

Transcription of Senator Mike San Nicolas questioning Attorney Mike Phillips: (1:48:46)

Senator Michael San Nicolas: Thank you Madam Chair. Hi Mike.

Mike Phillips: Hi Senator.

Senator Michael San Nicolas: I'm trying to see, in my mind, how everything is going to unfold based on what you shared for example. And you testified that "if you were asked if you thought we would win the case, you said the answer is no".

Mike Phillips: Yeah I don't think so.

Senator Michael San Nicolas: How about with the appeal?

Mike Phillips: Of course Senator I qualify that I start and hopefully end with the idea that has nothing to do with whether or not we should try. Because the attempt and going on record as not agreeing, I think at times, maybe even this time, has more consequence. It'll have more consequences when we end up before Congress one day. Likely, I mean there's no guarantee of anything but that's where we were before and can you imagine someone like yourself negotiating on behalf of the people of Guam but yet your people, maybe even yourself, before had consented and said you know you're right. How does a congressman from a city or a county in Washington State look at that and say you're asking for something today that you agreed with 30 years earlier, 20 years earlier was wrong. And then you have to say well I wasn't really wrong, it was unconstitutional.

Senator Michael San Nicolas: I'm just trying to, if you can bear with, how the sequence will unfold. You felt we would lose in the District Court, if we appeal and we lose, and we go to the Supreme Court and we lose, what happens after that?

Mike Phillips: Well there's two things: there's one thing that doesn't happen and that is there's never a record of the people of Guam agreeing with a certain act because of the fact that we were going to lose. That's number one but number two I think even during that there's no reason to wait but the avenue that I've always advocated is through Congress. But I will again qualify that, just like the Chamorro Land Trust Act, the fact that Congress gives or doesn't give does not mean that it's wrong. I, along with the chairperson and now judge Mike Bordallo, argued to have it implemented and I knew at that time the opposing side, now attorney general Liz Barrett-Anderson, representing the Governor and they were doing what they felt they had to do. That was one of their arguments but wait only Congress can pass programs such as affirmative action and things like that. The individual state, or in this case territory, doesn't have the authority to do it. We prevailed but at the same time if we had not, and the judge had ruled that yes Congress can do this but you can't, that wouldn't determine for anybody that the program or the act is wrong or that you shouldn't push for it, it just means that the system is there without the consent of the government, you're required to do something different. But it

doesn't change the program at all. What would have changed though is if our people never implemented the act authored in 74 and was patterned after the Hawaiian Homes Commission act, it was signed into law I believe in January of 75. If our people had never done that, we would never be talking about the Chamorro Land Trust Act today.

Senator Michael San Nicolas: Actually I wanted to clearly bifurcate the plebiscite ruling with the land trust ruling. Because I agree with you. I think that there is a lot of rational to protect the land trust. I, and I also agree with you, think that the rational to defend the plebiscite vote is very tenuous. And so just approaching strictly from the plebiscite question, if we lose the appeal and we lose Supreme Court, can you give me a clear example of what the next course of action would be after that? Because assuming that that happens, what do we do?

Mike Phillips: I think that I wouldn't call it, with all due respect Senator, "next" because I think the efforts can be made simultaneously. But from everything that I've seen in my lifetime, and everything that I've read, under that system the more likely path to success is through Congress. But it's not for the faint of heart. I mean it can go on and on and on and they will continue to ask you to change your question. They don't like what you're asking, they won't tell you no, in my opinion, but they will say why don't you ask me a different question. And they will wear you down; or they'll at least try to. But under that system, when it comes from Congress, we've all seen with regards to the territories that Congress can do almost anything that it wants. And often times that's for bad and sometimes it's for good. Obviously this is a time that they are empowered by the Constitution, by the treaties to make that determination. And they have pledged that the native inhabitants of Guam will exercise self-determination. And so at that level and with that body Congress, not the executive branch but Congress, it's almost like sovereign immunity with the Guam Legislature. That's yours. It's nothing that people can argue about all day long but that's something that you have the exclusive right to determine or waive; nobody else can. So with regard to self-determination, under that system, it doesn't mean that its right, it just means that Congress is empowered to make that happen. In fact Congress and the United States have pledged to make that happen. So when you come from that source, I believe that chances are much higher than going through the District Court route. And the reverse holds true that the chances of failing, it's not a question that we're bringing or someone else is bringing to the federal court so it's not like we're asking them to uphold this. Or someone saying can you strike this down. It's a very difficult path because under the current rules as set by Congress that's not happening. So until such time that it happens, under that system it's weaker. That doesn't mean as I said, I need to keep saying it, that I advocate not pursuing it because that would have drastic ramifications; very serious ramifications upon your efforts to Congress which could be a day later, or could be at the same time or it could be ten years later. It will have very serious ramifications.

