

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. OE-0140

IN RE: SHELLEY M. JOSEPH

ON MOTION FOR PARTIAL RECONSIDERATION OF SUSPENSION ORDER BY
THE SUPREME JUDICIAL COURT

BRIEF FOR *AMICUS CURIAE*
MASSACHUSETTS BAR ASSOCIATION
WOMAN'S BAR ASSOCIATION OF MASSACHUSETTS
MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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CERTIFICATION OF AMICI INDEPENDENCE

The *Amici* have no economic interest in this case and declare that none of the conduct described in Appellate Rule 17 has occurred.

INTEREST OF AMICUS MASSACHUSETTS BAR ASSOCIATION

The Massachusetts Bar Association (“MBA”), founded in 1910 is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 14,000 members state-wide. It is comprised of a House of Delegates that consists of a president, president-elect, one vice-president, treasurer, secretary, the two most immediate, living past presidents, 18 regional delegates, seven at-large delegates, chairs of the 19 section councils and others. The MBA House of Delegates also has representative seats for every county bar association and many other statewide legal associations focused on specific practice areas along with all major diversity bar associations in the Commonwealth.

The mission of the MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions and the public. With the approval of the Association’s President and Chief Legal Counsel, the House of Delegates votes on whether the MBA should participate in litigation

through the filing of an *amicus curiae* brief. The House of Delegates has determined that the issues raised in this case affect the administration of justice in the Commonwealth of Massachusetts and has authorized filing of this brief.

INTEREST OF AMICUS WOMEN'S BAR ASSOCIATION

The Women's Bar Association of Massachusetts (WBA) is a 1,600 member statewide organization whose mission is to support the advancement of women in the legal profession and in a just society. With members in all stages of their careers and in settings from law firms and corporations to government and legal services, we are proud that for more than four decades, the WBA has submitted, filed, and joined many *amicus curiae* briefs in state and federal courts on legal issues that have a unique impact on women, including cases involving same sex marriage, sexual discrimination, family law, domestic violence, and employment discrimination. The WBA has also been active in advocating for issues that impact the administration of justice and equal access to justice in the legal system, particularly in matters where fundamental rights are at stake. Therefore, the WBA has an interest in the outcome of this case, and it represents an appropriate issue for which the WBA can offer its support.

INTEREST OF *AMICUS*
MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

The Massachusetts Academy of Trial Attorneys (Academy) is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

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ISSUE PRESENTED

Whether the Massachusetts Constitution prohibits the withholding of a judge's salary during her tenure in office?

Position of the *Amici*

Judge Joseph has sought reconsideration of the “without pay” provision of this Court’s order of April 25, 2019. In the view of the *Amici*, the order violated Judge Joseph’s constitutional right to the salary “ascertained and established by law” during the continuance of her commission, and the separation of powers clause of the Massachusetts Constitution.

SUMMARY OF THE ARGUMENT

I. A. The stability of a Judge’s salary was sacrosanct to the drafters of the Massachusetts Constitution. (pp. 14-15). Salaries were to be fixed, permanent, and secure during the continuance of their commissions so that judges would be able to make decisions free from influence or control and without fear for their livelihood. (pp. 15-17). Assurances of a certain and fixed salary not subject to the will of others were deemed essential to attracting the highest quality people to take the job and to insuring their ability to perform it once appointed. The Constitution categorically prohibits withholding salary from judges during the term of their commission. (pp. 17-20). The indictment was insufficient to justify an order of suspension without pay. (pp. 20-23). It is times like these when judicial

independence is most important, so that judges can truly decide cases on their view of the merits rather than be swayed by popular will. (pp. 23-25).

I. B. This Court's precedents have generally recognized that interruption of judges' salaries should not take place until the completion of proceedings and the Court has been cautious about imposing financial sanctions. (pp. 25-28). Under the federal constitution, federal judges can be removed only by impeachment, and no federal judge's salary has ever been suspended or withheld prior to the judge's impeachment conviction by the Senate. (pp. 28-31).

II.A. Statutes authorizing suspension of executive branch officials upon indictment do not apply to judges. (pp. 31-36).

II. B. The Commission on Judicial Conduct complements, rather than displaces, the two long-standing, constitutionally-based judicial removal procedures. (pp. 36-39). Were power over salary to be exercised by the Supreme Judicial Court or some other part of the judicial branch, whether favorably or unfavorably toward particular judges, the critical separation of powers central to the entire structure of government will have been breached. (pp. 39-41).

ARGUMENT

I. UNDER THE MASSACHUSETTS CONSTITUTION, NO JUDGE MAY BE SUSPENDED WITHOUT PAY UNLESS THE CONSTITUTIONALLY REQUIRED REMOVAL PROCESS OF ADDRESS OR IMPEACHMENT HAS BEEN COMPLETED.

Introduction

The case at bar involves an assertion by the judicial branch of authority to summarily suspend a judge indefinitely without pay. The relevant constitutional provisions include the Preamble; Articles 11, 29, and 30 of the Declaration of Rights; Part II, c. 1, § 2, art. 8; Part II, c. 2, § 1, art. 13; and Part II, c. 3, art. 1.

