Our Quest for a Territorial Constitution

Virgin Islanders Arise!

Malik Sekou, PhD

Image by Steve Simonsen Photography
Our Quest for a Territorial Constitution: Virgin Islanders Arise!

The People of the US Virgin Islands have been on a steady road towards self-determination, self-government, and constitutional development. Similar to the experiences of other unincorporated territories, Puerto Rico, Guam, Samoa, and the Northern Marianas, our road has had a few difficult areas and detours. The US Territorial era has been a period that allowed tremendous political and socio-economic development for our People.

Once a Danish colonial society—the Danish West Indies—we overcame many societal challenges from that colonial era and formed the cultural foundation of the contemporary US Virgin Islands. Our current Territory is a hybrid of the earlier traditional Danish West Indies and an ever increasingly more self-governed US Territory. Like all of our sister societies in the Caribbean, the traditional Virgin Islands society was transformed by a culture of resistance against classic European colonialism in the Caribbean and all the negative features that grew out of it. This common tradition of opposing unjust colonial policies and adapting outside cultural influences to fit the needs of our People unite Caribbean societies. As the Caribbean Basin remains the region with the most amount of “non self-governing territories” that have not achieved a full measure of self-determination, political status decisions and constitutional development are frontiers for political development.

Unlike Puerto Rico, our political system and culture never developed electoral parties organized around political status options. All of our major political reformers such as David Hamilton Jackson and Rothschild Francis earnestly worked to transform the Virgin Islands society within the confines of the unincorporated territorial model—this has had the overall impact of creating meaningful political reforms and improvements in our standard of living within a fundamentally colonial political model.

The term “colonial” irks many of us because we can easily see many government policies and programs from the US Mainland implemented here in our society. In many respects, we have had “state like” treatment. In fact, since 1927, we have US citizenship as applied to an unincorporated territory. In 1936, the first Organic Act replaced the Danish Colonial Law of 1906: this allowed a full exercise of fundamental civil rights for Virgin Islanders.

This means that the current US Virgin Islands has achieved major reforms that allow most Federal policies and programs set aside for US states to be applied to the Territory. As an unincorporated territory, the US Virgin Islands does not have sovereignty and the US Congress has plenary power due to Article 4 section 3 clause 2 in the US Constitution. This means Congress has final say in all territorial policies. States have voting members of Congress as Senators and Representatives who reflect the will of their constituencies and whose votes inform the final decision in national policies. Territories have Delegates to Congress who do not have a full vote but are able to vote in many committees in the House of Representatives.

Even more, US citizens who are residents of the 50 states can vote (completely) in US presidential elections and are represented in the Electoral College. US citizens who are residents in the Territories cannot completely participate in the presidential elections. This contradiction of US citizenship based on residence in States versus Territories has created the current context for our People to determine our future political status and to formulate and ratify a modern constitution for our territory.
Timeline of Political Progress
During the first century of US Territorial political status (1917-2017), we made steady political strides towards self-government and self-governance. The following achievements show our progress:

- Establishment of Police Courts 1917-1921
- US Citizenship 1927/1932
- Civilian Government replaced Naval Rule 1931-first
  Civilian Governor Paul M. Pearson
- Organic Act of 1936—sponsored by Rothschild
  francis 1936
- The first political party, The Progressive Guide, 1937
- First Municipal Councils/Legislative Assembly 1937
- First Legislative Assembly Chairman Conrad Coniero 1937
- Women Elective Act 1938
- First Native Acting Governor—
  Morris de Castro—1939–1940
- First Native Government Secretary (Lt. Governor) Morris
- First African American Governor William Hastie 1946
- First Native Governor—Morris de Castro 1950
- Revised Organic Act of 1954
- Establishment of current Unicameral Legislature, 1954
- Creation of Territorial Attorney General 1959
- First Constitution Convention 1960-1961
- Second Constitution Convention 1963-1964
- Municipal Courts replaced Police Courts 1965
- Elective Governor Act 1968
- First elected Governor—Melvin Evans 1970
- Delegate to Congress Ron de Lugo 1972
- VI National Guard established and First Adjutant General Leyle
  Galiber 1973
- Territorial Courts replace Municipal Courts 1976
- Third Constitution Convention 1977-1978
- First Political Status Commission—Chairman Earle B. Ottley 1980
- Non-Binding Referendum, Political
  Status precedes Constitution, 1982
- Superior Courts replace Territorial courts 1984
- Select Committee on Political Status Chair Senator Lorraine Berry
  1984-1988
- Territorial Courts expand jurisdiction Presiding
  Judge Verne Hodge, 1991
- Second Political Status Commission—Co-Charis-Dr. Marilyn
  Krigger and Senator Lorraine Berry 1988-1993
- Establishment of Territorial Supreme Court 2004
- Investiture of founding Supreme Justices Rhys
  Hodge, Maria Cabret, and Ivé Swan 2006
- Transfer of Appellate Cases from Third Circuit to
  Territorial Supreme Court 2007
- Fifth Constitution Convention 2009-2010
- Consolidation of Supreme Court Administration 2016

