

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

HONORABLE MICHAEL C. DUNSTON,)	
in his official capacity as Presiding Judge of)	Case No. Civ. 16-0038
the Superior Court of the Virgin Islands,)	
)	Action for Declaratory & Injunctive
Plaintiff,)	Relief
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.)	
_____)	

**GOVERNOR MAPP'S TRIAL BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST
FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION**

COMES NOW Defendant Kenneth Mapp, in his official capacity as Governor of the Virgin Islands, by and through his undersigned counsel, and hereby submits his Trial Brief in support of his opposition to Plaintiff's Request for Permanent Injunction and Declaratory Judgment and states as follows:

I. INTRODUCTION

This case is about the local law of the Virgin Islands. The only merits issue is when the Governor may "designate" a new presiding judge under a local statute, 4 V.I.C. § 71. The rest is smoke and mirrors obscuring a discrete question of local law, over which Congress vested "original jurisdiction" in "the local courts of the Virgin Islands." 48 U.S.C. § 1612. This case presents no question supporting federal jurisdiction, and jurisdiction cannot be based on Plaintiff's say-so, or on his formless invocation of the separation of powers, ungrounded in principle or text. Congress has commanded that this local inter-branch dispute be left to the Virgin Islands courts.

But even if there were federal jurisdiction—and even if the merits were governed by federal rather than Virgin Islands law—Plaintiff’s claim would be foreclosed by *Mistretta v. United States*, 488 U.S. 361 (1989). The Court there held that removal by the Executive of an Article III judge from a nonadjudicatory position posed a “negligible threat to judicial independence.” *Id.* at 410. As in *Mistretta*, the Governor’s power to designate a new Presiding Judge gives him “no power to coerce the judges in the exercise of their judicial duties.” *Id.* at 411. Rather, the Presiding Judge is the “administrative head of the courts,” and his responsibilities are nonadjudicatory—e.g., prescribing “the times and places of holding court” and ensuring “the prompt payment of all utility bills.” 4 V.I.C. § 72b. Even if removed as Presiding Judge, Plaintiff will remain a Superior Court judge for the rest of his term. Thus, Plaintiff’s specter of unchecked executive power is “fanciful.” 488 U.S. at 409.

The relevant provisions of local law confirm that there is no separation of powers violation. Under Virgin Islands law, superior court judges are “appointed by the Governor with the advice and consent of the legislature” (4 V.I.C. § 72) “for a term of six years” and “continue in office” until certain events occur (4 V.I.C. § 73). By contrast, the law vests the Governor with the authority to “designate one of the judges of the court to serve as presiding judge to preside for such term, perform such duties, and exercise such authority as may be otherwise provided by law.” 4 V.I.C. § 71. Notably absent are any provisions stating that the presiding judge “shall continue in office” for any particular term, or providing for removal from his “administrative” duties (4 V.I.C. § 72b).

In the end, Plaintiff’s complaint obscures a simple truth: Virgin Islands law vests the Governor with complete discretion to designate a new presiding judge, and no provision in the Revised Organic Act or Virgin Islands law guarantees the presiding judge’s term of office.

II. FACTS & PROCEDURAL HISTORY

Judge Dunston was appointed to the Superior Court bench on May 29, 2007 for an initial term of six years. In 2013, he was re-nominated to the Superior Court for an additional six years and designated by Governor de Jongh as the Presiding Judge. Exhibits 1, 2, and 3. Judge Dunston replaced Judge Donoghue as Presiding Judge effective September 26, 2013. By letter dated June 17, 2016, the Governor of the Virgin Islands, Kenneth Mapp, informed Judge Dunston that, pursuant to his authority under 4 V.I.C. § 71, he was designating Superior Court Judge Harold W.L. Willocks to serve as the Presiding Judge of the Superior Court effective June 26, 2016. Exhibit. 4. Governor Mapp further informed Judge Dunston that he would be reassigned from the post of Presiding Judge of the Superior Court. The letter specifically stated that reassignment “does not affect [his] continued service as a duly appointed Judge of the Superior Court.”

On June 22, 2016, Judge Dunston filed this action challenging the Governor’s authority to reassign him from the Presiding Judge position. In his Amended Complaint, Judge Dunston seeks declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., prohibiting Governor Mapp from removing him as Presiding Judge. An evidentiary hearing and arguments on Plaintiff’s motion for temporary restraining order were heard on Friday, June 24, 2016. After the hearing, the Court entered a temporary restraining order in Judge Dunston’s favor enjoining Governor Mapp from removing Judge Dunston from the position of Presiding Judge.

