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Civil Division, Federal Programs Branch

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October 26, 2012

ORIGINAL BY ELECTRONIC COURT FILING
(COURTESY COPY BY INTEROFFICE MAIL)

Honorable Allyne R. Ross
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *O'Brien v. Calvo, et al.*, No. 12-CV-2700 (ARR/MDG)

Dear Judge Ross:

In the above-referenced case, the summons and amended complaint were served on the United States Attorney's Office for the Eastern District of New York on or about September 4, 2012, making the government's answer due by November 5. Plaintiff, who is proceeding *pro se*, has filed this action against the Governor and Legislature of the Territory of Guam, the Guam Department of Revenue and Taxation and its Director (the "Guamanian Defendants"), and the United States of America. No particular agency of the United States has been named. Rather, it appears that Plaintiff has only named the United States as a party because he challenges the constitutionality of the Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*, under, *inter alia*, the Take Care Clause, Presentment Clause, Vesting Clause, Appointments Clause, and Uniformity Clause of the Constitution.

By this letter, and for the reasons stated below, we respectfully request that the Court defer the United States' deadline to answer or otherwise respond to the amended complaint—which will in essence be a submission on the constitutionality of a federal statute similar to what the United States would file pursuant to 28 U.S.C. § 2403(a)—until such time as the Plaintiff and Guamanian Defendants have adjudicated the jurisdictional, venue, and *forum non conveniens* issues presented in this case.

In his amended complaint, Plaintiff appears to challenge the right of the Guamanian Defendants to subject him to the Guam Territorial Income Tax, their right to administer federal tax laws in the territory, and the specific means by which they have administered those laws, resulting in the injuries alleged in the amended complaint. Plaintiff appears to have named the United States

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as a defendant solely in a 28 U.S.C. § 2403-type capacity. Specifically, rather than articulate any allegations of conduct on the part of the United States or allege any specific injury caused by any act or omission of the United States, Plaintiff simply challenges the constitutionality of the Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*^{2/} Moreover, while Plaintiff's prayer for relief specifically requests that the Court enjoin the Guamanian Defendants from exercising taxing authority and to order them to "return any and all tax monies plaintiff is entitled to and any interest thereon," *see* Pl.'s First Am. Compl. at 26-27, it does not indicate any specific relief Plaintiff seeks from the United States or the Executive Branch. Instead, as to the United States, Plaintiff simply requests declaratory relief that the Organic Act of Guam, in its entirety, is unconstitutional. *See id.* at 27, ¶ D. As such, the United States' submission in this case will likely be limited to the constitutionality of the Organic Act of Guam—akin to a brief filed pursuant to 28 U.S.C. § 2403(a).^{2/}

Furthermore, this case presents numerous procedural issues affecting Plaintiff and the Guamanian Defendants that should be resolved prior to adjudicating the merits of any potential constitutional challenge, including whether this Court has personal jurisdiction over the Guamanian Defendants, whether venue is proper in this District, or whether the doctrine of *forum non conveniens* counsels against proceeding in this District. Adjudication of any of these issues could result in the dismissal or transfer of this action. These are threshold issues in which the United States has no stake, that the Guamanian defendants intend to raise in the first instance and that the Court should in the first instance resolve before the United States submits its views on the constitutionality of the Organic Act of Guam.^{3/} *See also, e.g., Nestor v. Pratt & Whitney*, 466 F.3d 65, 70-71 (2d Cir. 2006) (explaining that courts should avoid deciding constitutional issues unless necessary) (citing *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

¹ Rather than name the United States as a defendant, as the Plaintiff has done here, the ordinary course for raising a constitutional challenge of this nature would be to file a notice pursuant to Federal Rule of Civil Procedure 5.1(a). The United States would then decide whether to intervene to defend the constitutionality of the challenged statute(s). *See* Fed. R. Civ. P. 5.1(c); 28 U.S.C. § 2403.

² Some of Plaintiff's constitutional challenges were previously raised by him in a lawsuit filed in September 2011 against the Governor of Guam, among others, in the U.S. District Court for the District of Guam. *See O'Brien v. Calvo, et al.*, 11-cv-00022 (D. Guam 2011). After motions to quash, strike and dismiss were filed by the defendants in the case, *see id.* Dkt. Nos. 8-9, 12-13, Plaintiff ultimately agreed to voluntarily dismiss his claims against each defendant. *See id.* Dkt. Nos. 15-17, 19. Those dismissals were with prejudice as to every defendant save for the Governor and Lieutenant Governor. *See* Dkt. No. 15.

³ Counsel for the Guamanian Defendants have indicated to undersigned counsel that they intend to move to dismiss or transfer this case under some or all of the procedural grounds referenced above. Their deadline to do so is currently November 12, 2012.

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Given the uncertain procedural posture of this case, including the distinct possibility that this case will be re-filed in or transferred to the District of Guam, and/or will be decided in the first instance on non-constitutional grounds, the United States believes that its answer or pre-answer motion is currently premature, would unnecessarily complicate the case at this juncture, and may later become unnecessary. Accordingly, we respectfully request that the Court defer the United States' deadline to answer or otherwise respond to the amended complaint until such time as the Plaintiff and Guamanian Defendants have adjudicated the jurisdictional, venue, and/or *forum non conveniens* issues presented in this case. Specifically, the United States requests that it be allowed to return to the Court to suggest an initial response deadline at such time, if ever, as the procedural issues between the Plaintiff and Guamanian Defendants have been adjudicated and this Court retains jurisdiction over this case.

In the alternative, if the Court is not inclined to defer the United States' deadline to answer or otherwise respond to the amended complaint, we respectfully request an extension of approximately one month's time from the Guamanian Defendant's current answer deadline, until December 12, 2012, to file a motion and accompanying memorandum requesting dismissal of the constitutional challenges made in the amended complaint.

On October 24 and 26, 2012, respectively, undersigned counsel conferred with counsel for the Guamanian Defendants and the Plaintiff regarding the request made in this letter. The Guamanian Defendants do not oppose the United States' request. Plaintiff opposes the request.

We appreciate the Court's time and attention to this matter.

Respectfully submitted,

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