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US Virgin Islands Constitutional Convention Replies to US Concerns

REPLY OF US VIRGIN ISLANDS CONSTITUTIONAL CONVENTION TO THE MEMORANDUM OF THE U.S. DEPARTMENT OF JUSTICE REGARDING THE PROPOSED CONSTITUTION FOR THE U.S. VIRGIN ISLANDS

March 29, 2010

This memorandum is written in response to the Department of Justice ("Justice") memorandum to the Office of Management and Budget's on the proposed constitution submitted by the Fifth Constitutional Convention of the U.S. Virgin Islands ("Fifth Convention") to the President and Congress of the United States. Additionally, this memorandum serves as a response to all other memorandums and opinions that have been submitted in review of the proposed constitution. 1 This memorandum shall address the pertinent issues raised in the Justice memorandum, since the issues and opinions contained in the memorandum of the Department of Justice fairly reflects the same issues raised in the other reviews.

At the outset, it is important to note that Justice admits that its opinions are nothing more than conjecture. 2 The Justice Department did not review nor request to review any of the record or evidence gathered by the Fifth Constitutional Convention when rendering its opinions. Justice's opinions fail to cite any evidence to support conclusions rendered in its memorandum. In fact, in addressing the provision for senate district, after it had opined on several other alleged issues, Justice states ,"since districts would be fact-specific, we [Justice] do not recommend specific … changes to the proposed constitution to address these concerns, " (citation- on page 15 of its memorandum)The same statement should have concluded each and every issue raised by Justice since every issue raised by Justice is a fact determined issue and Justice did not review any of the facts that ere considered by the Fifth Constitutional Convention before it adopted the provisions of the proposed constitution. Throughout their memorandum, Justice renders opinions on other issues that are fact specific, but nonetheless, chose not to do so on the issue of districts.

Constitutional challenges to a specific provision of law cannot be resolved by any "litmus-paper test." see Anderson v. Celebrezze, 460 U.S.780, 789 (1983); Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). In deciding questions regarding constitutional validity, the analysis must first consider the character and magnitude of the injury to any alleged right protected by the Constitution. Id. Then, it must identify and evaluate the precise interest put forward as justification for the burden imposed by a rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. 3 The results of a constitutional review is not to be automatic. Anderson, supra at 789,

Since Justice's opinions do not consider any evidence that lead to the provisions contained in the proposed constitution, the opinions should not be given any weight as to whether the proposed constitution contains any constitutional violations. In order to properly evaluate the basis of why certain provisions were included in the proposed constitution, the record and evidence gathered by the Fifth Convention must be examined, including the empirical and antidotal evidence considered in drafting the proposed constitution.

The Fifth Constitutional Convention's fact gathering process included more than fifty public meetings throughout the Virgin Islands. A minimum of seventy-five to one hundred people testified at each meeting. Over fifty formal papers and documents were received and reviewed by the Fifth Convention. Additionally, the Fifth Constitutional Convention made numerous radio and television appearances during which caller comments were maintained for follow-up and consideration. Some broadcast programs were dedicated to the consideration of the proposed constitution such as the "Constitution Corner." Over one hundred internet blogs provided information to delegates of the Fifth Constitutional Convention.

Moreover, the Fifth Convention reviewed and discussed the record contained on the Fourth Constitutional Convention. Attached to this memorandum is an annex of information that lead to the provisions contained in the proposed constitution to remedy the numerous atrocities faced by the people

of the US Virgin Islands. 4

Response 1-The Proposed Constitution Recognizes the Sovereignty and the Supremacy of the United States and is therefore Compliant with the Enabling Act

The Justice memorandum raises a question on whether the proposed constitution recognizes the sovereignty and the supremacy of the U.S. Constitution. Justice spent a lot of time in its analysis discussing this issue and concluded that, throughout its many provisions, the overall proposed Constitution recognizes in expressed language the sovereignty and supremacy of the United States. 5 Therefore, this memorandum accepts the ultimate conclusion reached by Justice on this issue.

