

The Virgin Islands Consortium

Op-Ed: V.I. Governor Pardon Power Is Unconstitutional And Ineffective

Opinion / **Published On January 08, 2015 11:11 AM /**

Staff **January 08, 2015**



The VI Consortium recently reported on former two-term Virgin Islands Governor John P. de Jongh, Jr.'s decision to [pardon 16 persons](#) on his final day in office on Jan. 4. One reader has responded to the story, stating that de Jongh's and all V.I. governors' pardon power is unconstitutional.

By way of introduction and background, I was a prosecutor for 36 years retiring in 2011 with 32 of those years as a federal prosecutor. From 2005 through 2009, I served as the first assistant and acting and interim U.S. Attorney in the United States Virgin Islands. I teach Criminal Procedure at the University of St. Thomas Law School in Minneapolis, Minn. Obviously, I write only as a private citizen and in no official capacity to express an

opinion on the unconstitutionality of the Virgin Islands (VI) Governor's pardon power.

The Revised Organic Act of 1954 (ROA) provides:

The Governor....*may grant pardons and reprieves* and remit fines and for forfeitures *for offenses against local laws*. 48 U.S.C. 1591 (emphasis added).

Section 1591 is unconstitutional and ineffective to issue valid pardons because it violates the U.S. Constitution Article II, Section 2 which provides that the President "shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." In *Schick v. Reed*, 419 U.S. 256, 95 S. Ct. 379 (1974), the Supreme Court held the presidential pardon power flows from the U.S. Constitution and is not subject to Congressional acts or restrictions.

Within the sovereignty of the United States the pardon power is exclusively the President's. Congress has no pardon power it may delegate, nor may it create a pardon power, nor may infringe on the President's pardon power by delegating a pardon power to agents of an instrumentality it created within the single sovereignty of the United States. In the VI there is one sovereign-the United States and the VI Government (VIG) is a part of that single sovereign. No one but the President may issues pardons.

The Supreme Court of the Virgin Islands recently applied the single sovereignty rule in *Bryan v. Fawkes*, V.I. Sup. Ct., Civil No. 2014-0066 (Oct. 24, 2014). The Court held that the Federal District Court and the Courts of the Virgin Islands both derive their delegated powers from Congress by Article IV, Clause 2 of the U.S. Constitution. In reaching this holding the V.I. Supreme Court cited *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985) holding that the Government of Guam is in essence an instrumentality of the federal government. The same is true of the VI Government.

The holding in *Bryan v. Fawkes* is consistent with *United States v. Wheeler*, 435 U.S. 313 (1978) in which the U.S. Supreme Court held territorial governments are "an agency of the federal government". In *Wheeler* Supreme Court went on to hold that when a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as "*an agency of the federal government*." The Court held that the "dual sovereignty" concept of *Bartkus v. Illinois*, 359 U.S. 121 (1959) and *Abbate v. United States*, 359 U.S. 187 (1959) does not permit a single sovereign to impose multiple punishment for a single offense merely by the expedient of establishing *multiple political subdivisions with the power to punish crimes*.

In *GVI v. Schneider*, 893 F. Supp. 490 (D.V.I. 1995), the V.I. District Court held that "[t]he Fifth Amendment circumscribes Congress' ability to treat the Government of the Virgin Islands as a separate 'sovereign' in criminal matters, pursuant to its authority under Article IV of the Constitution to 'make all needful Rules and Regulations respecting' the Territory." In *Schneider* the Court held: "[s]ince the 'single sovereign' in the Virgin Islands is allowed only one bite of the apple whether acting as the United States or the Government of the Virgin Islands it behooves the federal and territorial prosecutors to work in concert when bringing charges against criminal defendants." In other words, the acts of the Virgin Islands Attorney General and the acts of the United States Attorney for the Virgin Islands bind each other in criminal matters because they are two parts of a

single sovereign.

Thus, "local laws" such as V.I. criminal laws are not laws of a separate, non-federal sovereign, such as a State. When the V.I. Legislature passes a criminal statute it does so by the authority granted to it by Congress and as an agency of the U.S. Government. When the V.I. Executive Branch, (the Governor or the V.I. Attorney General) acts to enforce a V.I. criminal statute, they act by authority granted to them by the U.S. Congress and they act as agents of the United States. Their acts have a binding effect on the entire sovereign because they each are part of the single sovereign.

