Department of Justice

STATEMENT OF

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BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
U.S. SENATE

ON

THE PROPOSED CONSTITUTION FOR THE U.S. VIRGIN ISLANDS

PRESENTED

MAY 19, 2010

Statement of
Jonathan G. Cedarbaum
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Chairman Bingaman, Ranking Member Murkowski, Members of the Committee:

My name is Jonathan Cedarbaum. I am a Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. I am honored to appear before you this morning to discuss the proposed constitution for the U.S. Virgin Islands ("USVI") recently drafted by a constitutional convention in the Virgin Islands.

As you know, Public Law 94-584 establishes a process by which the people of the U.S. Virgin Islands can adopt a constitution for their local self-government. In accord with that process, the Fifth Constitutional Convention of the U.S. Virgin Islands drafted a proposed constitution last year and submitted it to the Governor of the Virgin Islands. The Governor forwarded the proposed constitution to President Obama. President Obama then transmitted the draft Constitution to the Congress with his comments. As the President indicated in his letter of transmittal, in carrying out his responsibilities under Public Law 94-584 he asked the Department of Justice, in consultation with the Department of the Interior, to provide its views of the proposed constitution. The Department provided those views in the form of a memorandum from the Assistant Attorney General for Legislative Affairs to the Office of Management and Budget, and the President attached a copy of the Department's memorandum to his letter of transmittal.

As the President also noted, the Department of Justice's memorandum analyzed several features of the proposed constitution, including: (1) the absence of an express recognition of United States sovereignty and the supremacy of federal law; (2) provisions for a special election on the USVI's territorial status; (3) provisions conferring legal advantages on certain groups defined by place and timing of birth, timing of residency, or ancestry; (4) residence requirements for certain offices; (5) provisions guaranteeing legislative representation of certain geographic areas; (6) provisions addressing territorial waters and marine resources; (7) imprecise language in certain provisions of the proposed constitution's bill of rights; (8) the possible need to repeal certain federal laws if the proposed USVI constitution is adopted; and (9) the effect of

congressional action or inaction on the proposed constitution. I would be happy to address any of these issues with you this morning. I should emphasize that our review was limited to a review of legal issues in light of the requirements established by Public Law 94-548. The Department's memorandum does not address any questions of policy.

Because I trust you have had some opportunity to review the Department's memorandum in advance of today's hearing, I will not attempt to summarize in this opening statement the analysis it provides of all of these issues. I would just briefly discuss the three issues as to which the Department suggested that changes in the proposed constitution should be considered.

A. Provisions Concerning "Native Virgin Islanders" and "Ancestral Native Virgin Islanders"

First, several provisions of the proposed constitution give special advantages to "Native Virgin Islanders" and "Ancestral Native Virgin Islanders." These provisions raise serious concerns under the equal protection guarantee of the U.S. Constitution, which has been made applicable to the USVI by the Revised Organic Act, *see* 48 U.S.C. § 1561 (2006). Because we find it difficult to discern a legitimate governmental purpose that would be rationally advanced by these provisions conferring legal advantages on certain groups defined by place and timing of birth, timing of residency, or ancestry, we recommend that these provisions be removed from the proposed constitution.

In Article III, section 2, the proposed constitution would define "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." Proposed Const. art. III, § 1.[1]

[1] The third prong of this definition appears circular insofar as it defines "Ancestral Native Virgin Islander" in terms of descendants of "Ancestral Native Virgin Islanders" (a category of people already encompassed by the definition's second prong), and it is also grammatically ambiguous with respect to whether the qualifying terms modify the "descendants" or the "Ancestral Native Virgin Islander" from whom they are descended.

1. Property Tax Exemption for Ancestral Native Virgin Islanders

Under the proposed constitution, the USVI legislature would be authorized to impose real property taxes, but "[n]o Real Property tax shall be assessed on the primary residence or undeveloped land of an Ancestral Native Virgin Islander." Proposed Const. art. XI, § 5(g). The property tax exemption for Ancestral Native Virgin Islanders raises serious equal protection concerns. The Equal Protection Clause of the Fourteenth Amendment, which has been extended to the USVI by statute, *see* 48 U.S.C. § 1561 (2006),[2] generally requires only that legislative classifications be rationally related to a legitimate governmental purpose. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). But the proposed constitution does not identify a legitimate governmental purpose that the real property tax exemption for Ancestral Native Virgin Islanders would further, and it is difficult for us to discern a legitimate governmental purpose that the exemption could be said to further.