Response 2- The Provisions For Ancestral & Native Virgin Islanders Are Rationally Based and have Legitimate Government Purposes and Therefore Are Constitutional

Justice believes the special designation of opportunities afforded Ancestral and Native Virgin Islanders is not rationally based, therefore, violating the Equal Protection Clause of the U.S. Constitution. In its memorandum, Justice states, "Because we find it difficult to discern a legitimate governmental purpose that would be rationally advanced by the provisions conferring legal advantages on certain groups defined by place and timing of birth, timing of residency, or ancestry, we recommend that those provisions be removed from the proposed constitution." 6

Justice believes that provisions of the proposed constitution give special advantages to "Native Virgin Islanders" and "Ancestral Native Virgin Islanders." They further believe that these provisions raise serious concerns under the equal protection guarantee of the U.S. Constitution. 7

The Justice memorandum brings suspicion to the definitions of Ancestral and Native Virgin Islanders; In Article III, section 2, the proposed constitution defines "Native Virgin Islander" to mean (1) "a person born in the Virgin Islands after June 28, 1932," the enactment date of a statute generally extending United States citizenship to USVI natives residing in United States territory as of that date who were not citizens or subjects of any foreign country, see Act of June 28, 1932, ch. 283, 47 Stat. 336 (now codified at 8 U.S.C. 1406(a)(4) (2006)); and (2) a "descendant[] of a person born in the Virgin Islands after June 28, 1932." "Ancestral Native Virgin Islander" would be defined as: (1) "a person born or domiciled in the Virgin Islands prior to and including June 28, 1932 and not a citizen of a foreign country pursuant to 8 U.S.C. [§] 1406," the statute governing United States citizenship of USVI residents and natives; (2) "descendants" of such individuals; and (3) "descendants of an Ancestral Native Virgin Islander residing outside of the U.S., its territories and possessions between January 17, 1917 and June 28, 1932, not subject to the jurisdiction of the U.S. and who are not a citizens [sic] or a subjects [sic] of any foreign country." Proposed Const. art. III, § 1.

The definitions contained in the proposed constitution should not bring any suspicion or be challenged as the improper classification of the people of the Virgin Islands since the definitions are derived directly from the Government of the United States. It was an act of Congress that differentiated the people of the Virgin Islands and conferred different legal status upon them. 8 U.S.C. §1406 provides in its pertinent parts as follows:

Section 1406. Persons living in and born in the Virgin Islands

(a) The following persons and their children born subsequent to January 17, 1917, and prior to February 25,1927, are declared to be citizens of the United States as of February 25, 1927:

"…(2) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and were residing in those islands or in the United States or Puerto Rico on February 25, 1927, and who were not on February 25, 1927, citizens or subjects of any foreign country;

(3) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and were residing in those islands on February 25, 1927, and who were not on February 25, 1927, citizens or subjects of any foreign country; and

(4) All natives of the Virgin Islands of the United States who, on June 28, 1932, were residing in continental United States, the Virgin Islands of the United States, Puerto Rico, the Canal Zone, or any other insular possession or territory of the United States, and who, on June 28, 1932, were not citizens or subjects of any foreign country, regardless of their place of residence on January 17, 1917.

(b) All persons born in the Virgin Islands of the United States on or after January 17, 1917, and prior to February 25, 1927, and subject to the jurisdiction of the United States are declared to be citizens of the United States as of February 25, 1927; and all persons born in those islands on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth."

A comparison between the provisions of the proposed constitution and the provisions of 8 U.S.C. §1406 shows the same classification of people. Moreover, it was the Congress of the United States that designated some of the people of the Virgin Islands as "Natives."

The provisions in the proposed constitution that afford certain benefits to "Natives" is consistent with and in accordance with policies, agreements and treaties executed by the Government of the United States that provides for full self-governing and the preservation of culture and the land of native people. In the Treaty of Cession between Denmark and the United States, the United States declared its responsibility to inhabitants of the Virgin Islands. 8 More directly, the United States executed a treaty with the United Nations in which the United States agreed to hold the interests of native peoples (including the Virgin Islands natives whom they clearly had singled out and defined in the 1927 and 1940 citizenship and nationality acts), as a sacred trust, to protect the culture and aspirations of Virgin Islands natives and to protect them from abuse. 9

The United States has consistently supported laws that protect and provide for the self-governing of native people. The government of the United States acquires a heightened duty of trust to native and indigenous people. Further, the United States has a duty to furnish protection to native people and the authority to fulfill its obligations. Board of County Comm'rs v. Seber, 318 U.S. 705, 716 (1943); United States v. Sandoval, 231 U.S. 28, 45-46.

