

The USVI Constitutional Convention Clearinghouse

REPORT

The Proper Scope of USVI's Constitutional Convention

J.H. Snider – January 2, 2024

Policy Brief

Many citizens think of drafting a constitution as a relatively minor affair. Compare, for example, USVI newspaper coverage of major local sports events to major USVI constitutional convention events. The former coverage dwarfs the latter. If you're like most of your neighbors, you probably haven't discussed convention policy and politics with your family, friends, and colleagues even though USVI's key convention procedural issues were passed into law during 2022 and 2023.

One reason for this lack of timely public attention is that it is to the advantage of USVI's government, especially its Legislature, to avoid public discussion of these issues, as the lack of such discussion facilitates its control over the convention process. To the extent the Legislature--and government officials more generally--want to use the convention as a power grab for itself, it's easier if the public isn't paying attention. A similar political logic allows special-interest lobbyists to thrive when operating in the shadows. Vivid illustrations of that penchant for secrecy are the Legislature's [passage](#) via voice vote of its amended convention enabling act near midnight on Dec. 30, 2022, and its [passage](#) of amendments to that legislation as a rider to a wholly unrelated bill and without any public notice on July 20, 2023.

This low-visibility strategy is especially effective because the public doesn't understand the democratic function of either a constitution or the independent constitutional convention process. USVI's elites have been happy to keep them in that state of blissful ignorance, partly by distracting them with politically salient but secondary issues. The secondary issues surely deserve a hearing—but not at the expense of the core constitutional issue concerning how a people should hold its elected leaders democratically accountable via a constitution.



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It is already very late in the convention process given that the Legislature has already passed an [enabling act](#) for the convention. But it's not too late to right the ship. Most important is to elect convention delegates who will respect the independent convention process and thus won't serve as a rubber stamp for the Legislature's corrupt use of the convention process as a power grab. By "corrupt" I mean not individual but institutional corruption in the sense of undermining an institution's effectiveness—in this case, the constitutional convention's—by weakening its ability to achieve its purpose (see Lawrence Lessig, ["Institutional Corruption" Defined](#), 2013).

The Function of the Convention Process

For more than 150 years, the U.S. Congress has mandated that any U.S. territory seeking its own constitution must use an independently elected constitutional convention to do so. The reason that a convention must be elected independently of a local legislature is that a legislature would have a blatant conflict of interest in designing a constitution that controls its own powers.

In the late 18th Century, American states invented the written constitution, which entails a two-track process for lawmaking, one for ordinary lawmaking controlled by the legislature and another for higher lawmaking not controlled by the legislature and thus keeping the legislature in check. An independently elected constitutional convention combined with popular ratification of its proposals thus became central to the American state tradition of lower and higher lawmaking.

With the Legislature's support, Congresswoman Stacey Plaskett representing USVI made a failed [legislative](#) end run around this requirement. Other than that exception, USVI's Legislature has consistently conceded that it must convene an independently elected convention if it wants to win a territorial constitution from the U.S. Congress. Its strategy has been to use more subtle mechanisms to take control of the convention's agenda from the people.

The Legislature's Attempt to Corrupt the Convention Process

One clever attempt to corrupt the convention process was to attach language to the [advisory referendum](#) that voters [approved in 2020](#) stating that the purpose of the convention was to win as USVI's constitution the existing congressional organic act governing USVI, plus a provision giving USVI's Legislature control of future constitutional amendments. After winning the constitution, the Legislature could then convene a commission to make future amendments, which, unlike a convention, would be under its direct control. The Legislature needed to make this power grab in the form of an advisory referendum because Congress would have dismissed out of hand any Legislature-proposed convention that didn't give the convention formal control of its agenda.

There is no legal force to this restriction because U.S. courts won't allow a convention's agenda to be so limited. Instead, the intended impact is political. But the assertion that it was the will of the people to limit a convention is specious because what the Legislature did was present the people with a Hobson's choice by combining two separate choices into one. The first and

traditional choice was whether the people wanted to call an independently elected convention to propose a constitution for popular and U.S. Congress ratification. The second choice was whether they wanted to effectively give USVI's Legislature, as the price for USVI winning its own constitution, monopoly control over the proposal of all future constitutional amendments. If the questions were asked separately, the restriction on the convention's agenda would have had more legitimate political force. But by inappropriately combining them, it was like a hostage taker putting a gun to a child's head and saying that if the child wants to save either of his parent's lives, he must sacrifice one. The correct stance to such a Hobson's choice is that the choice should never have been presented to the people in this way because it was so clearly designed to be anti-democratic.