The definition of Ancestral Native Virgin Islander appears to combine two sub-classes: (i) individuals born or domiciled in the USVI before a certain date and (ii) descendants of such persons. The first sub-class may include many long-time residents of the USVI, but to the extent the real property tax exemption is designed to benefit such long-time residents it raises serious equal protection concerns. The Supreme Court has held that statutes limiting benefits, including property tax exemptions, to citizens residing in a jurisdiction before a specified date are not rationally related to any legitimate governmental purpose. For example, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court held that a New Mexico property tax exemption applicable only to Vietnam War veterans who resided in the state before a certain date violated equal protection by "creat[ing] two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens.'" *Id.* at 623. Explaining that "singling out previous residents for the tax exemption[] [and] reward[ing] only those citizens for their 'past contributions' toward our Nation's military effort in Vietnam" was "not a legitimate state purpose," the Court held that the tax exemption violated the Equal Protection Clause by "creat[ing] fixed, permanent distinctions . . . between . . .

We think it clear that these classifications could not be considered tribal within the meaning of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, that is, as falling within the established body of law defining the special relationship between aboriginal peoples of the United States and the Federal Government. In any event, that Clause empowers Congress, not the government of the Virgin Islands.

[2] *See also, e.g.*, *Government of the Virgin Islands v. Davis*, 561 F.3d 159, 163-64 n.3 (3d Cir. 2009) (recognizing applicability of the Fifth and Fourteenth Amendment Due Process Clauses to the USVI under the Revised Organic Act); *Hendrickson v. Reg O Co.*, 657 F.2d 9, 13 n.2 (3d Cir. 1981) (same); *Moolenaar v. Todman*, 433 F.2d 359, 359 (3d Cir. 1970) (per curiam) (requiring adherence to "the constitutional requirements of equal protection of the law" in the USVI).

classes of concededly bona fide residents.'" *Id.* at 622-23 (quoting *Zobel v. Williams*, 457 U.S. 55, 59 (1982)).[3]

Moreover, even as to this sub-class, the real property tax exemption proposed here appears to be even less constitutionally justifiable than benefits for long-time residents. In *Nordlinger v. Hahn*, 505 U.S. 1 (1992), the Supreme Court upheld a California real property valuation system that disfavored newer purchasers (though not necessarily newer or longer-term residents), and the Court recognized as legitimate two governmental interests for such a system: "local neighborhood preservation, continuity, and stability," *id*. at 12, and honoring the reliance interests of long-time property owners, *id.* at 12-13. To the extent that those interests might be offered in defense of tax benefits for long-time residents or property owners, they cannot justify the real property tax exemption for Ancestral Native Virgin Islanders. Neither of those interests appears to be rationally furthered by the first sub-class included in the proposed property tax exemption for Ancestral Native Virgin Islanders because membership in that sub-class is defined neither by length of residence nor even by length of property ownership in the USVI, but simply by having been born or having lived in the USVI many years ago. Thus, for example, an individual born in the USVI on June 28, 1932, who left the Islands the following year and who moved back to the Islands and bought a home there 50 years later (or who simply bought an undeveloped piece of land there 50 years later) would be entitled to immunity from real property taxes even though an individual who had spent his or her whole life in the USVI and had owned the same home there for the past 50 years, but who had been born there of parents who had arrived in the USVI as immigrants on June 29, 1932, would not be so shielded. How a system permitting this kind of discrimination could be said to further neighborhood stability or reliance interests of long-time property owners is unclear.

