No. 16-3234

In the United States Court of Appeals for the Third Circuit

HONORABLE MICHAEL C. DUNSTON, IN HIS OFFICIAL CAPACITY AS PRESIDING JUDGE OF THE SUPERIOR COURT OF THE VIRGIN ISLANDS,
APPELLEE;

v.

GOVERNOR OF THE VIRGIN ISLANDS; AND HAROLD W. WILLOCKS,
STRICTLY AS INTERESTED PARTY,
APPELLANT.

ON APPEAL FROM THE U.S. DISTRICT COURT OF THE VIRGIN ISLANDS NO. 16-00038, HON. CURTIS V. GOMEZ, DISTRICT JUDGE

BRIEF OF APPELLEE

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INTRODUCTION

Governor Kenneth Mapp asserts that he has the power—the absolute power—to remove Michael C. Dunston, the Presiding Judge of the Superior Court of the Virgin Islands, at will.

In support, the Governor posits a grandiose conception of his own authority, while trivializing that of the Presiding Judge. Contrary to the Governor's impressionistic characterizations, some of the core duties specific to the Presiding Judge position are inherently judicial in nature, and indeed include deciding issues of constitutional consequence. And even those that are administrative are essential to the institutional independence of the judicial branch.

Governor Mapp interprets an imprecisely-drafted local statute as granting him unchecked power to remove the Presiding Judge. But no local law actually says that. The Governor's construction is instead based on a hyperliteral distinction piled atop one false premise after another—all resting upon the "quicksand" foundation of legislative silence (*Helvering v. Hallock,* 309 U.S. 106, 121, 60 S.Ct. 444, 452, 84 L.Ed. 604 (1940) (Frankfurter, J.)). His interpretation also contravenes the Revised Organic Act of 1954, as did his attempted removal of the Presiding Judge.

The Governor does not see that as a problem; he says his actions took place under the federal jurisdictional radar. He asserts that there is no federal subject matter jurisdiction in this case because his removal power over the Presiding Judge

is a question of "purely local law." But the Revised Organic Act *is* local law. It is local law of the most fundamental sort. The Revised Organic Act is the basic charter—the "constitution" of the Virgin Islands—establishing separation of powers in a tripartite system of government. Those principles of are as much a part of local law as the Bill of Rights contained in that Act of Congress.

The Governor's action was an unprincipled arrogation of executive powers, in derogation of the independence of the judiciary, all in violation of the Revised Organic Act.

STANDARD OF REVIEW

It is undisputed that all issues are subject to plenary review.

SUMMARY OF ARGUMENT

I. This Court has subject matter jurisdiction because a separation of powers claim in the Virgin Islands, such as that presented by Presiding Judge Dunston, arises under a federal statute, the Revised Organic Act of 1954. This Court squarely so held in *Kendall v. Russell*, 572 F.3d 126 (3d Cir. 2009) and *Luis v. Dennis*, 751 F.2d 604 (3d Cir. 1984). The ROA, as the "constitution" of the Virgin Islands, supersedes and supplants any inconsistent substantive local law. *Mapp v. Lawaetz*, 882 F.2d 49, 51 (3d Cir.1989); *Smith v. Magras*, 124 F.3d 457, 465 (3d Cir. 1997). The jurisdictional reforms relied upon by Governor Mapp in support of his "local law" argument do not in any way alter the federal question jurisdiction of the District

Court (an Article IV court), nor do they detract in any way from the "constitutional" force of the ROA in the Territory.

II. The duties specific to the position of Presiding Judge, prescribed by statute and court rule, are many and varied. Such duties (described precisely and in detail, *infra*) include those of an "intrinsic judicial character."

III. The first principles of separation of powers apply with full force to the Virgin Islands (many cases so hold), and represent essential structural protections to individual rights extended to the Territory in the Bill of Rights of the ROA.

IV. The specific principle of independence of the judiciary is deeply rooted in American history, and a defining characteristic of constitutional democracy. It demands "total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler v. Judicial Council of Tenth Circuit of U. S.*, 398 U.S. 74, 84, 90 S. Ct. 1648, 1653, 26 L. Ed. 2d 100 (1970).

V. The Governor's asserted power to remove the Presiding Judge at will is fundamentally antithetical to judicial independence. The power to remove is the power to control. It necessarily relegates the at-will appointee to a position of subservience. Unrestricted executive removal power, while constitutionally protected within its proper sphere as an essential tool of political accountability, has no place whatsoever in judicial appointments. Judges must be accountable solely to the Rule of Law. The landmark case of *Humphrey's Executor v. United States*, 295

U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), accordingly holds that Congress may restrict executive removal power when the appointee exercises "quasi-judicial" authority, in order to protect the structural integrity of the decision-making process. *Wiener v. United States*, 357 U.S. 349, 353, 78 S. Ct. 1275, 1278, 2 L. Ed. 2d 1377 (1958), extends that core principle to hold that when a federal statute does not expressly limit removal power, courts will *infer* that Congress intended to *protect* the appointee from removal at will if he or she has a "quasi-judicial function." The Revised Organic Act adopts the rule of *Humphrey's Executor* by withholding executive removal powers over appointees having "quasi-judicial functions" (the exact terminology of *Humphrey's Executor*). 48 U.S.C. § 1597(c). Certain core functions specific to the Presiding Judge position are not merely "quasi-judicial," but *unequivocally* judicial. Any purported gubernatorial at-will removal power over the Presiding Judge would structurally compromise decisional independence, and encroach upon the institutional independence of the Superior Court.

VI. The Governor's construction of local law is artificial and syllogistic, inconsistent with legislative intent, and inconsistent with the ROA.

ARGUMENT

I. District Court Had Federal Question Subject Matter Jurisdiction

Governor Mapp's jurisdictional attack is misguided and ill-considered.

The Virgin Islands District Court, an Article IV court, had subject matter jurisdiction under the Revised Organic Act of 1954, 48 U.S.C. § 1612(a) (as amended), which confers upon that court the same federal question jurisdiction granted to its stateside, Article III counterparts under 28 U.S.C. § 1331. *E.g.*, *Callwood v. Enos*, 230 F.3d 627, 630–31 (3d Cir. 2000).[1]

This case arises under the Revised Organic Act ("ROA"), 48 U.S.C. §§ 1541, *et seq*., enacted by Congress in the exercise of its plenary powers under the Territorial Clause, and serving as the "constitution" of the U. S. Virgin Islands. *E.g.*, *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576 (3d Cir.1967) (ROA the "basic charter" of Virgin Islands government), *cert. den*., 390 U.S. 1041 (1968); *Mapp v. Lawaetz*, 882 F.2d 49, 51 (3d Cir.1989) (ROA the "analogue of a state constitution" for the territory). The Revised Organic Act imposes separation of powers principles upon territorial government. *E.g.*, *In re Richards*, 213 F.3d 773, 783 (3d Cir.2000) ("[T]he doctrine of separation of powers applies with respect to the coordinate branches of government in the Virgin Islands."); *Smith v. Magras*, 124 F.3d 457,

[1] The Court also had supplemental/pendant jurisdiction of the questions of local statutory construction. 28 U.S.C. § 1367(a).

465 (3d Cir. 1997) (same). Presiding Judge Dunston's claim is based on a violation of those principles.[2]

Governor Mapp argues that "[n]owhere does Judge Dunston cite a single, specific provision of the Revised Organic Act as the source of his cause of action." Opening Brief at p. 19. There is concededly no express provision for separation of powers in the ROA. That doctrine is *implied* from the tripartite structure of government. *Magras*, 124 F. 3d at 465 ("Congress … implicitly incorporated the principle of separation of powers into the law of the territory."). Indeed, there is no "separation of powers clause" in the text of the U.S. Constitution (nor, for that matter, is there a "judicial review clause" or "federalism clause"). That the doctrine is implied, not express, of course does not diminish its stature or force.[3]

This Court in *Kendall v. Russell*, 572 F.3d 126 (3d Cir. 2009), squarely held that an analogous separation-of-powers challenge mounted by a Superior Court judge in opposition to his removal by a legislative commission arose under the Revised Organic Act. 572 F.3d at 131, n.4 ("As the ROA is a federal statute, the

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[2] Presiding Judge Dunston's right of action exists not under the U.S. Constitution per se (the Guarantee Clause does not promise territories a republican form of government); not under any true Virgin Islands Constitution (there is no such document); but rather under the ROA—a federal statute.

