GOVERNMENT OFFICIAL'S FRINGE BENEFITS-FOOL ME TWICE-SHAME ON ME

By way of introduction and background I was a prosecutor for 36 years retiring in 2011 with 32 of those years as a federal prosecutor. From 2005 through 2009 I served as the First Assistant and the acting and interim U.S. Attorney in the United States Virgin Islands. I teach Criminal Procedure at the University of St. Thomas Law School in Minneapolis, MN. Obviously, I write only as a private citizen and in no official capacity to express an opinion and comment on the public interest issues raised by fringe benefits paid to Virgin Islands officials, particularly lodging and personal security.

Mafoligate was a divisive, sad and very expensive experience for Virgin Islands taxpayer. The objective of this op-ed is not to address the past. The purpose of this op-ed is to look to the future so that Virgin Islanders can seek to prevent similar events from happening again. Lack of transparency and accountability are two primary lessons to be learned from an experience such as Mafoligate. Another lesson was the overwhelming power of the Office of the VI Governor which has regularly defied the federal government, defied the VI Legislature which was pathetically reduced to begging for the people's money back, and most importantly defied the people of the Virgin Islands.

As a society the only methods by which the citizens of the Virgin Islands can address a Mafoligate type failure is through legislation, the courts, and assistance from the federal authorities. Until there is an independent Virgin Islands Attorney General (VIAG), no action can realistically be expected to come from that office. The VIAG represents the people, not individual government officials, not even VI governors. If a VIAG has to choose between the personal interest of an official and the public, their ethical obligations require them to choose their client, the public. Historically, the failure to recognize their true client as the people has been the primary failure of VIAGs. They cannot serve two masters.

Government House-The Official Residence of VI Governors

Governor Mapp is quoted as saying at a press conference, "Well, Government House is the official office of the governor. I believe that most people understand Catherinberg is the residence." He was further quoted as saying, "But the Organic Act says the Governor shall reside in the capital..." These statements are contrary to the law. These statements are simply wrong.

Government House, by federal law, is the "official residence" of VI governors, not Catherinberg. No law provides that a VI governor "shall reside in the capital". Governors may not like it, but the law is the law. Governors are not Kings who get to make the law up as they go along to support what they want to do. The law is the only protection citizens have and they should not reject it even when they dislike that it is federal law or they disagree with its provisions.

The starting point in the law is the Revised Organic Act of 1954 (ROA). Title 48 U.S.C. 1591 provides in pertinent part:

"The Governor **shall maintain his official residence in the Government House** on Saint Thomas during his incumbency, which house, together with land appurtenant thereto, is hereby transferred to the government of the Virgin Islands. While in Saint Croix the Governor may reside in Government House on Saint Croix, which house, together with land appurtenant thereto is also transferred to the government of the Virgin Islands." (Emphasis Added).

This federal statute transferred Government House to the government of the Virgin Islands for the express purpose that it serve as the "official residence" for the Governor of the Virgin Islands. The language of this statute is mandatory, that is, “The Governor **shall maintain** his **official residence** in the Government House on Saint Thomas during his incumbency...” It does not require the governor to live in Government House or live on St. Thomas. There is no doubt that under this federal law the Governor of the Virgin Islands can have only one “official residence” on St. Thomas, Government House. This statute does not permit a Governor to have any other “official” residence on St. Thomas. VI governors may have a personal residence, but that is their personal business and their personal expense.

Past Governor's have stated that living in Government House is no longer possible because the living quarters of the house have been turned into office space. Whose fault is that? Was it lawful?

First, a literal reading of the provisions of Section 1591 transferred Government House to the Government of the Virgin Islands for the purpose that it serve as the official residence of governors of the Virgin Islands, not as an office building. Use of the building as an office building appears to violate the federal law, especially when that use has intentionally defeated the statutory purpose for which the property was intended, the governor's official residence.

Second, if this literal reading of the statute seems too fault finding and persnickety, it is the governors who have defeated their ability to live in Government House by making their official residence an office building in which they can not live. Now, having eliminated their official residence, they want the People of the Virgin Islands to pay for not living in the mandated official residence. If governors cannot live in Government House because of their own actions whose fault is that and who should pay the price of that conduct? Obviously the governors, not the taxpayers.