The second sub-class benefitted by the real property exemption for Ancestral Native Virgin Islanders also seems difficult to justify as furthering a legitimate governmental interest, for the second sub-class is defined simply by parentage or ancestry. We need not delve into whether this use of "ancestry" in classifying citizens would be deemed "suspect" and thus subject to heightened scrutiny under the Fourteenth Amendment. *See, e.g.*, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 & n.4 (1976) (per curiam) (identifying alienage, race, and ancestry as classifications subject to strict scrutiny). Again, it is unclear to us what legitimate governmental purpose would support favoring so starkly the descendants of

[3] S*ee also, e.g.*, *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 909, 911 (1986) (plurality opinion) (applying heightened scrutiny to invalidate civil service employment preference limited to veterans who lived in the state when they entered the armed forces); *id.* at 913 (Burger, C.J., concurring in judgment) (same under rational basis review); *Bunyan v. Camacho*, 770 F.2d 773, 776 (9th Cir. 1985) (invalidating law enacted by Guam legislature awarding certain retirement credits for higher education degrees to Guam civil servants only if they resided in Guam before pursuing the degree).

individuals born or resident long ago in the USVI regardless of the descendants' own connections (or lack thereof) to the Islands.

2. Provisions on Voting and Office-Holding Favoring Native Virgin Islanders and Ancestral Native Virgin Islanders

Provisions in the proposed constitution that limit certain offices and the right to vote in certain elections to Native Virgin Islanders and Ancestral Native Virgin Islanders or that guarantee members of those groups the right to participate in certain elections present similar issues. Under the proposed constitution, the positions of Governor and Lieutenant Governor would be open only to members these groups, *see* Proposed Const. art. VI, § 3(d), as would service on the Political Status Advisory Commission, an eleven-member body composed of four appointed members and seven elected members that would promote awareness of the USVI's political status options and advise the Governor and legislature on "methods to achieve a full measure of self-government." *Id.* art. XVII, §§ 1(b), 3. The special election on "status and federal relations options" provided for under the proposed constitution would be "reserved for vote by Ancestral Native and Native Virgin Islanders only, whether residing within or outside the territory." *Id.* art. XVII, § 2. And the proposed constitution would guarantee that "Ancestral and Native Virgin Islanders, including those who reside outside of the Virgin Islands or in the military, shall have the opportunity to vote on" amendments to the USVI constitution. *Id.* art. XVIII, § 7.[4]

The provisions concerning eligibility to vote in certain elections raise equal protection concerns. To the extent one might attempt to justify the limitation on the electorate for the special election on status options as akin to a durational residence requirement, we believe it is too restrictive to be so justified. Although the Supreme Court has upheld a very brief residential limitation on eligibility to vote in one instance based on a state's legitimate interest in "prepar[ing] adequate voter records and protect[ing] its electoral processes from possible frauds," *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding 50-day durational residence requirement), it has held that even a requirement of one year's residence for voting, as opposed to office-holding, violates constitutional equal protection guarantees. *See Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating state's requirement that voters have resided in

[4] The right to vote on such amendments does not appear to be limited to these groups, as the same provision requires that amendments be submitted "to the electors of the Virgin Islands." Proposed Const. art. XVIII, § 7. Although the term "electors of the Virgin Islands" is undefined, the proposed constitution elsewhere provides that "[e]very citizen of the United States and the Virgin Islands eighteen (18) years of age or older and registered to vote in the Virgin Islands shall have the right to vote." *Id.* art. IV, § 1. The separate provisions establishing special voting rights and opportunities for Ancestral Native Virgin Islanders and Native Virgin Islanders suggest that the term "electors of the Virgin Islands" refers to the broader group of eligible voters.

the state for one year and the county for three months). Moreover, the classifications here are not based on length of residence, and their effects appear potentially arbitrary. As I discussed earlier, the categories of Ancestral Native Virgin Islanders and Native Virgin Islanders are based simply on place and timing of birth, the fact of having resided in the USVI before a certain date regardless of for how brief a time, or ancestry, regardless of the individual's own connection to the USVI. Thus, they could prohibit, for example, a foreign-born but life-long resident of the USVI from voting on political status, but would permit any qualifying ancestral descendant, including those who have never lived in the USVI, to do so.[5]

The proposed constitution's guarantee that Native Virgin Islanders and Ancestral Native Virgin Islanders "resid[ing] outside of the Virgin Islands" may vote on amendments to the USVI constitution also raises equal protection concerns. Proposed Const. art. XVIII, § 7. To uphold inclusion of non-resident voters in local government elections against equal protection challenges, courts have required a showing that the non-resident voters have a "substantial interest" in the elections in question.[6] Because many non-resident Ancestral Native Virgin Islanders and Native Virgin Islanders may have no connection to the Islands apart from ancestry,

