

# The USVI Constitutional Convention Clearinghouse

REPORT

## Fixing USVI's Constitutional Convention Enabling Act

J.H. Snider – March 27, 2023

### Policy Brief

No democratic task is more important for a people than drafting its constitution, a document that is the foundation of any modern democracy and functions to limit a legislature. But the way USVI's Legislature drafted USVI's 6<sup>th</sup> constitutional convention enabling act, [signed into law](#) by the Governor on Jan. 19, 2023, suggests hostility to the constitution-making rights of USVI's people. A convention's enabling act shouldn't be a power grab by the Legislature; it should empower the people. It also shouldn't be passed in secret and riddled with careless errors.

USVI's Legislature is currently considering amendments to fix those errors that make the enabling act impossible for the Elections System of the Virgin Islands to implement. The original hearing date to consider those amendments, March 15, 2023, was postponed. An essay by this author critiquing those amendments was [published](#) on March 2, 2023.

#### The Convention Process

The process for a U.S. territory to acquire its own territorial constitution entails three public votes: 1) whether to call a convention (USVI voters [overwhelmingly approved](#) a call on Nov. 3, 2020), 2) to elect delegates to a convention (currently scheduled for Nov. 4, 2024), and 3) to ratify the convention's proposed constitutional changes. Congress also needs to approve any proposed constitution.

#### USVI's Convention History

By the Legislature's [own count](#), USVI has convened five "constitutional conventions" between 1965 and 2012. None won approval for its proposed constitution. The Legislature hopes its 6<sup>th</sup> attempt will have a different outcome.

The Legislature has marketed all six attempts as efforts to empower USVI's people. Currently, USVI's fundamental law, called an "organic act," is controlled by Congress. The Legislature wants to transfer the



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power to amend this fundamental law from Congress to USVI. So far, so good.

The problem is that empowering itself and the people are identical from the Legislature's standpoint. But they are not: the Legislature has always prioritized empowering itself and its special interest allies over USVI's people. The result, ironically demonstrating that the process ultimately works the way it should, has been that either Congress or USVI's voters have refused to ratify each of the five convention-proposed constitutions. If the Legislature persists in its power grab, this current attempt should also hopefully fail.

As background, consider some basic constitutional theory: Congress requires that all new constitutions proposed by U.S. territories be proposed by an independently elected convention and approved by not only Congress but voters in the territory. This tradition began in late 1770s Massachusetts when voters expressed great distrust of their Legislature proposing and then ratifying a new state constitution. They contended that the Legislature would have a blatant conflict of interest in proposing and approving its own constitutional powers—a then-popular definition of “legislative tyranny.” The purpose of the convention process was to solve that conflict-of-interest problem.

The catch is that Congress leaves the implementation details to local legislatures, which can use that discretion to try to enable an independent convention in form but not substance. Alas, legislatures can get away with such sleight-of-hand if the public does not pay attention until after the enabling act is a fait accompli, which has been the case in USVI.

For USVI's [first two](#) conventions, the Legislature exercised control largely by ensuring that fifteen of the thirty-three convention delegates were incumbent legislators and by requiring a 2/3 majority for the convention to pass a proposal, which gave the legislator-delegates effective veto power over any proposal coming out of the convention. Both conventions were such gross violations of a convention's democratic function that neither deserves the label “constitutional convention.” But USVI has always labeled them as such, which is why the current enabling act is labeled USVI's sixth.

For the third through fifth enabling acts, the Legislature was granted control of the convention process in more subtle ways. The [sixth act](#) carries on that tradition.

### USVI's Current Enabling Act

Based on the belief that Congress wouldn't reject a fundamental law it created, the Legislature's [latest scheme](#) is to get a convention to propose Congress's existing organic act for USVI along with an amendment provision giving the Legislature effective control over future amendments. After Congress and the voters approve that constitution, the Legislature would convene a constitutional revision commission under its tight control, including its veto power over any proposed amendment, to propose amendments before submitting them to the people for their approval. In other words, contrary to an independent convention's democratic function, the Legislature would retain proposal power over the organic act's rewrite.