Given that the Legislature knew the shaky legal and democratic grounds of the convention control mechanism contained in the advisory referendum, it passed a convention enabling act with many auxiliary mechanisms to give it and its allies control over both the convention delegate election and subsequent convention. This includes a convention delegate election process designed to favor insiders, and a convention budget designed to ensure a rubber stamp convention. These subtle techniques of control would be difficult for a court to challenge. But even here there are some features, such as the Legislature's requirement that the convention use the government's legal staff for its legal counsel, that it's hard to imagine any court would uphold if convention delegates chose to ignore it and found means to do so. In the past, some conventions have gotten around such legislature budget abuse by finding independent non-profit educational funding, including for legal counsel.

The Lessons from USVI's previous five failed "conventions"

The Legislature claims the lessons from USVI's five previous failed conventions provide the rationale for its current course of action restricting the independence of the convention. But what exactly were those lessons? Surely not that the five previous conventions were properly independent of the Legislature. Consider the Legislature's often repeated [claim](#), embedded in many laws, that USVI has held five previous conventions. Given that the first two not only included as delegates every incumbent legislator but also gave those delegates effective veto power over everything the convention might propose, they were hardly independent of Legislature control by any reasonable standard. After those two illegitimate conventions, the [U.S. Congress passed legislation](#) granting USVI the right to call a convention. But the subsequent three conventions included provisions in their legislative

enabling acts that undercut their democratic purpose, as symbolized by [Governor Charles Wesley Turnbull](#), who served as a delegate to all five of USVI's claimed independent conventions.

During the last convention, the legislator who drafted its enabling act and the governor who signed it both planned to run for convention delegate. The legislator who drafted the enabling act ultimately decided not to run for delegate. But [six of the fifteen elected delegates](#) ran for the Legislature while serving as delegate. This distracted them from fulfilling their duties as delegates (e.g., by campaigning rather than showing up for convention meetings) while also damaging the convention by turning it into a platform for winning office and scoring points against their electoral competitors. This helps explain why not only incumbent government officials should not be eligible to run for delegate but also why delegates should not be eligible to run for elected office for at least two years after a convention adjourns. For more than 200 years American state constitutions have recognized the evils of plural officeholding in our democratic system based on checks & balances. USVI demonstrates what happens when that principle is ignored in the design of what state constitutional scholar Roger Hoar described as America's fourth branch of government, the constitutional convention.

The lesson that USVI's Legislature should have learned from those five previous conventions is that either USVI citizens or the U.S. Congress won't support an undemocratic constitutional convention process rigged in favor of USVI's elites. Instead, the current Legislature has doubled down on its efforts to corrupt the convention process, albeit with some novel twists with this iteration. USVI should respect America's 150-year tradition of independent territorial and statehood constitutional conventions.

The constitution-making process is working, rather than dysfunctional, when the people reject an undemocratically proposed constitution. As a vivid example, New Hampshire voters rejected three proposed constitutions before approving a fourth in 1784—now the second oldest in the world.

Recommendations

Delegates should pledge fidelity to an independent convention process. Candidates who run for delegate should pledge fidelity to fulfilling the historic function of the convention process, which entails participating in a convention that is genuinely independent of the Legislature and other government offices created by the constitution. Any Legislature attempts to improperly control the process should be immediately called out, and delegates should be branded as either 1)

Legislature rubber stampers, or 2) reformers willing to thoughtfully discuss democratic reforms, including democratic innovations such as open primaries, ranked choice voting, popular constitutional initiatives, and citizens' assemblies, as part of the constitutional reform process.

Voters should only support candidates pledging to support convention independence. Voters should only vote for candidates who promise not to be rubber stamps for the Legislature's preferred agenda. Voters should keep in mind that in designing a constitution the interests of government officials and the people are likely to come in conflict in a much more serious way than in ordinary lawmaking because the primary democratic function for a written constitution is to keep "constituted powers" (government officials) in check. This entails supporting delegates who promise a meaningfully independent convention and not voting for incumbent government officeholders, especially incumbent legislators, who may run for delegate.

The convention's agenda should include a prominent place for the future amendment clause. A constitution attains its long-term democratic legitimacy by reflecting the will of the people. For this to be more than window dressing, each current generation must have the means to alter its constitution. This entails that the provisions of a constitution's future amendment clause are the key to its long-term democratic legitimacy. For a future amendment clause to have such legitimacy, it must include a self-executing mechanism to provide the people with initiation, proposal, and ratification power over future constitutional amendment that is independent of the legislature. Ratification power alone is insufficient.

