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**35th LEGISLATURE'S COMMITTEE ON
HOMELAND SECURITY, JUSTICE, AND PUBLIC SAFETY**

**TESTIMONY
ON
BILL NO. 35-0248**

My name is Julie S. Todman, and I am the Chief Territorial Public Defender.

I thank the members and staff of the Committee on Homeland Security, Justice and Public Safety of the 35th Legislature for this invitation to testify on proposed Bill Number 35-0248: A Resolution petitioning [the] United States Congress to amend the Revised Organic Act of the Virgin Islands to authorize the people of the Virgin Islands to elect the Attorney General of the Virgin Islands. I thank Senator Gittens for the invitation to testify today on behalf of the Office of the Territorial Public Defender.

My office – the OTPD – deals with the Office of the Attorney General on a daily basis. As the agency tasked with representing indigent persons accused with crimes, our interaction with the Attorney General's office is in their role as prosecutor. The role as prosecutor is probably the most iconic of the Attorney General's many responsibilities. Of course, the Attorney General's mandate is broader than just prosecuting criminal actions. The

Office of Attorney General provides counsel to government actors; it represents the Territory, its agencies, and officials in litigation; and it is generally tasked with enforcing not only the criminal laws of the Territory – but also the civil laws. In addition to the responsibility of representing the state, attorneys general are also tasked with representing the public interest.

While our two offices are typically in direct opposition, OTPD shares in this body's interest in seeing that the Virgin Islands have the best possible Attorney General. Having an effective, ethical, and responsive Attorney General should be the goal for all Virgin Islanders – whether that person is appointed or elected. In preparing for this testimony today, I had the opportunity to review some of the legal commentary on the question of the election versus the appointment process. The two systems offer different approaches to delivering effective, ethical, and responsive leaders. There are lessons to be learned from our fellow jurisdictions under either approach.

There are many arguments in support of the notion of electing Attorneys General. First and foremost, and what appears to be surely embraced by Bill 35-0248 is the idea of popular sovereignty – the exercise by the people of their franchise – arguments that are foundational to our system of government. In addition to direct election by the people, a second

argument supporting a change in the current appointment system concerns the independence of the position and keeping the AG’s decision impartial from political influence. Finally, the bill quotes the federal government’s Justice Manual as noting that the Attorney General should exercise their powers as prosecutor “free from partisan consideration.”

While it is true that the majority of states conduct elections for Attorney General, it is noteworthy that the United States is the only country in the world that puts prosecutors up for popular vote.¹ The Bill points out that prosecutors should be free of partisan considerations but the truth is that prosecutors cannot help but become more overtly political if they are required to stand for election. It has been shown that elected attorneys general are active political forces in their states and have aspirations for the higher political office.

Of greater concern is that “when faced with elections, officials may be unduly influenced by campaign contributions. The need for the attorney general to campaign actively and solicit campaign contributions may present conflicts of interest after the election.”² They will be making campaign

¹ NOTE: *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1530 (2012).

² *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 Harv. L. Rev. 973, 984 (2014), citing as example to Dan Frosch, *Under Investigation, Utah Attorney General Resigns*, N.Y. Times, Nov. 22, 2013, at A20.

promises and taking campaign donations from individuals who may become victims of crime or even the subject of a criminal investigation.

Most relevant to OTPD’s role as defending those accused of crimes is concern that elected prosecutors will embrace harsher actions to placate public sentiment – what might be called the “tough on crime” problem. Crime is a leading concern for many members of our community. I am certain every member of this body has been the target of popular pressure to “do something” about crime. Given their role, an elected Attorney General will face even more of that public pressure. This creates a danger. Empirical studies show that in a country where prosecutors – and often judges – are elected, criminal sentences are longer in election years.³ Elected prosecutors will be the target of pressure and the evidence shows that they will change how they do their job because of it. The system can become less even-handed with elections.

³ Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy* 99 (Greenwood 1995) (summarizing a finding, based on matched pairs of state supreme courts, that courts with gubernatorially appointed judges adopt defendant-friendly rules more often than courts with popularly elected judges); David Abrams, et al, *Judicial Delegation* (working paper, June 29, 2018), archived at <https://perma.cc/RW64-MDMG> (finding that judges who cycle through districts are more punitive in their electoral districts shortly before elections); Carlos Berdejó and Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 *Rev Econ & Stats* 741, 741-42 (2013) (finding that sentences are 10 percent longer at the end of a judge's political cycle and upward departures increase across the cycle).

Elections also may not be the best tool to measure an attorney’s ability. There is evidence that voters pay less attention to lower-ballot races, including Attorney General races.⁴ In our last local General Election when the Governor was on the ballot, about one-half of the electorate voted but the highest-polling non-gubernatorial candidate received a vote from only about one-fifth of the electorate.⁵

There are several other measures that this body can take to increase accountability. First and foremost, the Revised Organic Act provides that the Attorney General “...shall have such powers and duties as may be prescribed by the legislature,”⁶ so this body could conceivably make adjustments to increase accountability. Secondly, this jurisdiction could focus on the rules of professional conduct that govern all attorneys.⁷ Finally, we could leave the issue to the voters and ask them at public referendum if they even seek this choice for themselves.

⁴ *Appointing State Attorneys General*, supra.

⁵ Results available at <https://www.vivote.gov/sites/default/files/officialresults/Territorial%20Summary%20%283%29.pdf>

⁶ 48 U.S.C.S. § 1597(c).

⁷ Gillers, Stephen, *Because They are Lawyers First and Foremost: Ethics Rules and Other Strategies to Protect the Justice Department from a Faithless President*, 57 Ga. L. Rev. 163 (2022).

What is noteworthy is that we all seek an effective, ethical, and responsive Attorney General, whether appointed or elected, who complies with the state professional conduct rules which govern lawyers. Thank you for the invitation and for your time.