The Massachusetts Constitution is to be construed “in the light of the circumstances under which it was framed, the causes leading to its adoption, the imperfections hoped to be remedied and the ends designed to be accomplished.”

Opinion of the Justices, 308 Mass. 601, 611 (1941), quoting *General Outdoor Advertising Co., Inc. v. Department of Public Works*, 289 Mass. 149, 158 (1935).

A. The Constitutional Provisions for Judges’ Tenure and Salaries, When Read in Light of the Reasons Advanced for Their Adoption and the Background of Grievances That Gave Rise to the Colonial Revolution, Prohibit Suspension of Judges Without Pay Before Their Removal in Accordance with the Constitutionally Required Procedures of Address or Impeachment.

Art. 29 of the Declaration of Rights of the Massachusetts Constitution provides:

“It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the

best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.”¹

1) The Language Chosen for the Constitution, That Judges “Should Have Honorable Salaries Ascertained and Established by Standing Laws,” had a Clear Meaning and a Long History in Legal Usage.

In determining the meaning of a constitutional provision, the provision’s words “are to be given their natural and obvious sense according to the common and approved usage at the time of its adoption.” *Opinion of the Justices*, 308 Mass. at 611. The common meaning of “ascertain” in the second half of the 18th Century when the Massachusetts Constitution was adopted, according to Samuel Johnson’s Dictionary of the English Language, published in 1755, was “1. To make certain; to fix; to establish ... [and] 2. To make confident; to take away doubt” 1 S. Johnson, Dictionary of the English Language 164 (2d ed. 1755). Another dictionary from the era substantiates this interpretation, defining “to ascertain” as “to make certain, to fix, to establish; to make confident.” 1 T. Sheridan, A General Dictionary of the English Language (1784). One of the definitions in Webster’s

¹ The Massachusetts Constitution further provides that “Permanent and honorable salaries shall also be established by law for the justices of the Supreme Judicial Court.” Part II, c. 2, § 1, art. 13. The constitutional protections of judicial independence extend to all judges, not just justices of the Supreme Judicial Court. Part II, c. 3, art. 1. See, e.g., *Commonwealth v. Leach*, 246 Mass. 464, 471 (1923); *In Re Opinion of Justices*, 271 Mass. 575, 579-581 (1930); *In Re Enforcement of a Subpoena*, 463 Mass. 162 (2012).

1828 dictionary defines “ascertain” as “to fix; to establish with certainty; to render invariable, and not subject to will.” N. Webster, *An American Dictionary of the English Language* (1828). *See also* Webster’s *New International Dictionary* (2d ed. 1939) and Webster’s *Third New International Dictionary* (3d ed. 1961) for similar definitions.

The stability of a Judge’s salary was sacrosanct to the drafters of the Massachusetts Constitution. The phrases “good behavior” and “ascertained and established by standing laws” were taken from historic English laws that restricted the King’s complete discretion over judges’ tenure and salary. John Adams, the architect of the Massachusetts Constitution of 1780, was intimately familiar with this history.² He wrote of the importance of stable salaries to an independent judiciary in a letter of January 18, 1773 to the *Boston Gazette* lamenting that judges in the colonies did not enjoy such freedom from the King’s will because their salaries were dependent on “the crown and ministry.” Letter to the *Boston Gazette*, 18 January 1773 in *1 Papers of John Adams* 261-268 (R. J. Taylor ed. 1977), <https://founders.archives.gov/documents/Adams/06-01-02-0096-0003>.

² The history was succinctly summarized by Chief Justice Burger in a passage in *United States v. Will*, 449 U.S. 200, 218-219 (1980).

Adams emphasized that judges' salaries ought to be "absolutely secured to them during the continuance of their commissions."³

This experience confirmed for Adams and others the importance of protecting judicial compensation from interruption or manipulation. Indeed, the Declaration of Independence, in listing grievances against the King, complained: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence: A Transcription, <https://www.archives.gov/founding-docs/declaration-transcript>.

2) The Constitution Categorically Removed Any Uncertainty in The Minds of Judges About Receiving Their Salary by Providing for Permanent, Fixed, and Certain Salaries Established by Standing Laws and Continuing Throughout a Judge's Tenure.

The framers of the Massachusetts Constitution had lofty ideas about the quality of people wanted as judges. These ideal judges were expected to perform difficult tasks under great pressure, to stand up against powerful forces, and to make difficult and unpopular choices when required.

John Marshall, whose rich experience as lawyer, legislator, and Chief Justice of the United States uniquely qualified him to speak, said:

“Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most

³ See C. F. Adams, *The Works of John Adams, Second President of The United States* 515, 528 (1850).

unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?"⁴

Our own Rufus Choate spoke eloquently on the matter in his famous speech before the constitutional convention in 1853, reprinted in 2 Mass. L. Rev. 220 (1917).

The financial rewards of judicial service were not likely to match what lawyers of that caliber could make in practice.⁵ In order to entice lawyers to give up their livelihoods in practice, the founders believed, it was necessary to make them confident that their salaries would be fixed, permanent, and not subject to interruption during their tenure. John Adams expressed the idea forcefully in his influential pamphlet, *Thoughts on Government*.⁶

⁴ Quoted in *Evans v. Gore*, 253 U.S. 245, 250-251 (1920).

