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Delegate, Fifth Constitutional Convention of the United States Virgin Islands
Personal Statement

Committee on Natural Resources
Subcommittee on Insular Affairs, Oceans and Wildlife
Oversight Hearing on the Proposed Constitution of the United States Virgin Islands
March 17, 2010

With appreciation to the Subcommittee for considering these remarks, I write concerning this matter of the utmost importance to the people of the Virgin Islands. I ask that the Subcommittee also consider letters of January 29, 2010 from eleven delegates of the Fifth Constitutional Convention to President Obama and to Congresswoman Christensen, each enclosing a copy of the proposed constitution marked up to reflect recommended modifications to eliminate those provisions, and only those provisions, deemed to be infirm as inconsistent with the Federal Constitution. Copies of those letters and of the marked up proposed constitution were submitted by my letter to Chairwoman Bordallo dated March 8, 2010.

Background

Congress enacted the 1976 enabling legislation permitting the people of the Virgin Islands to adopt a constitution for local self-government "recognizing the basic democratic principle of government by the consent of the governed." (Act of Oct. 21, 1976, Pub. L. 94-584, 90 Stat. 2899.)

Over the past half century, exercising its Article IV, Section 3 power respecting the Territories of the United States, Congress has enhanced the political autonomy and self-governance of the Virgin Islands, enacting laws to establish the popular election of our governor, to permit local law to determine the number and apportionment of legislators and granting virtually unlimited jurisdiction over local matters to the courts of the Virgin Islands.

These important steps in achieving political self-determination for Virgin Islanders have been granted by federal legislation. But by Public Law 94-584, Congress has authorized the people of the Virgin Islands to organize our own government pursuant to a constitution to be adopted by Virgin Islanders. With this prospect of self-governance as our goal, this process upon which we have embarked is among the most significant in the ninety-three year history of the American Virgin Islands. It is a process that must succeed in order that we may realize a government of the Virgin Islands crafted and adopted by the consent of the governed.

In 2004, pursuant to Public Law 94-584, the Twenty-Fifth Legislature of the Virgin Islands enacted Act No. 6688 establishing the Fifth Constitutional Convention of the Virgin Islands "as a significant step toward greater self-determination and autonomy in the Territory's relationship with the United States Government."

The delegates to the Fifth Constitutional Convention elected by Virgin Islands voters, despite limited resources, diligently labored to prepare and adopt a proposed constitution for submission by the Governor of the Virgin Islands to the President and Congress in compliance with Public Law 94-584. Notwithstanding those diligent efforts, it is recognized that the

proposed constitution before the Subcommittee is flawed and, in parts, out of harmony with provisions of the Constitution and laws of the United States.

As recommended by the February 23, 2010 analysis of the U.S. Department of Justice Office of Legislative Affairs ("DOJ Analysis") submitted with President Obama's February 26, 2010 transmittal to Congress, those constitutionally infirm sections of the proposed constitution, and only those sections, should be modified by Congress before the proposed constitution is returned for submission to the qualified voters of the Virgin Islands.

Analysis

The need for limited Congressional action. President Obama and the DOJ Analysis note nine features of the proposed constitution that "warrant comment." The last of those features concerns "the effect of congressional action or inaction on the proposed constitution." In the event that Congress fails to approve, modify or amend the proposed constitution by joint resolution within sixty days of President Obama's transmittal, it shall "be deemed to have been approved."

With deference to Congress, the failure to take timely action would be inconsistent with its Article IV oversight powers and responsibilities. By the 1976 enabling legislation, Congress granted the Territory the power to call a constitutional convention to draft a constitution which shall "recognize, and be consistent with" the supremacy of the Constitution, treaties and laws of the United States. To the extent that the proposed constitution is not so consistent, Congress would be remiss to permit the document to "be deemed to have been approved."

On the other hand, the enabling legislation, recognizing "the basic democratic principle" of self-governance, authorizes the people of the Virgin Islands to organize their own government through a constitutional convention comprised of members chosen pursuant to Virgin Islands law. In accordance with Public Law 94-584, the Virgin Islands Legislature established the Fifth Constitutional Convention, with delegates elected by the voters of the Territory. These representatives of the people of the Virgin Islands have drafted the document before the Subcommittee that is to be returned to the people of the Virgin Islands for acceptance or rejection.

This exercise in government by the consent of the governed, while subject to Congressional oversight must remain an exercise of, by and for the people of the Virgin Islands. The role of this Congressional review process must not be to substitute the judgment of federal legislators for that of the people of the Virgin Islands. To the extent that the proposed constitution recognizes and is consistent with the sovereignty and supremacy of the United States, its Constitution, treaties and laws, it must be approved by Congress and returned to the people of the Virgin Islands.

DOJ Analysis bottom line. Notwithstanding its recitation and review of nine areas of concern that warrant comment, the DOJ Analysis recommends definitively that only two features cause sufficient concern to warrant removal or amendment. Those features: (1) provisions

conferring legal advantages on certain groups based on national origin and ancestry; and (2) provisions addressing territorial waters and marine resources, are addressed in order.