III. STANDARD FOR PERMANENT INJUNCTION

The standard for granting a permanent injunction is essentially the same as for granting a preliminary injunction, except that a party seeking a permanent injunction must prove actual success on the merits rather than a mere likelihood of success. Thus, in deciding whether to grant a permanent injunction, the district court must consider whether: “(1) the moving party has shown actual success on the merits; (2) the

moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest." *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001); *Kendall v. Russell*, 49 V.I. 602, 618 (D.V.I. 2008).

IV. ARGUMENTS

A. *The District Court Lacks Subject Matter Jurisdiction or Should Abstain*

- (i) **Plaintiff's claim must be dismissed because it raises a matter of local law and raises no substantial federal question that would support federal jurisdiction.**

Despite Plaintiff's attempt to label the issue before the Court as a federal constitutional issue or a violation of the Revised Organic Act, a close review of the allegations shows that it is a purely local matter involving exclusively the interpretation of local law passed by the Virgin Islands Legislature. The salient issue is whether the Governor has the authority under 4 V.I.C. § 71 to designate Judge Willocks to serve as the Presiding Judge, an administrative position, and reassign Judge Dunston from that position. This matter does not implicate the separation of powers doctrine or any provision of the Revised Organic Act. As shown below, Plaintiff's claim arises solely under Virgin Islands law.

Plaintiff's cause of action does not arise under federal law. "The most straightforward test of whether an action presents a federal question is to determine the law from which the cause of action arises, federal or otherwise." *Club Comanche, Inc. v. Gov't of Virgin Islands*, 278 F.3d 250, 259 (3d Cir. 2002). Plaintiff alleges that he was appointed to a six-year term "[p]ursuant to 4 V.I.C. § 73," that his compensation may not be reduced during his term under "4 V.I.C. §72(c)," and that "[u]nder Section 73, [he is] subject to removal only as provided for in Title 4 of the Virgin Islands Code." Compl. ¶¶ 8-11. Plaintiff does not cite a specific provision of the Revised Organic Act as the source of his cause of action. Nor could he, since the Revised Organic Act does not provide for the term or compensation of Superior Court Judges or even mention the office of the Presiding Judge. Indeed, the Revised Organic Act left

the existence, jurisdiction, and administration of local courts to “local law.” 48 U.S.C. § 1611. The sole count of the Complaint is brought “[p]ursuant to the Declaratory Judgment Act,” Compl. ¶ 16, but that Act is procedural and does not confer jurisdiction. *See Bd. of Chosen Freeholders of Burlington v. Tombs*, 215 Fed. App’x. 80, 81 (3d Cir. 2006) (“A case does not arise under federal law simply because it is brought pursuant to the Declaratory Judgment Act.”); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (“The operation of the Declaratory Judgment Act is procedural only.”); *Bates v. Bryant Barnes Blair & Benoit, LLP*, 2015 U.S. Dist. LEXIS 178804, *7 (D.V.I. Sept. 18, 2015) (same).

To determine whether a case arises under federal law, courts must look to the plaintiffs’ well-pleaded complaint. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002). Under the well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Club Comanche*, 278 F.3d at 259 (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)). Judge Dunston’s peripheral citations to the Revised Organic Act are insufficient because “[a] plaintiff’s . . . erroneous reference to federal law is not controlling.” *Id.* The Revised Organic Act “must be an element, and an essential one, of the plaintiff[’]s cause of action.” *Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 398 (3d Cir. 2004), *as amended* (Dec. 23, 2004). In other words, it must be one of “the pleading requirements.” *Club Comanche*, 278 F.3d at 259. The Revised Organic Act has nothing to say about the appointment or removal of judges from “local courts” and instead expressly left those details to “be established by local law.” 48 U.S.C. § 1611.

Any federal question raised by the complaint would not be substantial. A claim does not raise a federal question where the claim “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (quotation omitted). As the Revised Organic Act does not create

tenure or salary protections for local judges—instead leaving local courts to local law—Plaintiff’s citation to the Act is “immaterial,” “made solely for the purpose of obtaining jurisdiction,” and “wholly insubstantial.”

“[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.” *Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 813 (1986). And it is not enough that the court may have to interpret federal laws or regulations. Rather, “the vindication of a right under state law must turn on some construction of federal law” and federal law “must be in the forefront of the case and not collateral, peripheral, or remote.” *Id.* at 808. *See also Gunn v. Minton*, 133 S. Ct. 1059 (2013) (finding no federal jurisdiction to hear a state-based claim where the federal issue was not substantial); *Gardiner v. St. Croix Dist. Governing Bd. of Dirs.*, 859 F. Supp. 2d 728, 740 (D.V.I. 2012)(holding that because the federal-law issues “embedded” in the claim are not substantial, federal court lacks jurisdiction). The issue here rests on the interpretation of local law and any peripheral federal issue cannot satisfy the substantiality requirement for federal jurisdiction.

