PRESENTATION OF DEPUTY ATTORNEY GENERAL
IAN S.A. CLEMENT
THIRTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS
COMMITTEE ON RULES & JUDICIARY
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Good morning, Chairperson Capehart, Committee on Rules & Judiciary members, legislative staff, and the viewing and listening audience.

My name is Ian S.A. Clement, and I am the Deputy Attorney General for St. Thomas and St. John and presently Acting Attorney General of the Virgin Islands. I am honored to be invited to provide a few remarks regarding Bill No. 35-228 on behalf of Attorney Nominee General Gordon C. Rhea, as proposed by Senator Kenneth L. Gittens, Franklin D. Johnson, and Marvin A. Blyden. Bill No. 35-228, which divests the Attorney General of the jurisdiction to administer ethics and conflict of interest law, allows the Attorney General to enforce them alongside the proposed Commission on Ethics and Conflicts of Interest when there is criminal nexus. The Bill also establishes procedures for investigating, enforcing, and appealing public officers and employees' ethical and conflict of interest violations. Section 2 of the Bill also establishes the Ethics Commission Fund. Section 3 of the Bill appropriates $500,000.00 to the Ethics and Conflict of Interest Commission Fund for operating expenses.

As stated in my testimony for Bill 35-227, the Department of Justice favors the establishment of the Commission. The proposed Bill No. 35-227 aligns with the trend of good governance embraced nationwide.

That said, I cannot support Bill 35-228 as written and assert that this Bill requires major revision. Title 3 of the Virgin Islands Code Section 114(a)(2),(3) grants the Attorney General, and the Attorney General alone, the duty to prosecute all offenses against the laws of the Virgin Islands in the inferior courts of the Virgin Islands. The Attorney General achieves this through their staff of Assistant Attorneys General under Title 3 of the Virgin Islands Code Section 113(b). Under Section 114(a)(6), duties assigned to the United States attorney solely under the laws of the Virgin Islands were transferred to the Attorney General.[1] But Section 1 of the Bill would replace subparagraph 17, which states that the Attorney General shall "administer and enforce laws about ethics and conflict of interest," and replace it with language stating the Attorney General shall enforce laws about the ethics and conflicts of interest in conjunction with the Virgin Islands Commission on Ethics and Conflicts of Interest."

The change mentioned above conflicts with the internal language of Section 114 and the plain language of Section 113. And it creates confusion with the

[1]*See also Sekou v. Moorhead*, 72 V.I. 1048, 1056 (V.I. 2020)

proposed language of Bill 35-227. Bill 35-227 requires the Commission to employ a chief legal counsel. But it does not require the chief legal counsel or any attorneys under the chief legal counsel to be Assistant Attorneys General, violating Section 113. Even though Bill 35-228 strips the Attorney General of the sole responsibility to enforce the ethics and conflict of interest law and vests it jointly with the Commission. Neither of the proposed bills requires the Attorney General to appoint the chief legal counsel or any of the commission's attorneys as Special Attorneys General. And if they did require such a designation, how long would it be before this Commission is melded into the Attorney General's office?

This Bill also abrogates the duties of the White Collar and Public Corruption Section of the Department of Justice, which has been specifically established by Title 3 of the Virgin Islands Code, Section 118, and states:

> There is hereby established within the Department of Justice a White Collar Crime and Public Corruption Section, to institute aggressive prosecution of white collar crime and corruption, which crimes fall within the jurisdiction of the Attorney General under Virgin Islands statutes, or which the Attorney General is authorized to prosecute with the consent of the United States Attorney.

3 V.I.C. § 118

Almost all of the criminal violations of the ethics provision would be considered white-collar crimes or crimes of public corruption and fall under the

jurisdiction of the White Collar and Public Corruption Unit or not. This Bill creates confusion where there should be none.

I repeat my reservations from my analysis of Bill 35-227, which requires the Attorney General to "make available to the Commission such personnel, facilities, and other assistance as the Commission may request to assist in the performance of its duties." That is a quote from proposed subsection (j). I am concerned that any shortages in the Commission's staffing and funding will be visited upon the Department of Justice since it serves not only as the only backstop for the Commission but, based on this language, has ceded some of its responsibility to the Commission. I cannot object strongly enough to this change in the law.

Rather than changing the Attorney General's duties and responsibilities, I suggest that the Bill be amended to allow the Commission to refer cases to the Attorney General for criminal prosecution. Maine allows for referrals to its Attorney General.[2] So does Massachusetts,[3] Mississippi,[4] Nebraska,[5] Nevada, [6] New

[2] *See* M.R.S., tit. 1, § 1006.

[3] *See* Mass. Gen. Laws Ann. ch. 268B, § 4

[4] *See* Miss. Code. Ann. § 25-4-18

[5] *See* Neb. Rev. Stat. Ann. § 49-14,124.02.

[6] *See* Nev. Rev. Stat. Ann. §§ 281A.240, 281A.260, 281A.290.

Hampshire,[7] South Carolina,[8] and Washington State.[9] There is precedent for referrals to the Attorney General within Virgin Islands law. Title 3 of the Virgin Islands Code, Section 1203(f) states

> In carrying out the powers, duties, and authority of this chapter, the Office of the V.I. Inspector General shall report expeditiously to the Attorney General whenever the V.I. Inspector General has reasonable grounds to believe there has been a violation of law.

3 V.I.C. § 1203

Subsection (g) of the same statute instructs that the Attorney General cannot limit the Inspector General's investigative authority. Yet this Body proposes to limit or divest the Attorney General, specifically the White Collar and Public Corruption unit, of its ability to investigate. Instead, these bills should seek the cooperation of the Commission, the Attorney General, and the Inspector General to investigate criminal ethics violations.