(1) Legal advantages conferred on certain groups. The following provisions confer different legal treatment of Ancestral Native Virgin Islanders and Native Virgin Islanders, defined in the proposed constitution in Article III, Sections 1 and 2, from other persons within the Virgin Islands:

Article VI, Section 3(d): Governor and Lt. Governor must be "an Ancestral or Native Virgin Islander;"

Article XI, Section 5(g): Primary residences and undeveloped land of Ancestral Native Virgin Islanders are exempt from assessment of real property tax;

Article XVII, Section 1(b): Political Status Advisory Commission is to be created with members "who are Ancestral Native and/or Native Virgin Islanders;"

Article XVII, Section 2(b): Special election on status and federal relations "shall be reserved for vote by Ancestral Native and Native Virgin Islanders only, whether residing within or outside the territory;"

Article XVIII, Section 7: "Ancestral and Native Virgin Islanders, including those who reside outside of the Virgin Islands" have the non-exclusive right to vote in elections to ratify proposed constitutional amendments.

The thorough treatment of these provisions within the DOJ Analysis (§ II.C., pages 6-10) notes the absence of any expressed or discernable legitimate governmental purpose for treating particular groups of citizens of the United States and the Virgin Islands differently from other groups of citizens concerning any of these subject areas. As such, the provisions are in violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution, applicable to the Virgin Islands pursuant to the Section 3 of the Revised Organic Act of 1954 (48 U.S.C. §1561).

I ask that Congress modify the proposed constitution by eliminating Article VI, Section 3(d) and Article XI, Section 5(g) in their entirety; by eliminating the phrase "who are Ancestral Native and/or Native Virgin Islanders" from the first sentence of Article XVII, Section 1(b); by eliminating Article XVII, Section 2(b) in its entirety; and by eliminating in its entirety the second sentence of Article XVIII, Section 7.

I do not ask Congress to eliminate the definitions of Ancestral Native Virgin Islander and Native Virgin Islander. Persons who trace their Virgin Islands ancestries back multiple generations are justifiably proud of their heritage. The proposed language defining these persons simply recognizes that heritage.

I do believe the inclusion of the definitions language to be politically imprudent, and that Virgin Islands ancestry could more appropriately be recognized by local legislation or other means rather than by constitutional definition. I fear that individuals and other groups will see the inclusion of such language not as recognition of heritage but as the designation of privileged classes, with the looming prospect that different categories of persons will enjoy or suffer different advantages or disadvantages.

As such, I am concerned that the inclusion of definitions, even without special privileges, threatens the success of the constitution in the referendum before the electorate. Nonetheless, in keeping with the view that the limited role of Congressional review extends only to insuring compliance with the Federal Constitution, treaties and laws, I ask that the language defining Ancestral Native Virgin Islanders and Native Virgin Islanders be approved.

(2) Territorial waters and marine resources. Article XII, Section 2 of the proposed constitution asserts sovereignty of the Virgin Islands over its "inter-island waters to… extend 12 nautical miles from each island coast up to the international boundaries." The DOJ Analysis notes that while the meaning and effect of this provision are not clear, concerns exist that claims of Virgin Islands sovereignty are inconsistent with federal law to the extent intended to derogate from the sovereignty of the United States.

This legitimate concern set out in the DOJ Analysis can be readily resolved in a manner that, although it doesn't clarify the intent, meaning and effect of the provision, does allay fears of any attempted usurpation of federal sovereignty.

I recommend that at the end of the last sentence of Article XII, Section 2, a phrase be added, such that the last sentence reads: "This is an alienable right of the people of the Virgin Islands of the U.S. and shall be safeguarded, *in a manner consistent with the laws of the United States.*" (Added phrase in italics.)

Other DOJ concerns. Apart from those two features of the proposed constitution noted above, the DOJ Analysis does not recommend that any other provision of the document must be eliminated or modified to assure compliance with the Constitution, treaties and laws of the United States. Several other features of the proposed constitution which warranted comment in the DOJ Analysis are addressed here.

(1) Recognition of U.S. sovereignty and the supremacy of U.S. laws. The Department of Justice indicates that it would be preferable that Congress modify the proposed constitution in order that its language explicitly recognizes the sovereignty of the United States and the supremacy of its Constitution and laws. Yet, its bottom line is that the language of the proposed constitution substantially complies with the requirements of Public Law 94-584 by its implicit recognition of federal sovereignty and the supremacy of federal law (§ II.A., pages 3-6).

As the DOJ Analysis notes, the very first paragraph of the proposed constitution in its preamble states that the people of the Virgin Islands are establishing a constitution assuming the responsibilities of self-government in the context of our status "as an unincorporated territory of the United States."