[3] Also—and contrary to the Governor's understanding—the Presiding Judge relies upon the ROA's *specific* provisions making executive removal powers dependent on whether the appointee has "quasi-judicial functions," 48 U.S.C. § 1597(c), which apply *a fortiori* to purely judicial functions.

District Court had federal question jurisdiction in this case pursuant to 28 U.S.C. § 1331."). That jurisdictional holding is fundamentally sound, it is directly on point, and it is binding precedent.[4]

Governor Mapp criticizes *Kendall's* holding as an aberrational ruling on an issue he says was given short shrift by this Court. Opening Brief at p. 19-20. He finds fault with this Court for failing to "reconcile" its holding in *Kendall* with the changes in federal court-territorial court jurisdictional relations in the Virgin Islands. *Id.* at p. 20. Nonsense. The only conflict to "reconcile" is Governor Mapp's own confusion on what these structural reforms did and did not do.

The Governor's argument conflates federal question jurisdiction with the general civil jurisdiction that the District Court previously possessed (now replaced with diversity jurisdiction). Two different things. He also conflates the ROA's grant of power to prescribe qualifications for judges with the power to remove those judges. Also two different things.

Governor Mapp argues that the territorial-federal jurisdictional reforms taking place under the auspices of the 1984 Amendments to the Revised Organic Act morph

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[4] *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel. Court *en banc* consideration is required to do so.") (quoting Third Circuit Internal Operating Procedure 9.1).

the present case into a purely local action. Opening Brief at p. 16-20; and *id.*, p. 20 ("[T]he District Court does not have original jurisdiction over local matters.").[5]

None of the local judiciary reforms—important though they may be in many contexts—altered the basic *federal question* jurisdiction of the District Court of the Virgin Islands. Federal question jurisdiction preexisted the changes in the court systems, and it survived them fully intact. *Club Comanche, Inc. v. Gov't of Virgin Islands*, 278 F.3d 250, 256 (3d Cir. 2002) (1984 amendments do not "divest the District Court of its federal question … jurisdiction in civil actions").[6]

Federal question jurisdiction was separate and distinct from the *general civil jurisdiction* over local law disputes that the District Court previously possessed (and

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[5] These reforms consist, essentially, of the limitation of Virgin Islands District Court's civil jurisdiction to coincide with that of an Article III district court (diversity and federal question); the transfer of the District Court's general, original civil jurisdiction over to the Superior Court, substituting § 1332 diversity jurisdiction in its place; the abolition of District Court 3-judge appellate review panel jurisdiction; the creation of the Supreme Court of the Virgin Islands (with temporary, provisional certiorari review jurisdiction by this Court); and a general molding of the relationship between the local (Article IV) federal and territorial judicial systems to parallel that existing between the Article III federal and state courts. *See, generally, e.g., Pichardo v. Virgin Islands Com'r of Labor*, 613 F.3d 87, 93–94 (3d Cir. 2010); *Parrott v. Gov't of Virgin Islands*, 230 F.3d 615, 623 (3d Cir. 2000).

[6] **BEFORE:** 48 U.S.C. § 1612 [pre-1984] ("The District Court of Virgin shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy ...."); **AFTER:** 48 U.S.C. § 1612(a) (as amended 1984) ("The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States…."); 48 U.S.C. § 1612(b) (granting District Court "general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands"); Virgin Islands Code, 4 V.I.C. § 76(a) (adopted 1990) (vesting "original jurisdiction in all civil actions regardless of the amount in controversy" in Territorial Court, now named Superior Court).

different also from the diversity jurisdiction that the District Court now has in the place and stead of general civil jurisdiction). This Court clarified that very point in *Luis v. Dennis*, 751 F.2d 604 (3d Cir. 1984), a case the Governor fails to cite.

In *Luis*, the territorial governor sued the Virgin Islands legislature, contending that the legislature, by enacting enhanced quorum requirements for votes of approval of appointments, unlawfully impaired his executive powers in violation of the ROA's separation of powers principles. 751 F.2d 606. This Court held that the governor's claim properly invoked the Court's federal question jurisdiction, and not the "general civil jurisdiction" that the Virgin Islands District Court *then* possessed (now replaced with diversity jurisdiction). 751 F.2d at 607. The Court took pains to differentiate the two. *Id.* at n.3. The Court held that the claim "properly 'arises under' federal law." *Id.*

Governor Mapp places great reliance upon *Edwards v. HOVENSA, LLC*, 497 F.3d 355 (3d Cir. 2007), contending that this Court overlooked it in *Kendall.* Opening Brief, *passim.* But that case is nothing more (and nothing less) than an affirmation that the ROA's judiciary reforms conferred *diversity jurisdiction* on the District Court of the Virgin Islands, and that familiar *Erie* doctrine principles apply to that Court *sitting in diversity*. Although the application of *Erie* principles was new, diversity jurisdiction already existed (albeit not in name). It was subsumed

within the all-encompassing general civil jurisdiction that the District Court (a non-Article III court) already possessed.[7]

Edwards changes nothing of interest here. *Edwards* in no way supports the idea that local law trumps the ROA, under the *Erie* doctrine or otherwise. When it comes to separation of powers disputes—unlike, for example, contract or tort actions based on Virgin Islands common law, which a federal court must honor when sitting in diversity—there can *be* no conflicting local substantive law to which any federal court could legitimately defer. The ROA supersedes contrary local law. *Kendall*, 572 F.3d at 135; 48 U.S.C. § 1574(a) (legislature has authority only to enact laws "not inconsistent" with ROA). That is as it must be. The ROA could not serve its vital purpose as a territorial "constitution" otherwise.

There is no true, *de jure* dual sovereignty in the federal-territorial relationship. *Puerto Rico v. Sanchez Valle*, --- U.S. ---, 136 S. Ct. 1863, 1876, 195 L. Ed. 2d 179 (2016) (holding that the United States and Puerto Rico were not "dual sovereigns" for purposes of the Double Jeopardy Clause; "[t]he ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol"); *accord*, *Bluebeard's Castle, Inc. v. Gov't of Virgin Islands*, 321 F.3d 394, 397 (3d Cir. 2003)

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[7] *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057 (3d Cir. 1982) ("Diversity jurisdiction would add nothing to the grant of general jurisdiction contained in the [pre-amendment ROA].").

("It is settled that Congress has sovereignty over the territories…."); *Parrott v. Gov't of Virgin Islands*, 230 F.3d 615, 623 (3d Cir. 2000), citing *Binns v. United States*, 194 U.S. 486, 491, 24 S.Ct. 816, 48 L.Ed. 1087 (1904) (recognizing Congress's plenary power to define institutional relationships in territories) (parenthetical *précis* provided by this Court).[8]

The ROA is the *only* constitution we have in the Virgin Islands. The 1976 Enabling Act of Congress (as later amended) invites the Virgin Islands to adopt its own constitution.[9] To gain the requisite Congressional approval, it must "provide for a republican form of government, consisting of three branches: executive, legislative, and judicial" as well as a Bill of Rights. *Id.* Virgin Islanders, despite a number of local conventions, have thus far failed to come up with a constitution.

If a congressionally-approved local constitution *had* been adopted, it would have addressed separation of powers (at least by implication). The Governor's "purely local law" argument would then have had the legitimacy that it so patently lacks now. *Cf., Senate of Com. of Puerto Rico ex rel. McClintock v. Acevedo Vila*, No. CIV. 05-2082 (JAF), 2005 WL 2671043, at *4 (D.P.R. Oct. 19, 2005)

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[8] Federalism, when it is observed, is observed as a matter of congressional comity. *E.g., Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.,* 795 F.2d 325, 327 (3d Cir. 1986) ("By statute the Virgin Islands is specifically designated as an unincorporated territory which does not enjoy the autonomy of a state within the union. Nevertheless, Congress has steadily increased the scope of self-government granted to the Virgin Islands.").

[9] Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899.