Resolving Constitution Issues and Political Status—Are the two connected?
The dominant trend in our political development has been a step by step march of meaningful reforms. As the above timeline showed self-governance and self-governance go together as each new power and responsibility was tied to a Virgin islander or Virgin Islanders becoming engaged in the process. In this sense, self-determination has been gradually implemented as Virgin Islanders acquired the power to run our local affairs and create public policies that would improve our standard of living, economic development, culture, and society.

Although each attempt at formulating a constitution did not end in complete success, a closer review of the political capital generated by each constitution convention led to positive improvement at the minimum. Territorial leaders were able to mobilize political pressure for more reforms and benefits for our people. A few areas of dispute have persisted since the Fourth Constitution was rejected by Virgin Islands voters in 1980. Disputed areas are tied to...
Virgin Islanders Arise!

legislature was proposed: (1) six Senators elected “at large” by the Islands as a whole, three of whom must be residents of St. Croix and three of whom must be residents of St. Thomas or St. John; (2) two Senators elected from each of two sub-districts on St. Croix; (3) two elected from each of two sub-districts on St. Thomas; and (4) one elected from St. John. At least once every ten years and within 120 days of the publication of the official census for the Islands, the Senate would be required to appoint a “reapportionment commission,” which would develop a plan, to be approved by the USVI Supreme Court, for the reapportionment of “At-Large and sub-district senate seats that are contiguous and compact areas.” Although the proposed constitution provides that the areas in these districts “shall be constituted as to give, as nearly as is practicable, representation in proportion to the census population,” the plan also would be required to “provide for at least one Senator from St. John.” These provisions, particularly the reservation of a Senate seat for St. John, raise equal protection concerns because they may prove to be at odds with the principle of “one person one vote.” (See page 14). DOJ concluded that the right to change electoral districts is ours but it questioned whether these reapportionment districts had addressed the “one person one vote” principle. (In the Senate Hearings in October 2018, Virgin Islands Senators brought this concern to proponents of reapportionment).

Political Status Election
The provision on a special political status election is important. Weich indicated that “in Article XVII, the proposed constitution provides for a “special election,” to be held after a year of “Public Education” programs conducted by a “Political Status Advisory Commission,” on “the status and federal relations options of: (1) statehood, (2) free association, and (3) Independence. Although he Enabling Act that allowed the Virgin Islands to draft a constitution did not specify that political status changes are included, the Virgin Islands has already organized periodic status advisory organizations to conduct public education on political status, and in fact, the second advisory body or commission held a referendum in 1993. The drafting of a constitution within the territorial status does not preclude addressing political status separately. (See page 6).