None of the cases cited by the Plaintiff support jurisdiction here. In *Luis v. Dennis*, the separation of powers claim arose under federal law because it directly implicated the Governor’s express authority to appoint department heads. 751 F.2d 604, 607 (3d Cir. 1984). By contrast, Plaintiff’s claim rests on the existence of imaginary implied rights. Plaintiff also cites *Kendall v. Russell*, 572 F.3d 126, 136 (3d Cir. 2009). That case, however, is inapposite as the issue there was the removal of a judge from his judicial position as Judge of the Superior Court of the Virgin Islands.

Judge Dunston has not been removed from his judicial position. The Governor in his June 17, 2016, letter to Judge Dunston, specifically informed Judge Dunston that the reassignment “does not affect your continued service as a duly appointed Judge of the Superior Court.” Moreover, the court in *Kendall* was careful to note that “the Appellants [had] not advanced an argument that somehow the disciplining of

the judiciary [was] incidental to legislative power” and that the court was “not hold[ing] that Superior Court judges are beyond discipline or removal in the Virgin Islands,” “only that the Commission Act in its present form violates the separation of powers principle of the ROA.” *Id.* at 138. By contrast, the governing law expressly states that the Presiding Judge’s duties are “administrative” and non-judicial, and the Governor has inherent and statutory authority to designate the Presiding Judge. Designating a new Presiding Judge is incidental to that power. *See infra*.

Except for general references and categorizations, Plaintiff has not cited a single specific provision of the Revised Organic Act that has been violated. It is evident that Judge Dunston’s claim is a challenge of the Governor’s action under the *local* statute, not the Constitution or the Revised Organic Act. It is the local courts that Congress vested with the authority to determine the interpretation of local law, not the District Court. In *Bryan v. Fawkes*, 61 V.I. 416, 440 (V.I. 2014), the Virgin Islands Supreme Court explained that the District Court lacked jurisdiction to issue an injunction based solely on its interpretation of local law. *Id.* (holding that the V.I. Supreme Court serves as the final arbiter of local law the “the Revised Organic Act has been interpreted to require the District Court to defer to [the V.I. Supreme court] as to issues of Virgin Islands law.”); *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 978 (VI. 2011) (explaining that when the Legislature established the V.I. Supreme Court in 2004, “it reposed in [the V.I. Supreme] Court “the supreme judicial power of the Territory” which “includes the power to both interpret local law and modify the common law.”).

All that remains is a question of local law, and the District Court does not have jurisdiction over local matters. As the Third Circuit has repeatedly recognized, the Virgin Islands legislature has “divested the District Court ‘of original jurisdiction over purely local civil matters.’” *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 359 (3d Cir. 2007) (citation omitted). Virgin Islands law provides that “the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy.” 4 V.I.C. §

76. Plaintiff does not contest this. See Compl. ¶¶ 5-6 (alleging only federal question and supplemental jurisdiction and not jurisdiction under 48 U.S.C. § 1612). This case thus properly belongs in the local courts, not the District Court.

(ii) Even if this Court has jurisdiction, abstention under *Pullman* is appropriate.

To the extent a federal question may lurk—which it does not—given that the Territorial law issue is substantial and has not yet been addressed by the Territorial courts, the Court should abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). See *O'Reilly v. Bd. of Elections*, 2014 WL 7365942, at *4 (D.V.I. Dec. 23, 2014) (abstaining under *Pullman*). “There are dual rationales behind *Pullman* abstention: (1) avoiding premature federal court constitutional adjudication, which could ultimately be displaced due to state court construction of the law, and (2) preventing avoidable interference with state policies.” *Skif Corp. v. Gov't of the V.I.*, 2010 U.S. Dist. LEXIS 36919, *15 (D.V.I. Apr. 13, 2010). A court may abstain from hearing a case under *Pullman* if the following three “special circumstances” exist: “(1) There are uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) The state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and (3) A federal court’s erroneous construction of state law would be disruptive of important state policies.” *Phila. City Council v. Schweiker*, 40 Fed. App’x. 672, 675 (3d Cir. 2002). Provided all three circumstances are present, the District Court must then assess whether abstention is appropriate by balancing such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the effect of delay on the litigants. *O'Reilly*, 2014 WL 7365942 at 11.