(separation of powers issue a "purely local concern"; "[w]e decline to imply a federally enforceable three-branch local constitutional system for Puerto Rico … for the important and obvious reason that the people of Puerto Rico have already meticulously crafted their own locally enforceable three-branch constitutional system in 1952").

Governor Mapp also, in support of his "purely local law" argument, repeatedly asserts that Congress, by authorizing the territory to establish its own court rules and to prescribe qualifications for judges, intended to grant the power to remove judges without regard to ROA separation of powers constraints. (*E.g.*, Opening Brief at p. 18.) This exact argument was roundly rejected in *Kendall*.

> Appellants contend that the power to prescribe the qualifications and duties of the judges encompasses the power to remove judges from the bench. … While the ROA does grant the Legislature the authority to prescribe the qualifications of judges, which the Legislature has done, there is no indication that Congress intended that authority to include the power to remove judges.

572 F.3d at 136 (*footnote omitted*).

This case is not really a dispute about federal-versus-territorial powers. There is no doubt in any court, federal or local, about the "constitutional" force of the ROA's separation of powers principles. *E.g.*, *In re Joseph*, No. CV 2016-0001, 2016 WL 3702775, at *3 (V.I. July 8, 2016) ("The Revised Organic Act [is] the Virgin Islands' *de facto* constitution…. [T]he separation of powers doctrine applies to each

branch of our tripartite system of government."). This case is about the ROA's limits on *the Governor's* powers.

The District Court had federal question jurisdiction over this dispute.

II. Duties Specific to Presiding Judgeship

The Governor contends that *everything* the Presiding Judge does is "administrative." (Opening Brief at p. 25-30.) "These functions are far removed from the core judicial function of adjudicating private rights and issuing binding final judgments." (*Id.* at p. 26.) His "*duties are essentially executive, and could be administered by the Governor himself*…." (*Id.* at p. 30; *emphasis added*.)

That is where the Governor's entire case implodes.

Can the Governor order a change of venue in a criminal trial? Review and set aside a bail ruling? Decide which judges are assigned which cases? Oversee judges' docket-management and procedural rules-compliance? Discipline magistrates? Issue writs of mandamus to magistrates presiding over probate proceedings? Promulgate local rules of procedure?

Each of these is obviously a judicial task, and each falls within the broad array of responsibilities and functions *specifically assigned by statute or rule* to the Presiding Judge (as discussed at length in the post-hearing briefing at trial, and as further elaborated *infra*). The Governor's argument—his patently absurd argument—that those functions lie within *his* domain is a paradigmatic claim of

unchecked and unbalanced power. *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612, 684, 46 L. Ed. 2d 659 (1976).[10]

III. Separation of Powers: First Principles, Observance in Territories

Separation of powers is a "sacred maxim of free government." The Federalist No. 47 (Madison). The Constitution of Massachusetts, drafted by John Adams nearly a decade before the U.S. Constitutional Convention, captures the essence of the doctrine:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Part the First, Article XXX, of the Massachusetts Constitution of 1780.

Chief Justice Marshall in *Marbury v. Madison*, reciting what is by now an American legal proverb, borrowed from Adams: "The government of the United

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[10] Under the newly-enacted Virgin Islands Court Unification Bill, many functions of the Presiding Judge are being transferred over to the Chief Justice of the Supreme Court. The Governor addresses that Act in detail, and does so in his *Jurisdictional Statement*, of all places. (Opening Brief at 4-6.) The Governor admits that "[t]his statute does not affect this Court's jurisdiction or the merits. The law does not apply retroactively." *Id.*, at p. 5. He also admits that the statute does not moot the issues. *Id.*, at p.6.

So why muddy the waters with all of this? The Act is relevant, if at all, only to the extent that it expresses a basic policy of the legislature: "*Nothing contained in this title may be construed to grant authority to the Governor of the Virgin Islands to remove … the Presiding Judge of the Superior Court….*" Act No. 7888, Section 19(b) (*emphasis added*); JA 199.

States has been emphatically termed a government of laws, and not of men." 5 U.S. 137, 176, 2 L. Ed. 60 (1803). That principle expresses the sum and substance of Presiding Judge Dunston's entire position in this case.[11]

"[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers 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. at 122, 96 S. Ct. at 684 (citing The Federalist No. 51 (Madison)). No one branch "ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." *United States v. Johnson*, 383 U.S. 169, 178, 86 S. Ct. 749, 754, 15 L. Ed. 2d 681 (1966) (quoting The Federalist No. 48 (Madison)).[12]

In the Virgin Islands, separation of powers is applied, through the ROA, "as a general rule inherent in the American constitutional system." *Magras*, 124 F.3d at

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[11] The historical provenance of the Rule of Law principle is ancient and impressive: ARISTOTLE, POLITICS 3.16 ("[I]t is more proper that law should govern than any one of the citizens."); PLATO, LAWS 4.715d ("[I]f law is the master of the government and the government its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."); CICERO, THE SPEECHES 379 (H.G. Hodge, trans.) (1966) ("[W]e are all servants to the law so that we might be free."). *See*, Joshua J. Schroeder, J.D., America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is, 43 Cap. U. L. Rev. 833, 888, n.193 (2015) (quoting above).

[12] The essays compiled in The Federalist are readily available in full text on the Internet. *E.g.*, http://www.gutenberg.org/files/1404/1404-h/1404-h.htm (*last visited August 31, 2016*). Appellee will for the most part dispense with citations to book editions.

466, quoting *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201, 48 S. Ct. 480, 482, 72 L. Ed. 845 (1928).[13]

> Some of our state Constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. ... And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital-not merely a matter of governmental mechanism.

Springer, 277 U.S. at 201, 48 S. Ct. at 482 (*internal citations omitted*). The rule of separation of powers is generally one of "inviolate character." *Id.*

Separation of powers is intended not only to "protect each branch of government from incursion by the others," but to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222, 131 S. Ct. 2355, 2365, 180 L. Ed. 2d 269 (2011). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (Kennedy, J., concurring).[14]

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[13] *Springer's* formulation of the separation of powers doctrine closely tracks the Massachusetts Constitution. *See id.*, 277 U.S. at 201–202, 48 S. Ct. at 482.

[14] *Accord, e.g., Boumediene v. Bush*, 553 U.S. 723, 742, 128 S. Ct. 2229, 2246, 171 L. Ed. 2d 41 (2008) ("[A]llocated powers among three independent branches … serves not only to make Government accountable but also to secure individual liberty."); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 809 F.2d 979, 987 (3d Cir. 1986) (separation of powers principles are "bulwarks to … freedom").

The Virgin Islands Revised Organic Act has a Bill of Rights protecting the basic rights and liberties of the individual, and which "makes[s] the federal Constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory." *In re Brown*, 439 F.2d 47, 50–51 (3d Cir. 1971); ROA, Section 3, 48 U.S.C. § 1561.

IV. Independence of the Judiciary: First Principles, Historical Roots

When it comes to separation of powers, individual rights are at their most vulnerable when judicial independence is compromised by the political branches. "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217–218, 101 S.Ct. 471, 481–482, 66 L.Ed.2d 392 (1980). "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Hamilton, quoting Montesquieu).

In the years leading up to the American Revolution, King George III of course employed the colonial courts not as guardians of the rights and liberties of the individual, but as instruments of their abuse. He punished judges who failed to do his bidding by removing them from office or cutting their salaries. As explained by the late Professor Archibald Cox, colonial lawyers were acutely aware of the Crown's hypocrisy in refusing to grant Colonial judges the critical tenure protections

that had been granted to English judges under the Settlement Act of 1701. That Act was "[o]ne of the great landmarks of British liberty," which stipulated that "judges should not be removed except upon address of the Houses of Parliament."[15]

Indeed, one of the chief grievances listed in the Declaration of Independence was that King George III had made colonial judges "dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[16] Thus, in the American Revolution, colonists "fought the battle for judicial independence as a guarantee against executive oppression."[17]

Judicial independence is indeed required in the Universal Declaration of Human Rights of the United Nations.[18]

V. Purported Power to Remove Presiding Judge at Will Antithetical to Judicial Independence

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

It is axiomatic that the power to remove is the power to control. *Edmond v. United States*, 520 U.S. 651, 664, 117 S. Ct. 1573, 1581, 137 L. Ed. 2d 917 (1997) ("The power to remove officers, we have recognized, is a powerful tool for

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[15] *Id.*

[16] Cox, at p. 570, quoting THE DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776).

