

A. Recognition of U.S. Sovereignty and the Supremacy of Federal Law

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.

Indeed, one provision of the current constitution states, without any reference to the U.S. Constitution or federal law, that "[t]his Constitution shall be the supreme law of the Virgin Islands," see Constitution of the Virgin Islands of the United States, Fifth Constitutional Convention, art. II, 5 (June I, 2009) ("Proposed Const."), and in several places the proposed constitution refers to the USVI's "sovereignty" or "right of self-determination." E.g, id. pmbl. para. 6, art. XII, 2. Particularly in light of these provisions, we think it would be preferable if Congress revised—or urged a reconvened constitutional convention to revise—the proposed constitution to include a more express recognition of U.S. sovereignty and especially of the supremacy of federal law, as Congress did in

considering the 1980 proposed constitution.

Even in its current form, though, we conclude, as the Department did in reviewing the 1980 proposed constitution, that a number of provisions in the present proposed constitution considered together bring it into substantial compliance with the Enabling Act's requirement that the proposed constitution recognize U.S. sovereignty and the supremacy of federal law. see DOJ Views, 4B op. O.L.C. at 760-61.

Because the Department's analysis of the 1980 proposed constitution informs our analysis of the current proposed constitution, we begin by describing the Department's 1980 analysis and the development of that earlier proposed constitution in some detail. The 1980 proposed constitution, like the constitution proposed now, included no express statement of federal sovereignty and supremacy. And that earlier proposed constitution described "[t]his Constitution and laws of the Virgin Islands enacted under it" as "the supreme law of the Virgin

Islands." See 1980 Constitution at 7. The Justice Department nonetheless concluded that the 1980 proposed constitution was in "substantial compliance" with subsection 2(b)(1) of the Enabling Act because other provisions effectively acknowledged United States sovereignty and the supremacy of federal law. See DOJ Views, 4B Op. O.L.C. at 760-61. **As the Department explained, the 1980 proposed constitution's preamble included a statement "declar[ing] that the Virgin Islands assume 'the responsibilities of self-government in political union with the United States,'" See id. at 760 (quoting 1980 proposed constitution). In prior testimony regarding a proposed constitution for the territory of Guam, a Justice Department witness had observed that "[n]early 200 years of political history have established that political union with the United States necessarily carries with it the recognition of the sovereignty of the United States and the supremacy of its laws," and that a statement in the preamble of the Guam constitution referring to "political union" with the United States was therefore "sufficient to overcome any contention that the explicit or tacit approval of the constitution by Congress would have the effect of relinquishing the sovereignty of the United States over Guam and the supremacy of Federal laws."** Constitution of Guam: Hearing Before the Senate Committee on Energy and Natural Resources, 95th Cong. 64 (1978) (statement of Herman Marcuse, Attorney-Adviser, Office of Legal Counsel, Dep't of Justice). By the same token, **the**

Department concluded that the reference to "political union" in the 1980 USVI proposed constitution sufficiently recognized federal sovereignty and supremacy to satisfy the Enabling Act. See DOJ Views, 4B Op. O.L.C. at 761. The

Department further observed that a draft official analysis of the 1980 proposed constitution interpreted its preamble as recognizing U.S. sovereignty and that the proposed 1980

USVI constitution elsewhere limited the legislative power of the USVI government to "subjects . . . consistent with . . . the Constitution and laws of the United States applicable to the Virgin Islands." See id. at 760; see also Hr'g on Fourth USVI Constitution at 58 (reproducing draft official analysis); 1980 Constitution at 7.

. In accordance with the Justice Department's conclusions, the President stated in his message transmitting the 1980 proposed constitution to Congress that "[t]he document implicitly recognizes the sovereignty of the United States and the supremacy of United States law over locally-enacted legislation, and is, therefore, in substantial compliance with the pertinent provision of the Enabling Act

that established the procedure for the drafting of a constitution for the Virgin Islands." 1980 Presidential Message at iii.

Discussions in Congress led to a suggestion that an additional reference to U.S. sovereignty and federal supremacy be added. See H.R. Rep. on Fourth USVI Constitution at 173, 194. The USVI constitutional convention then proposed and Congress adopted an additional clause qualifying the draft constitution's statement that the USVI constitution and laws enacted under it constituted the "supreme law of the Virgin Islands" so as to assert such supremacy only "[t]o the extent not inconsistent with the Constitution and laws of the United States." See S. Rep. No. 9766, at 4; H.R. Rep. No. 97-25, at 2, 11; Pub. L. No. 97-21, 95 stat. at 109.