Senator Michael San Nicolas: For not appealing?

Mike Phillips: Absolutely. Giving in to anything that appears to be consenting will have very serious consequences. In one of the cases I represented with a Chamorro family, they were

occupying their ancestral land in Mafalk, Dededo. Senator Angel Santos of one of those individuals and on two separate cases. And what they perceived to be a big plus on their side, the United States federal government, was that they had a check that was apparently signed by one family member and we might find that funny, oh a check that one family member they allege endorsed, and they're waving it. And we look at them like "are you serious?" They felt that that somehow legitimized what they had done and that they were there to show the court that under this system, they gave in. We gave them some money in return. And again similarly here it's not about money, it's about the leaders of Guam deciding to either consent to that. And when you consent, it's not like in criminal defense you sometimes take a plea called "no contest" I'm not really saying you're right, I'm just saying you have an overwhelming amount of evidence. This is not a no contest plea, this is very different. I mean it's obviously something of a consent decree like with the department of corrections. Most lay people interpret it as we agreed that we needed to fix some things up there; we agree with that. Now I don't know whether that's true or not but from a lay person stand point, that's the way that everybody understandably interprets the consent decree that we weren't going to fight that one because we agree you're right there. Whether that's right or wrong, whether there was some other tactical purpose of doing it. If your intent was to fight it at a later time or the Ordot dump, or any of these other issues, I believe you chose the wrong path because at that point, everybody just shakes their head.

Senator Michael San Nicolas: So then I'm really trying to get a handle on how this would then given what you're sharing. So we appeal, we lose. We go to the Supreme Court, we lose. And I'm not saying we're going to lose but if that should happen, then we go to Congress. And so between all of that, all that time would've passed and then were going to go to Congress. Now, some of my colleagues are saying no and I'm sure that the statement is going to be we can do it at the same time. (**Mike Phillips** says: "or not do it".) But then the question becomes wouldn't Congress just say "well we want to wait for the courts to rule." And so as we're waiting for the court's decision, and all this time is passing, we eventually get to the end of the road, and assuming worst case scenario we lose all the cases. Couldn't Congress come back and say "we're not going to do it because the courts already ruled no." And then if that happens, and Congress says we're not going to do this at all, because you appealed and you appealed and the court already ruled no, then what do we do?

Mike Phillips: Senator, we you argued the Chamorro Land Trust Act the opposition I think artfully and correctly pointed out, it was their best argument, that the people of Guam themselves cannot create the Chamorro Land Trust act under the Constitution. It was supposed to come from the federal government. (Sen. San Nicolas: I want to bifurcate the land trust question with the plebiscite question because what I'm trying to get to) If I could explain Senator, the reason I mention that is because that's nowhere in the current federal court opinion; and in my humble opinion, it should've been there. The idea that you can't, in the current system, decide on your own that you're going to exercise self-determination. It goes against the grain of most common sense interpretations of self-determination. But that is under the system the way it works and so very similar to the Chamorro Land Trust Act they're both legitimate

and seen from their system, if it comes from their Congress. And so I understand can we bifurcate the two but what's missing in the current court analysis is that, kind of like a P.S. if this came from the Congress, it would likely have a very different result. And that's what we can't give up on because as long as we point that out and we maintain that and we hold them to an obligation that they've made, not just us but to the world that this would happen. Then it would be very difficult for Congress in the long run not to do that. But I would also like to add that if there's any concern appealing the case would delay things, nothing will proceed that fast in Congress anyway. I think historically we've seen that. I appreciate the concern but I don't think that's anything you need to worry about; delaying the process because Congress moves very, very slow anyway.