In this regard, Congress has continued to accept responsibility for the welfare of natives. Congress has established special programs in areas of healthcare, education, employment and loans. Rice at 496. It has enacted laws providing for special and different treatment of Native Hawaiians, Native Alaskans, Aleutians and Native Indians. The special treatment laws have allowed for special voting privileges, special taxation, segregated property ownership and other benefits as the United States has sought to fulfill its obligations to Native people. 10

In its review of the proposed constitution, Congress can provide the U.S. Virgin Island its right to self-governing and fulfill its obligations to provide for the natives of the Virgin Islands. Congress has the authority to protect the language, culture, religion, race, community structure and politics of native people. 11

The United States is on record accepting the responsibility for the welfare of native people. In its brief in the case of Rice v Cayento, 528 U.S. 495, the Government of the United States declared that a special right to vote should be bestowed on "native" people to the exclusion of non-natives. 12

The Department of Justice has repeatedly stated that it could not discern any rational basis that would allow the provisions for Ancestral and Native Virgin Islanders to have certain special and different advantages over others of the Virgin Islands. As if it was an open and shut policy of constitutional law Justice states "we find it difficult to discern a legitimate government purpose that would rationally advance" the special provisions of the proposed constitution. 13 Contrary to the insertions of Justice the constitutionality of the special provisions is not open and shut.

Analogous to the issues raised by Justice, a Federal District Court and the Ninth Circuit Court of Appeals found and held that a voting provision of the Hawaiian Constitution to allow only "Native" Hawaiians the right to vote for trustees of Hawaiian land did not violate the Constitution of the United States. 14 However, in a 7-2 decision the Supreme Court of the United States reversed the two lower courts holding, that limiting the vote to only Native Hawaiian for the nine trustees in a statewide election to be in violation of the 14th and 15th Amendment. 15

After the review of facts and after an examination of the reasons why Hawaii sought to limit the right to vote to "Native" Hawaiians only, the Supreme Court held that the particular provision that defined "Ancestral and Native" was drawn on racial lines. The Hawaiian constitution was designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defined "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the Islands before 1778 and "Hawaiians"–a larger class that includes "native Hawaiians"–as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The Court stated that the provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." 16

The proposed constitution's provisions for Ancestral and Native Virgin Islanders are not drawn upon race. The definitions used for these classes of people are the definitions given to the people of the Virgin Islands by the Congress of the United States. Of greater importance, is the fact that the provisions contained in the proposed constitution apply equally to the different races of people that inhabit the Virgin Islands. An examination of the record discussed by the Fifth Constitutional Convention would show that at the time the United States established the "Native" designation on the people of the Virgin Islands, the population of the Virgin Islands consisted of people from Europe, Puerto Rico, Africa and other ethnically diverse populations. The record shows that the Virgin Islands still maintains this ethnically diverse population.

In Rice, Justice Stevens with whom Justice Ginsburg joined in dissent, stated that the standard of review of evaluating a question of equal protection on the question of special voting permissions is whether the special treatment is rationally tied to fulfill a unique obligation toward native people. 17 Justice Stevens stated that [Natives] Indians and other natives must show that the goal is reasonably and directly related to a legitimate nonracially based goal. 18

The record clearly shows that the proposed constitution addresses directly those rights and protections expressly offered to the native people of the Virgin Islands, but never given. Since 1917 the United States has failed to provide for the Natives of the Virgin Islands the right of self-governing, a right to

property and the right to maintain its culture. The opinions contained in the Justice's memorandum must be discounted by their own admissions/omission because they did not review any evidence that was considered by the Fifth Constitutional Convention. Therefore. all issues raised by Justice surrounding its concerns about special treatment of "Native" Virgin Islanders must be ignored. A determination of the constitutional validity of a provision must include a fact based analysis.

Response 3. The Property Tax Exemption for Ancestral Native Virgin Islanders Has a Legitimate Government Purpose and Therefore is Constitutional

Justice in its memorandum states that the property tax exemption for Ancestral Native Virgin Islanders raises serious equal protection concerns. Without examining any of the record, Justice states, "we find it difficult to discern a legitimate government purpose… advanced by providing tax exemptions only for Ancestral Native Virgin Islanders." 19

Since 1992, the Supreme Court has recognized that a property tax exemption based on longevity of ownership can have a legitimate government purpose if the government has an interest in local neighborhood preservation, continuity and stability of life and family. See Nordlinger v. Hahn, 505 U.S. 1, 13 (1992), 112 S.Ct. 2326.

An examination of the record of the Fifth Constitutional Convention reveals numerous instances of the adverse impact suffered by Ancestral Native Virgin Islanders who have held their property for a long period of time without property tax exemption. The record contains numerous discussions and testimonials of people who would be considered Ancestral Virgin Islanders who have had lost their property due to hotel and resort development causing enormous increases in their property taxes. This occurrence has been eroding families and kinship in the Virgin Islands for many years. The Virgin Islands is rapidly losing the younger members of the families who move out of the territory for more affordable places to live. 20

The property tax exemption serves a legitimate government purpose in providing a mechanism to protect the property of the families who due to their longevity are the guardians of the life and culture of the Virgin Islands.