[17] *Id.*

[18] U.N. Universal Declaration of Human Rights, Article 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal…."). http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (*last visited 7/3/16*).

control."); *Bowsher v. Synar*, 478 U.S. 714, 726, 106 S.Ct. 3181, 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."); *Silver v. U.S. Postal Serv*., 951 F.2d 1033, 1039 (9th Cir. 1991) ("The power to remove is the power to control.... [R]emoval power need not be exercised to exert effective control ....").

The power to remove *at will* is the power to control *at will*. "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). Removal power creates a superior-subordinate relationship. *Bowsher*, 478 U.S. at 730, 106 S.Ct. at 3190 ("In Constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.").

The very idea that the Presiding Judge should "fear" the Governor in performing his duties, or that he is in any way "subservient" to him, is appalling.

B. Removal Power Not Incident to Appointment Power If Judicial or Quasi-Judicial Functions Involved

As a general rule, "the power of removal from office is incident to the power of appointment." *Pievsky v. Ridge*, 98 F.3d 730, 734 (3d Cir. 1996). There is indeed 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 attempt to limit President's power to remove Postmaster General); *also, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (restrictions imposed by Congress on presidential removal power over Public Company Accounting Oversight Board created by Sarbanes-Oxley Act violated separation of powers); *Chabal v. Reagan*, 841 F.2d 1216, 1219 (3d Cir. 1988) (affirming the President's "unrestrictable power ... to remove purely executive officers") (quoting *Humphrey's Executor*, 295 U.S. at 632, 55 S.Ct. at 875).

In other contexts, Congress may properly restrict the removal power and "the question … [becomes] whether Congress intended to restrict the President's removal authority in the particular situation." *Chabal v. Reagan*, 841 F.2d at 1219. Congressional intent to restrict the removal power may be express, or it may be inferred by the courts from the nature of the appointee's functions.

The seminal case on point is *Humphrey's Executor*. There, President Franklin Roosevelt sought to remove a member of the Federal Trade Commission to substitute an appointee of his own preference, despite a statute restricting his removal except for cause. The Court, in declaring the removal unlawful, examined the nature of the FTC's duties in detail, concluding that they were "quasi-judicial" (as well as "quasi-legislative") in nature. The FTC was "authorized to act as a

master in chancery under rules prescribed by the court, [and] acts as an agency of the judiciary." *Humphrey's Executor*, 295 U.S. at 628, 55 S. Ct. at 874.

> We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power … continue in office only at the pleasure of the President. We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it 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.

Id., 295 U.S. at 629, 55 S. Ct. at 874.

In so holding, the Court adopted the principles of *Marbury v Madison*—previously seen as mere dicta by many courts and commentators—on the limitations of executive removal power in judicial appointments:

> In *Marbury*, Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that 'their acts are his acts' and his will, therefore, controls….

Id., 295 U.S. at 631, 55 S. Ct. at 875.

Subsequently, in *Wiener v. United States*, 357 U.S. 349, 353, 78 S. Ct. 1275, 1278, 2 L. Ed. 2d 1377 (1958), the Court confronted a "variant" on *Humphrey's* in which Congress was silent on any limitations on executive removal power. *Id.*, 357 U.S. 349, 352, 78 S. Ct. 1275, 1278 ("Nothing was said about removal."). Wiener, a Truman appointee, served on the War Claims Commission, a body established to decide American citizens' claims for compensation for injury or damage caused by enemy action in World War II. Eisenhower replaced him—not for "cause," but simply because he wanted someone of his own choosing.

Justice Frankfurter, in a unanimous opinion holding Eisenhower's conduct unlawful, discussed *Humphrey's Executor* at length.

> *Humphrey's* case was a *cause célèbre*—and not least in the halls of Congress. And what is the essence of the decision in *Humphrey's* case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' … 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.*

Wiener, 357 U.S. at 353–54, 78 S. Ct. at 1278 (*emphasis added*). Justice Frankfurter noted further that the Court had "explicitly disapproved the expressions in *Myers*

supporting the President's inherent constitutional power to remove members of quasi-judicial bodies." *Wiener*, 357 U.S. at 352, 78 S. Ct. at 1277 (*internal quote marks omitted*). The Commission's task of administratively deciding claims was of an "intrinsic judicial character." *Wiener*, 357 U.S. at 355–56, 78 S. Ct. at 1279.

The rationale for this "sharp differentiation" between appointees who are part of the "executive establishment" and those with quasi-judicial duties is basic. The removal power, through which the President directs and controls subordinates, is essential to *political accountability.*

> The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed.1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

Free Enter. Fund, 561 U.S. at 497–98, 130 S. Ct. at 3155. That point was reiterated by this Court in *Pievsky v. Ridge*, which upheld a governor's removal power over a Delaware River Port Authority commissioner as a necessary tool of political

accountability—i.e., it assured his "responsiveness" to the interests of his own state as a party to the interstate compact creating the Authority. 98 F.3d at 736.

Judicial accountability differs from political accountability, and it differs profoundly. The judiciary is solely accountable to the Rule of Law, and must rise above the politics of the day. "[J]udges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; judges represent the Law." *Republican Party of Minnesota v. White*, 536 U.S. 765, 797, 122 S. Ct. 2528, 2546, 153 L. Ed. 2d 694 (2002) (Ginsburg, dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 411, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) (Scalia, J., dissenting)); and *id.* (Judges must "stand up to what is generally supreme in a democracy: the popular will.") (quoting Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L.Rev. 1175, 1180 (1989)); *Dennis v. United States*, 341 U.S. 494, 525, 71 S. Ct. 857, 875, 95 L. Ed. 1137 (1951) (Frankfurter, J., concurring) ("Courts are not representative bodies.… Their essential quality is detachment, founded on independence."). *Fiat justitia, ruat coelum*—"Let justice be done, though the heavens may fall."

C. Revised Organic Act Adopts *Humphreys Executor*

The ROA vests the executive power in the Governor, giving him or her "general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the *executive branch* of the government of the Virgin Islands."

48 U.S.C. § 1591 (*emphasis added*). The Governor's appointment and removal powers are delineated in two sections of the ROA. Under § 1591: "He shall appoint, and may remove, all officers and employees of the executive branch of the government of the Virgin Islands, except as otherwise provided …." *Id.*

Under § 1597 (effecting the 1954 "reorganization of the government"), the Governor is granted authority to create certain executive departments. 48 U.S.C. § 1597(a). The Governor is given both appointment *and removal* power as follows:

> The heads of the *executive departments* created by this chapter shall be appointed by the Governor, with the advice and consent of the legislature. Each shall hold office during the continuance in office of the Governor by whom he is appointed and until his successor is appointed and qualified, unless sooner removed by the Governor.

48 U.S.C. § 1597(c) (*emphasis added*).

Juxtaposed within that same subsection is an express grant to the Governor of *appointment* power—*but not removal power*—as follows:

> The chairman and members of any board, authority, or commission established by the laws of the Virgin Islands shall, if the laws of the Virgin Islands hereafter provide, also be appointed by the Governor with the advice and consent of the legislature, if such board, authority, or commission has *quasi-judicial functions*….

48 U.S.C. § 1597(c) (*emphasis added*).

"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." *Rea v. Federated Inv'rs*, 627 F.3d 937, 940 (3d Cir. 2010).

The reference in the ROA to "quasi-judicial functions"—an essential, constitutionally-determinative term of art in *Humphrey's Executor*—must be seen as purposeful and deliberate. As noted by Justice Frankfurter, *Humphrey's* was a "*cause célèbre*" in the "halls of Congress." Congress was not constitutionally illiterate when it enacted the ROA. *Kendall v. Russell*, 572 F.3d at 136 (stating that it was "extremely doubtful" that Congress ignored the question of removing judges in the ROA, in light of Article III of the Constitution).