Identity
The desire to define Virgin Islanders is obvious in the draft constitution. Virgin Islanders are classified into Virgin Islanders, Native Virgin Islanders and Ancestral Virgin Islanders. Each sub group is defined by the date of their ancestry in the Territory. According to Weich, in Article III, section 2, the proposed constitution would define

Apportionment
The DOJ insight may be useful based on our recent experience in the Special election on Reapportionment March 30, 2019. Weich’s description of the proposal matches the Initiative for Reapportionment that had begun in 2018 and ended in the Special Election in March 30, 2019. Weich’s views may help us. In the draft constitution, a new political status questions, mainly draft provisions that sought to acquire additional powers and privileges given to sovereign states (independence and free association) and a tendency to seek identity resolution and residency restrictions to favor “Native” Virgin Islanders. These same areas of concern reemerged in the Fifth Constitution. Ronald Weich, Assistant Attorney General, Department of Justice/DOJ during the Barack Obama-Joseph Biden administration reviewed the draft Fifth Constitution that was delivered to President Obama in 2009. Weich’s analysis is found in DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED CONSTITUTION DRAFTED BY THE FIFTH CONSTITUTIONAL CONVENTION OF THE UNITED STATES VIRGIN ISLANDS, dated February 23, 2010. Weich examined nine areas of concern that need our review and resolution as a People. To simplify Weich’s analysis the order in which he approached the issues is rearranged and minimal changes to his wording will occur.
Virgin Islanders Arise!

“Native Virgin Islander” to mean (1) “a person born in the Virgin Islands after June 28, 1932,” the enactment date of a statute generally extending United States citizenship to USVI natives residing in United States territory as of that date who were not citizens or subjects of any foreign country, see Act of June 28, 1932, ch. 283, 47 Stat. 336 (now codified at 8 U.S.C. § 1406(a)(4) (2006)); and (2) a “descendant[] of a person born in the Virgin Islands after June 28, 1932.” “Ancestral Native Virgin Islander” would be defined as: (1) “a person born or domiciled in the Virgin Islands prior to and including June 28, 1932 and not a citizen of a foreign country pursuant to 8 U.S.C. [§] 1406,” the statute governing United States citizenship of USVI residents and natives; (2) “descendants of such individuals; and (3) “descendants of an Ancestral Native Virgin Islander residing outside of the U.S., its territories and possessions between January 17, 1917 and June 28, 1932, not subject to the jurisdiction of the U.S. and who are not a citizens [sic] or a subjects [sic] of any foreign country.” (See pages 7-8).

Supremacy of US Federal Government and Federal Laws

The Enabling Act of Congress clearly pointed to a territorial constitution within the existing unincorporated territorial status. In explicit terms Weich states: The Enabling Act requires any proposed constitution for the USVI to “recognize” and “be consistent with” United States sovereignty and the supremacy of the applicable provisions of the Constitution, treaties, and laws of the United States. Enabling Act § 2(b)(1). The current proposed constitution, like the one initially proposed in 1980, does not include an express statement directly satisfying this requirement. (See pages 3-6) The draft constitution stated it is the “supreme law of the land” which is not permissible as a non-sovereign state. Weich noted this as a recurring problem in the draft document. The remaining DOJ concerns are tied to the tendency to not uphold the supremacy of Congress, US Constitution, and Federal laws.

Territorial Marine Authority

The draft constitution provides for territorial “sovereignty” over marine resources, fisheries, submerged lands, and mineral up to 12 miles from

Residency for Elected Officials

Similar to the previous concerns about Native and Ancestral Virgin Islanders provisions that emphasize lengthy, “durational residency” needs modification. Federal Courts have viewed durational residency in terms of degree. The national standards have pointed to much shorter durational residency for the senior leaders such as governor, lt. governor, and judges. The draft constitution provides to 10 year and 15 year residency requirements for governor and lt. governor. Weich noted “these provisions raise constitutional concerns, and we would recommend that consideration be given to shortening the ten- and fifteen -year residence requirements for USVI Governors, Lieutenant Governors, and judges. Cf. 1980 Presidential Message at iv, 10, 22 (recommending that 1980 proposed constitution be revised to require that the Governor and Lieutenant Governor have been domiciliaries of the USVI for ten years instead of fifteen years, even though provision required only five years of residence immediately preceding the date of taking office). “ (See pages 11-14).
It is confined to the US Virgin Islands but its imprecise language and concepts can become a constitutional problem in the future. For example, like its 1980 predecessor, the draft document includes protections of unclear scope for the “dignity of the human being,” the “right to a reasonable expectation of privacy,” and the “right to examine any public document and to observe the deliberation of any agency of government.” Proposed Const. art. I, §§ 1, 3, 4. The constitution also prohibits “employment of children” in certain occupations without specifying the maximum age of a “child,” (See pages 17-18). Weich suggests we avoid provisions in our Bill of Rights that will be difficult to implement.