The current proposed USVI constitution appears no less compliant with subsection 2(b)(1) of the Enabling Act than the constitution originally proposed in 1980, if not also the revised version of that constitution ultimately approved by Congress. Much as the preamble of the 1980 constitution described the USVI as "assuming the responsibilities of self-government in political union with the United States," 1980 Constitution at 1, the preamble of the current proposed constitution declares that the USVI is "assuming the responsibilities of self-government as an unincorporated territory of the United States."

Proposed Const. pmb. para. I (emphasis added). **The term "unincorporated territory of the United States," like the term "political union," carries a well-established meaning signifying recognition of the supremacy of the United States government.**

Territorial Court of the Virgin Islands v. Richards, 673 F. Supp. 152, 157 (D.V.I. 1987) (identifying the USVI as an "unincorporated territory" and describing Congress's authority over the territory as "plenary"), *aff'd*, 847 F.2d 108, 112 (3d Cir. 1988); *Harris v. Boreham*, 233 F.2d 10, 13-14 (3d Cir. 1956) (describing Congress's "sovereignty" over "unincorporated territories, such as the Virgin Islands"); S. Rep. No. 97-66, at 4 (report on the 1980 constitution describing the USVI as "an unincorporated territory of the United States subject to the plenary authority of the Congress"). Indeed, the Constitution itself prescribes that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations" with respect to United States territories. U.S.

Const. art. IV, 3, cl. 2. **The current proposed constitution's acknowledgment of the USVI's status as an "unincorporated territory of the United States" thus implies recognition of the United States' sovereignty over the US VI.**

Furthermore, the current proposed constitution also recognizes congressional authority over the USVI by describing the 1917 treaty between the United States and Denmark as "confirm[ing]" that Congress may "determine[]" the "civil rights and political status of the inhabitants" of the USVI, see Proposed Const.

pmbl. para. 3; it limits the legislative power of the USVI to "subjects of legislation consistent with . . . the Constitution and laws of the United States," just as the 1980 proposed constitution did, see id. art. V, 1; 1980 Constitution at 7; and in certain other provisions it acknowledges the applicability of federal law, see, e.g., Proposed Const. art. IV, 4 (prohibiting any "political or religious test" for public office "other than an oath or affirmation to support the Constitution and laws of the Virgin Islands, and the Constitution and laws of the United States"); id. art. VII, 2 (providing that decisions of the USVI Supreme Court "on questions arising under this Constitution and the laws of the Virgin Islands shall be final, except as Federal law may provide for review of such decisions by courts of the United States"); id. art. VII, 3 (requiring rules in USVI courts to be consistent with the United States Constitution and federal laws). It is true that the current proposed constitution also states that it "shall be the supreme law of the Virgin Islands." See id. art. II, 5. But while, as noted above, Congress revised the similar supremacy provision in the 1980 proposed constitution to declare that "[t]his Constitution and laws of the Virgin Islands enacted under it shall be the supreme law of the Virgin Islands" only "[t]o the extent not inconsistent with the Constitution and laws of the United States," Pub. L. No. 97-21, 95 Stat. at 109; see also Hr'g on Fourth US VI Constitution at 173, 194; S. Rep. No. 97-66, at 4; H.R.

Rep. No. 97-25, at 2, 11, **the President and the Department of Justice**

deemed the 1980 proposed constitution in "substantial compliance" with the Enabling Act even without this change. Moreover, the original supremacy provision in the 1980 proposed constitution was arguably less consistent with United States sovereignty and federal supremacy than the current provision. The supremacy clause of the 1980 proposed constitution

appeared in a provision addressing legislative powers and asserted the supremacy not only of the proposed constitution, but also of "laws of the Virgin Islands enacted under it." See 1980 Constitution

at 7. **In contrast, the supremacy provision of the current proposed constitution appears in a stand-alone section and refers only to the USVI constitution. See Proposed Const. art. 115 5. It may therefore be reasonably understood to indicate only that the USVI constitution is "the supreme law of the Virgin Islands" in the sense Of superseding other USVI laws but not federal law.** Cf. Maine Const. art.

X, 6 (referring to the Maine constitution as 'the supreme law of the State'); Iowa Const. art. XII, 1

("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void.").

Accordingly, while we think it would be preferable if Congress revised—or urged a reconvened constitutional convention to revise—the proposed constitution to include a more express recognition of U.S. sovereignty and especially of the supremacy of federal law, as Congress did in considering the 1980 proposed constitution, we believe the proposed constitution is in substantial compliance with subsection 2(b)(1) of the Enabling Act. DOJ Views, 4B Op. O.L.C. at 761.