

The Virgin Islands Consortium

Opinion: Revisiting The Unconstitutionality Of The Governor's Pardon Power

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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 the 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, MN. 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 to effectively grant anyone a pardon.

In January 2015 [I wrote and the VI Consortium published an op-ed](#) advocating that the pardon power of the Governor of Virgin Islands pursuant to 48 U.S.C. 1591 is

unconstitutional and ineffective because it violates Article II, Section 2 of the U.S. Constitution which reserves the power to grant pardons, clemency, and amnesty within the sovereignty of the United States exclusively to the President of the United States. Congress may not subject that exclusive pardon power to its acts. *Schick v. Reed*, 419 U.S. 256 (1974). 48 U.S.C. 1591 is unconstitutional because it is an act of Congress which purports to create a pardon power in the office of the VI governor which office is itself a creation of Congress within the single federal sovereign. Within the federal sovereignty only the President has the power of the pardon and the constitution prohibits Congress from creating that power in any other office holder. Congress may not create nor grant to another a power which it does not itself have.

The single sovereignty of the U.S. Government and the VI government, makes the unconstitutionality of Section 1591 very clear. It is beyond all disagreement that for purposes of criminal cases territorial governments, including the Government of the Virgin Islands (GVI), are creations of the Congress of the United States and as a result there is only a single sovereign made up of the territorial government and the United States. Put simply, it means that in criminal cases when one part of the sovereign acts, the GVI or the United States, its conduct binds the other part of the single sovereign. The United States and the GVI are one sovereign whose actions bind each other.

The U.S. Supreme Court recently reiterated this conclusion in *Commonwealth of Puerto Rico v. Sanchez Valle*, 579 U.S. ____ (No. 15-108, June 9, 2016). In *Valle* the defendant was originally charged under Puerto Rico's criminal code with illegally selling guns in Puerto Rico. While that case was pending the U.S. Government charged the defendant based on the same conduct with violations of federal gun trafficking laws. The defendant entered a guilty plea to the federal charges and moved to dismiss the charges by the Government of Puerto Rico as prohibited by the Double Jeopardy Clause because the single sovereign may prosecute a person only once.

The issue presented was whether the Double Jeopardy Clause bars the Federal Government and Puerto Rico from successively prosecuting a defendant on like charges for the same conduct. The Court held that successive prosecutions by the single sovereign made up of the United States and Puerto Rico each of which have the same "ultimate source" of their power were prohibited by the Double Jeopardy Clause.

A pardon by the President of the United States for criminal conduct in the Virgin Islands would prohibit the GVI from prosecuting the person for violations of the Virgin Islands code based on the same conduct. Conversely, a valid pardon by the Governor of the Virgin Islands for criminal conduct in the Virgin Islands would prohibit the federal government from prosecuting the person for violations of the federal criminal code. This of course assumes that 48 U.S.C. 1591 is valid, which it is not. But, if valid it must bind the single sovereign from which the governor's pardon power is ultimately derived.

The unconstitutionality of 48 U.S.C. 1591 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 3). The Court declined to reach the constitutional issue and left the constitutionality of 48 U.S.C. 1591 and the validity of past pardons undecided.

The issue is, are past pardons issued by past VI governors invalid and ineffective because Congress lacked the constitutional power to enact Section 1591 because within the sovereignty of the United States the pardon power is exclusive to the President? Congress has no pardon power it may delegate nor may its acts in any way affect the exclusive nature of the President's pardon power.

If the constitutionality of Section 1591 is raised it is an issue that may be decided only by the District Court of the Virgin Islands because it concerns the constitutionality of an act of Congress. If raised the plaintiff must follow Federal Rules of Civil Procedure, Rule 5.1 and give notice to the United States Attorney General and the Court must pursuant to 28 USC 2403(a) certify the issues to the US Attorney General and give the United States up to 60 days to intervene in the litigation. Neither procedure was properly followed in Hansen v. Fawkes.

It may be that no litigation challenging the validity of a past governor's pardon will immediately present itself. One can only hope a case ripe for litigation might appear now. However, one can imagine another avenue by which the constitutionality of Section 1591 might ultimately be litigated. It is not lost on governors of the Virgin Islands that when the GVI acts in a criminal matter it binds the United States as part of the same single sovereign. Thus, if Section 1591 is valid any VI governor by use of the pardon power in Section 1591, including amnesty, has the ability to prevent a federal criminal prosecution. If the single sovereign pardons, it may not later prosecute the pardoned conduct.

Sooner or later a governor of the Virgin Islands will grant a person a pardon or amnesty for particular criminal conduct and the United States will wish to prosecute that person for that same conduct. If Section 1591 is valid the single sovereign will have pardoned the person's criminal conduct and the federal prosecution will be prohibited. When that set of facts eventually arises, as it most certainly will, then the Pardon Attorney in the U.S. Department of Justice will be forced to face this issue and do its duty to protect the exclusive constitutional pardon power of the President.

As I noted in January 2015 a VI governor could grant all Virgin Islanders amnesty from prosecution for all income tax offenses or grant amnesty to all members of their administration for corruption while in office. Another interesting set of facts could arise where a criminal course of conduct took place in part in the VI and in part in the continental US and the VI governor granted a pardon or amnesty for that course of criminal conduct.

Only those who have never lived in the VI would think such events are fanciful. Sitting in Washington D.C. a person might opine that such imagined facts could never really happen or they will erroneously think dual sovereignty applies. Everyone who has lived in the VI knows it is not a matter of if, it is just a matter of when it will happen. In the politics of the VI anything is possible. The U.S. Pardon Attorney should address this issue now before it becomes a real issue in an actual case and should protect the exclusive pardon power of the President.

Submitted by:

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