⁵ Chief Justice Shaw estimated he would have made twice as much in practice as he did on the Supreme Judicial Court, though he did not regret his choice. See F.H. Chase, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860*, 260 (1918). He didn't take kindly to the legislature's efforts to dock his pay, either. *Id.* at 259-261.

⁶ "The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law." *Thoughts on Government* (1776) in 4 *Works of John Adams* 189, 198-199 (C. F. Adams ed. 1851).

The founders also knew the importance of a secure salary as a guarantee of independent judgment. In fact, the security and permanency of the salaries of the governor and the judges was so important that an Article of the Constitution instructed legislators to make it the first order of business after the Constitution went into effect to pass laws to protect them. Part II, c. 2, § 1, art. 13. A judge, like a governor, holds an office that demands the utmost independence of action and judgment for the benefit of the people. The Constitution prohibits others from exercising financial authority to influence or retaliate against a judge or a governor because such subservience would impair the ability of the office holder (and all who follow) to perform the duties of the office in the manner and with the freedom of will and judgment intended.

One with influence over judges' salaries has influence over judges' conduct. The judge reacts to the potential financial threat and wonders whether she might be harmed financially by a decision she is about to make. At that point there is no independent judge.” H.T. Lummus, *The Trial Judge* 9-10 (1937), cited with approval in *In Re Enforcement of a Subpoena*, 463 Mass. 162, 171 (2012).

The Constitution leaves no room for a balancing test, analyzing how much uncertainty about salary would seriously impair impartiality or damage the public's perception of judges' independence. The founders were not shooting for probably impartial and fairly independent, but for “judges as free, impartial and independent

as the lot of humanity will admit.” The Constitution has already struck the acceptable balance of uncertainty: none.

The people who enacted the Massachusetts Constitution of 1780 understood human nature. As Hamilton later put it,⁷ “In the general course of human nature, *a power over a man’s subsistence amounts to a power over his will.*” Human nature hasn’t changed since 1780. The constitutional command that judges receive a certain salary for the life of their commission should be obeyed. It’s simple, clear, and essential to the historic independence of Massachusetts judges.

3) This Case is a Textbook Example of Why the Constitution Protects Judge Joseph’s Salary from Suspension.

(a) The allegedly improper conduct took place in a courthouse in the exercise of the powers of her judicial office, exercising the jurisdiction vested in her by law, and deciding upon the rights of others. It was a case where the power of the state was being brought to bear against an individual, when an independent judge undaunted by the power of parties before her is most needed. Whether her conduct and decisions were correct or incorrect hasn’t been determined by any court. Mistakes do not justify punishment in any event. *In Re Enforcement of a Subpoena*, 463 Mass. 162, 171 (2012); *Pratt v. Gardner*, 2 Cush. 63, 69, 70 (1848)

⁷ The Federalist No. 79 (emphasis in original).

(Shaw, C.J). Judges' salaries are not calibrated to go up or down according to their mistakes.

The complaints about Judge Joseph's rulings and courtroom conduct are being lodged against her by an interested non-party, and the complaining government agency is a part of the executive branch of the government of the United States. The agency's complaint is being pursued criminally, not civilly, by the prosecuting arm of the United States Government and will be adjudicated in that sovereign's own courts. The judicial immunity she is entitled to under Massachusetts law⁸ will depend upon the rulings of United States judges, as will all other aspects of her criminal case. We expect that federal judges will have the independence to reach a result contrary to the wishes of the agency, if warranted on the facts and the law. The impact of the outcome of that proceeding on her status can then be determined in an appropriate Massachusetts forum.

The lesson of the consequences upon Judge Joseph, based solely on the fact that she "has been indicted by a Federal grand jury on charges of obstruction of justice relating to alleged misconduct in her judicial office," however, sends a chilling message to our state judges. Proclamations that Massachusetts judges may do their jobs "uninfluenced by any apprehension of consequences" pale in the face of the reality that a single decision has resulted in summary suspension without pay

⁸ See *In Re Enforcement of a Subpoena*, 463 Mass. 162 (2012).

for an indeterminate period of time, interrupting the livelihood needed to support a judge's family.

(b) The mere filing of criminal charges, or any charges for that matter, doesn't justify suspension without pay. If a mere allegation of misconduct were enough to summarily terminate a judge's salary, the constitutional provisions for certainty of compensation would be rendered worthless. *Cf. In Re Enforcement of a Subpoena, supra; Pratt v. Gardner, supra.*

Citizens sitting on a grand jury are not authorized to interfere with a judge's salary or adjudicate whether a judge has comported herself consistently with the good behavior required to maintain her salary and constitutional tenure. The Constitution allocates that authority elsewhere, and neither a small group nor the citizenry as a whole may change it except by constitutional convention.⁹

An executive branch prosecutor, state or federal, is not an appropriate person to wield such power over judges. For one thing, the balance of power tilts the opposite way,¹⁰ and the relationships between prosecutors and judges are fraught

⁹ The Constitutional provisions protecting judicial independence are not subject to change by popular initiative or popular referendum. *See* Amendments, Art. 48.