The subject of executive power to remove judges is not completely absent from the ROA. The ROA withholds from local District Court judges Article III's life tenure for good behavior, and instead provides for a finite term (currently 10 years) and allows the President to remove them, *but only for cause.* 48 U.S.C. § 1614(a). That, precisely, is the baseline standard of *Humphrey's Executor*.[19]

Removal "for cause" is fundamentally different from removal "at will," which by definition allows removal for any reason or no reason at all.[20] In the area of

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[19] "[I]t appears that no President has ever actually sought to exercise that power by testing the scope of a 'for cause' provision." *Free Enter. Fund*, 561 U.S. at 524-25, 130 S. Ct. at 3170.

[20] *Davis v. Devine,* 736 F.2d 1108, 1112 (6th Cir. 1984); *cf., Mistretta v. United States*, 488 U.S. 361, 410, 109 S. Ct. 647, 675, 102 L. Ed. 2d 714 (1989) ("In order to safeguard the independence of the Commission from executive control, Congress specified in the Act that the President may remove the Commission members only for good cause.").

judicial discipline or removal, "cause" presupposes demonstrable misconduct or incapacity—of which there is *absolutely no evidence* in this case—and it requires judicial review to prevent arbitrary action. *See Kendall v. Russell,* 572 F.3d at 137 ("[T]he authority to discipline judges is fundamentally a judicial power.").[21]

The obvious intent of the ROA was, and is, to deny at-will removal power to a governor when it comes to appointees with duties of an "intrinsic[ally] judicial character." *Wiener*, 357 U.S. at 355, 78 S. Ct. at 1279, citing *Humphrey's Executor*, 295 U.S. at 629, 55 S.Ct. at 874.

Humphrey's Executor is still the law of the land.[22] It is enshrined in the ROA.

E. Purported At-Will Removal Power over Presiding Judge a Threat to Both Decisional and Institutional Independence

The Governor's entire case is premised on an incomplete and inaccurate portrayal of the actual duties of the Presiding Judge—all of which are specifically prescribed by statute or court rule. Those duties are now more fully discussed.

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[21] *Cf.*, Rules for Judicial–Conduct and Judicial–Disability Proceedings, 249 FRD 662 (affording extensive due process rights, including review by Judicial Conference, to federal judges facing disciplinary complaints).

[22] *E.g.*, *Free Enterprise Fund,* 130 S. Ct. at 3148-49 ("The parties agree that the [SEC] Commissioners cannot … be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' … and we decide the case with that understanding.").

1. Venue Authority

The Presiding Judge must approve *any* change of venue, upon a showing that it is "in the interest of justice." 4 V.I.C. § 78; *In re People of Virgin Islands,* 51 V.I. 374, 391 (V.I.2009). This is a discretionary judicial determination. In the civil arena, judges have "discretion to decide a motion to transfer based on an individualized, case-by-case consideration of convenience and fairness." *Harris v. Nat'l R.R. Passenger Corp.,* 979 F. Supp. 1052, 1053 (E.D. Pa. 1997); *Plum Tree, Inc. v. Stockment,* 488 F.2d 754, 756 (3d Cir. 1973) (court deciding venue "vested with a wide discretion, which is rarely disturbed").

In criminal cases, a venue issue takes on constitutional gravitas. *Skilling v. United States,* 561 U.S. 358, 378, 130 S. Ct. 2896, 2913, 177 L. Ed. 2d 619 (2010) (transfer of venue motion to be granted "if extraordinary local prejudice will prevent a fair trial—a basic requirement of due process"); *United States v. Miller,* 111 F.3d 747, 749 (10th Cir. 1997) ("[V]enue is a right of constitutional dimension…."); *In re People of Virgin Islands*, *supra,* 51 V.I. at 391 (recognizing requirement of Presiding Judge approval; stating that change of venue may be required to protect 6th Amendment right to impartial jury).

When the Presiding Judge decides whether to approve or disapprove a change of venue, he cannot do so under the threatening cloud of retaliatory removal by the Governor—express or implied, blatant or subtle. "There can, of course, be no

disagreement … as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler v. Judicial Council of Tenth Circuit of U. S.*, 398 U.S. 74, 84, 90 S. Ct. 1648, 1653, 26 L. Ed. 2d 100 (1970). This principles applies *a fortiori* to litigation in which the executive branch is a party—i.e., every criminal case and a great many civil cases.[23]

2. Review of Bail Decisions

The same is true as to the Presiding Judge's power (shared with the assigned judge) of review of a magistrate's ruling setting or denying bail. Super. Ct. Rule 141(e). This too is a purely judicial function, and involves a discretionary judicial determination of a specific constitutional right. U.S. Const. amend. VIII ("Excessive bail shall not be required…."); ROA Bill of Rights, 48 U.S.C. § 1561 ("[a]ll persons shall be bailable by sufficient sureties"; qualified exceptions for murder/capital offenses). A bail issue calls for a multi-factorial, discretionary ruling by the judge (here the Presiding Judge upon review). *Tobal v. People of Virgin Islands,* 51 V.I. 147, 2009 WL 357975, at *5 (V.I. 2009) (*per curiam*) (factors include risk of flight, danger to society, seriousness of offense). The executive branch, in its law

[23] *E.g., Gov't of Virgin Islands v. Williams,* No. CIV.A. 2004-69, 2006 WL 522375, at *3 (D.V.I. Feb. 24, 2006) ("In the Virgin Islands, the prosecutorial power is located solely in a department of the executive branch known as the Department of Justice and headed by the Attorney General."); 3 V.I.C. § 114(a) (Attorney General to represent executive branch in cases in which "Government, or any executive department, board, commission, agency, instrumentality or officer thereof is interested").

enforcement and prosecutorial role, is *always* directly interested in a bail issue. The Presiding Judge's decision on a bail issue is obviously a "task[] requir[ing] absolute freedom from Executive interference," *Wiener*, 357 U.S. 353, 78 S. Ct. 1278, including freedom from the chilling effect of at-will removal power.

3. Mandamus Authority over Magistrates

Preliminarily: the Magistrate Division itself has a broad spectrum of powers, some limited, some unusually expansive. It conducts arraignment and probable cause hearings, issues arrest and search warrants, and sets bail. 4 V.I.C. § 123(a)(1) & (4). It tries low-level misdemeanor cases. 4 V.I.C. § 123(a)(4). Subject to the approval of the Presiding Judge, a Virgin Islands magistrate may conduct a civil trial by consent of the parties. 4 V.I.C. § 123(d).[24]

The Magistrate Division has the *entire probate jurisdiction* of the Territory. 4 V.I.C. § 123(a)(4). A magistrate exercising probate jurisdiction adjudicates claims—including potentially massive claims—against the decedent's estate, 15 V.I.C. § 395, applying "the substantive law of the underlying claim (contract, tort, personal injury, etc.)*." Kalloo v. Estate of Small*, 62 V.I. 571, 581, 2015 WL 1514572, at *5 (V.I. 2015) (involving wrongful death claim against estate).

[24] *Cf.*, 28 U.S.C. §636(c) and Fed.R.Civ.P. 73 (relating to federal magistrates).

The Presiding Judge has special mandamus jurisdiction over magistrates. Superior Court Rule 322.11(a) empowers the Presiding Judge to "compel a magistrate to perform some duty the magistrate is required to perform but has neglected or refused to perform, or to enjoin action by a magistrate that exceeds his/her authority…." *Id.* This Rule mirrors the standard formulation of mandamus powers of the federal appellate courts.[25]

The Governor asserts that the mandamus authority of the Presiding Judge *vis-à-vis* the Magistrate Division is purely "administrative," even ministerial. (Opening Brief at 39). That is absurd. Patently. Mandamus is quintessentially a discretionary *judicial* power. *Kerr v. U. S. Dist. Court for N. Dist. of California*, 426 U.S. 394, 403, 96 S. Ct. 2119, 2124, 48 L. Ed. 2d 725 (1976) ("[I]t is important to remember that issuance of the writ is in large part a matter of discretion with the court….").