If Section 1591 were valid, when the VI governor grants a pardon, he is acting as an agent of a political subdivision of the United States government. A governor's pardon, to be effective, must bind the only sovereign from which his power derives, the United States. If it does not bind the United States the pardon has no effect at all. To argue it binds only the VIG is to argue it does not bind any sovereign. A valid governor's pardon would prohibit both the federal government and its political subdivision, the VI territorial government, from acting inconsistently with that pardon. The Fifth Amendment demands the single sovereign abide by the pardon it has granted in all respects. As the Court held in *Schneider*, the 'single sovereign' in the Virgin Islands is allowed only one bite of the apple whether acting as the United States or the VIG. Granting a governor's pardon is that one bite of the apple.

It is obvious by the terms of Section 1591 of the ROA that Congress attempted to limit the pardon power it created for the governor of the Virgin Islands in 1954 to "*offenses against local laws*".

Since 1954 judicial decisions have negated the false premise of dual sovereignty in a territory upon which the distinction in Section 1591 between "local laws" and "federal laws" was premised. The criminal statutes of the Legislature of the Virgin Islands are not "local laws" as that term would be used to describe the local laws of a separate sovereign State under a dual sovereign theory. They are criminal laws passed under the sovereign power of the United States by a local agency created by the United States Congress. Further, court decisions over the last 60 years have made it clear that the acts of territorial officials, certainly in criminal cases, are the acts of agents of an agency of the United States. *Wheeler* and *Schneider* leave no doubt that in criminal matters the federal authorities and the territorial authorities are one and their acts bind each other. To the extent Congress has given the VIG autonomy in many respects, that autonomy must not be conflated with sovereignty.

These issues should have been addressed in *Hansen v. Fawkes, et. al.* District Court of the Virgin Islands, 1:14-cv-00055-WAL-GWC, in which the plaintiff's complaint requested that the District Court "...issue a declaration that the Pardon issued by the Governor of the Virgin Islands to Senator Hansen is valid..." (See Complaint page 30). The validity, or invalidity, of Section 1591 is necessarily a federal statutory and federal constitutional question. By raising the validity of Section 1591 the plaintiff was "drawing into question the constitutionality of a federal statute". Indeed neither the plaintiff nor the defendant in *Hansen v. Fawkes* was *actually* seeking to have Section 1591 of the ROA declared invalid. The case was "friendly", if not "collusive", litigation. Nevertheless, the case presented the Court with the issue: is Section 1591 valid or is it invalid? "Friendly" and "collusive" litigation never produces honest litigation of the issues because both sides are

seeking the same outcome.

Since the complaint of the plaintiff drew into question the constitutionality (the validity) of a federal statute the plaintiff was required by Federal Rules of Civil Procedure, Rule 5.1 to give notice to the United States Attorney General and the Court was required by 28 USC 2403(a) to certify that fact to the US Attorney General and give the United States up to 60 days to intervene in the litigation. The docket in the case does not indicate that the US Attorney General was given any notice.

The plaintiff in Hansen v. Fawkes asserted the erroneous theory of dual sovereignty to support a claim that a pardon by the Governor of the Virgin Islands was valid while citing case law that supported the opposite conclusion. The plaintiff cited Public Citizen v. United States Department of Justice, 491 U.S. 440, 485 (1989) for the proposition that "...where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the Legislative Branch. For example, the Constitution confers upon the President the 'Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.'" (See Hansen Complaint, page 4). This holding in Public Citizen is sufficient to conclude that Congress could not constitutionally enact Section 1591 delegating the pardon power that is exclusively the President's to the VI Governor who is an officer of a subordinate political subdivision of the United States.

In Hansen v. Fawkes the plaintiff argued that the Constitution of the United States is not the true source of the governor's pardon power and that the true source of the pardon power in the Virgin Islands is the Revised Organic Act. A statute. This is an erroneous argument since all Acts of Congress must derive from the powers granted to Congress by the Constitution of the United States. One power Congress does not have is the pardon power. Congress may not pass an act which intrudes on the President's pardon power within federal sovereignty. Congress may not delegate a power it does not have. Congress may not divine a power for itself or one of its creations unless the authority to do so is derived from the U.S. Constitution. Since only the President has the pardon power Section 1591 is unconstitutional and does not support granting a valid pardon to anyone. All pardons by the VI Governors, past, present and future, are invalid and void.