Should the Court find that there is jurisdiction, *Pullman* abstention is appropriate. First, Plaintiff’s complaint alleges violations of 4 V.I.C. §§ 73 and 72(c) and also challenges the Governor’s authority under Section 71 to remove him as Presiding Judge. These statutory provisions have not been construed by

either the Superior Court of the Virgin Islands or the Supreme Court of the Virgin Islands in similar instances. There is no case law that Defendant is aware of that will assist this Court in determining how the local courts would interpret the statutory provisions.

Second, the Superior or Supreme Court of the Virgin Islands' interpretation of these statutory provisions would certainly obviate the need to address any federal issues, to the extent that there are any. Undoubtedly, any erroneous interpretation of Territorial law by the District Court would disrupt important state policies, as the efficient administration of the courts is of paramount interest to the Government.

All three exceptional circumstances are present and justify abstention under *Pullman*. With respect to the other discretionary factors, there is no question that the Superior Court and the Supreme Court of the Virgin Islands would have jurisdiction over this matter, the same emergency relief that Plaintiff petitioned for here can be sought in the local courts, and the impact of any delay from abstention will be minimal, if any at all. Thus, to the extent it has jurisdiction at all, this Court should abstain under *Pullman*.

B. Plaintiff is not Entitled to Declaratory Judgment or Injunctive Relief

a. Plaintiff Cannot Succeed on the Merits

(i) The Governor's authority to designate a Presiding Judge is consistent with Congress's design for the Virgin Islands.

Even if there were jurisdiction, Plaintiffs' claim would fail on the merits. The existence and duties of the office of the Presiding Judge fall squarely within the domain of local law as delineated by Congress. While "Congress [has] implicitly incorporated the principle of separation of powers into the law of the territory," *Smith v. Magras*, 124 F.3d 457, 465 (3d Cir. 1997), these incorporated principles are not identical to those embodied in the U.S. Constitution. In the Organic Act, Congress set up a three-branch government, but declined to establish a cookie-cutter mold of the U.S. Constitution and left many details to "local law."

To illustrate, Superior Court judges do not serve “during good behaviour,” U.S. Const. art. III, § 1, but instead serve six-year terms, after which they may (or may not) be re-appointed, 4 V.I.C. § 73. In addition, even though Congress vested the “judicial power of the Virgin Islands” in the courts, it left the existence, jurisdiction, and administration of local courts to “local law.” 48 U.S.C. § 1611. Plaintiff, on his own, cannot graft the protections of Article III courts onto the Virgin Islands courts.

With the Revised Organic Act, Congress chose a different design. The Revised Organic Act provides that “[t]he 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, oaths and bonds, and the times and places of holding court *shall be governed by local law* or the rules promulgated by those courts.” 48 U.S.C. § 1611(c) (emphasis added). “It is thus clear from the Organic Act itself that local law—enacted by the Virgin Islands legislature—may have some role to play” in the administration of the courts. *Smith v. Magras*, 124 F.3d 457, 466 (3d Cir. 1997). “Put differently, the Organic Act envisions the possibility of the sharing of power . . . between the Virgin Islands courts and the Virgin Islands legislature.” *Id.* “The possibility of that sharing itself disposes of the argument that [other branches’ involvement in court administration] violates the principle of separation of powers.” *Id.* It was “the Virgin Islands Legislature’s choice to invest the Superior Court presiding judge and other personnel with duties to supervise and enforce internal procedures,” and it was the Legislature’s choice to invest the Governor with the authority to designate the presiding judge. *Hodge v. Superior Court of Virgin Islands*, 2009 WL 2996507, at *6 (D.V.I. Sept. 11, 2009), *aff’d*, 404 F. App’x 641 (3d Cir. 2010), *and aff’d*, 404 F. App’x 641 (3d Cir. 2010). Thus, the key issue here turns on the interpretation of local law, i.e. when the Governor may “designate” a new presiding judge. 4 V.I.C. § 71.

In any event, the Governor's removal power does not run afoul of any inherent separation of powers. Separation of powers problems arise when the other branches intrude on the "irreducible inherent authority" of the courts. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 (3d Cir. 1985) (en banc). This irreducible authority is circumscribed, "encompass[ing] an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power.'" *Id.* The administrative duties of the Presiding Judge are simply not that fundamental, as they are unrelated to deciding specific cases and controversies.

(ii) The duties of the presiding judge are administrative, not judicial, and, therefore, do not violate the separation of powers doctrine.