The DOJ Analysis notes that federal case law has clearly defined the relationship between the United States and its unincorporated territories in a manner that recognizes federal sovereignty and the plenary authority of Congress over territorial affairs. Accordingly, by its reference to the Virgin Islands' status as an unincorporated territory, the proposed constitution has unmistakably, although implicitly, recognized U.S. sovereignty and the supremacy of federal law.

The DOJ Analysis further notes that other provisions of the proposed constitution also recognize the authority of Congress over the Virgin Islands. The third paragraph of the preamble

recognizes that the 1917 treaty between the United States and Denmark confirmed that the civil rights and political status of the inhabitants of the Virgin Islands were to be determined by Congress. Additionally, Article IV, Section 4; Article V, Section 1; Article VII, Section 2; and Article VII, Section 3 all recognize the applicability of and the requirement of consistency with the Federal Constitution and laws in the context of holding public office, limitations on legislative power, and the supremacy of federal law with reference to judicial decisions and rulemaking.

It is in this context that the language of Article II, Section 5 of the proposed constitution recognizing that "This Constitution shall be the supreme law of the Virgin Islands" must be read. As the DOJ Analysis concludes, the recognition of federal sovereignty and the supremacy of federal laws in the various provisions of the proposed constitution confirm its substantial compliance with the enabling legislation. No changes to the proposed constitution are required in this regard.

(2) Residency requirements for office holders. The proposed constitution requires that persons seeking the offices of Governor and Lieutenant Governor must have been domiciliaries of the Virgin Islands for fifteen years, at least ten of which must immediately precede the date of filing for office.

The DOJ Analysis well describes the potential equal protection concerns inherent in such a lengthy residency requirement for office holders. Indeed, in light of the cited case law, a shorter period of required residency may be preferable. Yet, the cited decisions clearly confirm that the U.S. Supreme Court has held that some durational residency requirement is constitutionally permissible. Also, the Department of Justice notes that "the territorial status and unique history and geography of the USVI make familiarity with local issues particularly important for office-holders there, [such that] the governmental interests supporting durational residence requirements for USVI offices may be particularly strong." (§ II.D., page 13.)

In this setting, the representatives of the people of the Virgin Islands have determined proper requirements for persons seeking to hold office. Whether that determination violates the equal protection rights of office seekers who have resided in the Virgin Islands for shorter periods is a judgment to be made by the courts of the Virgin Islands and the United States, if and when such a challenge is presented. Alternatively, the people of the Virgin Islands themselves can shorten the period by amendment to the approved constitution.

The role of Congress as to this provision should not be to presently substitute its view for that of the representatives of the Virgin Islands people in the context where no clear equal protection violation is evident. No modification to the proposed constitution should be imposed as to this provision.

(3) Violation of "one person, one vote" in legislative districting. In analyzing the propriety of the proposed constitution's requirement that the island of St. John have its own legislator, competing interests must be weighed. Strict adherence to the "one person, one vote" principle would effectively deprive residents of St. John from any direct and meaningful legislative representation. On the other hand, assuring such legislative representation will modestly dilute the effectiveness of the representation of residents of the other islands. The

delegates to the Constitutional Convention have resolved this dilemma in favor of assuring representation for the people of St. John.

The cited case law within the DOJ Analysis establishes that equal protection concerns in such settings can only be resolved upon a review of the specific existing factual circumstances. As is true of the preceding provision addressed, the role of Congress in this context must not be to substitute its judgment for that of the representatives of the people of the Virgin Islands.

The Department of Justice does not recommend specific changes to this provision of the proposed constitution, notwithstanding noting the potential litigation risk inherent in such legislative apportionment. The potential for litigation exists in numerous provisions of the proposed constitution, and litigation concerning those provisions will keep the Virgin Islands Supreme Court busy for years to come. Yet, such litigation is part of the process of establishing autonomy and self-governance for the people of the Virgin Islands.

As recommended by the Department of Justice, the provisions relating to legislative apportionment should not be the subject of Congressional modification.

Conclusion

Consistent with its Constitutional oversight responsibilities, Congress must act to insure that the proposed constitution of the Virgin Islands recognizes and is consistent with the sovereignty and supremacy of the Constitution and laws of the United States. This can be accomplished by the elimination of several specific provisions that violate the equal protection clause of the Fourteenth Amendment applicable to the Virgin Islands.

Specifically, the proposed constitution should be modified by the striking the language referenced above from those sections that confer legal advantages on certain groups of persons based upon the place and timing of birth and ancestry: Article VI, Section 3(d); Article XI, Section 5(g); Article XVII, Section 1(b); Article XVII, Section 2; and Article XVIII, Section 7.

Further, to insure compliance with federal laws, a qualifying phrase should be added to proposed Article XII, Section 2, the last sentence of which should be modified to read: "This is an alienable right of the people of the Virgin Islands of the U.S. and shall be safeguarded, *in a manner consistent with the laws of the United States.*" (Added phrase in italics.)

With those modifications, the proposed constitution should be approved and in accordance with Public Law 94-584 submitted to the voters of the Virgin Islands for acceptance or rejection.

Respectfully Submitted,

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