¹⁰ E.g., *Attorney General v. Pelletier*, 240 Mass. 264 (1922).

enough,¹¹ without endowing their charging decisions with the power to suspend judges' salaries. *Cf. In Re Enforcement of a Subpoena*, 463 Mass. at 172, n.5.

Moreover, recent scholarship confirms that national political influence is brought to bear on prosecuting decisions by local United States attorneys' offices.¹²

Without disparaging particular individuals or disputing the authority of a prosecutor to institute criminal proceedings, the mere filing of charges by a state or federal prosecutor cannot be permitted to trigger automatic suspension of a judge's pay. That sort of potential influence over a judge's salary would profoundly compromise the independence of the judge and the perception of litigants that they will receive impartial justice.

(c) History teaches us that judges face some of their most difficult challenges in times of turmoil and division, especially strong political and moral divisions over the content of the rule of law, and even more especially when state and national policy are at odds. The historical analogy that immediately comes to mind in this regard is the fight over slavery and the conflicts that arose over the Fugitive Slave Act. An unpopular decision of this Court, rejected by some, was

¹¹ *E.g.*, the various complications of the Commonwealth's recent drug lab scandals, including financial responsibility issues; *see also*, Crisis in Pennsylvania: The Decline Of A Commonwealth's Faith In Its Legal System, 37 ELMF § 1.04 (2017).

¹² B. P. Miller & B.W. Curry, *U.S. Attorneys, Political Control, and Career Ambition* (Oxford University Press 2019), 151-156.

accepted by others solely because the independence of Massachusetts judges convinced them the decision was made on the law, not on political grounds.¹³

The polarization of our country over immigration issues has overtones of the strong views staked out by proponents and opponents of the Fugitive Slave Act. It remains to be determined the extent, if any, to which a relatively routine case in a very busy District Court may have implicated such political issues, and to what extent, if any, the ensuing pursuit of criminal charges by a federal prosecutor may have been influenced by such political issues.

It is times like these when judicial independence is most important, so that judges can truly decide cases on their view of the merits rather than be swayed by popular will. *Commonwealth v. O'Neal*, 369 Mass. 242, 271 (1975) (Tauro, C.J., concurring). It is times like these when the public's belief in the independence of our judiciary is most important, so that people can accept that decisions are made on the law not politics. It is times like these when it is most important to preserve and protect the fundamental constitutional principles that create this judicial independence in the first place.

¹³ See Berenson, Book Review of Handelsman, *The People's Court: Pursuing Judicial Independence in America*, 94 Mass. L. Rev. 147, 148-149 (2013), referencing remarks (opposing election of judges) by abolitionist Richard Henry Dana, Jr.: "I suffered as much in my feelings as any man under these [Fugitive Slave Act] decisions.... But I can truly say that in my greatest distress there was one drop of comfort left me. I knew that those decisions came from [judges] who were not making them for their judicial lives."

Despite the disclaimer, the unprecedented order of April 25, 2019, appeared to prejudge misconduct on Judge Joseph's part. More fundamentally, an order summarily stripping a Massachusetts judge of her salary for an indefinite time solely because someone levels a charge against her undercuts a critical pillar of judicial independence. Who will hereafter believe that Massachusetts judges are free to make decisions "uninfluenced by any apprehension" of adverse financial consequences?

B. The Practice and Precedents Under Our State and Federal Constitutions Establish that Judges' Salaries Should Not Be Withheld Prior to Completion of the Constitutional Processes for Removal.

1) Supreme Judicial Court Precedents Generally Recognize that Judges' Salaries May Not Be Withheld Prior to Completion of the Constitutional Processes for Removal.

This Court has generally recognized that interruption of judges' salaries should not take place prior to their removal from office. "We recognize that the question whether the Chief Justice should continue to serve and receive compensation as such is one which is not assigned to the judicial department under the Constitution of the Commonwealth." *In the Matter of Robert M. Bonin*, 375 Mass. 680, 711 (1978), *citing In the Matter of Jerome P. Troy*, 364 Mass. 15, 21-

22 (1973); *In the Matter of Edward J. DeSaulnier*, 360 Mass. 787, 807-809 (1972).¹⁴

The Court has been cautious about imposing financial sanctions on a judge. In some cases, and only after a full trial and hearing, this court has imposed financial sanctions on a judge.¹⁵ E.g., *In the Matter of Francis X. Morrissey*, 366 Mass. 11 17-18 (1974); *In the Matter of Francis J. Larkin*, 368 Mass. 87, 92 (1975); *In the Matter of Paul H. King*, 409 Mass. 590, 611 (1991); *In the Matter of Markey*, 427 Mass. 797, 800-801 (1998). The periods of suspension were fixed and short, and in two instances were related to the transfer of the judge to another court, partly for health reasons. The financial amounts were modest. None of those cases undertook such a drastic action *ex parte* at a preliminary stage of the proceedings.

The Court has previously used the phrase “suspended without pay” in only three reported decisions. *In the Matter of Ernest B. Murphy*, 452 Mass. 796, 801

¹⁴ In *DeSaulnier*, the Court stated: Our powers of supervision outlined above we propose to exercise with deference to the provisions in the Constitution of the Commonwealth which impose upon the Governor and the General Court primary responsibility for removal of judges. *Id.*

¹⁵ The cases also involved elements of financial benefits conferred as part of the misconduct, or costs and expenses incurred in the disciplinary proceedings, as justification for the financial sanction.