Senator Michael San Nicolas: My last question, Madam Chair, thank you because I'm really trying to wrap my head around what the right decision is going to be. If we didn't appeal, if we just said you know what? Exactly what you said, until there is consent of the governed, there can be no legitimate authority. We're not recognizing the legitimate authority on this ruling of this Davis case. We're going straight to you Congress because they're apparently saying change it. So we're not going to appeal this, we're just coming to you. Couldn't we do that because I don't think they can turn around and say don't come to us and appeal it. I think they would need to, at that point, adjudicate from their perspective because their courts already ruled. And an act of Congress cannot be conditional upon the people appealing. So couldn't we just go straight to Congress at this point since we are already dissatisfied? And the reason I asked that is because if we appeal and go straight to Congress, then they can point to us and say "oh we're going to wait for that ruling". And what I'm worried about is appeal, appeal years and years and years. Why don't we just go straight? Why don't we just go straight and say "we're not going to recognize that ruling as legitimate, you guys need to get your act together and give us some kind of congressional relief. And then we get to the immediacy of the question rather than allowing them to point to court cases and drawing us out. So couldn't we just do that instead? And that's my only concern about this appeal. I'm worried that it's going to give them the rational and resources to draw this out and say oh no you guys are appealing your case, wait for your adjudication. And then the courts can take almost as long as they want. This Davis case took six years. The Supreme Court could refuse to hear this case entirely. So perhaps we should go straight to the Congress and if you could chime in on that.

Vice Speaker Therese M. Terlaje: I'd like to chime in on that also Senator. I think the people of Guam should've been going to Congress all these years. I think that's what all of our leaders have always said that we have many paths to self-determination and we use all of them as best we can. Congress has always been the path. It's the path we were on in our common-wealth quest. We were there regularly and yes I agree that we should be there, should've been there and we will be there.

Senator Michael San Nicolas: My only concern Madam Chair is that I have seen us delay legislative action because there's a pending court case. Like I remember us not acting on certain gambling initiatives because we were waiting for the gambling case to be resolved. And so if we

initiate cases that gives Congress the rational to not act because they're waiting for the case to be resolved, then are we potentially answering ourselves by appealing when instead we should be saying you know what you're wrong and we're going straight to Congress to get relief from you.

Mike Phillips: Senator, what will be before Congress in the charge place is that the Congress of the United States shall determine the political status of the native inhabitants of Guam. That's their charge. And our presentation to them, while it passed historically, has always included a remedy for the fact that there is a illegitimate government until such time you have the consent of the governed therefore one of the articles of self-determination is one literally of many. So the push there is really comprehensive; it's everything. Like I said even the Chamorro Land Trust act was mentioned in the draft common-wealth act; Chamorro self-determination, control of immigration. Many different articles and many different causes and issues. So this would just be one. I don't think that, of course you never know what one individual Congressman is going to say but I don't think overall it would be distracting. Although I do believe it would be if consent it. It really has significance when you consent and like I said going back to that story, whether it's true or not, one check, one member of a family having endorsed it was used to argue that somehow the land wasn't taken.

As Senator Michael San Nicolas began formulating another question, Senator Fernando Esteves intervened to ask if the Senator had any further inquiries for Attorney Mike Phillips, he should schedule a meeting at a later date due to time constraints. Both Senator Michael San Nicolas and Attorney Phillips agreed.

Conversation at the end of hearing between Vice Speaker Terlaje and Attorney Mike Phillips: (5:25:13)

Vice Speaker Therese M. Terlaje: Si Yu'os Ma'ase talo for everybody who has testified today. Attorney Phillips is here does the panel have any questions for him? We promised we would get back to him. Attorney Phillips I do have one question, if I may ask you. My colleagues are concerned with the timing of these resolutions whether they are necessary to be passed today versus a month from now versus a week from now, and if you have any comment on that.

Mike Phillips: My recommendation, with all due respect, with the pressure placed upon other government leaders and the intent of all of this is for you to be heard, and to a larger extent, for the people of Guam to be heard. I think it's of the utmost urgency that you pass resolutions as soon as reasonably possible. When I learned that the threat had been made in the past, the deadlines have passed; we have no idea what's going to happen in the interim. Of course the questions, for example, in hindsight, why did we delay? If there was truly that resolve if we heard, at least what I heard today, as far as the people are concerned, the message is unified; it's clear, I think it remains urgent. I think it explains, what appears to be efficient movement towards the drafting and hearing of the resolutions and the response by the community I think matched it; if not maybe exceeded it. And so because of that I think it would be quite frankly

reckless to wait and hope that nothing happens. There's nothing to gain from what I can see from waiting and a lot to lose if you're one day late.

Vice Speaker Therese M. Terlaje: Si Yu'os Ma'ase.

Mike Phillips: And if I could just state for the record, I think I speak for everyone that testified that intended this but may not have said it, I said that I'm testifying in favor of Resolutions 51 and 52, and of course I didn't know until the end that they weren't being heard at the same time because to me, they're really the same thing. I just wanted to make sure that the record reflects that and I think that speak for a lot of the people that testified earlier also.