

TESTIMONY OF
CHIEF JUSTICE RHYS S. HODGE,
TO
THE COMMITTEE ON THE JUDICIAL BRANCH OF
THE FIFTH CONSTITUTIONAL CONVENTION
ON
MARCH 26, 2008

Co-Chairmen Attorneys Capdeville and Jackson, members of the Committee on the Judicial Branch of the Fifth Constitutional Convention, other Delegates present, ladies and gentlemen, - Good Evening.

It is my pleasure to appear on behalf of the Supreme Court and share our suggestions for the Judicial Article of the constitution. In response to your February 1, 2008, request, I previously provided this Committee with information and certain documentation for the Committee's consideration. I attach that correspondence to these remarks as Exhibit 1, for purposes of the record and will reiterate some of those points in these remarks.

At the outset, I wish to emphasize that the constitution being drafted by this convention is for the long haul and should not be concerned with or seek to address merely the concerns of the present office holders of any of the offices to be established by the constitution. With respect to the Judicial Branch, the goal must be to establish the best judicial system for the Virgin Islands.

The Fifth Constitutional Convention enabling law, Act 6688 as amended, requires the Fifth Constitution Convention to start with the draft of the Fourth Constitution Convention and I am happy to state that the Judicial

Article of that draft is, in principle, a fairly good judicial article and a good starting point.

The Congressional enabling legislation requires that the constitution must establish a republican form of government consisting of three separate co-equal branches of government. It also requires a system of local courts consistent with the provisions of the Revised Organic Act of the Virgin Islands, as amended (“ROA”). While the judicial article of the ROA has not been amended since the creation of the Virgin Islands Supreme Court in 2004, Congress in 2004 amended the almost identical judicial article of Guam’s Organic Act to clearly establish the judiciary for Guam in the Organic Act instead of leaving the establishment to local law as in the case of the Virgin Islands. Although those Congressional provisions are not binding on the Virgin Islands, they are instructive as to exactly the judicial branch that Congress considers important to the Territories and which Guam’s Constitution when ever it is written, pursuant to the same Congressional authority as that for the Virgin Islands constitution, must be consistent. The Guam Organic Act judicial article amendment should therefore be instructive in drafting the judicial article of the Virgin Islands constitution. [The Guam Organic Act judicial article, 48 U.S.C. §§ 1424, 1424-1 is attached hereto as **Exhibit 2**]. The Congressional provisions for Guam’s Organic Act judicial article provide for the establishment of a unified judicial system with the Supreme Court as the highest court. It vested the Supreme Court, not only with appellate jurisdiction, but also with supervisory jurisdiction over the Superior Court. It also vested the Supreme Court with the authority to make and promulgate rules governing the administration of the judiciary as well as the practice and procedure in the courts of the judicial branch. Importantly, the Chief Justice of the Supreme

Court is designated as the administrative head of the judicial branch with general supervisory power over, all departments, divisions, and other instrumentalities of the judicial branch; and with authority to issue such administrative orders on behalf of the Supreme Court, as necessary for the efficient administration of the judicial branch.

These and similar provisions are found in almost every state constitution and I recommend the Congressional provisions of Guam's Organic Act to this Committee as it drafts the Judicial Article for the Virgin Islands.

I will now address the specific areas which you requested that we comment on in your February 1, 2008 correspondence.

Administration of the Judicial Branch

In keeping with the mandate that there be three co-equal branches of government it is imperative that there be a unified judicial branch and not just separately administered courts. Each branch must therefore be headed and controlled by one person, the Legislature by the Senate President, the Executive by the Governor and the Judiciary by the Chief Justice. The recent Congressional provisions for Guam are a good example for establishing such an independent unified judicial branch.