(2008); *In the Matter of Elwood S. McKenney*, 384 Mass. 76, 98 (1981); *Markey*, 427 Mass. at 804-806, 808.¹⁶

The use of the language “without pay” took place without extended analysis or discussion in the opinions. A fine or financial sanction was seemingly treated as the same as suspension without pay; some may not have protested because it seemed like a way to pay a fine with pretax dollars. Although *Markey* cited three cases for the proposition that suspension without pay was not a removal, the cases did not involve judges. The guaranty of tenure and salary enshrined in the Massachusetts Constitution puts the office of judges on a different plane than those of sheriffs, clerks, or other non-constitutional executive and judicial branch employees.

None of these earlier cases is precedent for what happened here. The Order was summarily entered, and the suspension and withholding of pay is for an unlimited time. If it were anticipated that “further order of the court” would be forthcoming upon completion of the criminal trial, *cf. Governor v. McGonigle*, 418 Mass. 558, 559 (1994), the financial impact would be in the hundreds of thousands of dollars and the judge might be out of office for years. As of December 31, 2018, Federal Judicial Center statistics from the Administrative Office of the United

¹⁶ An unlimited suspension without pay appears in a recent order of the Court in the Thomas Estes matter, again after hearing and decision, which had been forwarded to the legislature for consideration of removal.

States report that the national median time period from indictment to completion of jury trial, in obstruction of justice cases, is 19 months.¹⁷ Local lawyers say it takes longer in Boston.

It does not appear that the constitutional issues being raised in this case were presented to the Court in those earlier cases. Nor was there discussion of the stark difference in judicial independence between state and federal judges that would exist if state judges' salaries were subject to interference during their constitutional tenure. Fairly read, prior precedents cannot be said to have adversely ruled on these issues. If they are read to have done so, they should be reversed, for the reasons given in this brief. *Cf. Erie Railroad v. Tompkins*, 304 U.S. 64, 77-78 (1938) (Brandeis, J.) (“[T]he unconstitutionality of the course pursued has now been made clear, and compels us to do so”).

2) The United States Constitution Was Modeled on the Massachusetts Constitution of 1780, and federal judges appointed under Article III have never been deprived of their salaries prior to an impeachment conviction.

The Massachusetts Constitution of 1780 and its model of judicial independence had a compelling influence upon Article III of the United States

¹⁷ https://www.uscourts.gov/sites/default/files/data_tables/jb_d10_0930.2018.pdf

Constitution of 1787.¹⁸ Because of the similarity between the provisions for judicial independence in the Massachusetts and United States Constitutions, the “practice and decisions under that Constitution are pertinent as illuminating and persuasive....” *See Commonwealth v. Leach*, 246 Mass. 464, 473 (1923).

Under the federal constitution, federal judges can be removed only by impeachment, and no federal judge’s salary has ever been suspended or withheld prior to the judge’s impeachment conviction by the Senate. Among other things, the purpose of these guarantees is “to insulate ‘the individual judge from improper influences not only by other branches but by colleagues as well, and thus [to promote] judicial individualism.’” *See* 1 R.D. Rotunda & J.E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* § 2.9(a) (5th ed. 2012 & Supp. May 2019), quoting *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (Brennan, J.).

This rule remains in effect despite notorious incidents of imprisoned judges drawing pay until removed.¹⁹ Studies by a National Commission and an article by

¹⁸ U.S. Const. art. III, § 1 provides: “The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”

¹⁹ *See* 1 R.D. Rotunda & J.E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* § 2.9 (e) & (f) (5th ed. 2012).

an influential judge²⁰ made many of the points that influenced the drafters of the Massachusetts Constitution; in this public debate some 200 years afterwards, those arguments still carried weight.²¹ Congress ultimately concluded that the number of such cases was incredibly small, and the risks to judicial independence were too great to allow a federal judge's salary to be interrupted prior to an impeachment conviction.

Federal judicial discipline procedures have been established, but do not permit the withholding of pay. The Judicial Conduct and Disability Act of 1980 allows any person to file an anonymous complaint alleging a federal judge has engaged in “conduct prejudicial to the effectiveness and expeditious administration of the business of the courts,” or is “otherwise unable to discharge the duties of the office.” After investigating a complaint, the Judicial Council can either dismiss the complaint, or issue consequences like ordering a suspension of cases heard before the judge, censure, or requesting the judge voluntarily retire.²² The law specifically states, however, that “Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.”²³

²⁰ Irving Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681 (1979).

²¹ E.g., 3 J. Kobrick & D. Holt, Debates on the Federal Judiciary: A Documentary History 304-307 (2018).

²² 28 U.S.C. § 354(a).

²³ 28 U.S.C. § 354(a)(3).

Before and after this discipline statute, no federal judge has ever had salary withheld prior to an impeachment conviction.

II. NO STATUTE AUTHORIZES THE ORDER SUSPENDING JUDGE JOSEPH WITHOUT PAY AND ANY STATUTE PURPORTING TO DO SO WOULD BE UNCONSTITUTIONAL.