Response 4- The Designation of a Senator for St. Johns is Constitutional

The Justice Department has cited the designation of a senator for the Island of St. Johns as being a violation of the Fourteenth Amendment. Justice argues that in order for a legislative district to pass constitutional muster, the district must be drawn in a way to assure one man one vote or be drawn as close as possible to one man one vote. 21

Federal courts including the Supreme Court have recognized that one man one vote is not the only legitimate government purpose acceptable under the Constitution. It has been held that the principle of one man, one vote does not require exact mathematical equality in representation in the legislature; some consideration may be given by apportioning authorities to factors like geography, the integrity of subdivisions like counties, cities, or towns, and communities of interest. See Kelly v Bumpers,340 F. Supp. 568, 571 (E.D Ark 1972). The equal protection clause does not require absolute equality in the legislative districts but does require a rational basis for legislative distinctions, such as geography, economics, mass media and functional or group voting strength. See Thigpen V. Meyers, 211 F. Supp. 826 (W.D. WA).

Conclusion

As indicated in this memorandum the opinions of the Department of Justice are flawed. Justice throughout its memorandum expressed conjecture and could not properly evaluate the proposed constitution because it did not examine evidence gathered or the record of the proceedings that lead to the Fifth Constitutional Convention to set forth certain provisions in the proposed constitution. Moreover, constitutional analysis requires a case by case evaluation of the facts in order to properly measure constitutional implications. The opinions of the Justice Department regarding its review of the proposed constitution fail for these reasons.

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1. Opinions on the proposed constitution were submitted by letter of Governor John P. de Jongh, Jr., the Attorney General of the U.S. Virgin Islands and the Congressional Research Service.

2. Statements of conjecture by justice: "we find it difficult to discern.." Memorandum for the Office of Management and Budget (Justice, 2010)-page 1; "the ..constitution does not identify… and it is difficult for us to discern…," Id at 7 ; "to the extent that those interest might be offered…," Id at 8; "…seems difficult to justify…," Id ; "because we find it difficult to discern…," Id; "in absence of any identified …interest…," Id at 10; "any challenge to USVI's Senate districts would be fact-specific, we do not recommend specific … changes to the proposed constitution to address these concerns." Id at 15.

3. See Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968393 U.S., at 30-31, 89 S.Ct., at 10; Bullock v. Carter, 405 U.S., at 142-143, 92 S.Ct., at 855; American Party of Texas v.

White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); Illinois Elections Bd. v. Socialist Workers Party,440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979).

4. The annex was prepared by Delegate Gerard Emanuel. Note the summation of facts was also contained in Delegate Emanuel's testimony before Congressional on March 17, 2010.

5. Justice concedes that the proposed constitution complies with Sovereignty and Supremacy requirement. Justice concession is derived from the following statements:" the present proposed constitution considered together bring it into substantial compliance with the Enabling Act's requirement that the proposed constitution recognize U.S. sovereignty and the supremacy of federal law." supra Justice at 4; "The current proposed constitution's acknowledgment of the USVI's status as an "unincorporated territory of the United States" thus implies recognition of the United States' sovereignty over the USVI. Id. at 5; "The current proposed USVI constitution appears no less compliant with subsection 2(b)(1) of the Enabling Act than the constitution originally proposed in 1980, if not also the revised version of that constitution ultimately approved by Congress." Id at 4.

6. Justice at 1.

7. Id at 6

8. Convention Between the United States and Denmark for Cession of the Danish West Indies, 39 Stat. 1706 (1916).

9. See UN Charter, Chapter 11, Article 73; See also UN Resolution 1514 and UN Resolution 35-118.

10. Id at 6; United States v. Antelope, 430 U.S. 641, 647 1977; Sandoval at 45-46; Morton v. Mancari, 417 U.S. 535, 553 (1974).

11. See U.S.Amicus.Brief,1999.at 5; Sandoval at 45-46.

12. Rice v. Cayento, U.S.Amicus.Brief,1999.at 5;

13. Justice at 8.

14. 963 F. supp 1547; 146 F.3d 1075

15. 528 U.S. 495,509, 120 S. Ct 1044, 145 L. Ed 2d 1007

16. Id at 516.

17. Id at 531.

18. Id at 538 citing Mancari, 417 U.S., at 554, 94 S.Ct. 2474.

19. Justice at 4.

20. See Annex.

21. Justice at 14.

See also relevant articles on this issue:

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