

The Virgin Islands Consortium

Mapp Left To Call Special Election In Rodriquez Matter Following District Court Opinion

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ST. THOMAS -- The District Court of the Virgin Islands in the St. Thomas district issued its conclusion Tuesday regarding the matter of 32nd Legislature seat winner Kevin Rodriquez, whose candidacy was challenged by Janelle Sarauw and Brigitte Berry, and wound up turning what would have otherwise been a Senate seat for Mr. Rodriquez into a monumental legal battle that ended today with an opinion from District Court Judge Curtis Gomez who, in the end, gave neither Mr. Rodriquez nor Ms. Sarauw the seat. Instead, Judge Gomez appeared to have left the matter squarely in Governor Kenneth Mapp's corner, and in doing so leaving the territory's leader -- already under immense pressure to deal with the USVI's financial crisis -- only one day to call a special election, in accordance with local law.

The case dates back to December 2016, following the November 2016 General Election when Mr. Rodriguez placed sixth in the Senate race. Ms. Berry and Ms. Sarauw alleged in court that Mr. Rodriguez was not eligible to be a member of the Senate because of residency issues.

Background

On January 25, 2016, Mr. Rodriguez filed a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Tennessee. In his bankruptcy petition, Mr. Rodriguez swore under penalty of perjury that he lived in Tennessee and had not lived in another state anytime during the preceding three years. On November 8, 2016, the Virgin Islands held an election to choose senators to serve in the 32nd Legislature of the Virgin Islands. The District of St. Thomas-St. John was allotted seven seats to be filled by the top seven vote-getters.

After the election, Mr. Rodriguez placed sixth while Sarauw placed eighth. The Board of Elections certified the election results on November 22, 2016. On December 9, 2016, Sarauw and Berry, a volunteer for Sarauw's campaign, filed a complaint in the Superior Court of the Virgin Islands. The complaint names as defendants Mr. Rodriguez; the Virgin Islands Joint Board of Elections; the Board of Elections St. Thomas & St. John; and Caroline F. Fawkes, the supervisor of elections. Ms. Sarauw and Ms. Berry allege that Mr. Rodriguez is not qualified to serve in the Virgin Islands Legislature because he has not been "a bona fide resident of the Virgin Islands for at least three years next preceding the date of his election."

Developments

Multiple rulings followed, one of the most consequential being the Virgin Islands Supreme Court decision that [barred Mr. Rodriguez from being seated one day before inauguration](#). Mr. Rodriguez would later file with the District Court of the Virgin Islands, naming the Virgin Islands Legislature and its current president, Myron Jackson, as defendants. Mr. Rodriguez's preferred outcome would have seen the District Court forcing the Legislature to seat him. A subsequent suit was filed by Ms. Sarauw and Ms. Berry in the District Court against Mrs. Fawkes, the Joint Board of Elections, and the St. Thomas-St. John District Board of Elections.

In the end, however, the court's decision gave hope to both parties; did not force the Legislature to act on the matter -- stating it remains a coequal branch of government -- and, while it did not explicitly ask Mr. Mapp to call a special election, the court concluded that the governor had the right -- even duty -- to do just that to remedy the tumultuous saga.

On the matter of injunctive relief for Mr. Rodriguez, it said: "Even if Rodriguez were a member of the 32nd Legislature, his claim to injunctive relief is problematic. Rodriguez asks this Court to command a coordinate, coequal branch of government to undertake a task--seating Rodriguez--that is entirely and exclusively within the 32nd Legislature's control. See, e.g., *Reed v. Cnty. Comm'rs*, 277 U.S. 376, 388 ("[The Senate] is the judge of the elections, returns, and qualifications of its members. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the executive or judicial department." (citation omitted)). In essence, Rodriguez invites this

Court to cross a line that separates the coordinate branches. The Court will decline that invitation," the court said.