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[25] *E.g., Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction ... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."). The Governor observes that the mandamus power of the Presiding Judge over magistrates is circumscribed by statute. 5 V.I.C. § 1361 (mandamus "shall not control judicial discretion"). But that statute is not specific to the Presiding Judge—in fact by its terms its purports to apply to the *District Court*. In all events that statute is merely declaratory of familiar constraints. *E.g.*, *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004) ("Although courts have not confined themselves to an arbitrary and technical definition of 'jurisdiction,' only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify … this extraordinary remedy.") (*internal quote marks, citations,* omitted); *Connor v. Emanuel*, No. CIV. 547/1989, 1990 WL 10659023, at *2 (Terr. V.I. Feb. 26, 1990) ("[E]ven when the official action required involves the exercise of discretion, the relief may be ordered, albeit only to compel the functionary in question to act, but not to control or dictate the discretion to be exercised.") (citing 5 V.I.C. § 1361).

4. Case Assignment

The Presiding Judge has the responsibility to "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 case loads of the several judges …." 4 V.I.C. § 72b(a). Superior Court case assignments are, for the most part, made by rotation (a system that is by no means legally mandatory), but sometimes there is a need for discretionary assignments. JA 98. He also has the power to recruit a retired judge as Senior Sitting Judge, 4 V.I.C. § 74a, a power frequently exercised.

Contrary to Governor Mapp's portrayal (Opening Brief at 37), that power is neither *de minimis* nor—at least if the assignment is out-of-rotation—ministerial. It is a core, discretionary, judicial function, as illustrated by *People v. de Jongh*, No. ST-15-CR-309, 2016 WL 310422, at *4 (V.I. Super. Jan. 26, 2016). In that case, the Attorney General of the current administration prosecuted Governor Mapp's immediate predecessor (the charges were ultimately dropped). Presiding Judge Dunston exercised his discretion to appoint/assign a Senior Sitting Judge due to conflicts of the regular judges—hardly a ministerial act.

And in general:

> The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, [or] a search-and-seizure case … may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings

> on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like.

Chandler, U.S. at 140–41, 90 S. Ct. at 1682 (Douglas, J., dissenting).

If the Presiding Judge, in assigning cases (or setting up the assignment system), were to work under the thumb of the Governor via some purported at-will removal power, would that not be a recipe for prosecutorial judge-shopping?

5. Disciplinary Authority over Magistrate Division

The Presiding Judge has qualified appointment, removal and disciplinary power over magistrates.[26] He or she may discipline or remove a magistrate upon the recommendation of the Magistrate Disciplinary Board, subject to the approval of a majority of Superior Court judges and judicial review by the Supreme Court.[27]

The authority to discipline judges belongs to the judicial branch under the ROA. This court emphatically so held in *Kendall*. *Id.*, 572 F.3d at 137 (striking down the Virgin Islands legislature's attempt to usurp that prerogative). The same reasoning applies with full force against encroachments by the executive branch. The Governor cannot, in effect, have super-removal powers in this setting. The Governor cannot be in a position to say to the Presiding Judge, for example, "If you remove/don't remove magistrate X, I'll remove *you*."

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[26] 4 V.I.C. § 122(a) & (e); Super. Ct. R. 314.

[27] 4 V.I.C. § 126; Super. Crt. Rules 319(b), (c) & (d); 319.2(b) & (c).

6. Administrative Oversight of Judges

The Presiding Judge is "responsible for the observance by the court of the rules … governing the practice and procedure of the Superior Court and prescribing the duties of its judges and officers." 4 V.I.C. § 72b(a). 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 … of the Court's Rules … or the prompt dispatch of the Court's business." *Id.* The Presiding Judge's authority does not include review of substantive rulings by regular judges. *In Re Fleming*, 56 V.I. 460, 2012 WL 917315, at *4 (V.I. 2012).

These duties resemble those assigned to the Judicial Councils in the federal system. 28 U.S.C. § 332(d)(1) ("Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.").[28] Judicial Councils are composed solely of judges. 28 U.S.C. § 332(a)(1). Congress thus empowered the courts to "put their own house in order." *Chandler*, 398 U.S. at 85, 90 S. Ct. at 1654.

[28] *Chandler, supra,* 398 U.S. at 84, 90 S. Ct. at 1653–54 (addressing Judicial Councils' "power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters….").

In the Virgin Islands, as in the federal system, the administrative oversight of judges—a function assigned to the Presiding Judge—is solely and uniquely a function within the province of the judicial branch.

7. Rule-Making

In the federal system, Congress in the Rules Enabling Act has of course assigned the procedural rulemaking power to the judiciary. 28 U.S.C. § 2072(a). In the ROA, Congress gave *concurrent* procedural rulemaking authority to the Virgin Islands legislature and the local courts. 48 U.S.C. § 1611(c). The Virgin Islands legislature, in turn, has acknowledged the Superior Court's power. 4 V.I.C. § 32(f)(1) ("The Superior Court shall adopt the rules of court for the Superior Court … consistent with … the [ROA]."). There is also authority that the judiciary has the *inherent* power to prescribe its own procedural rules. *E.g.*, *United States v. Klubock*, 832 F.2d 649, 652 (1st Cir.), *on reh'g*, 832 F.2d 664 (1st Cir. 1987) ("It is generally accepted that the district courts have broad rule-making powers … by reason of the inherent nature of the judicial process, ex-statute…."). The Presiding Judge has indeed promulgated a number of local rules, some quite significant.[29]

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[29] *See, 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 judicial 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 Magistrate Div. of Superior Court,* 2008 WL 10596429, at *7 (V.I. Super. Mar. 19, 2008) (adopting rules implementing new magistrate statute.); *In re Adoption of Superior Court Rule 20,* 2016 WL

There is always the lingering debate about whether procedural rule-making power is ultimately judicial or legislative in nature (due of course to the sometimes-illusory nature of the substance-procedure dichotomy).[30] But whether the authority to issue court procedural rules is ultimately judicial, legislative, or both, nobody ever says that it is executive. Thus, in practical terms: when the Presiding Judge issues a local rule, he or she must be free from fear of retaliatory executive action by the exercise of any at-will removal power.

8. Administrative Authority

Finally, there is that limited and discrete—yet significant—category of institutional management functions of the Presiding Judge that may be fairly seen as purely administrative in nature. The Virgin Islands Code 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 "supervise[s] and direct[s] the officers and employees of the court in the performance of their duties." (*Id*.). Other subsections of Section 72b grant the Presiding Judge certain contracting authority, 4 V.I.C. § 72b(b); and discretionary fiscal management authority to be exercised "as he deems appropriate to obtain maximum quality of judicial services from the appropriations

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1383737, at *1 (V.I. Super. Feb. 15, 2016) (adopting panel system for indigent criminal defense appointments).

[30] *E.g.*, *In re Richards*, 213 F.3d at 784 ("[T]he line separating procedure from substance is often unclear….").

made to the Superior Court in any fiscal year." 4 V.I.C. § 72b(d). The Presiding Judge also represents the Superior Court's critical fiscal interests, testifying in budget hearings before the legislature. JA 79.

The Presiding Judge appoints the Court Administrator, 4 V.I.C. § 91, who in turn has a broad range of subordinate duties relating to systemic efficiency, fiscal 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 appoints the Clerk, 4 V.I.C. § 86; the Marshal, 4 V.I.C. § 79(b); and probation officers, 4 V.I.C. § 79(c)—all of whom work under the Presiding Judge's supervision and control.[31]

Governor Mapp calls these duties "executive." (Opening Brief at 29-30.) The Presiding Judge in this respect *does* function as something of a CEO of the Superior Court. But *he*—not Governor Mapp—is that CEO. *See Humphrey's Executor*, 295 U.S. 630, 55 S. Ct. 874 ("The sound application of a principle that makes one master in his [or her] own house precludes him from imposing his control in the house of another who is master there.").