A. Statutes and Regulations Authorizing Suspension Of A Public Official Without Pay Upon Indictment Do Not Apply To Judges.

None of the laws enacted by the General Court to allow the suspension without pay of public officials (in certain circumstances) apply to judges. That is for good reason, as the General Court would have extremely limited, if any, authority to enact such a law. *See* Mass. Const. Pt. II, c. 2, § 1, art. xiii (“Permanent and honorable salaries shall also be established by law for the justices of the Supreme Judicial Court”); Mass. Const. Pt. II, c. 3, art. i (“All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made *in this constitution*”) (emphasis added).

There is, for example, a statute pertaining to Executive Branch officials that permits suspension without pay upon an indictment. *See* G.L. c. 30, § 59. Both the text of that statute and its place within our state constitutional structure are illustrative. The text provides, in pertinent part, that:

An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment

for misconduct in such office . . . if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice and consent of the council Any person so suspended shall not receive any compensation or salary during the period of such suspension During the period of any such suspension, the appointing authority may fill the position of the suspended officer

G.L. c. 30, § 59. The power of summary suspension bestowed by the Legislature upon the Governor is limited to the Executive Branch (governed by G.L. c. 30), and says nothing at all about judges.²⁴ In fact, the authorization to temporarily fill the position during the period of such suspension shows the statute was not intended to apply to judges because it is impossible to appoint a temporary judge without constitutional tenure.

The power of summary suspension must be viewed against the backdrop of the default status of Executive Branch officials who, in Massachusetts, are subject to for cause removal protection unless the law provides otherwise. *See* G.L. c. 30, § 9. So, until the enactment of G.L. c. 30, § 59, Executive Branch officials were able to hold office while under indictment. Section 59 was meant to address those circumstances. *Bessette v. Comm'r of Pub. Works*, 348 Mass. 605, 608 (1965).

Why did the Legislature limit its effect to the Executive Branch? That, of course, was the extent of its power. “[W]here an office is created by the Legislature and

²⁴ The reference to the Executive Council should not mislead; G.L. c. 30, § 59, was enacted in 1962, at a time when the Executive Council played an extensive role in confirming Executive Branch appointees. *See* St. 1964, c. 740 (repealing Executive Council’s role in most Executive Branch appointments).

not by the Constitution the Legislature is free to alter the methods for appointment and removal of State officers” *McCarthy v. Sheriff of Suffolk County*, 366 Mass. 779, 782 (1975), *abrogated in part by Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

This Court has actively policed those limits in other contexts. In *McGonigle v. Governor*, the Court recognized that the Governor had no authority to remove an elected sheriff without pay,²⁵ because “[w]here an individual is elected by the people, there is no ‘appointing authority.’” 418 Mass. 147, 149-150 (1994). This Court continued: “If the Legislature intended to confer the authority to suspend an elected official on the office of the Governor, it could have clearly identified the individual or office”; the Legislature demonstrated by G.L. c. 30, § 59, that it knows well how to confer such a power. *Id.* at 150.

Instead, the Legislature has given *this Court* the authority to remove sheriffs and certain other elected officials (e.g., the Register of Probate, Recorder of the Land Court, and District Attorneys). G.L. c. 211, § 4. And this Court has concluded that even though G.L. c. 211, § 4, “does not specifically enumerate the authority to suspend such an official, it is clear that the power to remove an official includes within it the authority to suspend that individual.” *Governor v.*

²⁵ Then-Governor Weld cited G.L. c. 268A, § 25, as the source of his authority, which is materially identical to G.L. c. 30, § 59, but applies to municipal and county officials.

McGonigle, 418 Mass. 558, 559 (1994). The list of offices enumerated in G.L. c. 211, § 4, over which this Court has such powers is notable because of who is omitted: commissioned judges.

Following a canvas of state removal laws and review of the text of the Order, it appears that this Court is drawing upon the general superintendence power in G.L. c. 211, § 3, to summarily suspend the pay of Judge Joseph. Even without the plain constitutional direction that judicial salaries are “permanent,” it would be anomalous for the General Court to have: (i) impliedly granted *de facto* judicial removal power in Section 3, while (ii) expressly enumerating a much narrower power (for specifically named offices, no less) in Section 4. *Cf. Entergy Nuclear Generation Co. v. Dep’t of Env’tl. Protection*, 459 Mass. 319, 333 (2011) (the “Legislature would not ‘delegate a decision of such . . . significance . . . in so cryptic a fashion’”) (internal citation and quotation marks omitted); *cf. also Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary positions — it does not, one might say, hide elephants in mouseholes”). To paraphrase this Court’s holding against the Governor in *McGonigle*: “If the Legislature intended to confer the authority to suspend [a judge without pay] on the [Supreme Judicial Court], it could have clearly identified the individual or office, as [is] the case in a related provision” which allows the

Supreme Judicial Court to suspend any enumerated officer who “is under indictment for misconduct.” *McGonigle*, 418 Mass. at 150.