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[5] *Cf. Soto-Lopez*, 476 U.S. at 915 (Burger, C.J., concurring in judgment) (discussing "irrationality" of law that "would grant a civil service hiring preference to a serviceman entering the military while a resident of [the state] even if he was a resident only for a day," but that would deny the preference to a veteran "who was a resident of [the state] for over 10 years before applying for a civil service position"); *Dunn*, 405 U.S. at 360 (concluding that the state interest in "knowledgeable" voters did not justify a durational residence requirement for voting because "there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months"); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 632 (1969) (rejecting, under strict scrutiny, restrictions on franchise for school board elections because "[t]he classifications in [the statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions").

[6] *See, e.g.*, *May v. Town of Mountain Village*, 132 F.3d 576, 583 (10th Cir. 1997) (upholding inclusion of nonresident property owners in town electorate because such voters "have a substantial interest in township elections"); *Board of County Commissioners of Shelby County, Tenn. v. Burson*, 121 F.3d 244, 248-51 (6th Cir. 1997) (deeming participation of city voters in county school board elections irrational and thus impermissible under Fourteenth Amendment where city voters had their own independent school board and lacked a substantial interest in county school board elections); *Hogencamp v. Lee County Bd. of Educ.*, 722 F.2d 720, 722 (11th Cir. 1984) (deeming city taxpayers' contribution of 2.74% of county school board's budget "insufficient by itself to create a substantial interest in the city residents" justifying their participation in county school board elections).

it is unclear whether their inclusion in the electorate for USVI constitutional amendments would satisfy this standard.

Finally, although the residential duration requirements for Governor and Lieutenant Governor and members of the Political Status Advisory Commission would prevent non-resident individuals who qualify as Native Virgin Islanders or Ancestral Native Virgin Islanders from serving in those offices, it is unclear what legitimate governmental purpose would be advanced by narrowing the subset of longtime residents who could hold those offices to Native Virgin Islanders and Ancestral Native Virgin Islanders.

In the absence of any identified legitimate governmental interest to support such provisions concerning voting and office-holding based on place of birth, residence many decades ago, or ancestry, we would again recommend that these provisions be removed from the proposed constitution.[7]

B. Residence Requirements for Office-Holding

Second, the proposed constitution imposes substantial residence requirements on a number of USVI offices. In particular, the Governor and Lieutenant Governor would be required to have been "domiciliar[ies]" of the USVI for at least fifteen years, ten of which "must immediately precede the date of filing for office," Proposed Const. art. VI, § 3(a); judges and justices of the USVI Supreme Court and lower court to be established under the proposed constitution would be required to have been "domiciled" in the USVI for at least ten years "immediately preceding" the judge or justice's appointment, *id.* art. VII, § 5(b); the Attorney General and Inspector General would need to have resided in the USVI for at least five years, *id.* art. VI, §§ 10(a)(1), 11(a)(2);[8] and the members of the Political Status Advisory Commission would be required to have been "domiciliaries" of the USVI for "a minimum of five years," *id.* art. XVII, § 1(b). In addition, the proposed constitution would require that USVI Senators be

[7] Because we conclude that the restrictions on voting present clear equal protection concerns under the Fourteenth Amendment, we need not consider whether they may also violate the Fifteenth Amendment's prohibition on denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV; *see also* 48 U.S.C. § 1561 (extending Fifteenth Amendment to USVI).

[8] The proposed constitution appears ambiguous with respect to how this five-year period is determined. It provides: "There shall be an Attorney General, who shall be appointed by the Governor with the advice and consent of the Senate, and at the time of the appointment must . . . have resided in the Virgin Islands at least five (5) years next preceding his election." *See* Proposed Const. art. VI, § 10(a)(1). Given that the Attorney General would be appointed rather than elected, the reference to the period "next preceding his election" seems unclear.

"domiciled" in their legislative district "for at least one year immediately preceding the first date of filing for office." *Id.* art. V, § 3(c).