Repeal of Revised Organic Act of 1954
The transitional period after the new constitution is approved will have a period of revising Federal Laws that apply to the Virgin Islands. Weich indicated that “because federal law is superior to territorial enactments and may preempt contrary provisions of territorial law, Congress may need to repeal certain provisions of the USVI’s organic statutes to enable this proposed constitution to operate, assuming it is approved by Congress and the USVI voters.” (See page 18)

Action/Inaction of Congress on Process
The Enabling Act that allowed the formulation of the territorial constitution does not bind the Federal government when it comes to “defective provisions.” Weich reminded us that in the Third Constitution in 1978, Congress did not modify the draft document and simply forwarded it to the Virgin Islands for vote. This lack of comment did not necessarily mean that the US President or Congress supported the draft document. The Virgin Islands voters rejected the Third Constitution in 1978. In 1980, the draft Fourth Constitution was modified by Congress in a joint committee, and then it was returned to the Territory. The modified draft was not supported by Virgin Islands voters. Weich indicated that both the US President and Congress were not bound to accept defective provisions in the constitutions and they allow the documents to be voted on by Virgin islanders and expected the Federal courts to have their say if necessary.

It is instructive that Weich concluded the DOJ review by quoting former President Ronald Reagan and showing the similar posture of Congress. Upon signing the joint resolution approving the revised 1980 proposed constitution, President Reagan observed: “This legislation approves referring the constitution to the voters of the Virgin Islands for referendum. It does not represent a Federal endorsement of the constitution’s substantive provisions.” Statement on Signing a Bill To Approve a Constitution for the United States Virgin Islands, 1981 Pub. Papers 617, 617 (July 10, 1981). The legislative history indicates that Congress shared the same view.
Virgin Islanders Arise!

Weich’s quote of this earlier posture showed that the Obama-Biden Administration shared the view that the Federal government reserved the right to allow the constitution to be voted on by Virgin Islanders, but if necessary, the Federal Government can oppose defects in the final draft. A more thorough review can be found by reading the entire memorandum that Ronald Weich wrote. (See pages 18-19).

Where do we go from here?
In November 1982, Virgin Islands voters agreed that political status must be decided first. Perhaps, we need to include a referendum in the 2020 Election and simply ask:

Do you seek to continue as an unincorporated territory with improvement or not?

If no, do you support:
Yes       No

Statehood
Free association
Independence

Based on the outcome of the referendum we return to improving the draft Fifth constitution by addressing the nine areas of concern and then resend the modified Fifth Constitution to the Federal Government. After Federal review, we can vote on it in 2022.
If Territorial Status wins the 2020 election, we will have to create a Political Status organization for ongoing public education for future political status decisions. A permanent commission on self-determination and/or political status and federal relations ought to be organized that includes representatives from the three branches of government and elected representatives who reflect the entire Virgin Islands society.
After that process is over, we should consider addressing our cultural symbols in 2024 and/or 2026. We can review issues such as our Territorial flag, governor’s ceremonial sash/necklace, and any other cultural symbol that we seek to modernize to encourage greater unity among our People.
These elections would be in time for the Centennial of our acquisition of US citizenship—2027. Addressing these issues in this manner would essentially fulfill international standards and norms of political development that are taken seriously by the United Nations, the US Federal Government, and of course, our People who live in our beloved Territory. Virgin Islanders, arise!

AALIYAH, DIANA FRANCIS, 10
Wesleyan Academy

Fort Christian was a symbol from our past to our present. The man blowing the conch shell to represent freedom. The bamboula dancer gives Virgin Islanders the opportunity to reconnect with their historical heritage.
Our Quest for a Territorial Constitution

Virgin Islanders Arise!

Malik Sekou, PhD