Of course, judges in Massachusetts are different from Executive Branch officials and elected county officials. They are nominated by the Governor and confirmed by the Executive Council, they hold office during good behavior, and their salaries are “permanent and honorable.” Mass. Const. Pt. II, c. 1, § 1, art. 12; Mass. Const. Pt. II, c. 2, § 1, art. 9; Mass. Const. Pt. II, c. 3, § 1, as amended by art. 82. Removal processes are set *by the constitution and only by the constitution*. Mass. Const. Pt. III, c. 3, art. 1.

In this fraught area, more than any, this Court should be particularly reticent to effectuate a *de facto* removal of a judge from office without clear direction from the other branches of government. *See* Mass. Const. Pt. I, art. 30; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-638 (1952) (“When [a branch of government] takes measures incompatible with the expressed or implied will of [the legislature], [its] power is at its lowest ebb, for then [it] can rely only upon [its] own constitutional powers minus any constitutional powers of [the legislature] over the matter”). Triggering a constitutional clash in this area, which might require amendment to resolve definitively, would be particularly unwise, for as this brief demonstrates, this Court has no inherent constitutional authority to deprive

judges of payment of their salaries while they hold their commissions, and an effort to do so would intrude on the powers committed to the other branches.

B. The Statute Creating the Judicial Conduct Commission Did Not Authorize the Supreme Judicial Court to Suspend Judges' Salaries.

Since its founding in 1911, the Massachusetts Bar Association (“MBA”) has played a pivotal role in the debate and passage of every major court reform debate in the Commonwealth. In 1978, Governor Michael Dukakis signed into law the state’s “most significant court [reform] bill in 119 years, since the Superior Court was created in 1859.” *Boston Globe*, June 12, 1978. The court reorganization Act was a result of recommendations contained in a December 1976 Report by the Governor’s Select Committee on Judicial Needs, more commonly referred to as the “Cox Commission.” Many of the Cox Commission’s recommendations, including calls for a unified system and the establishment of a formal system of judicial discipline, were initially proposed by the MBA’s Res Gestae Report filed earlier in the fall of 1976.

The Cox Commission’s report came on the heels of intense public outcry and powerful media scrutiny over the ouster in 1975 of a Dorchester District Court justice, as well as coverage of another Roxbury District Court judge cited for myriad judicial improprieties. Additionally, in 1978, another media onslaught of negative coverage surrounded the resignation of the Chief Justice of the Superior

Court over allegations of serious judicial misconduct. The sustained media coverage and civic outcry of these noteworthy misconduct cases led to the establishment of today's Commission on Judicial Conduct established in the 1978 Court Reorganization Act. "The Commission, it was hoped, would add new weight to the scales of justice by helping to maintain the proper balance between judicial independence and judicial accountability."²⁶

The Cox Commission had originally recommended that a formal system of judicial discipline be added to the Massachusetts Constitution.²⁷ The recommendation to amend the state's constitution through a constitutional amendment initiative was eventually rejected and never embraced by the Legislative, Executive or Judicial branches in the final enactment of the 1978 court reorganization. Accordingly, the Court Reorganization Act of 1978 included statutory language that created the Commission on Judicial Conduct to complement -- not displace -- the two long-standing, constitutionally-based judicial removal procedures.

General Laws c. 211C, inserted by St. 1978, c. 474, § 114, is the enabling statute for the Commission on Judicial Conduct. Its members are appointed by the

²⁶ Fiat Justitia at 90.

²⁷ *Id.*

Judiciary and the Governor. G.L. c. 211C, § 1. All judges are subject to discipline on various grounds, including conviction of a felony. G.L. c. 211C, § 2(5).

If a matter has not been dismissed or resolved voluntarily, then after investigation and hearings, the Commission may recommend “one or more of the following sanctions” to the Supreme Judicial Court: “(a) removal; (b) retirement; (c) imposition of discipline as an attorney; (d) imposition of limitations or conditions on the performance of judicial duties; (e) public or private reprimand or censure; (f) imposition of a fine; (g) assessment of costs and expenses; (h) imposition of any other sanction which is reasonable and lawful.” G.L. c. 211C, § 8(4).

Although it authorizes imposition of a fine and/or assessment of costs and expenses, the statute does not purport to specifically authorize suspension of judges’ salaries, and it makes clear that the Governor and Legislature have not relinquished their constitutional authority over removal of judges.

The foregoing shall not be construed to derogate the inherent authority of the Supreme Judicial Court to supervise and discipline judges, the authority of the governor with the consent of the council to remove a judge upon the address of both houses of the legislature or to retire a judge involuntarily because of advanced age or mental or physical disability, the authority of the legislature to remove a judge through impeachment, or the supervisory authority of the chief justices of the appeals and Supreme Judicial Courts or of the chief and department administrative justices of the trial court.

With all the institutional reforms that have been enacted in 1978, 1992, and 2011, and in this 21st century era of new technology, new management tools, sophisticated human personnel management systems, improved educational

programs, better understanding of human behavior and improved counseling techniques and programs, the Supreme Judicial Court has ample authority to supervise and discipline judges without the power to suspend judges' salaries.

While supporting legislation to reform our court system and improve the administration of justice, including creation of the Judicial Conduct Commission, the Massachusetts Bar Association never intended to authorize the justices of the Supreme Judicial Court, any other judicial officer, or any commission or agency to summarily suspend a judge without pay, nor do we consider any such authorization to be permissible under the Massachusetts Constitution. Not only would such authority violate the constitutional provisions guaranteeing the stability of judges' salaries, as discussed above, but it would violate the separation of powers clause, as is discussed below.