The presiding judge is selected for an administrative rather than a judicial function. The presiding judge serves as the "administrative head of the court," and is, among other things, "responsible for the observance" of court rules, "assign[ing] the cases among all the judges," "supervis[ing] and direct[ing] the officers and employees of the court," "enter[ing] into contracts," "preserv[ing] the records" of the court, and paying "utility bills." 4 V.I.C. § 72b.¹ Based on Judge Dunston's testimony, his duties as presiding

¹4 V.I.C. 72b provides as follows:

(a) The Presiding judge of the Superior Court shall be the administrative head of the court and shall preside at all sessions of the court which he attends. He shall be responsible for the observance by the court of the rules adopted by the district court governing the practice and procedure of the Superior Court and prescribing the duties of its judges and officers and the times and places of holding court. In conformity with such rules he shall from time to time designate the judges who are to sit in each judicial division and divide the business and assign the cases among all the judges of the court in such manner as will secure the prompt dispatch of the business of the court and equalize the caseloads of the several judges, taking into consideration the time required by those judges who have been designated to serve as district court commissioners to perform their duties as such. He shall supervise and direct the officers and employees of the court in the performance of their duties.

(b) The Presiding Judge of the Superior Court is authorized to enter into contracts for security systems and/or security services, through competitive negotiations, in order to protect and preserve the records, files, equipment, property and premises of the Court.

(c) The Presiding Judge of the Superior Court is authorized to establish within the Superior Court an account for the prompt payment of all utility bills chargeable to any division of the Superior Court.

judge includes testifying regarding Court administration matters and presenting the Superior Court's budget before the legislature; entering into contracts for surveillance and security improvements; selecting vendor for new electronic case management and e-filing system, facilitating the upgrades, improvements maintenance and repair of the Superior Court facilities; attending several board and committee meetings as the ex officio member; and promoting a health and wellness symposium. These are purely administrative responsibilities, not deciding cases.

Courts in the Virgin Islands have repeatedly treated these duties as administrative and non-judicial:

This administrative authority [granted by Section 72b(a)] is limited to making sure that the court's rules of practice and procedure are followed, prescribing when and where court will be held, assigning cases to equalize the work load of the other judges and to "secure the prompt dispatch of the business of the court." None of these administrative powers authorizes the Presiding Judge to tell one of his co-equal colleagues how he or she is to decide a particular legal issue. The administrative power to "direct the officers and employees of the court in the performance of their duties" can have no relevance to the judges, who in any event are covered by the earlier provision described above.

In re Richards, 52 F. Supp. 2d 522, 533 (D.V.I. 1999), *rev'd on other grounds*, 213 F.3d 773 (3d Cir. 2000); *see also Callwood v. Superior Court of the Virgin Islands*, 2014 V.I. LEXIS 105, *6 (V.I. Super. Ct. Oct. 29, 2014) ("The Presiding Judge has the power to enter into contracts, but does so acting as a Government official."); *Gov't of Virgin Islands v. Thomas*, 341 F. Supp. 2d 531, 534 (D.V.I. 2004) ("Pursuant to this statutory grant of authority [in Section 72b(a)], the Presiding Judge has the power to resolve administrative problems, not the power to review rulings of the trial court on legal questions."); *Gov't of Virgin Islands v. 8560 Square Feet of Land*, 1999 V.I. LEXIS 36, *3 (V.I. Terr. Ct. 1999) ("While the

(d) From the amounts appropriated to the Superior Court in any fiscal year, the Presiding Judge may execute the powers and duties authorized by this section. The Presiding Judge is authorized to transfer funds between various items, accounts, sections, and divisions of the Superior Court as he deems appropriate to obtain maximum quality of judicial services from the appropriations made to the Superior Court in any fiscal year; provided that such transfers are within the line items fixed by law.

Presiding Judge oversees the daily administration of the Court, the Presiding Judge does not have the power to interfere with the fair and impartial exercise of judicial duties.”). In sum, the Presiding Judge as Presiding Judge does not adjudicate cases and controversies. It is not an infringement of the independence of the judiciary for the Governor to remove a judge from an administrative, non-judicial position of presiding judge.

Indeed, the Presiding Judge’s duties are *executive-type* duties. In *Daly v. Hemphill*, 411 Pa. 263, 268-269 (Pa. 1963) the appellant argued that the Governor was without authority to appoint or remove a Chief Magistrate. The court rejected that argument and held that “[s]hould the Governor choose to remove a Chief Magistrate, the latter no longer serves in the capacity of *Chief* Magistrate, but he does retain his judicial position undisturbed until the expiration of his elected term.” The Court explained that “the duties of the Chief Magistrate, beyond those performed as magistrate, are purely administrative and executive responsibilities dealing with the non-judicial functions of the magistrates’ courts, and are not part of the judicial power.” Thus, the Pennsylvania Supreme Court concluded there was no encroachment on judicial independence or violation of separation of powers.