The Legislature signaled its intent in the text of its successful 2020 advisory referendum on whether to call a convention: “Are you in favor of the Legislature enacting legislation to convene a constitutional convention to adopt the Revised Organic Act of the Virgin Islands... *or a portion of it* as the Constitution of the Virgin Islands?” But this call for a limited convention is not legally enforceable; its purpose was to provide political cover for the Legislature's subsequent attempts to control the convention process.

Sure enough, the enabling act the Legislature passed on Dec. 29, 2022 is rife with provisions granting it excessive control over the convention process. Among them:

1. Forcing the convention to use the Legislature's and Governor's legal staff as counsel.
2. Making delegates beg the Legislature for funds to run a convention, including paying for non-Legislature staff, for more than a minimal period.
3. Spending \$150,000, half the convention's total budget, on a PR campaign to win public ratification of the convention's proposed constitution.
4. Preventing fair representation in delegate elections via a primary-less election with huge multi-member districts and first-past-the-post voting rules.
5. Favoring one group of delegate candidates over another by guaranteeing no loss of pay or position for the government, but not the private sector, candidates who win.
6. Favoring political elites over relatively unknown candidates through a variety of tried-and-true devices, including rushed elections for delegates and convention leaders.

If the Legislature were serious about creating a democratically accountable convention process, it would have conducted a genuinely open debate about the process, including inviting expert testifiers to discuss the convention's independence from the Legislature. Instead, its invited experts, who were politically astute, avoided such issues and legislators debated them among themselves in secret. The Legislature's unanimous passage of the enabling act

after 11:00 pm on Dec. 29, 2022, 26 months after voters approved calling a convention and less than two hours before the session adjourned, illustrates its penchant for secrecy.

As constitutional convention scholar Jon Elster argues, the convention process should be most public before a convention convenes and after it makes its proposal to the public. By the time a convention's enabling act has passed or delegates have been elected, vital decisions have already been made. But in USVI, the [vast majority](#) of press coverage and public discussion has historically centered on convention delegates' actions after being elected.

This secrecy has a cost—including sloppy and embarrassing errors that could have been avoided if more public eyes had been allowed to read the legislation prior to its passage and signing by the Governor. For example, the Legislature was forced to change the enabling act's original delegate election date because it had already passed by Dec. 29, 2022. But it then forgot to change the subsequent dates in the act. For example, one clause says "Delegates elected to the Constitutional Convention shall convene on the fourth Monday in January 2023." But that date has already passed! Other specified convention deadlines are equally impossible to meet.

Similarly, it created inconsistencies when it changed the delegate districting at the last moment. For example, one part of the enabling act says there are no at-large seats whereas another part specifies how they are to be elected.

The Governor's staff blames the Legislature for the errors.

These inconsistencies, which could have been detected by a first-grader, make the enabling act impossible to implement. But a 6-year-old would not have been able to discover them because they were not publicly detectable until after the Governor signed the enabling act on Jan. 19, 2023 and the last-minute amendments made in the wee hours of Dec. 29, 2022 were for the first time publicly released. Indicative of the mindset, the Society of Professional Journalists in 2016 awarded its "annual Black Hole Award to the Government of the United States Virgin Islands for its bald and breathtaking contempt of the public's right to know."

### Fixing the Enabling Act

To fix the problem, the courts could rule that the delegate election date should take precedence over the other dates and then grant convention delegates—not the Legislature—substantial control over the calendar.

On the districting inconsistencies, the courts could rely on clear legislative intent.

Instead, the Legislature has been seeking to quietly fix the problems during a session originally scheduled for March 15, 2023 and then postponed with no announced new date. Meanwhile, the public should call for democratic improvements, including:

1. Favoring electoral competition rather than government elites and special interests by not rushing delegate elections.
2. Holding an open primary in multi-member districts to narrow down the field of delegates.
3. Using ranked-choice voting in multi-member districts for the general delegate election.
4. Banning government officials, including incumbent and retiring legislators, from running for delegate.
5. Banning delegates from running for another office, including the Legislature, until at least a year after the convention adjourns.
6. Paying all delegates equally rather than favoring government elites.
7. Allowing candidates for delegate to submit their resumes and reasons for seeking office to the Elections System of the Virgin Islands, which would compile that information for all candidates, post it online, mail it in a pamphlet to all voters, and link to it on all ballots.