On the matter of injunctive relief for Ms. Sarauw and Ms. Berry, the court said: "Finally, Sarauw and Berry seek an injunction barring Rodriguez from serving as a Senator under 5 V.I.C. § 80. Pursuant to 5 V.I.C. § 80, "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee." 5 V.I.C. § 80. As the Supreme Court of the Virgin Islands explained, "Virgin Islands courts . . . construe section 80 as meaning what it says, that any taxpayer may sue the Government or one of its officers or employees to prevent a violation of the law." Haynes, 61 V.I. at 567 (emphasis added). Rodriguez is not an officer or employee of the Government of the Virgin Islands. For this reason, Sarauw and Berry cannot obtain injunctive relief through 5 V.I.C. § 80." wrote the court.

Below is the District Court's full conclusion in italic form. Read full document [here](#).

The issues presented by the Consolidated Cases are, in many respects, novel, subtle, and complex. They call upon this Court to interpret laws that most likely did not contemplate the procedural and substantive Gordian Knot that could be wrought by the perfect storm of events that have developed. Indeed, the entanglement presented by the parties' petitions require, among other things, inquiry into, and balancing of, separation of powers issues, political question issues, and federal-state issues.

The unfortunate timing of events creates uncertainty and hardship on the community and the parties. With respect to Sarauw and Berry, the record clearly establishes that Rodriguez claimed residence in two different places for the same time period. Because those conflicting claims were made in two separate judicial tribunals, the inconsistent positions are subject to judicial estoppel—the purpose of which “is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). Yet, given the statutory construct, as well as the timing of Sarauw and Berry’s claim—post-election and postcertification of election results—an otherwise arguably dispositive doctrine currently finds no forum within which to be applied.

*It is unfortunate that Sarauw and Berry may have felt assured with the partial ruling on judicial estoppel. At the same time, it is worth noting that when it issued its ruling on judicial estoppel, the Virgin Island Supreme Court cautioned that, “the Superior Court has to date not expressly identified the precise legal basis for Sarauw and Berry to challenge Rodriguez’s eligibility to serve in the 32nd Legislature.” Sarauw, 2017 WL 77123, at *11. The absence of that legal basis is fatal to Sarauw and Berry’s claim.*

Similarly, with respect to Rodriguez, it is unfortunate that he may have felt some degree of assurance with the certification of elections results. At the same time, the challenges to his residence, at the very least, served notice that a path to membership in the Legislature was not assured. As the Legislature has taken no action to consider whether Rodriguez is entitled to membership, his claim is both procedurally novel and legally wanting. At its core, he seeks to have this Court command action on the part of a co-equal and coordinate branch of government—the Legislature—to seat him. That action is exclusively within the province and discretion of that branch. The Court cannot cross that line.

In light of the foregoing, dismissal of the complaints in the Federal Action and the Removed Action is appropriate.

Significantly, the vacancy of a member of the Legislature created by the attendant circumstances, is not without remedy. Indeed, the Revised Organic Act (ROA) contemplated that there might be vacancies. To remedy that occurrence, Section 6(h) of the ROA provides: "The Legislature of the Virgin Islands shall by law provide the procedures for filling any vacancy in the office of member of the legislature." ROA § 6(h). The Virgin Islands Legislature did so. The Virgin Islands Code provides that, where the next election is more than a year away, if "a vacancy occurs in the office of a member of the Legislature, the Governor shall call a special election . . . within 30 days following the day on which the vacancy occurs." 2 V.I.C. § 111. It is entirely within the province of the executive to do so if he chooses.

*The Court is not unmindful that, given the current state of the law with respect to the Joint Board of Elections created by Act 7895, there may be some doubt as to the current survival of any entity that would hold an election. There are multiple possible interpretations of, and inconsistencies and conflicting contingencies in, Act 7895 that arguably may require an overhaul. Indeed, a Court would have to substitute its judgment for the words of the statute to create a comprehensive and internally consistent statute. That, however, would require the Court to engage in an exercise in which it cannot—judicial legislation. As the United States Supreme Court has cautioned, **[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of a statute.***

The conundrum created by Act 7895, like the Senate vacancy issue, is not without remedy. Indeed, the remedy to Act 7895 involves policy considerations that are appropriately left to the first branch of government.

According to Virgin Islands Code, the governor is required to call a special election within 30 days of a Senate seat vacancy. This year's Senate inauguration, with 14 members, was January 9. Mr. Mapp has until Wednesday to make an announcement.