Third, because federal law establishes unequivocally that Government House is a governor's official residence and a governor thus may not have a different “official residence” on St. Thomas, it would be a violation of the ROA to spend money from the treasury of the Virgin Islands for the purpose of paying for a different property as the “official residence” of the Governor of the Virgin Islands. The VI Legislature could not lawfully pass a statute authorizing the expenditure of money to pay for a different “official residence” for a governor as it would be contrary to Section 1591. Any other residence of a governor is their personal residence.

Discussed below are the issues presented for the VI government when it pays the personal lodging and security expenses of any employee. Such payments, lawful or not, are fringe benefits to an employee and fringe benefits may have income tax consequences which are also discussed below.

VI Legislature Approval of Payment of a Governor's Personal Lodging Expenses Is Required

The ROA, Title 48 U.S.C 1561 provides in part:

“No money shall be paid out of the Virgin Islands treasury except in accordance with an Act of Congress or money bill of the legislature and on warrant drawn by the proper officer.”

Has Congress or the VI Legislature passed any money bills authorizing the expenditure of funds for the personal lodging expenses of any governor, be it improvements to their personal residence or residence rental, or for physical security, or for personal security in the form of bodyguards? If there is such legislation, then Government House should provide the public with the bill number and with the specific line items of the VI government budget from which the funds are drawn to pay these personal expenses. Has a “warrant drawn by the proper officer” been issued? If it has Government House should provide the public with copies of those public documents, the name of the officer involved, and the contract issued through the normal VI contracting process incurring these expenses.

Compensation for VI Governors

Title 3 V.I.C. 1 is titled "Governor's compensation, Assistant" and it provides in pertinent part:

"(a) The Governor shall receive a salary of $150,000 per annum, payable in equal bi-weekly installments."

This statute does not provide that a VI governor's compensation may include the expenditure of money from the VI treasury for any form of compensation other than a salary. Personal living expenses such as lodging are not provided for in this statute. If there is some statute by which the VI Legislature authorized payments for personal expenses it should be provided to the public. Lodging and personal security are personal expenses unless certain IRS regulations are complied with as set out below.

The ROA, 48 U.S.C. 1641 provides:

"The salaries and travel allowances of the Governor, Lieutenant Governor, the heads of the executive departments, other officers and employees of the government of the Virgin Islands, and the members of the legislature shall be paid by the government of the Virgin Islands at rates prescribed by the laws of the Virgin Islands."

This federal statute does not provide that the compensation of a VI Governor may be anything other than a salary and travel expenses. Further, the statute provides that the salary and the travel allowances must be prescribed by the laws of the Virgin Islands. If there is any VI statute which provides for lodging expenses for a governor the public should be provided with the citation to the VI Code.

It is true that a governor may have to travel from island to island and may have to stay on an island away from his personal or official residence, however, whatever the amount of travel expenses expended for such travel must be "at rates prescribed by the laws of the Virgin Islands". What laws of the Virgin Islands authorize rent payments and even assuming they do, what is the rate set by the VI Legislature? Is it $12,500 per month rent? If so, what is the citation to that statute in the VI code?

Are There Income Tax Consequences to Providing Lodging to any VI Governor?

Anyone receiving compensation from an employer should consult a tax attorney and certified public account for adequate income tax advice. Especially when the issues are complex. Fringe benefits are complex. Compensation in the form of fringe benefits are included in gross income unless IRS regulations exclude them. The following is not intended as income tax advice to anyone. It is intended to raise the public interest issues that impact the VI government and its citizens when fringe benefits are paid to any official of the VI government. The VI government has a duty to properly classify such compensation it pays for income tax purposes and properly report it to the income tax authorities. It is a complex topic and requires far more space than this op-ed. VI government officials, governors, Attorney Generals, Commissioners of the VI Bureau of Internal Revenue (BIR), the IRS and the VI Legislature have a duty to examine these issues and report to the people how they have, by law, determined these issues will be handled.

