May 13, 2024

Ref: GOV 24-0100

Honorable Lourdes A. Leon Guerrero
Governor of Guam
Office of the Governor of Guam
Ricardo J. Bordallo Complex
513 West Marine Corps Drive
Hagåtña, GU 96910

Subject: Legal Opinion; Self-Determination Plebiscite, 1 GCA § 2110

Hafa Adai Governor:

You asked for a Legal Opinion on the following questions, which document serves as a duty of this Office and is a public document. Please be reminded of our February 28 and 29, 2024, as well as March 18, 2024 letters that inform all public officials that our client is the Government of Guam and that we do not serve any public official in their personal capacities.

Questions Presented

1. Can a definition of "*Native Inhabitants of Guam*" be crafted that is consistent with both the mandate of 1 GCA, Chapter 21 and the holding of *Davis v. Guam* so that the Government of Guam may undertake the plebiscite called for at 1 GCA § 2110?

2. May a non-governmental agency that use its own funds conduct its own election as described at 1 GCA § 2110? Would such an election qualify as state action or a decision on a public issue for purposes of the 15th Amendment to the US Constitution?

Summary

1. The breadth and sweep of the controlling opinion in *Davis v. Guam* leaves no room to craft a definition of "*Native Inhabitants of Guam*" that will be consistent with the requirements of the opinion and limitations found at 1 GCA § 2110.

2. A non-government entity, using its own funds, is not bound by the requirements of *Davis v. Guam*, unless the facts and circumstances lead to the conclusion that the private entity is merely a surrogate for a public entity. We recommend seeking Congressional passage of a statute recognizing Guam's unique history and need to conduct a vote with funding authorization under it's authority under Article IV, § 3, Clause 2 of the U.S. Constitution, assistance from the United Nations in a resolution supporting Guam's quest for self-determination, and/or use of a private organization to conduct a self-determination vote to be used by the Guam Legislature.

Discussion

The duties of the Guam Commission on Decolonization for the Implementation and Exercise of Chamorro Self Determination include holding a plebiscite on a specified question when a specified number of "*Native Inhabitants of Guam*" are registered to vote. 1 GCA § 2110. Only Native Inhabitants of Guam are allowed to vote in this plebiscite. *Id*. The persons allowed to vote are persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons. 1 GCA § 2102(b). It is assumed that the plebiscite, and only the plebiscite, is how the Commission will "*ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America*." 1 GCA § 2105.

The constitutionality of this limitation on who may vote in the plebiscite was challenged by Mr. Arnold Davis, a United States citizen. The Federal District Court for the District of Guam found that "*The U.S. Constitution does not permit for the government to exclude otherwise qualified voters in participating in an election where public issues are decided simply because those otherwise qualified voters do not have the correct ancestry or bloodline*." *Davis v. Guam,* CV No. 11-00035 2017 WL 930825, (D. Guam 2017).

On appeal the 9th Circuit found that "there is no room under the [15th] Amendment for the concept that the right to vote in a particular election can be allocated based on race." *Davis v. Guam*, 932 F.3d 822 at 832 (2019) citing *Rice v. Cayetano*, 528 US 495 at 523, 120 S.Ct.1044 at 1044, 145 L. Ed. 1077 (2000). The United States Supreme Court declined to take this matter up. 140 S.Ct. 2739 (Mem), 206 L.Ed.2d 917 (2020). We believe that the end goal for the right of a indigenous people to decide their political fate is consistent with the Constitution's Properties Clause, and fundamental principles of democracy and the formation of a "United" grouping of individual States.

The courts have addressed the matter of the role of private organizations in deciding public issues or policies. Texas law used to allow private organizations to hold elections for individuals who, in turn, would appear as candidates in a government run election for a government office. The electoral rules of these private groups excluded black voters. The vote of the private organization ultimately decided a government function: who would appear on the general election ballot. This brought the actions of the private group under the 15th Amendment and made the private activity with its racial exclusions unconstitutional. *Terry v. Adams* 345 U.S. 46 173 S.Ct. 97 L.Ed. 1152 (1953). In *Rice* the Court determined that "the Fifteenth Amendment applies to any election in which public issues are decided . . .." *Rice* 528 US at 523 (quoting *Terry*, 3435 US at 468). The *Davis* court included decisions regarding "governmental policies" in the scope of private activities to which the 15th Amendment applies. *Davis* at 831 (internal citations omitted).