If this Body is concerned with any possible lack of cooperation by the Attorney General, this Body drafted a check on that in Section 1203, which requires the Inspector General to

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[7] *See* N.H. Rev. Stat. Ann. § 14-B:4.

[8] *See* S.C. Code Ann. § 8-13-320

[9] *See* Wash. Rev. Code Ann. § 42.52.420.

> notify the Governor, Chief Justice of the Supreme Court, or President of the Legislature, as appropriate, within 30 business days after the Attorney General declines orally or the writing to prosecute a matter referred, to or otherwise brought to the attention of the Attorney General pursuant to subsection (f) of this section

3 V.I.C. § 1203

I recommend that this Committee include a similar provision in Bill 35-228.

In sum, I suggest that Section 1 of the Bill be deleted and that this Body consider having criminal cases referred to the Attorney General and, where appropriate, notice to the Inspector General.

Financial interest disclosure forms are already required to be maintained by the Attorney General's office under Section 1105(a)(4). The White Collar and Public Corruption Unit would maintain these forms. The Bill suggests that two instances of the word Committee be struck and replaced with "Attorney General." I suggest instead that the Commission and its staff maintain the files required under Section 1105 and that files be referred only to the Attorney General and Inspector General as necessary for criminal prosecution and financial analysis.

Bill 35-228 proposes that Section 1106 be amended by striking the words "Attorney General" and inserting the words "Virgin Islands Commission on Ethics and Conflicts of Interest." The revised language would state:

> This chapter shall be administered by the ~~Attorney General~~ Virgin Islands Commission on Ethics and Conflicts of Interest who shall conduct investigations, issue rules and regulations, and file actions in the appropriate courts when and as necessary to enforce its provisions.

Consistent with my prior recommendation, I suggest that the reference to the Attorney General not be changed. Instead, the words "on referrals from the Virgin Islands Commission on Ethics and Conflicts of Interest" should be inserted after the word "who," and the words "issue rules and regulations" be struck. The new language would thus be:

> This chapter shall be administered by the Attorney General, who, on referrals from the Virgin Islands Commission on Ethics and Conflicts of Interest, shall conduct investigations, ~~issue rules and regulations,~~ and file actions in the appropriate courts when and as necessary to enforce its provisions.

I also suggest moving the definition of a public official in proposed 1109(a)(1) to the Definitions Section 1101 for consistency, with a cross-reference in proposed section 1109 to Section 1101 and visa-versa. Sections 1109(b)-(m) align with the duties of ethics commissions in other states. Proposed Section 1109(m) requires the Commission to preserve statements and reports for five years. The proposed preservation requirement reflects the preservation requirements of other states, which range from four to six years.

Subsection 1109(o) requires the Commission to issue advisory opinions within 14 days or state when an opinion may be issued. From my personal experience, this requirement may be overly optimistic. I am also concerned that if the Commission cannot meet this requirement with its own staff, the burden will be placed on the Department of Justice.

Proposed Section 1109 (o) also creates an absolute defense to anyone who acts in good faith on an opinion issued by the Commission. Similarly Proposed Section 1109(p) states:

> It is a complete defense in any enforcement proceeding initiated by the Commission and evidence of good faith conduct in any other civil or criminal proceeding if the requester at least 21 working days before the alleged violation requested written advice from the Commission in good faith, disclosed truthfully all material facts and committed the acts complained of either in reliance on the advice or because of the failure of the Commission to provide advice within 21 days after the request or such later time. The person requesting the advice may, however, require that the advice contain deletions and changes as necessary to protect the identity of the person involved.

The provision of an absolute defense may be abused as a loophole and hamstring the Department of Justice in any criminal or civil proceedings. The words "*complete defense*" may also serve as a trap for the unwary.

In proposed Section 1109(o), I would replace the words "*A person who acts in good faith on an opinion issued by the Commission is not subject to criminal or civil penalties for so acting if the material facts are as stated in the opinion request*," with "A person who acts per an opinion issued by the Commission, if the material facts are as stated in the opinion request, is presumed to have acted in good faith. That presumption may be rebutted by the Attorney General by the standard of proof as is required by the rules criminal or civil court, respectively."

Providing language that forcefully promotes circumspection will let public employees know that obtaining an advisory opinion from the Commission is not the end of their duties. They may still be subject to civil or criminal proceedings if they do not adhere to the letter of those opinions.

In proposed Section 1109(p), I suggest removing the words "*complete defense*" and adding the words "rebuttable presumption of good faith conduct" after the word "a" and removing the words "*evidence of good faith conduct*" after the word "and."[10]

Proposed Section 1110(c) states that a "findings report may not be issued later than 360 days after the initiation of an investigation." But proposed Section 1110(c)

[10] The new language would read:

> It is a rebuttable presumption of good faith conduct ~~complete defense~~ in any enforcement proceeding initiated by the Commission and ~~evidence of good faith conduct~~ in any other civil or criminal proceeding . . .

does not state the investigation's status if a report is not issued on time. The Bill should clarify this.

Proposed Section 1110(e) states, "matters not specifically denied in the response are deemed admitted." So fundamental is this provision to due process that it should have a separate subjection so that it is not lost in the paragraph. Similarly, the provision in proposed Section 1110(g), which states, "Any person who appears before the Commission has all the due process rights, privileges, and responsibilities of a party or witness," should be singled out in a separate subsection. Equally, the clear and convincing burden of proof in proposed Section 1110(g) should be highlighted. Finally, the proposed Section 1112 about frivolous complaints is strong and follows frivolous complaint provisions in other states.

I thank the Committee for the invitation to testify on Bill No. 35-228. I greatly appreciate your consideration of my remarks. This concludes my formal remarks, and I remain available for any members' questions.