Governor Mapp notes (as did the District Court) that historically, the Department of Justice handled the administrative aspects of the federal judiciary. That is true. But it is also true that Supreme Court justices in the early days rode

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[31] 4 V.I.C. §§ 79(b) & (c); 351(b), 411.

circuit on horseback, holding court in taverns or local officials' homes.[32] The Framers in 1789 of course could not have foreseen the institutional growth and complexity of the modern federal judiciary (and indeed could not even agree in the Constitutional Convention on whether to *create* "inferior courts," leaving that question up to Congress in Article III).[33]

In 1939, Congress took court administration away from the executive branch and turned it over to the judicial branch, where it belongs. It created the Administrative Office of the United States Courts, which is "supervised by a Director and a Deputy Director appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference." 28 U.S.C. § 601. Congress assigned court administration to the judicial branch *precisely because* of separation of powers concerns. *Tashima v. Admin. Office of U.S. Courts*, 967 F.2d 1264, 1271 (9th Cir. 1992) (Administrative Office "established, in large part, to relieve the Judiciary from possible interference by the Department of Justice….").[34]

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[32] ABA Report on the Commission of Separation of Powers and Judicial Independence, Appx. A, p. 72, n.39.

[33] Erin Morrow Hawley, The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction, 56 Wm. & Mary L. Rev. 2027, 2072 (2015) (discussing the "Madisonian Compromise" giving Congress the power to "ordain and establish" the lower courts).

[34] Charles Gardner Geyh, Courts, Congress, and The Constitutional Politics of Interbranch Restraint, 87 Geo. L.J. 243, 259–60 (1998) (stating that the transfer of "financial control of the judiciary from the Justice Department to an Administrative Office of United States Courts" was justified by "separation of powers principles and the … desire to restructure the relationship between Congress and the courts so as to preserve and protect the 'true balance' between them"); The Honorable Anthony J. Scirica, Judicial Governance and Judicial Independence, 90 N.Y.U. L.

There has been no apparent need for the federal courts to draw any constitutional boundary lines in the area of court administration because Congress has definitively drawn those lines. There has been no controversy. But that is decidedly untrue when it comes to state courts applying state constitutions. The unequivocal statement of the Michigan Supreme Court appears to represent the clear majority view on the subject: "[T]he fundamental and ultimate responsibility for all aspects of court administration, including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch." *Judicial Attorneys Ass'n v. State*, 459 Mich. 291, 299, 586 N.W.2d 894, 897 (1998).[35]

The Governor cannot encroach upon this area. He cannot, for example, tell the Court Administrator or Clerk: "Do as I say if you want to keep your job. I am your boss's boss." The Superior Court, acting through the Presiding Judge, has the

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Rev. 779, 780 (2015) ("[B]y establishing and bolstering the courts' administrative and oversight capacities, Congress has fostered and validated the federal judiciary's capacity for self-governance."); and *see, generally,* Leah M. Litman, Taking Care of Federal Law, 101 Va. L. Rev. 1289, 1339 (2015) ("Congressional practice may be especially relevant to separation-of-powers questions. … [C]ongressional practice is a way of giving more concrete content to the concept and contours of the separation of powers.").

[35] *Accord, e.g., 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…."); *Mowrer v. Rusk*, 95 N.M. 48, 618 P.2d 886 (N.M. 1980) (striking as violative of state separation of powers a 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"); *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 [appropriated] 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.").

right to self-governance. The Governor cannot lawfully extend his chain of command to "aggrandize[]" his own powers and "encroach[]" upon the judiciary. *Buckley v. Valeo*, 424 U.S. at 122, 96 S. Ct. at 684.

F. *Mistretta* Distinguished: Presiding Judge Not Moonlighting on any Extrajudicial Body

Governor Mapp places great reliance upon *Mistretta v. United States* (*supra*). The District Court correctly reasoned that *Mistretta* was distinguishable: the judges in *Mistretta* did not perform a "judicial" role, and Presiding Judge Dunston does. Memorandum Opinion at 26 [JA 29].

Mistretta is not merely distinguishable. It is illustrative by contrast.

That case primarily involved a challenge not present here—that Congress had unlawfully delegated its legislative powers to the judiciary via the Sentencing Commission—an excessive-"aggrandizement" argument that the Supreme Court rejected. 488 U.S. at 393, 109 S. Ct. at 666. Secondly (and seemingly secondarily), the Commission's legitimacy was challenged on the basis that its members, some being Article III judges, were subject to presidential removal, thus (in the appellant's view) compromising judicial independence.

The Supreme Court stated that "the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Mistretta*, 488 U.S. at 393, 109 S. Ct. at 666. The Court characterized the functions of Commission members as "nonadjudicatory" and

"extrajudicial" (noting that, historically, Chief Justice John Jay once contemporaneously fulfilled an ambassadorial role, Robert Jackson served as Nuremburg prosecutor, and Earl Warren headed the investigation of the Kennedy assassination). *Id.*, at 488 U.S. at 399, 109 S. Ct. at 669.

By contrast, *many* of Presiding Judge Dunston's core duties, specific to the Presiding Judge position, are, as established, inherently judicial. These particular duties are not "extrajudicial" in any sense; they are performed for the Superior Court. Not for some special external commission, agency, or other nonadjudicatory body. When it comes to those functions, the Presiding Judge—unlike the judges moonlighting on the Sentencing Commission—is solely accountable to the courts.

The Supreme Court in *Mistretta* observed that the President's power to remove a judge for cause from the Commission would have nothing more than a "negligible" impact on his Article III duties. 488 U.S. at 410, 109 S. Ct. at 674–75 ("The Act does not … authorize the President to remove, or in any way diminish the status of Article III judges, as judges."). That is decidedly untrue here. Removing the Superior Court Presiding Judge from his position, although it would not affect his status as a regular judge, would be a flat-out demotion. It would involve a clear and categorical loss of his official judicial title as Presiding Judge, along with its enhanced stature and leadership authority. It would also, as a practical matter, involve a $10,000 pay cut, contrary to 4 V.I.C. §72(c). JA 64, 163-164.

The Supreme Court further observed that the Commission members were "safeguard[ed]" by the statutory provision that they could be removed "only for good cause." *Mistretta*, 488 U.S. at 393, 109 S. Ct. at 666. In the present case, Governor Mapp asserts the *absolute power* to fire the Presiding Judge at will.

The Governor also places disproportionate reliance upon a Pennsylvania case relating to its "Traffic Court" and "police courts" and addressing (seemingly by pure dicta) the local gubernatorial power to remove the Chief Magistrate of a Board of Magistrates. That Board, like the Commission in *Mistretta*, was a separate entity external to the court itself— a purely administrative body with *no judicial duties*.

> The Board of Magistrates is not a constitutional entity nor is it in any sense a court or judicial forum. The Board, as such, is not invested with judicial power nor does it render judicial determinations. Rather, it is a creation of the Legislature composed of twenty-eight magistrates organized into a board for administrative purposes only.

Daly v. Hemphill, 411 Pa. 263, 269–70, 191 A.2d 835, 840 (1963).

Daly is no more than a state-specific holding regarding the distinctive administrative set-up of local, decidedly inferior courts (Traffic Court and "police courts"). It has not gained much acceptance or even attention outside Pennsylvania, and even *within* that State there is substantial qualifying authority.[36]

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[36] *Cf.*, Pa. Const. art. VI, § 4 ("Appointed civil officers, *other than judges of the courts of record*, may be removed at the pleasure of the [governor]….") (*emphasis added*); *Com. ex rel. Specter v. Vignola*, 446 Pa. 1, 6, 285 A.2d 869, 871 (1971) ("Walsh … was appointed President

VI. Local Statutes Must Not Be Construed or Applied Inconsistently with ROA

The Virgin Islands Code requires at least 6 Superior Court judges, appointed for 6 years by the Governor with the advice and consent of the legislature, 4 V.I.C. §§ 71, 73, who "shall continue in office until their successors are appointed and confirmed or until they are renominated and confirmed." 4 V.I.C. § 72(a). "The Governor shall designate one of the judges of the court to serve as presiding judge of the court to preside for *such term … as may be otherwise provided by law, or by rules of the court*." 4 V.I.C. § 71 (*emphasis added*).[37]

There are no "rules of the court" on point. And there is but a *single* "law," *viz.*, Section 73 of Title 4, which states: "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. "This title" (Title 4) includes Chapter 36, creating the "Commission on Judicial Disabilities" with authority to remove or involuntarily retire a judge for specified malfeasance, misfeasance, nonfeasance or incapacity. 4 V.I.C. § 656. Chapter 36 was of course abrogated by *Kendall* on separation of powers grounds; Supreme Court of the Virgin Islands responded by

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Judge and the Traffic Court is not a court of record"; *held:* President Judge *not* removable at will); *Jefferson County Court Appointed Emples. Ass'n, supra,* 603 Pa. 500-501 (judicial branch has "constitutional duty to allocate funds to administer justice" and "constitutional right to hire, fire, and supervise its employees").