Guam, Hawaii and the Northern Marianas Islands all argued that their Indigenous Peoples were the equivalent of Native American Tribes recognized under Federal law. *Davis* at 842, *Rice* at 518-20 and *Davis v. Commonwealth Election Commission,* 844 F.3d 10878, 1094 (9th Cir. 2016). All three cases relied on *Morton v. Mancari* where the Supreme Court permitted the Bureau of Indian Affairs to reserve certain jobs for persons who were enrolled as members of a tribe recognized by the Bureau. *Morton* v. *Mancari*, 417 US at 535, 94 S.Ct. 2474, 41 L. Ed. 290 (1974). In all three cases the courts determined that Tribal Indians and the United States had a "special relationship." This special relationship entitled Tribal members to reserved opportunities. This relationship is largely founded on the premise that the United States has recognized Tribes as sovereign governments of their own and that Congress was free to make political choices in dealing with its sovereign relationships. *Id.* At 550. A review of the Guam Organic Act finds no parallel recognition on the part of the Congress of any "Sovereign Nation" found on Guam. 48 USC Ch. 8A, §1421, et. seq. In fact, the Bill of Rights found in the Organic Act directs that:

> (m) No qualification . . . apart from citizenship, civil capacity and residence shall be imposed on any voter.
>
> (n) No discrimination shall be made in Guam against any person on account of race, language or religion nor shall the equal protection of the laws be denied.

41 USC § 1421b.

To bring the "Native Inhabitants of Guam" to a place equivalent to sovereign tribe would require an amendment to the Organic Act. We strongly recommend that Guam use its political connections in the U.S. Congress to vie for a statute supporting Guam's unique history and the 1898 Treaty of Paris to lobby Congress to achieve a federal statutory enactment (*and methodology w/ funding authorization*) to achieve Guam's goals for political self-determination.

The goal of Guam's statute is to allow the Guam Legislature to be able to seek a final political determination as close to Guam's transfer to the United States, which is now a century past from 1898. ***There also remains an important lingering question whether the voting group should be those who can trace their lineage back to 1898, and not the arbitrary 1950 date where Guam was already part of the United States for 52 years.*** All these legal and political issues would be properly addressed in Congress as part of the political process.

The United Nations has also been politically effective in championing the causes for self-determination in the Pacific Islands, and throughout the world, of former colonies of the European countries. As part of Guam's overall strategy to convince Congress that Guam is entitled to a self-determination vote of the indigenous inhabitants of Guam or their descendants, the United Nations should be petitioned to adopt a resolution.

Another option, although not as effective is pursuing private organizations to query sets and subsets of the public such as residents, voters, citizens, adults, children, etc. for their opinions on a wide variety of topics. We see no reason a private organization could not ask a universe of individuals meeting the statutory definition of Native Inhabitants of Guam for their views on a variety of topics, including the preferences of this group about the future structure and organization of government on Guam. The critical question is what does the private organization do with the results of their survey research? It is our opinion that so long as the results of this private research do not become a simple substitute for the plebiscite then there are no legal difficulties. The private organization may call a press conference and announce their results. They may hold a public meeting and discuss the outcomes. They can write a research paper explaining their interpretation of their work and publish the paper. And what the government of Guam does upon learning the results of the survey is up to the leadership of the executive and legislative branches of government. Again though, we emphasize that the law is clear that the government may not hire a private agent to do what the government itself cannot do.

Guam, the Northern Mariana Islands and Hawaii have all enacted programs designed to facilitate government activity in the preservation of their Indigenous cultures and to empower their Indigenous Peoples. Votes regarding the governance of these programs were limited to persons meeting a statutory definition of "Indigenous." The courts have found all these voting limitations unconstitutional. See *Adams, op.cit* regarding Guam, *Rice. op.cit* regarding Hawaii and *Davis op. cit.* regarding the Northern Mariana Islands. The common denominator among the cases is the courts' determination that the outcome of the governance vote would trigger some government action, that some government policy would be decided. It is the requirement of follow-on action that renders a limitation on who may vote to decide government's course of action unconstitutional.