These requirements, particularly those requiring more than five years of residence, raise potential equal protection concerns. The Supreme Court has summarily affirmed three decisions upholding five- to seven-year residence requirements for state senators and governors, *see Chimento v. Stark*, 353 F. Supp. 1211, 127 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973); *Kanapaux v. Ellisor* (D.S.C. unreported), *aff'd*, 419 U.S. 891 (1974); *Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975), and lower courts have upheld relatively brief durational residency requirements for state or local offices, typically applying only rational basis review and deeming such laws adequately justified by the governmental interest in ensuring familiarity with local concerns.[9] But in some cases lower courts have struck down laws imposing residence requirements of five or more years on certain state or local offices.[10]

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[9] *See, e.g., City of Akron v. Bell*, 660 F.2d 166, 168 (6th Cir. 1981) (one-year residence requirement for city council members); *MacDonald v. City of Henderson*, 818 F. Supp. 303, 306 (D. Nev. 1993) (one-year residence requirement for city council); *Hankins v. Hawaii*, 639 F. Supp. 1552, 1556 (D. Hawaii 1986) (five-year residence requirement for Hawaii governor under state constitution); *Schiavone v. DeStefano*, 852 A.2d 862, 866-67 (Conn. Sup. Ct. 2001) (five-year residence requirement for city mayor); *Civil Service Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 734 (Tenn. 1991) (one-year residence requirement for municipal civil service boards); *State ex rel. Brown v. Summit County Bd. of Elections*, 545 N.E.2d 1256, 1259-60 (Ohio 1989) (two-year residence requirement for city council); *Langmeyer v. Idaho*, 656 P.2d 114, 118 (Idaho 1982) (five-year residence requirement for appointment to local planning and zoning board); *cf. Thournir v. Meyer*, 909 F.2d 408, 411 (10th Cir. 1990) (upholding under rational basis review state requirement that unaffiliated candidates have been registered as unaffiliated voters in the state for at least one year before filing for office); *White v. Manchin*, 318 S.E.2d 470, 488, 491 (W.Va. 1984) (applying strict scrutiny based on the fundamental right "to become a candidate for public office" but upholding state constitutional requirement that state senators have resided in their district for at least one year before their election).

[10] *See, e.g., Antonio v. Kirkpatrick*, 579 F.2d 1147, 1151 (8th Cir. 1978) (invalidating ten-year residence requirement for State Auditor); *Brill v. Carter*, 455 F. Supp. 172, 174-75 (D. Md. 1978) (invalidating four-year residence requirement for members of county council); *Billington v. Hayduk*, 439 F. Supp. 975, 978-79 (S.D.N.Y.) (invalidating five-year residence requirement for county executive), *aff'd on other grounds*, 565 F.2d 824 (2d Cir. 1977); *cf. Robertson v. Bartels*, 150 F. Supp. 2d 691, 696, 699 (D.N.J. 2001) (applying strict scrutiny based on "the combined right of persons to run for public office and the right of voters to vote for candidates of their choice" and invalidating state requirement that state legislators have resided within their legislative districts for at least one year); *Peloza v. Freas*, 871 P.2d 687, 691 (Alaska 1994) (applying heightened scrutiny under state constitution and invalidating three-year residence requirement for city council).

Insofar as the territorial status and unique history and geography of the USVI make familiarity with local issues particularly important for office-holders there, the governmental interests supporting durational residence requirements for USVI offices may be particularly strong.[11] Yet at least some courts might consider the lengthy residence requirements here—particularly the ten- or fifteen-year periods required for USVI judges, Governors, and Lieutenant Governors—unjustified.[12] Accordingly, we would recommend that consideration be given to shortening the ten- and fifteen-year residence requirements for USVI Governors, Lieutenant Governors, and judges.

C. Territorial Waters, Marine Resources, and Submerged Lands

In *Clements v. Fashing*, 457 U.S. 957 (1982), a plurality of the Supreme Court observed that "the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny,'" and that "[d]ecision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions." *Id.* at 963 (plurality opinion) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). *Clements*, however, did not involve durational residence requirements, but rather provisions requiring a waiting period or mandatory resignation before certain current state officeholders could seek new elective offices. *See id.* at 966-71. In another case, a concurring opinion, citing *Chimento*'s approval of a seven-year residence requirement for a state governor, suggested that residence requirements may serve legitimate purposes, but this opinion did not elaborate on how long a period of prior residence may be required. *See Zobel*, 457 U.S. at 70 (Brennan, J., concurring) (observing that "allegiance and attachment may be rationally measured by length of residence . . . and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes").