C. The Supreme Judicial Court Has No Inherent Constitutional Authority to Suspend Payment of Judges' Salaries Because Doing So Would Violate the Separation of Powers Clause.

Since a fixed, permanent, and certain salary is a constitutionally mandated essential attribute of judicial office in Massachusetts, and since the constitutional tenure of office continues until age 70, unless sooner removed by impeachment or address for lack of good behavior, the power to withhold salaries may only be exercised by the branches of government to whom the removal power is entrusted. Neither impeachment nor address are easy methods of removal; they require a

wide consensus among elected officials, and they were intended to be difficult to achieve, yet responsive to the ultimate will of the people. The inseparable marriage of salary and tenure in the constitution precludes any notion that withholding of salaries can be separated from removal. It would be an historic breach of the principle of separation of powers for the judicial branch to assert unilateral authority to deny to any judge the linchpin of her independence: a secure salary throughout her tenure unless removed from office by the constitutionally mandated processes of impeachment or address. Relegating the certainty of payment of judges' salaries to the discretion of members of the judicial branch would restore the very threat to judicial independence despised by those who adopted our Constitution.

There was good reason to establish the Governor, Council, and both houses of the legislature as the branches of government that have the power of removal of judges, and thereby the sole authority to interfere with the permanent, certain salaries guaranteed to them during good behavior. The enormous degree of independence granted to the judicial branch had to be balanced.²⁸

²⁸ Adams wrote that “the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, *as both should be checks upon that* (emphasis added). *Thoughts on Government* (1776) in *4 Works of John Adams* 189, 198-199 (C. F. Adams ed. 1851).

Were the power over salary and tenure to be exercised by the Supreme Judicial Court or some other part of the judicial branch, whether favorably or unfavorably toward particular judges, the powers of the other branches will have been invaded in violation of the Article on separation of powers.

CONCLUSION

Summary suspension of judges without pay sounds the death knell for judicial independence in Massachusetts. *Amici* urge this Court to resist pressures to encroach on the hard-won, priceless independence of our judges.

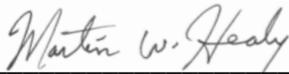
An independent judiciary is not some cliché to be taken for granted. It rests on specific attributes of office proven by long, pragmatic experience to be indispensable to recruiting the best judges possible and enabling them to act in accordance with their view of the law and justice of each case. Judges must be able to act without fearing for their livelihood or the well-being of their family if a powerful litigant, the public, or other judges disagree with their actions.

The Motion for restoration of the salary and benefits of Judge Joseph should be granted.

Respectfully submitted,



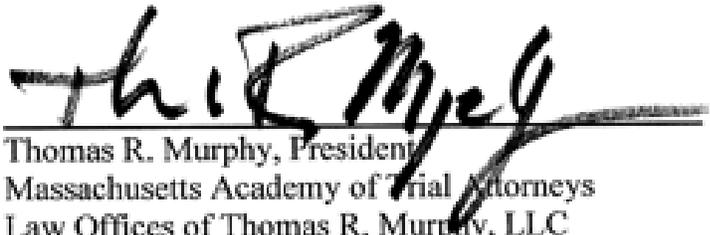
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ADDENDUM A

DECISION TO BE REVIEWED

In Re: Shelley M. Joseph, No. OE-0140 (Docket #1)

April 25, 2019

ORDER: Where District Court Judge Shelley M. Joseph has been indicted by a Federal grand jury on charges of obstruction of justice relating to alleged misconduct in her judicial office, the Justices of the Supreme Judicial Court, in the exercise of their powers of general superintendence of the courts of the Commonwealth, hereby suspend her without pay from her duties as an associate Justice of the District Court until further order of this court. This Order is based solely on the fact that a sitting judge has been indicted for alleged misconduct in the performance of her judicial duties. It in no way reflects any opinion on the merits of the pending criminal case. The Code of Judicial Conduct prohibits all judges from making “any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any Massachusetts court.” SJC Rule 3:09, Code of Judicial Conduct, Rule 2.10. This suspension is effective immediately. By the Court

ADDENDUM B

Constitution and Statutes

pmb. of the Massachusetts Constitution.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

art. 11 of the Declaration of Rights of the Massachusetts Constitution.

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

art. 29 of the Declaration of Rights of the Massachusetts Constitution.

It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

art. 30 of the Declaration of Rights of the Massachusetts Constitution.

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 II, c. 3, art. 1 of the Massachusetts Constitution, as amended by art. 58, 98 of the Amendments.

The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution; provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability; and provided further, that upon attaining seventy years of age said judges shall be retired. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Thomas J. Carey, Jr., hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional spaced font Times New Roman at size 14 point and contains 7,209 words.



Thomas J. Carey, Jr.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that I have made service of this Brief via the Massachusetts Tyler Host electronic filing system upon:

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A handwritten signature in blue ink that reads "Thomas J. Carey, Jr." The signature is written in a cursive style with a horizontal line extending from the end of the name.

Thomas J. Carey, Jr.