You asked could a definition of "*Native Inhabitants of Guam*" be crafted that would preserve the opportunity for GovGuam to conduct the plebiscite of Guam's Native Inhabitants for the purposes set out in 1 GCA Chapter 21? Your question assumes that the outcome of the plebiscite remains the singular mechanism used by the Commission to ascertain the intent of the Native Inhabitants of Guam regarding their future political relationship with the US.

So long as the plebiscite remains as the sole mechanism to trigger notification to Federal officials then any election held by the Government of Guam must be open to all registered voters. The Government of Guam conceded in all its briefs in *Adams* that the plebiscite was the only piece of information the Commission would use in deciding which notice to provide. The Constitution of the United States will not permit a vote for this purpose to be limited to a subset of Guam's voters. We note though that when the Legislature created the Commission it was also tasked with setting up task forces and working with the University of Guam and Guam Community College to research and undertake public outreach on the matter of the future Chamorro relationship with the Government. 1 GCA §§ 2106 and 2109.

The Legislature might amend the function of the Commission and charge it with holding public meetings, taking testimony and building a record with a wide variety of public input concluding with a vote of the Commission on what it, the Commission, determines is the preference of the Native Inhabitants of Guam regarding their political future based on this wide-ranging record. 1 GCA § 2105. The Legislature will also need to repeal the requirement that all members of the Commission meet the statutory definition of Native Inhabitant of Guam. 1 GCA § 2104. In fulfilling the public outreach obligation of the Commission, the Legislature may direct the Commission to undertake surveys or polls of Native Inhabitants of Guam as one element of the public record used by the Commission in determining which future preference to report.

These constitutional burdens on a plebiscite do not extend to private organizations so long as the private organization is not a mere substitute for government in deciding governmental action or policy. If a private organization announces the results of a plebiscite on the question set out at 21 GCA §21110 and the Commission on Decolonization relies on those results to conclude the preference of Native Inhabitants of Guam regarding their future relationship to the United States and shares that conclusion with the President, Congress and UN then the private effort will be also constitutionally defective. If the private organization conducts a plebiscite, survey or conducts other research of the Native Inhabitants of Guam and shares the results with Guam's elected leaders and the public then there are no constitutional limitations on the scope of that effort. The Commission on Decolonization may have to rely on multiple means of discerning the preferences of Guam's native population. Survey research from one or many private organizations may be part of their deliberations.

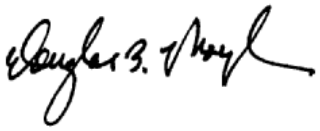
Conclusion

It is this Attorney General's legal opinion that the methodology enacted by the past Guam Legislature in determining Guam's political future is legally flawed and wasted decades pursuing. The end goal can be reached, using a different legal approach.

Guam's best option, *supra*, is to pursue a Federal statute from the U.S. Congress recognizing Guam's unique history, the commitments agreed to by the United States under the 1898 Treaty of Paris, the Properties' Clause in the U.S. Constitution and the fundamental democratic principle that all People have a fundamental and inalienable right to decide their political future and relationship with the United States of America. In addition, to seek political support from the United Nations via a resolution to be taken to the U.S. Congress, and also partnering with other nations with similar histories as Guam's in having been once a colony of Spain or other European colonial power. This would invariably require all our executive, legislative and judicial branch government leaders joining together. Notably, despite Guam and the Philippines being part of the spoils of the Spanish-American War, unlike the Philippines that was given their independence, Guam's political status was never resolved.

Finally, an Attorney General's fundament nationally-recognized duty is to Protect the Public Interest. In issuing this legal opinion, I firmly believe that any political option chosen by our leaders and People must preserve our economic strengths that protects and improves our current and future quality of life. Prideful independence that hurts us economically, and isolates us from a Nation as politically, economically and militarily powerful as the United States of America will ultimately hurt us as an "Island nation" that has historically had no enduring export other than tourism and our strategic importance to the world's superpowers. We are unable to economically stand alone in this world, and must recognize the stark realities that have brought us to our current Western standard of living, for which we are accustomed. Guam's enduring strength is founded upon our "melting pot" and mixture of nationalities and cultures that make up our People, as well as our welcoming spirit.

Respectfully,



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