Similarly, the duties of the Presiding Judge here are administrative and non-judicial. Even the federal courts, imbued with the protections of Article III, were administered by the Executive Branch until the twentieth century. See Federal Judicial Center, *Establishment of the Administrative Office of the U.S. Courts*, available at http://www.fjc.gov/history/home.nsf/page/landmark_17.html (“In 1939, with the establishment of the Administrative Office of the U.S. Courts and the circuit judicial councils, Congress for the first time provided the judiciary with budgetary and personnel management agencies that were independent of the executive branch of government. For 150 years, administrative responsibility for the federal courts shifted from the Treasury Department to the Interior Department in 1849 and to the Justice Department in 1870.”).

(iii) Since Judge Dunston will remain as a Superior Court Judge, the separation of powers doctrine is not implicated.

In his June 17, 2006 letter to Judge Dunston, Governor Mapp specifically informed Judge Dunston that his reassignment from the position of Presiding Judge to Superior Court Judge does *not* affect his “continued service as a duly appointed Judge of the Superior court.” Exhibit 4. Because Judge Dunston will remain a Superior Court Judge, there is no separation of powers problem. In *Mistretta v. United States*, 488 U.S. 361, 410 (1989), the United States Supreme Court held that the President’s power to remove judges from the United States Sentencing Commission posed a “negligible threat to judicial independence” because the judges would still remain Article III judges:

The President’s removal power over Commission members poses a similarly negligible threat to judicial independence. The Act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges. Even if removed from the Commission, a federal judge appointed to the Commission would continue, absent impeachment, to enjoy tenure “during good Behaviour” and a full judicial salary.

Mistretta v. United States, 488 U.S. 361, 410 (1989). “Because an Article III judge serving on a nonadjudicatory commission is not exercising judicial power, and because such limited removal power gives the President no control over judicatory functions, interbranch removal authority under these limited circumstances poses no threat to the balance of power among the Branches.” *Id.* at 411 n.35.

So too here. Because Judge Dunston will remain a Superior Court Judge for the rest of his term, the independence of the judiciary remains undisturbed. *Id.* (“In other words, since the President has no power to affect the tenure or compensation of Article III judges, *even if the Act authorized him to remove judges from the Commission at will*, he would have no power to coerce the judges in the exercise of their judicial duties.”) (emphasis added). And because Judge Dunston enjoys fewer protections than an Article III judge, any threat to his judicial independence is less than negligible.

Judge Dunston suggests that appointment to the presiding judgeship is a carrot and removal is a stick that may influence a judge’s decision-making. Dunston Em. Mot. for TRO at 13. This is, at best,

“fanciful.” *Id.* at 409. The Supreme Court “ha[s] never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions. . . . Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago.” *Id.* at 409-10. And “[a]lthough removal . . . conceivably could involve some embarrassment or even damage to reputation, each judge made potentially subject to these injuries will have undertaken the risk voluntarily by accepting the President’s appointment to serve.” *Id.* at 411 n.34. There is thus “no risk” that “removal . . . will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies.” *Id.* at 411. The Governor’s action does not in any way interfere with Judge Dunston’s or any other Superior Court Judge’s adjudicatory functions or their ability to “exercise judicial power in the constitutional sense of deciding cases and controversies.” *Id.* at 390.

- (iv) **The text and structure of the governing provisions of the Virgin Islands Code confirm the Governor has the authority to designate a new presiding judge and his action does not violate the separation of powers.**

Beyond the lack of federal jurisdiction and the lack of any threat to judicial independence, the governing provisions of the Virgin Islands Code confirm that the Governor’s designation of a new presiding judge does not violate the separation of powers. The manner of appointing judges of the Superior Court is set forth in V.I. Code Ann. tit. 4 § 72.² Under 4 V.I.C. § 72, “[t]he judges of the Superior Court shall be appointed by the Governor with the advice and consent of the Legislature,” and “[j]udges so appointed shall continue in office until their successors are appointed and confirmed or until they are renominated

² 4 V.I.C. § 72(a) provides:

(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, but in no event shall judges remain in office more than 120 days after the expiration of their terms unless they have been renominated and confirmed.

and confirmed, but in no event shall judges remain in office more than 120 days after the expiration of their terms unless they have been renominated and confirmed.”

