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## Governor Says No to Draft Constitution

June 11, 2009 -- After reviewing the document and conferring with both his legal team and the attorney general, Gov. John deJongh Jr. said Thursday he would not send the draft constitution submitted by the Constitutional Convention to President Barack Obama because it's not in compliance with either local or federal laws.

The governor said at a press conference Thursday that he was ready to work with senators to determine what the next step should be. But convention delegates have other plans, and are getting ready to file a writ of mandamus in V.I. Superior Court to push the document on to Congress.

Speaking during the press conference at Government House on St. Thomas, deJongh said he couldn't take what some might describe as the "politically expedient" course and forward the document on with some "strong critical comments." The governor's role isn't to rubber stamp and pay for postage -- otherwise, he wouldn't be required to review the document, deJongh added.

Both the federal law authorizing territories to establish constitutional conventions and the local law setting up the Fifth Constitutional Convention are silent on what the governor should do if the proposed document doesn't pass constitutional muster. But in a recent opinion, Attorney General Vincent Frazer made it clear that deJongh doesn't have to do anything else at this point.

"In other words, the wrongful acts of the Convention in adopting a draft that did not comply with law could not require of me yet another further act not authorized by law," the governor explained, saying that he would not send the president a proposed constitution that doesn't recognize the U.S. Constitution as the "supreme law of the land" or adhere to its basic civil rights and protections.

Speaking from New York Thursday, convention president Gerard Luz James II said the convention plans to take action and will soon file a writ of mandamus in V.I. Superior Court in an attempt to get the document moving. James said the governor is the one in violation of local and federal laws, which define his role as more of a conduit charged with getting the papers to Congress.

"The governor waited until the midnight hour to be both judge and jury," he added. "He placed the opinion of the attorney general in front of him, knowing full well that he had his own issues with the document. He should be dealing with the real issues of the Virgin Islands, like fixing the budget and dealing with the high crime rates, especially on St. Thomas."

Any document with a compelling state interest -- dealing with issues important to the people of the Virgin Islands -- could be deemed constitutional, James said, expressing his disappointment with deJongh's decision.

Interestingly, deJongh noted that the statute establishing the Fifth Constitutional Convention specifically instructed delegates to build upon the work of their predecessors by adopting the "standard and non-controversial" provisions of the draft document submitted by the Fourth Constitutional Convention. This section of the statute was intended to save time and money but delegates did not follow the Legislature's directions, he added.

Even with a local constitution in place, the U.S. Constitution, treaties and laws of the United States applicable to the Virgin Islands, would remain the ultimate trump cards, superseding all

other local laws. Members of the Fourth Constitutional Convention recognized this and put it in their document, the governor said. But the Fifth Constitutional Convention didn't, and instead inserted the phrase, "This constitution shall be the supreme law of the Virgin Islands." Had they added on something like "notwithstanding all other federal laws," the concern would have been moot, Frazer said after the press conference.

"It is very important to note this point: because the failure to recognize the U.S. Constitution as the supreme law of the land was not just an oversight -- it was, in fact, removed from the originally incorporated and adopted language of the Fourth Constitutional Convention draft," deJongh explained during the press conference.

The Fourth Constitutional Convention did grapple with the controversial issue of native rights, and included definitions for native and ancestral Virgin Islanders, but they didn't come attached with specific rights and privileges, the governor said.

"This time, those individuals who fit these definitions were now being favored with significant rights and benefits not available to all other V.I. citizens," he added. "What was attempted this time was to provide an unconstitutional advantage with respect to property taxes, participation in the amending of the constitution and the qualifications to run for and serve as governor and lieutenant governor."

From the beginning, convention attorney Lloyd Jordan made clear his opposition to such provisions, often calling them illegal, particularly the section requiring local governors and lieutenant governors to be native born. In his recent opinion, Frazer also tacked on the term "unconstitutional," saying that certain sections -- particularly the ones dealing with the composition of the Senate and giving only native Virgin Islanders the right to amend the constitution, even if they aren't residents of the territory -- likely violate the U.S. Constitution's Equal Protection Clause.

On Thursday, deJongh echoed these sentiments, saying that the incorporation of such provisions into the local constitution would reverse decades of progress in the area of civil rights. No one group can operate above the law, the governor said.

"Just imagine for a moment what any of us from these islands would say if we went to live or work or study on the mainland, and we were told we were second-class citizens unable to hold public office or that we were unequal in our rights," he said. "The 2008 election of Barack Obama was to be a moment in our nation's history that said those days were gone. I will not permit these days to return to our Virgin Islands, where we have long taken pride in our tolerance and respect for all."

Further, Congress shouldn't have to clean up the language of the constitution. That should be done in the territory, by the people of the Virgin Islands, deJongh said.

"Surely we cannot rely on Congress to stop considering health care reform, the financial and economic crisis, the wars in Iraq and Afghanistan, and the nomination of the first Hispanic Supreme Court justice to turn their attention to 'cleaning up' the draft sent to them from the Virgin Islands," he added.

Nor could the governor be expected to forward on a "clearly unconstitutional" document to the nation's first African American president who is incidentally both a constitutional scholar and former law professor, deJongh added. If the Fifth Constitution Convention had been willing or able to follow the local law, or if they hadn't waited until the last minute to adopt a document, maybe there would have been time for revisions, he added.

"I believe wholeheartedly that were I presented with a proposed constitution that appeared to comply with the local and federal requirements, then it would indeed be my duty to forward it to the President of the United States for his consideration and further action," the governor said.

Now, it's up to the community and the Legislature to decide what to do next. The convention had until May 31 to come up with its document -- since the deadline has passed, there's nothing more the delegates can do, he explained.

"Only through legislation -- only by having and obeying a law -- can government act or can this or any other convention act," deJongh said. "This is a matter that must first be resolved in the Legislature, but it is one in which I believe we must all take part. Now is the time for all to

pay attention, get involved and take part. I ask all in the territory to reflect on those principles that keep us free, those principles that are the foundation of the American democracy, those principles of equality and justice for all that make us both proud as Americans and proud as Virgin Islanders."

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