Another option would be for the public to pass a law by ballot initiative to fix the enabling act. However, USVI's bar for approving an initiative is so high that [no initiative has ever been passed](#), indicating this is an unrealistic mechanism to fix the enabling act's problems.

Some proposals should ideally be implemented in the enabling act. But, if not, they could be implemented by the convention because they occur after the convention convenes.

For example, instead of paying \$150,000 on a PR campaign to sell the constitutional convention's recommendations to the public, the convention could pay a lesser amount to create a "citizens' assembly" to foster a more balanced educational effort prior to the public's ratification vote. Specifically, I recommend:

1. Creating a super-sized jury (commonly known as a “citizens’ assembly”) of approximately 500 registered voters.
2. Assigning the head of the territory’s supreme court (or some other independent authority) to randomly select, organize, moderate, and record the proceedings of the jury.
3. Tasking the jurors to listen to a debate between pro and con speakers chosen by convention delegates who respectively voted for and against the proposed constitutional changes.
4. Televising and recording the debate for all citizens to watch.
5. After the debate, tasking the jurors to meet in round-robin groups of ten to discuss among themselves the merits of the pro and con sides.
6. Tasking the jurors to vote in a plenary session on whether to support or oppose each proposed constitutional change.
7. And most important: publishing the resulting tallies on the ballot item asking voters whether they want to ratify a proposed constitutional change; that is, like a party label, reporting next to the ballot question the percentage of jurors who voted yes or no on the question, along with a link to the recorded debate the jurors witnessed.

Other uses of a citizens’ assembly as an auxiliary body to a convention could be incorporated in the convention’s proposed constitution. For example, a citizens’ assembly could be used to vet candidates for delegate, with the jurors first reading the candidates’ statements submitted to the Elections System (see above proposal) and then meeting in round-robin groups to propose, discuss, and rank questions for a judge to ask the candidates in a televised public forum that would later be included as a link on the election ballot or an election pamphlet mailed to all voters. This public education device is especially important to compensate for the information deficit when candidates for delegate cannot run under party labels. It is also important when, as is usually the case, a huge number of candidates run for delegate (open seats attract many candidates and all convention seats are, by definition, open) while the press lacks the incentive to cover all the candidates.

A citizens’ assembly could also be used as an optional check on the Legislature’s enabling act. For example, the convention could be granted the option of amending the Legislature’s enabling act (e.g., concerning the convention’s deadline or budget) by seeking approval from a citizens’ assembly rather than the Legislature. Specifically, the assembly would first listen to pro and con debaters chosen respectively by the presidents of the convention and Legislature. Then, after meeting in round-robin discussion groups, it would vote each proposed amendment up or down. If the convention lost, it would have one opportunity to revise its proposals and resubmit them to the same citizens’ assembly.

This check on a legislature is important because one way a legislature can gain improper control of a convention is by making delegates routinely beg the legislature for more funds to stay in operation. On the other hand, it is also important for a convention to have an independent check when it seeks to modify its enabling act. A legislature can continue to play that checking role but should know that if it abuses that power can be checked by a citizens’ assembly. Similarly, a convention should know it cannot write itself a blank check to stay in operation.

#### **The Convention’s Agenda**

A constitution’s legitimacy should depend in major part on its provisions to allow the popular sovereign (“the people”) to amend it. It is immoral for the present generation to pass a constitution that effectively bans future generations from passing amendments needed to protect their democratic rights.

Accordingly, a convention should prioritize improving constitutional amendment processes that bypass the Legislature and that the Legislature will not fix for that reason. These include the constitutional initiative and the constitutional convention processes.

Above all, if USVI’s future amendment process is to be truly democratic, the Legislature should not be granted monopoly gatekeeping power over it. A convention may address many other constitutional proposals as well. But safeguarding the right of future generations to alter their constitution should be viewed as the right that safeguards all the other rights.

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J.H. Snider edits the [USVI Constitutional Convention Clearinghouse](#)