The Fourth Constitutional Convention provided that the chief judge of the appellate court would be responsible for the administration of that court while the administration of the lower trial court would be as provided by law. Although this provision was understandable under the circumstances where the initial Appellate Court was to be made up of two federal judges and one local judge, it is however, a recipe for confusion and conflict, as each new Legislature would be free to change the administration structure of

the lower courts thereby interfering with the independence of the judicial branch. This is contrary to the model selected by Congress for Guam, the only other U.S. Territory operating under an Organic Act of Congress. It is also contrary to the constitutional provisions in all states and territories but one where either the Chief Justice or Supreme Court is the administrative head of the entire judicial branch. Utah alone has its Judicial Council, chaired by its Chief Justice, as the administrative head of its judicial branch. [See Bureau of Justice Statistics, State Court Organization 2004, Part III, Table 12, attached hereto as **Exhibit 3** and available on the web at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf>]. It is therefore important and essential to the independence of the judicial branch to provide clearly in the constitution that the Supreme Court or the Chief Justice is the administrative head of the judicial branch with administrative and supervisory authority over all the courts of the judicial branch. The Puerto Rico Judicial Article, Sections 2 and 7 is also a good example of such provisions.

While it is not my intention to debate the merits of the arguments of the Superior Court judges for separate administrations, I would note that the ten states they cited in their Position Paper are contrary to their assertion, and in fact support the position that the Supreme Court or Chief Justice be designated in the constitution as the head of the judicial branch with administrative and supervisory authority over all courts of the judicial branch. The fact that states are divided into circuits, districts or counties, such as Florida with 20 circuits, with local presiding or chief judges having administrative authority over the trial courts of those areas, does not alter the fact that the respective Chief Justices of those states still have administrative and supervisory authority over all courts of the state. In fact, the provisions

of Act 6687, which created the Supreme Court, provided for such a division of administration in the Virgin Islands. Moreover, the provisions of Act 6687 repealed at the request of the Superior Court judges, are almost identical to those of the New Hampshire provisions referred to approvingly by the Superior Court judges in Exhibit D to their Position Paper.

Prior to assuming and implementing the administrative and supervisory authority over the judicial branch conferred on it by Act No. 6687, the Supreme Court contracted with the National Center for State Courts (“NCSC”) to study the judicial branch of the Virgin Islands and devise and recommend the most suitable administrative structure for the new two tier court structure of the Virgin Islands within the confines of Act 6687. The report of the NCSC is attached hereto as **Exhibit 4**. Before the recommendations could be implemented, the Superior Court judges successfully lobbied the Legislature to change Act 6687. The Supreme Court requested the author of the NCSC report to comment on the objections raised, weighing the pros and cons of having a central Judicial Branch Administrator for the judicial system. Those comments are attached as **Exhibit 5**. I presented the position of the Supreme Court against the proposed changes to Act 6687 to the Legislature and attach those arguments as **Exhibit 6** hereto. The Superior Court judges simply refuse to accept the fact that the judicial branch of the Virgin Islands is no longer a one tier court system controlled solely by the Superior Court and its Presiding Judge. It is therefore necessary to establish clearly in the constitution the Supreme Court as the administrative head of the judicial system with the Superior Court as the subordinate trial court to perform its trial court functions pursuant to the supervisory authority of the Supreme Court.

The constitution should also provide the Supreme Court or Chief Justice the authority to appoint a Court Administrator to assist the Court in carrying out its administrative responsibilities. Almost every state has, since the early 1970's, amended their constitutions to clearly provide for the administrative and supervisory authority of the Supreme Court and Chief Justice and for the appointment of a judicial branch court administrator, making the holder of that position a constitutional officer. [*See, e.g.*, Puerto Rico's Judicial, Article Section 7; Alaska's Judicial Article, Section 16; Delaware's Judicial Article, Section 13; Hawaii's Judicial Article, Section 6; North Dakota's Judicial Article, Section 3; New Jersey's Judicial Article, Section VII; and Pennsylvania's Judicial Article, Section 10, to name a few]. That authority should likewise be provided in the constitution of the Virgin Islands.