Voters and convention delegates will always prioritize the more immediate needs of the present over the more abstract needs of the future. But just as the people shouldn't sanction destroying the natural ecosystem at the expense of future generations, they shouldn't endorse a constitutional system that gives short shrift to the interests of future generations. That is, the Legislature shouldn't be given effective constitutional veto power over issues such as legislative redistricting, term limits, campaign finance, transparency, and democratic accountability more generally. The people should preserve their right to put such issues on the constitutional agenda even if the Legislature would not do so on its own.

Conclusion

Deliberating deep questions of democratic constitutionalism does not come easily to either the people or most democratic elites, who have rarely thought about such issues. But they should be an

essential part of USVI’s deliberations leading up to its Nov. 5, 2024 election for convention delegates. That doesn’t mean that other more politically salient questions are unimportant and shouldn’t also receive a fair hearing. But addressing those questions should not come at the expense of crowding out the fundamental constitutional design issues that will determine the long-term democratic legitimacy of USVI’s constitution. Granting USVI’s Legislature monopoly power over future amendment would be a terrible and needless price to be paid for winning USVI’s own constitution, as the means exist for the people to retain

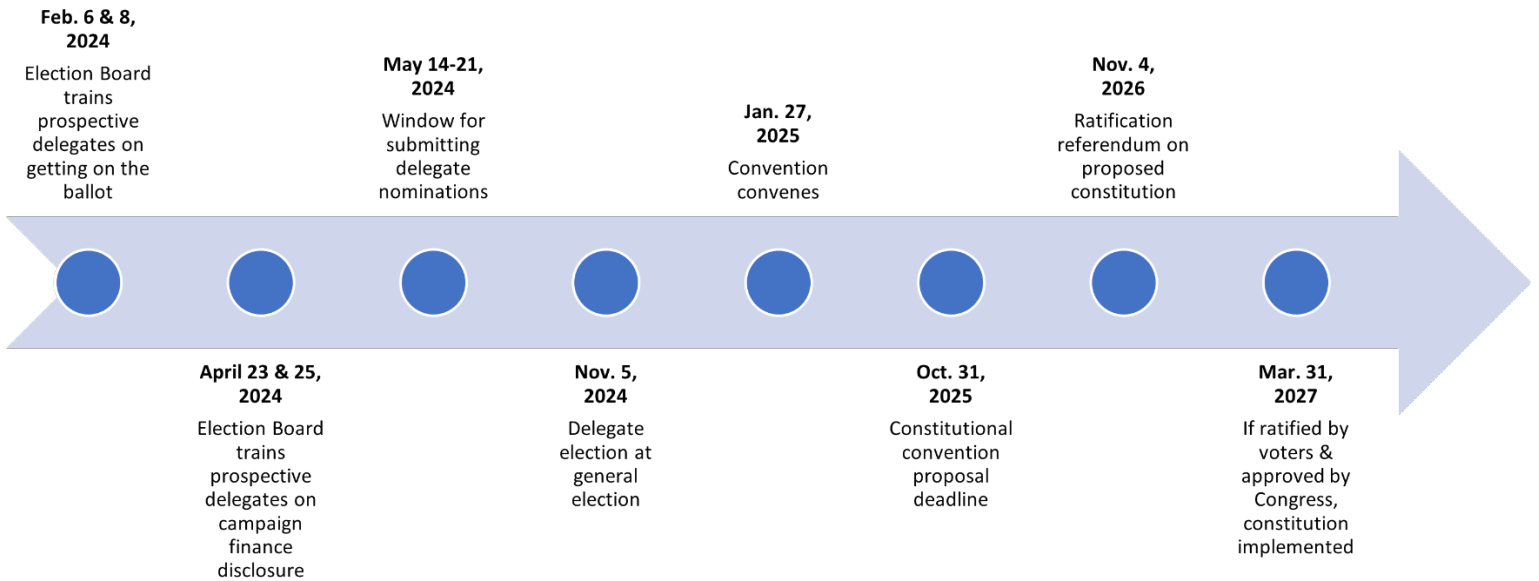
constitutional agenda-setting power while also securing a constitution. Accordingly, the people should demand that convention delegates carefully consider whether the Legislature’s demands for monopoly agenda-setting power over future amendment—and not just limited to the current convention—is in the people’s interests.

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Constitutional Convention Timeline

2024 to 2027 Calendar



2020 to 2023 Calendar