What is a fringe benefit? Any property or service that an executive receives in lieu of or in addition to regular taxable wages is a fringe benefit that may be subject to taxation. In 1984, the Internal Revenue Code was amended to include the term "fringe benefits" in the definition of gross income found in §61. A fringe benefit provided in connection with the performance of services, regardless of its form, must be treated as compensation includible in income under §61.

IRS Publication 15-B defines a fringe benefit as follows:

"A fringe benefit is a form of pay for the performance of services. For example, you provide an employee with a fringe benefit when you allow the employee to use a business vehicle to commute to and from work." The rules on vehicles may result in taxable income to the employee, but the topic is beyond the scope of this op-ed. It is an interesting topic in the VI given how many government vehicles there are on the roads driven by government employees.

Fringe benefits are subject to income tax. IRS Publication 15-B provides as follows:

"Any fringe benefit you [the employer] provide **is taxable** and must be included in the recipient's pay **unless the law specifically excludes it.** Section 2 discusses the exclusions that apply to certain fringe benefits. Any benefit not excluded under the rules discussed in section 2 is taxable." (Emphasis added).

What about employer provided lodging? What cost of lodging must an employer include in the employee's gross income and report as wages to the BIR and IRS?

IRS Publication 15-B provides as follows:

"You can exclude the value of lodging you furnish to an employee from the employee's wages if it meets the following tests.

- It is furnished on your business premises.
- It is furnished for your convenience.
- The employee must accept it as a condition of employment."

When the VI government pays an official's lodging expenses in any form, including rent, it is part of the employees gross income unless IRS regulations for exclusion are satisfied. The first requirement for excluding such payments is that the lodging is furnished on the employer's business premises. This might mean that the cost to the VI government for a governor they require to live on its business premises (Government House) and who accepts as a condition of employment that they must live at Government House is excluded from the gross wages of a governor. It seems obvious that any other arrangement under which the VI government pays for a governor's lodging expenses not on the government's business premises does not meet the first requirement of the IRS test that the lodging be on the employer's business premises.

There is yet another complication. IRS Publication 15-B also provides:

"Lodging meets this test **if you require your employees to accept the lodging because they need to live on your business premises to be able to properly perform their duties.** Examples include employees who must be available at all times and employees who could not perform their required duties without being furnished the lodging." (Emphasis added).

IRS Publication 15-B goes on to provide an example as follows:

"A hospital gives Joan, an employee of the hospital, the choice of living at the hospital free of charge or living elsewhere and receiving a cash allowance in addition to her regular salary. If Joan chooses to live at the hospital, the hospital **cannot exclude** the value of the lodging from her wages because she is not required to live at the hospital to properly perform the duties of her employment." (Emphasis added).

"Joan's" gross income includes the value of living at the hospital, or alternatively, the cash allowance for other lodging, because she is not required to live at the hospital to properly perform her duties.

It appears that VI governors and the VI government have taken the position that VI governors are not required to live at Government House as a condition of employment. VI governors are thus like "Joan" in the IRS example. VI governors have a choice to live at Government House or elsewhere. Given the facts that appear on the public record the lodging expenses paid by the VI government, whether it is the cost of Government House as a residence or a cash allowance in the form of rent payments, are fringe benefits that are included in gross income of the employee and must be reported by the government.

If there is some special rule that declares that if you are a governor you are exempt from the usual IRS rules on lodging as a fringe benefit, government officials should cite it to the public. In any event, the VI Legislature has to provide for the lodging expense by passing a bill authorizing the payments.

VI Legislature Approval of Payment of a Governor's Personal Security Is Required

As noted above the ROA, Title 48 U.S.C 1561 provides that VI government money may be spent only if the expenditure is approved by Congress or the VI Legislature. If lodging expenses are characterized as security expenses they must be authorized by VI law. If such authorization has been given for personal security for governors then the specific VI statute should be cited by government officials.

Characterizing lodging expenses as security expenses, or bodyguards as security, does not mean that the cost of the security is not a fringe benefit. Nor does it mean that the rules with regard to lodging as a fringe benefit do not apply. Personal security is a fringe benefit and is subject to IRS rules with regard to how much of the cost, if any, is to be included in an employee's gross income.