Rule Making Power

The Fourth Constitution in Section 9 of Article VII, provided for “[t]he Appellate Court to adopt rules with respect to judicial matters including temporary disability, civil and criminal procedure, judicial ethics, and admission to, governance of and expulsion from the practice of law.” This provision should remain as is. If anything, it should be expanded to clearly provide that the Supreme Court has the authority to adopt administrative rules, practice and procedure rules for all courts, rules of evidence, rules for admission to and discipline of attorneys and for judicial discipline. The Congressional provisions for Guam Organic Act are a good example of such rule making authority as are the several judicial articles of the constitutions attached including section 6 of Puerto Rico's. Also, Table 13 of the Bureau of Justice Statistics, State Court Organization 2004,

publication attached as **Exhibit 3**, shows that the rule making authority of the Court of Last Resort is conferred by constitutional authority in almost every state.

The arguments of the Superior Court judges that it should have rule making authority is simply not persuasive. The constitutions and laws of the ten states they cite all provide that the Supreme Court adopts practice and procedure rules for all courts of the state. Those states that also permit local courts to adopt local practice rules require that they be consistent with, be subject to or be approved by, the Supreme Court. Washington D.C., which allows the Superior Court the widest authority to adopt local rules nevertheless require that the rules so adopted first be approved by the Court of Appeals which serves as its Supreme Court. The provision of the Fourth Constitution regarding rule making authority should remain as written. Additionally, consideration should be given to providing for the legal effect of such practice and procedure rules once adopted either by providing that once adopted they have the force and effect of law or that they be legally effective unless changed by a two thirds majority of the Legislature; the same as required for over-riding a Governor's veto.

Composition of Supreme Court

The Fourth Constitution in Section 2 of Article VII, provided that the Appellate [Supreme] Court shall be composed of not less than three justices. It is not clear whether this provision would authorize the Legislature to expand the number of justices to five without a constitutional amendment. Unless the number of justices is increased to five in the constitution, it is desirable to provide the authority now for the Legislature to have the authority to increase the number of justices of the Supreme Court to five

justices without having to amend the constitution. The example of Alaska's Judicial Article, Section 2(a) providing that "the number of justices may be increased by law upon the request of the supreme court" is one way of providing such flexibility. [*See also* Puerto Rico Judicial Article, Section 3].

The Fourth Constitution did not provide for the Chief Judge [Justice] for the Appellate Court. Section 10 referred to the "chief judge "of the appellate court as being responsible for the administration of the court but nowhere else is there any reference to a chief judge (except to provide that the non federal judge be the chief judge of the interim appellate court). It is suggested that the constitution provide for the office of Chief Justice of the Virgin Islands, the method of selection and the term of the office. The current provisions of the Supreme Court law with the selection by the justices should be adopted but the term should be increased from three to five years. *See also* Alaska's Judicial Article, Section 2(b). Experience in other jurisdictions has shown that three years is too short a period to permit a new chief justice to propose and accomplish his or her goals and programs. The Conference of Chief Justices recommends that the terms of Chief Justices not be less than five years.

Judicial Selection

The Fourth Constitution in Section 3 of Article VII, provided for the appointment of judges by the Governor, subject to Legislative advice and consent, from those names nominated by a Judicial Nominating Committee, which Committee was to be established by law. This method of judicial selection is a transparent and satisfactory procedure and should be adopted for the Fifth Constitution. However, since the operation of the judicial branch depends on the availability of judicial officers which could be

hampered if the Governor or Legislature failed to appoint and /or act on the confirmation in a timely manner, time limits for the action of those branches to act should be imposed. The judicial article of Hawaii, Section 3, Indiana's Section 118 and Wyoming Judicial Article, Section 97-5-004(b), are good examples of time limits.