The provisions governing the designation and role of the presiding judge are found in a separate section, 4 V.I.C. § 71. Section 71 in relevant part provides:

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. § 71. Unlike Section 72 (a), Section 71 provides for the Governor alone—without the legislature’s involvement—to “designate one of the judges to serve as presiding judge.” Thus, while judges of the Superior must be nominated and obtain the advice and consent of the Legislature to serve a judicial term, the presiding judge is selected solely by the unilateral “designation” of the Governor, from among the judges properly seated judges.

The Legislature of the Virgin Islands does not confirm the position of presiding judge. In fact, there is absolutely no authority or requirement under Virgin Islands’ law for the Legislature to confirm the assignment of the presiding judge after the judge has being so designated by the Governor. Plaintiff’s reliance on Exhibits 1 and 5 to support his position that he was confirmed by the Legislature as Presiding Judge is of no moment, as the Legislature has no authority, statutory or otherwise, to designate Judge Dunston as *Presiding* Judge. Given the foregoing, the Governor may unilaterally designate one of the properly seated judges to perform the administrative duties of presiding judge.

Plaintiff’s contention that once he is designated as a Presiding Judge he holds that position for six years is not supported by the plain reading of the statutes. To support his claim, Plaintiff relies on 4 V.I.C. § 73. Section 73 provides that “[t]he 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” thereby limiting the circumstances under which judges may be removed from office once confirmed. Plaintiff’s reliance on

Section 73 is misplaced, as Section 73 only relates to judges of the Superior Court, not the role of presiding judge, which is governed by a separate section (Section 71).

While Section 73 prohibits removal of a judge of the Superior Court during his six-year term “unless sooner retired or removed in accordance with [the law]”, absent from Section 73 is any such limitation on the additional role of “presiding judge”. In contrast to the language of § 73—which both specifies a six-year term for Superior Court judges and provides that they shall “continue in office” until certain events occur—the presiding judge provisions contain no such language. Section 71 states only that the Governor may designate the presiding judge “to preside for such term, perform such duties, and exercise such authority as may be otherwise provided by law.” Notably absent are any provisions stating that the presiding judge “shall continue in office” for any particular term, or providing for removal from his “administrative” duties (4 V.I.C. § 72b).

That silence is telling. Under the maxim of statutory construction known as “*expressio unius est exclusio alterius*,” “to express or include one thing implies the exclusion of the other.” *Miller v. Virgin Islands*, 54 V.I. 398, 404 (2010); *cf. Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919-20 (2015) (“where Congress [includes] particular language in one [part] of a statute but omits it in another, it is generally presumed that Congress acts intentionally”) (citations omitted); *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir. 2004) (same). Thus, when the legislature provides that a superior court judge shall “continue” in that office for six years, but declines to provide a specific term for the presiding judge—or that his or her designation “shall continue”—it “plainly follows that the legislature did not intend” to restrict the Governor’s discretion to control the length of the term for which he or she serves as the presiding judge. *Miller*, 54 V.I. at 404. While the Governor may not remove a judge from his post as judge of the Superior Court, there is nothing in the law that precludes the Governor from changing, at his discretion, the person designated as *presiding* judge.

(v) The Governor did not reduce Judge Dunston's salary

Title 4 V.I.C. § 72 (c) provides that a judge's compensation shall not be reduced during his term of office. It also provides that the presiding judge shall receive a greater compensation than the judges of the Superior Court.³ Significantly, Judge Dunston's salary is not controlled by the Executive Branch, but by the Judicial Branch. During his testimony at the June 24, 2016 Hearing, Judge Dunston testified that the compensation for the judges and presiding judge is set by the Superior Court and sent to the Legislature for approval. Judge Dunston also testified that at no time did the Governor inform him that his salary will be reduced. The Governor's June 17, 2016 letter to Judge Dunston (Ex. 2) makes no reference to Judge Dunston's salary. The Human Resources Manager who testified at the Hearing also stated that Exhibit 2, which states the salary of the Presiding Judge is \$162,000, was prepared by the Superior Court and sent to Governor de Jongh for his signature. The evidence shows that it is up to the Judicial Branch to determine Judge Dunston's compensation, and that the Governor at no time reduced Dunston's salary.

Whether Judge Dunston's salary should be reduced is again a matter of local law that the District Court need not reach. *See* 4 V.I.C. § 72c; 48 U.S.C. § 1611. In any event, it did not present a problem in *Mistretta*, even though district judges appointed to the Sentencing Commission "receive[d] an increase in salary" that they might lose if removed. 488 U.S. at 410 n.35 (reserving "the hypothetical constitutional question whether, under the Compensation Clause of Article III, a district judge removed from the Commission must continue to be paid the higher salary"). At most, Judge Dunston is entitled to his current salary until the end of his current term as Superior Court Judge.