The IRS has suggested following a 3-Step analysis when examining a particular fringe benefit an employer gives or makes available to an executive.

> First, identify the particular fringe benefit and **start with the assumption that its value will be taxable** as compensation to the employee. (Emphasis Added).
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> Second, check to see if there are any statutory provisions that exclude the fringe benefit from the executive's gross income.
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> Third, value any portion of the benefit that is not excludable for inclusion in the executive's gross income. Fringe benefits are generally valued at the amount the employee would have to pay for the benefit in an arm's length transaction.

26 Code of Federal Regulations 1.132-5 sets out rules with regard to working condition fringe benefits. In order for an employer to provide a fringe benefit of security services there must be a demonstrated bona fide business-oriented security concern. The regulation provides a definition of a bona fide business-oriented security concern as existing "...if the facts and circumstances establish a specific basis for concern regarding the safety of the employee. **A generalized concern for an employee's safety is not a bona fide business-oriented security concern.** (Emphasis added).

The IRS regulation requires an independent security study by private employers and it provides a separate rule for government employers in 26 CFR 1.132-5 as follows:

“(v) Independent security study with respect to government employees. For purposes of establishing the existence of an overall security program under paragraph (m)(2)(ii) of this section with respect to a particular government employee, a security study conducted by the government employer (including an agency or instrumentality thereof) will be treated as a security study pursuant to paragraph (m)(2)(iv) of this section if, in lieu of the conditions of paragraphs (m)(2)(iv)(A) through (D) of this section, the following conditions are satisfied:

(A) The security study is conducted by a person expressly designated by the government employer as having the responsibility and independent authority to determine both the need for employer-provided security and the appropriate protective services in response to that determination;
(B) The security study is conducted in accordance with written internal procedures that require an independent and objective assessment of the facts and circumstances, such as the nature of the threat to the employee, the appropriate security response to that threat, an estimate of the length of time protective services will be necessary, and the extent to which employer-provided transportation may be necessary during the period of protection;
(C) With respect to employer-provided transportation, the security study evaluates the extent to which personal use, including commuting, by the employee and the employee's spouse and dependents may be necessary during the period of protection and makes a recommendation as to what would be considered reasonable personal use during that period; and
(D) The employer applies the specific security recommendations contained in the study to the employee on a consistent basis.”

If these conditions are not met then the fringe benefit of security for a government official is included in their gross pay and must be reported by the VI government to the BIR and the IRS. Have all these IRS rules been satisfied by the VI government? Has there ever been a credible threat against any VI governor? One measure of that would be whether or not there has ever been any prosecutions of anyone for making threats against or attacking a VI governor? A generalized concern is insufficient.

Has there every been an audit of the costs to the taxpayers of the security provided to VI governors? Such an audit should be conducted by the VI/OIG, the DOI/OIG, in conjunction with the BIR and the IRS. Another agency with authority to conduct audits of VI government expenditures is the General Accountability Office (GAO) pursuant to 48 U.S.C. 1469b. Historically the GAO has not been called upon to exercise this discretion, however, it has very significant auditing capabilities and it serves as the watchdog of Congress seeking out fraud, waste and abuse. The Delegate should lobby the GAO to participate in a joint audit of VI government fringe benefits.

This discussion of the income tax consequences of fringe benefits is not intended to provide advice or to be a definitive statement of the income tax consequences of fringe benefit payments to anyone. It is intended to raise issues of serious public interest and to alert the citizenry that their public officials have a duty to examine these issues and make proper determinations of whether or not such fringe benefits are authorized by law to be paid and ask how is the VI government treating such payments for purposes of reporting any government official's gross income.

This discussion is also intended to highlight the critical need for an independent VI Attorney General. One who recognizes that the VI AG's client is the public, not the individual who happens to occupy a public office, even if that official can fire them on the spot. A VIAG must speak truth to power. The lack of independence of the VIAG is an intolerable situation for the citizens of the Virgin Islands.