[37] Westlaw archives reveal an old statute, formerly codified at 4 V.I.C. § 72a, providing that the presiding judge of the "municipal court" serves for 2 years.

creating the Judicial Conduct Commission as an extension of the judicial branch, while adopting the same substantive grounds for discipline or removal of former Chapter 36. VISCR 209, *et seq.*[38]

Governor Mapp's position, at its core, is premised on legislative silence on the precise question of removal of the Presiding Judge. To fill that perceived void in the statutory scheme, he advances a hyperliteral, overly syllogistic, and very expansive interpretation of his own powers. He contends that his authority to "designate" the Presiding Judge involves a definitive term of art encompassing the power to remove at will. (Opening Brief at 20-23.) Research discloses no authority attaching any special legal significance to the word "designate," and standard dictionary definitions make that word synonymous with "appoint."[39]

Although the Governor is correct in observing that legislative approval is required when the Governor nominates someone to be "appointed" as a Superior Court judge, and not when the Governor "designates" someone within that group of judges to be Presiding Judge (Opening Brief at p. 21), he is incorrect in his conclusion that this distinction necessarily implies removal power over the Presiding

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[38] No proceedings of any nature in either Commission have been conducted or initiated against Judge Dunston. Ever.

[39] Merriam-Webster's: to "designate" is "to choose (someone or something) for (a particular role or purpose)." http://www.merriam-webster.com/dictionary/designate%20as; to "appoint" is "to choose (someone) to have a particular job; to give (someone) a position or duty." *Id*, at http://www.merriam-webster.com/dictionary/appoint.

Judge. If that *is* a distinction, it a distinction neither of principle nor of consequence in this case. There is no sound reason why a "designee," any more than an "appointee," should be outside the protections of the separation of powers doctrine, the core constitutional tenets of judicial independence, or the ROA's provisions adopting the protective standard of *Humphrey's Executor*. 48 U.S.C. § 1597(c).

According to Governor Mapp, Section 73, which provides for a term of 6 years for "[t]he judges of the Superior Court," applies only to regular judges. He says that presiding judges are excluded. He relies upon the maxim, *expressio unius est exlusio alterius* (to express one thing implies the exclusion of the other). But "judge" and "presiding judge" are not mutually exclusive categories. A presiding judge *is* (indeed must be) a judge.

And to exclude presiding judges from Title 4's statutory protections of term and tenure on the strength of the "*expressio unius"* rule would run afoul of at least two "dueling canons" of statutory construction: (1) "[E]xceptions are not to be implied. An exception cannot be created by construction." 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 47:11 (7th ed. 2007); and (2) "[A] word is known by the company it keeps" (the maxim, *noscitur a sociis*). *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 1582, 6 L. Ed. 2d 859 (1961). The latter principle counsels in favor of a "holistic" approach in interpreting a statute. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest*

Associates, Ltd., 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740 (1988); *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 591–92, 7 L. Ed. 2d 492 (1962) ("[A] section of a statute should not be read in isolation from the context of the whole Act…."); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (statutes not "read as a series of unrelated and isolated provisions"). Section 71 *cannot* be faithfully read in isolation when it explicitly refers to other sources for its content and meaning.

When Section 71 states that the Presiding Judge's term is as "otherwise provided *by law*," 4 V.I.C. § 71, it means that the term is established by the Rule of Law. Not by the Rule of Governor Mapp. The *only* "law" on point is Section 73, providing for a term of 6 years for Superior Court "judges" (with no express exception for presiding judges). Tenure is governed by Chapter 36 (now Supreme Court Rules 209, *et seq*.) allowing removal only for misconduct or incompetence.

Section 72(c) provides that regular judges are to receive a certain minimum annual salary, $35,000, with presiding judges to be paid a minimum of $37,500 (never *formally* amended to reflect current pay levels). 4 V.I.C. § 72(c). "No judge's compensation shall be reduced during his term of office without his consent." 4 V.I.C. § 72(c); *cf.*, U.S. Const. art. III, § 1 ("Compensation … shall not be diminished during [judges'] Continuance in Office."). A demotion from Presiding Judge to

regular judge with a corresponding reduction in pay (here, of $10,000), would violate the letter and spirit of Section 72(c).

Not a single statute in the entire Virgin Islands Code expressly grants the Governor the power to remove the Presiding Judge or any other judge—for cause, at will, or indeed at all. When the Virgin Islands legislature wants to give the Governor removal power, it knows perfectly well how to say so. A great many Virgin Islands statutes provide that particular appointees serve "unless sooner removed" (with no "for-cause" limitation) or, equivalently, serve at the Governor's "pleasure."[40]

The term and tenure of the presiding judgeship should be construed as coinciding with those of his underlying regular judgeship (6 years/removal only for cause). That is a common sense, internally-consistent, principled view of these statutes taken as a whole. It was the view of the former Governor in granting him a

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[40] **"UNLESS SOONER REMOVED":** *E.g.*, 3 V.I.C. § 112 (Attorney General); 3 V.I.C. § 113 (Assistant Attorneys General); 3 V.I.C. § 412 (Commissioner, Department of Health); 3 V.I.C. § 172 (Commissioner, Department of Finance); 3 V.I.C. § 229 (Director, Bureau of Motor Vehicles); 3 V.I.C. § 373 (Director, Bureau of Prisons); 3 V.I.C. § 270 (Commissioner, Department of Licensing and Consumer Affairs); 3 V.I.C. § 400 (Commissioner, Department of Planning and Natural Resources); 3 V.I.C. § 330 (Commissioner, Department of Tourism); 3 V.I.C. § 430 (Commissioner, Department of Human Services); 3 V.I.C. § 252 (Commissioner, Virgin Islands Police Department). **AT "PLEASURE":** *E.g.*, 32 V.I.C. § 245 (Director, Virgin Islands Lottery); 17 V.I.C. § 485 (Board, University of the Virgin Islands Research and Technology Park); 29 V.I.C. § 1102 (Board, Economic Development Authority); 30 V.I.C. § 103(a) (Board of Water and Power Authority); 29 V.I.C. § 497 (Board of Waste Management Authority); 3 V.I.C. § 13 (Director, Museum of Fine Arts); 3 V.I.C. § 28h (Archives Council); 3 V.I.C. § 27a (Governor's Awards Board); 3 V.I.C. § 359 (Commission on the Status of Women).

Commission as Presiding Judge for 6 years (Trial Exhibit 1, JA 182); it is the apparent intent of the legislature; and it is the only construction consistent with the ROA. *Cf., e.g., INS v. St. Cyr*, 533 U.S. 289, 299–300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (doctrine of constitutional avoidance applied to federal statutes).

CONCLUSION

The Governor violated the separation of powers and judicial independence principles of the Revised Organic Act of 1954 by arrogating to himself the power to remove the Presiding Judge at will. His conduct was properly enjoined.

This Court should affirm the Judgment of the District Court.

RESPECTFULLY SUBMITTED this 27th day of September, 2016.

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COMBINED CERTIFICATIONS

The undersigned certifies as follows:

1. This brief complies with the length limitations of FRAP 32(a)(7)(B), in that it contains 12,599 words (not counting those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), and is written a proportionally-spaced typeface, Times New Roman, 14-point font, all in compliance with FRAP 32(a)(5) & (a)(6).

2. I am admitted to the Bar of the United States Court of Appeals for the Third Circuit.

3. The electronic copy of this Brief for Appellant is identical to the paper copies being filed with the Court.

4. Based upon a virus check of the PDF electronic version being filed with the Court using Norton Symantec software, it is free from viruses.

September 27, 2016

/s/ Edward L. Barry
Edward L. Barry

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on September 27, 2016.

I further certify that all participants in the case are registered CM/ECF, and that service hereof will be made automatically upon them through that system.

September 27, 2016 *<u>/s/ Edward L. Barry</u>*
Edward L. Barry