The drawback to the Nominating Commission in a small jurisdiction as the Virgin Islands is that there may be years between the selection of judicial candidates and the Commission will remain dormant for long periods of time. To make the Commission more effective and efficient the duties of the Commission may be expanded to include the functions of a Judicial Council such as in Alaska (*See* Alaska Judicial Article, Sections 5 and 8), or to combine the Nominating and Judicial Disability Commissions into one Commission performing both functions. *See e.g.* Indiana Judicial Article, Section 9.

The Nominating Commission should also be required to screen and nominate magistrate candidates for the Magistrates Division of the Superior Court but the nomination should be to the Chief Justice who, as the highest judicial officer, should be the appointing authority, required to appoint from the list provided by the Commission.

Direct judicial appointment by the Governor with Legislative advice and consent without nomination by a nominating committee is also a satisfactory method which has worked well in the federal judicial system. However, since the federal system is lifetime appointments it is not clear exactly how that added security impacts the system. In the Territories where the federal judicial appointment is for terms of ten (10) years, the direct appointment of federal judges in the Virgin Islands has produced quality judges. Attached hereto is an article by, G. Alan Tarr, *Designing an*

Appointive System: The Key Issues published in Vol. XXXIV Fordham URB. Law Journal, pg. 291 and found on the internet at “<http://law.fordham.edu/publications/articles/400flspub8521.pdf>”, which describes the various judicial selection methods.

As between the systems, the Supreme Court recommends the Nominating Commission method and does not recommend any form of judicial election for the selection or retention of judges or justices.

Judicial Tenure

The terms of judicial office should be long enough so that the judge or justice will be free to make decisions without looking over his or her shoulder wondering if the result will affect the reappointment to office. The present term in the Supreme Court of ten (10) years with reappointment during good behavior is a good balance. This is similar to the case of New Jersey where the initial term is seven years followed by life tenure. Massachusetts and Rhode Island appoint justices and judges to serve during good behavior while Puerto Rico appoints Justices for life to age 70 and trial court judges for terms of 12 years. Delaware has twelve (12) year terms; New York fourteen (14) year terms; while Washington D.C., has fifteen (15) year terms. Many states have ten year terms for the Justices and shorter terms for judges. The present term for the Supreme Court justices should continue as is or if the “during good behavior” is changed the terms should be expanded to 12 or 15 years. A retirement age of 75 or 76 years should be imposed for justices. Many states with age 70 retirement requirements have sought to extend those terms to permit later retirement ages.

Judicial Performance, Suspension or Removal

The Fourth Constitution's provision establishing a Judicial Misconduct and Disability Commission established by law should be utilized except that the Commission should not itself discipline or remove the judge or justice but should investigate and submit its recommendations to the Supreme Court which would then have the power to sanction, suspend, remove or retire the judge or justice. The Alaska Judicial Article, Section 10, is a good example. Alternatively, to place the issue of judicial discipline exclusively within the judicial branch the Supreme Court may be provided the authority to remove judicial officers and establish and appoint the Commission. The Hawaii Judicial Article, Section 5 is a good example of such a system.

Transition

There should be a miscellaneous provision of the constitution which provide for the continuation of the judicial business when the constitution is adopted, with the current courts, justices and judges to serve, with all new appointments or reappointments to be made pursuant to the terms of the constitution. The second paragraph of the section entitled "Continuity of Judicial Matters" of the Fourth Constitution should be modified to reflect the current courts of the Virgin Islands and provide for the continuation of their judicial business with the current judicial officers. Also, a provision such as South Dakota's Judicial Article, Section 13, providing "The Legislature by law and the Supreme Court by rule shall provide for the orderly transition of the judicial system in conformity with this article", should be used to further facilitate the transition.

I trust the suggestions offered here will be of assistance to the Committee as it creates the Judicial Article for the new Virgin Islands constitution. Attached hereto as **Exhibit 7**, is a modified version of the Fourth Constitutional Judicial Article with changes tracked to show the proposed changes suggested hereby. The members and staff of the Supreme Court stand ready to offer any further assistance the Committee may desire.

Thank you.