³ 4 V.I.C. § 73(c) provides as follows:

The judges of the Superior Court shall be officers of the Government of the Virgin Islands and each shall receive a salary of not less than \$35,000 per annum, except that the presiding judge shall receive a salary of not less than \$37,500 per annum. No judge's compensation shall be reduced during his term of office without his consent.

b. Plaintiff will not Suffer Irreparable Harm

Plaintiff has wholly failed to assert any irreparable harm that he will suffer if an injunction is not granted. Judge Dunston's affidavit in support of his claim for irreparable injury and his testimony at the June 24, 2016 Hearing fail to establish irreparable harm. The purported chaos and disruption that would allegedly occur if Judge Dunston were not allowed to remain as Presiding Judge is unlikely and speculative at best and cannot support an injunction. *Continental Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (reiterating that "injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties.").

Judge Dunston is not the first Presiding Judge of the Superior Court, and he certainly will not be the last. The Superior Court functioned when he was not the Presiding Judge and will continue to do so if he is not the Presiding Judge. In fact, as Judge Dunston testified at the June 24, 2016 Hearing, when he took over the position of Presiding Judge from Judge Donohue the Superior Court did not collapse into chaos. The fact that Judge Dunston may have initiated certain projects, planned improvements for the Superior Court's infrastructure and "devoted substantial personal attention" to these matters cannot form the basis of irreparable harm. These are just administrative functions and any administrator would put in place adequate record keeping, support personnel, protocols and policies to ensure continuity even if the administrator, for a multitude of reasons, could not continue to occupy that position. During the hearing, Judge Dunston testified that Judge Willocks is the Administrative Judge and performs many of the administrative duties of the Presiding Judge in St. Croix as he is not physically on that Island. Judge Dunston also admitted that Judge Willocks has appeared with him and testified before the Legislature. Judge Dunston further stated that he has no reason to believe that Judge Willocks could not perform the duties of Presiding Judge. The absence of irreparable harm is patently evident.

Plaintiff's decision that he will "emphatically defy the illegal edict of Governor Mapp" and will not step down does not constitute irreparable harm. *Anonymous Oxford Health Plan Member v. Oxford Health Ins., Inc.*, 2012 U.S. Dist. LEXIS 80117, *7 (D.N.J. May 30, 2012) (self-created harms cannot be considered irreparable harms). To the extent that Dunston may suffer some reputational harm or reduction in salary (if the judicial branch decides to reduce his salary), these do not constitute irreparable injury. *Noorhasan v. De Jongh*, 2012 U.S. Dist. LEXIS 45368, *19 (D.V.I. Mar. 31, 2012) (holding reputational injury and economic injury insufficient to establish irreparable harm). Since Judge Dunston cannot show irreparable harm, his claim for injunctive relief must be denied. *ACE Am. Ins. Co. v. Wachovia Ins. Agency Inc.*, 306 Fed. App'x. 727, 732 (3d Cir. 2009) ("A failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction.")

c. Balancing of the Harm & Public Interest

Judge Dunston will suffer little or no harm if an injunction is not granted. He will continue to perform his judicial functions as a Judge of the Superior Court, even though he will not be the Presiding Judge. He will continue to hear cases, conduct trials, render opinions, issue orders and perform other functions typically performed by judges of the Superior Court. The public has an interest in the enforcement of the laws of the Virgin Islands. And the law gives the Governor the right to appoint and remove the Presiding Judge. The Governor, in enforcing the laws, has good reasons to be concerned with the efficient administration of the courts, the elimination of any backlog, and technological improvements in the courts. As stated above, the Governor has the authority to designate Judge Willocks as the Presiding Judge and to reassign Judge Dunston from that position.

For all the reasons set forth herein, Defendant Governor Mapp requests that the Court dismiss Plaintiff's complaint, and deny Plaintiff's request for declaratory judgment and injunctive relief.

RESPECTFULLY SUBMITTED,

CLAUDE E. WALKER, ESQ.
ATTORNEY GENERAL

DATED: July 5, 2016

BY: /s/ Carol Thomas-Jacobs
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Office of the Attorney General

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.4.9, on the 5th day of July, 2016, I electronically filed the foregoing Brief with the Clerk of Court using the CM/ECF system, which will send notification to:

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By: /s/ Carol Thomas-Jacobs