[11] *See, e.g.*, *Hankins*, 639 F. Supp. at 1556 (observing that "[t]he State has a strong interest in the assurance that its governor will be a person who understands the conditions of life in Hawaii" and that "[t]his concern has 'particular relevance in a small and comparatively sparsely populated state'" (quoting *Chimento*, 353 F. Supp. at 1215)); *cf. Bell*, 660 F.2d at 168 (noting that "the interests of [a state or local] governmental unit in knowledgeable candidates and knowledgeable voters may be served by differing lengths of durational residency requirements").

[12] *Cf. Clements*, 457 U.S. at 963 (plurality opinion) (observing that "[d]ecision in this area of constitutional adjudication is a matter of degree"); *Summit County Bd. of Elections*, 545 N.E.2d at 1260 (upholding two-year residence requirement but deeming it "conceivable that such a requirement may be too long in duration to serve a legitimate state interest").

Third, Article XII, Section 2, concerning "Preservation of Natural Resources," states:

> The Government shall have the power to manage, control and develop the natural and marine resources comprising of submerged lands, inlets, and cays; to reserve to itself all such rights to internal waters between the individual islands, claim sovereignty over its inter-island waters to the effect that the territorial waters shall extend 12 nautical miles from each island coast up to the international boundaries. This is an alienable right of the people of the Virgin Islands of the U.S. and shall be safeguarded.

The intended meaning and effect of this provision are not entirely clear. To the extent that its reference to a claim of "sovereignty" over coastal waters is intended to derogate from the sovereignty of the United States over those waters, it is inconsistent with federal law and should be removed. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) (proclamation of U.S. territorial sea). In addition, by statute, the United States has, subject to certain exceptions, conveyed to the USVI its right, title, and interest in submerged lands and mineral rights in those submerged lands out to three miles. *See* 48 U.S.C. §§ 1705, 1706 (2006); *see also, e.g.*, Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001) (proclamation of Virgin Islands Coral Reef National Monument). Any assertion of USVI control over submerged lands and mineral rights beyond those federal statutory limits would be inconsistent with federal law and should be removed. Federal law also reserves to the United States exclusive management rights over fisheries within the "exclusive economic zone." *See* 16 U.S.C. § 1811(a) (2006). Again, the proposed constitution must be made consistent with this federal statutory mandate. While the final sentence of Article XII, Section 2 acknowledges that the rights it addresses are alienable, we recommend modifying this language to make clearer that these matters are subject to Congress's plenary authority.[13]

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[13] After the Department of Justice had completed its memorandum, we received a copy of a letter from several members of the Fifth Constitutional Convention to Delegate Christensen in which they raised, among other things, a concern about another article in the proposed constitution addressing submerged lands. *See* Letter for Hon. Donna M. Christensen, from Craig Barshinger et al. (Jan. 29, 2010). Article XV, concerning "Protection of the Environment," provides in Section 4:

> **Submerged, Filled and Reclaimed Lands**
>
> Submerged lands, filled and reclaimed lands in the Virgin Islands are public lands belonging collectively to the people of the Virgin Islands, and shall not be sold or transferred. The Virgin Islands of the United States cannot be sold or transferred.

Because this provision comes in an Article on environmental protection and follows sections on establishing a land, air and water preservation commission and protecting public access to beaches, we understood it as directed at private owners. To the extent the second sentence could

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I would like to emphasize that my statement has focused on three aspects of the proposed constitution that we believe Congress should consider revising because we believed that discussing those provisions would be most helpful to the subcommittee as its considers what action to take in response to the transmittal of the proposed constitution. Let me close by echoing President Obama's letter of transmittal in commending the electorate Virgin Islands and its governmental representatives in their continuing commitment to increasing self-government and the rule of law.

I would be happy to address any questions you may have. I would be grateful if the Department's memorandum could be inserted in the record of this hearing immediately following my statement.

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be read as purporting to limit Congress's power under the Territories Clause of the Constitution, *see* U.S. Const. art. IV, sec., to transfer the USVI, we agree that it should be amended to remove any ambiguity on that score.