at *10. The same applies to the Virgin Island Code. Any attempt to "lightly infer" the Governor's power to remove based upon the bare power of appointment of Section 71 would fundamentally contravene the bedrock principles of judicial independence (even "*quasi-judicial*" independence) established by the United States Supreme Court in *Humphrey's Executor*; and see *Marbury v. Madison*, 5 U.S. 137, 162, 2 L. Ed. 60 (1803) (Thomas Jefferson lacked authority to revoke commissions of District of Columbia justices of the peace granted by John Adams). A substantial body of well-reasoned state jurisprudence similarly holds, emphatically, that the statutory power to appoint a judge does not imply the power to remove a judge.¹²

Perhaps the Governor will invite the Court to "lightly infer" his removal powers based on some ambiguity or implied exception to Section 73 which, in prescribing a tenure of 6 years "unless sooner

¹¹ The legislature, despite *Kendall*, has never explicitly repealed Chapter 36.

¹² 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. 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 ... 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 ... 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...."). See Motion for Temporary Restraining Order (Doc. 2), at p. 9-10 (collecting additional cases).

retired or removed in accordance with the provisions of this title [i.e., Chapter 36],” refers to “*judges* of the Superior Court” and not *presiding* judges of the Superior Court. Such an argument would be futile. The rationale of *Kendall* in interpreting the ROA fully applies here: If the Virgin Islands legislature had intended to give the Governor the power to remove the Presiding Judge, it would have said so.

“Judge” and “presiding judge” are not mutually exclusive classifications, triggering the rule of *expressio unius est exclusio alterius* (to express one thing implies the exclusion of the other). To the contrary, a presiding judge is—*must be*—a Superior Court judge. 4 V.I.C. § 71. In the absence of a clear and explicit statutory exception of presiding judges to the 6-year, protected tenure of “judges” of Section 7, this Court must not “lightly infer” one. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:11 (7th ed. 2007) (“[E]xceptions are not to be implied. An exception cannot be created by construction.”); *Mgmt. & Training Corp. v. United States*, 118 Fed. Cl. 155, 166 (2013) (quoting *Sutherland*). Plaintiff’s commission of appointment (Exhibit 1) indeed *explicitly states* that his tenure as Presiding Judge was, and is, 6 years.

The Revised Organic Act, serving as the functional equivalent of a constitution in the Virgin Islands (*Brow v. Farrelly*, 994 F.2d 1027, 1032 (3d Cir.1993)), must obviously guide any interpretation of Title 4 (and of course trumps any inconsistent provision). The ROA compels the observance of separation of powers principles. The Governor’s self-aggrandizing interpretation of his own powers in this case is fundamentally antithetical to those principles.

Finally, any demotion of Plaintiff from Presiding Judge to regular Superior Court judge would, according to the uncontroverted evidence, entail an annual pay cut of \$10,000. That is explicitly prohibited under Title 4. 4 V.I.C. §72(c).

IV. Entitlement to Permanent Injunctive Relief.

Plaintiff has established that each of the familiar factors required for permanent injunctive relief militates overwhelmingly in favor of an order permanently restraining Governor Mapp from attempting

to remove him as Presiding Judge. *Kendall*, 2008 WL 219762, at *7; and *id.*, at n. 18, citing, e.g. *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.*, 747 F.2d 844, 850 (3d Cir.1984). The merits are beyond good faith dispute. The Governor's action, unless restrained, will continue to wrongfully place a cloud on the legitimacy of Plaintiff's official position, and create chaos in the internal governance of the Superior Court. The Governor, by contrast, suffers no cognizable legal or equitable harm by being restrained from exercising powers that he does not have. Finally, the fundamental public policy of this Territory demands that all public officials respect the independence of the Virgin Island judiciary.

V. Conclusion.

For the foregoing reasons, and those stated in the Emergency Motion for Temporary Restraining Order, the Court should declare and determine that a Governor of the Virgin Islands has no authority to remove the Presiding Judge of the Superior Court, and the Court should permanently enjoin and restrain Governor Mapp from attempting to remove Plaintiff Michael C. Dunston from said position.

RESPECTFULLY SUBMITTED this 5th day of June, 2016.

/s/ Edward L. Barry

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Certificate of Service

I hereby certify that the foregoing was this date electronically filed utilizing the CM/ECF system of the Court, which will automatically a copy to Carol Thomas-Jacobs, Esq., Assistant Attorney General, Attorney for Defendant Mapp, 18 Kongens Gade, St. Thomas, VI 00802; Tel. 340-774-5666 ext. 155; Fax: 340-776-3494; email: carol.jacobs@doj.vi.gov.

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