Amnesty: The Real Danger of the Governor's Clemency Powers

The true danger lurking in the Section 1591 pardon power, if valid, is the possibility of grants of amnesty (a form of clemency like the pardon or commutation) to large classes of persons by a VI Governor. Suppose a governor of the Virgin Islands decides that everyone in the Virgin Islands who has failed to file an income tax return, or has committed income tax evasion (and wants to run for office) is granted amnesty for that criminal conduct? Putting aside the issue that federal income tax law in the VI is entirely a matter of federal law and no aspect of it is "local law", such amnesty would bind the single sovereign. Suppose the governor of the Virgin Islands on the last day in office decided that all persons who worked for the Virgin Islands government during the governor's terms in office are granted amnesty for any criminal offenses they may have committed during the performance of their duties? One sovereign. One bite of the apple. If the governor's pardon power is valid his grants of amnesty cannot be reviewed by any legislative or any judicial authority, including the federal courts, Congress, or the President. The pardon power is the power of a king.

These supposed applications of the amnesty power might be dismissed as a parade of the improbable or the ridiculous. However, in the Virgin Islands anything is possible in the realm of politics, even the seemingly ridiculous.

The exercise of the VI governor's pardon power in the past is an ignominious record fraught with great controversy. For example, in 2007 governor Charles W. Turnbull granted 37 pardons and commutations as he left office for convictions ranging from murder and rape to embezzling money from the Virgin Islands Government. Governor Schneider, as he left office, pardoned five individuals, including persons close to him politically. Governor Farrelly, as he left office, pardoned 12, including five murderers. One of those pardoned by Governor Farrelly was Rafael Joseph who was serving eight life sentences for his part in the Fountain Valley case in which eight innocent persons died. In the Virgin Islands, the improbable is very possible and ridiculousness does not exclude it from the realm of reality.

As important as the number and types of pardons that are granted, is the fact that there is no process, let alone a transparent process, by which pardons by the governor of the Virgin Islands are granted. No one knows exactly what it takes to get a VI Governor's pardon, commutation, or amnesty. One can only guess.

Once again, an outgoing VI Governor has granted pardons and commutations to a range of criminals. There was no public process. No known standards. No opportunity for the victims of the crimes to give input to the decision process. No input by law enforcement. No input by the prosecutors or judges. No investigation to determine if the person being pardoned has accepted responsibility for their crime. No determination that the person is in fact rehabilitated. No record of how or why a pardon or commutation was granted. It is a process that is totally inconsistent with the US Pardon Attorney process. Congress should not permit this practice, even if the governor's pardon power were valid, which it is not.

The pardon power is the most unfettered power that the executive branch has and it therefore has the greatest potential for abuse. This is why the federal Pardon Attorney process is so long and detailed. When the pardon power is exercised in total secrecy, as it is in the Virgin Islands, democratic

Government fails for lack of accountability. In an oligarchy, such as the GVI, the rich, powerful and connected reap the benefits of government power and the populace reaps the failures of the government, which failures are on full display to the world in the numerous reports of fraud, waste and abuse conducted by the Department of Interior/Office of Inspector General and published on its web site. The failures are exemplified by the unconscionable homicide rate and corruption prosecutions.

Congress should pass a new Section 1591 which requires all pardon applications from the VI to undergo the same rigorous US Pardon Attorney Office process as all other clemency applications within the federal sovereignty and permits the governor of the VI to make a recommendation to the Pardon Attorney to be considered by the President. Neither Congress nor the President can benignly ignore the great harm that may result from the exercise of an unconstitutional pardon power. These issues can only be ignored for political reasons which undercuts the rule of law.

The new VI governor, through a new VI Attorney General, should challenge any pardons and commutations granted by the outgoing administration. It will take courage for the new Governor to acknowledge that his pardon power is invalid. It will take courage for the new VI Attorney General to tell the governor his pardon power is invalid. However, fidelity to the law, not politics, should be the hallmark of this new administration. Single sovereignty is not popular in the VI; however, it is the law and it must be followed until such time as it is changed. Disregarding the law because of individual dislikes of the law is a failure of government. The Governor and VI Attorney General should follow in the courageous footsteps of the VI Supreme Court, which recently adhered to the rule of law, not the rule of VI politics as usual.

Submitted by:

Paul A. Murphy

The views and opinions expressed are solely those of the author, and do not necessarily reflect the views and opinions of the staff and management of the VI Consortium.

Image Credit: Guim

© Viconsortium 2026