Samoans against the loss of their family lands is an important policy not only as regards the economy, but also as it may affect the Samoan 'matai' system. It is the policy to maintain this protection." The policy statement continues:

General advancement .- It is the policy to respect the Samoans' desire to protect the matai system and to consult fully with the Samoans, through their Jegally constituted representatives, on any question which may affect the preservation or destruction of the system. It is also the policy to encourage the acceptance of such nonindigenous social concepts as would be beneficial and to provide such social regulations and services as may be necessary in the light of local conditions and dictated by precepts of common humanity and governmental responsibility.

The "traditional leadership" is a vital force in Samoan life today. It must be, and should be, taken into consideration in any action taken by the Federal Government affecting Eastern Samoa.

There, are, to be sure, countervailing influences. The election by secret ballot and universal suffrage of members of the house of representatives of the legislature from among Samoans in all strata of the social order, in contrast to the senate, which is composed of persons elected by the county councils from local chiefs who have been chosen in the traditional way, is inevitably bringing about a shift in political power. Another such influence is the greater ease of travel, with more and more Samoans coming in contact with the outside world, as is the developing wage economy spurred by the establishment of the fishpacking company.

As to land tenure, it is significant that the constitution of American Samoa contains the following provision in article I, section 3:

It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry. and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a twothirds vote of the entire membership of each house and by the Governor.

#### GOVERNMENT

After 61 years under the American flag, the legal basis for government in American Samoa is still executive fiat from Washington.

Western Samoa, in sharp contrast, is attaining full and complete independence on January 1, 1962, when it will become sovereign.

As stated, by the 1899 treaty-to which, of course, the Samoans were not a party-Germany assumed sovereignty over the Samoan islands west of the 171st meridian. New Zealand occupied them, bloodlessly, as a war measure in 1914, and took a League of Nations mandate over them in 1921. This mandate became a United Nations trusteeship after World War II, and Western Samoa will at the beginning of 1962 become a nation.

Some 77 miles to the east, the voluntary cession of the seven Samoan islands by the chiefs thereof in 1900 and 1904 was accepted de facto by the executive branch of the U.S. Government and administrative responsibility assigned by President McKinley to the Navy Department.

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

The Navy's administration was characterized by almost complete reliance on the traditional matai system. That is, the United States governed through the hierarchy of chieftainships.

But at the same time the Navy maintained a relatively effective public health service, kept law and order, dispensed justice, and inaugurated a system of free, compulsory education. In some ways our social services appear to have been superior to or at least more effective than those of either Germany or New Zealand in Western Samoa.

In 1951, President Truman transferred administrative responsibility from the Secretary of the Navy to the Secretary of the Interior after extensive consultation among the Secretaries of State, Navy, War, and Interior. In 1960 a constitutional convention of American Samoans drafted and the people approved the first constitution in Samoan history. It was signed by Gov. Peter Tali Coleman, a nativeborn Samoan appointed by the Secretary of the Interior, and by the Secretary himself. This constitution is discussed in detail in the report submitted by Prof. Norman Meller, of the University of Hawaii, in part III.

As nearly as we can determine, this document for the most part is a product of the Samoans themselves, and it appears to have their acceptance and support. By its own terms, the constitution of American Samoa provides that 5 years from the effective date of the constitution the Governor shall appoint a constitutional committee to prepare amendments or a revised draft "in view of changing conditions."

However closely the constitution and the civil government it creates are in conformity with the wishes and present political capabilities of the Samoan people as a whole, the fact remains that all executive, judicial, and legislative power is concentrated in the Secretary of the Interior through the President. Legally, the American Samoa constitution is but an administrative order, subject to the will of the Executive in Washington.

The Secretary of the Interior appoints the Governor, without the benefit of the advice and consent of the Senate; he appoints the Chief Justice of the High Court; the powers of the legislature are dependent upon his grant of legislative authority.

However, just as the Members of the Senate should be informed of and consider these facts, we also should know and acknowledge that on the whole the administration of Eastern Samoa by the United States, both under the Navy and under Interior, has been markedly fair, and has enabled the Samoans to preserve their own traditions and way of life, while at the same time bringing to them social services in the way of education and public health, which, inadequate as they are by American standards, are many ways superior to those of their larger, richer neighbors.

# CONCLUSIONS AND RECOMMENDATIONS

In the light both of the history of the relationship of Eastern Samoa and the United States, and the complete independence being attained by their cousins and neighbors in Western Samoa, the most basic, if not the most pressing, of our problems concerning Eastern Samoa is its political status.

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

In order to solve that problem, the basic question must be asked and answered: "What do these 20,000 persons who have been American nationals for 61 years want?"

Do they want to join with their kinsmen in Western Samoa, with its much greater resources, and participate in the new state, which is but a few miles distant and with whose people they are joined by common language, cultural heritage, and intermarriage?

Or do they want to be enabled to enter more fully into the American social and economic pattern, the nearest point of which, Hawaii, is some 2,200 miles distant and where the predominant language and culture are alien?

There is no doubt whatever in the minds of the members of your subcommittee, or of any of the staff members or specialists, that the answer is strongly in the affirmative for the latter course of development. Namely, the people on the islands of Eastern Samoa choose America.

While your subcommittee was in Eastern Samoa, we discussed this matter publicly and privately with many Samoans in all walks of life. We talked with the highest ranking matais, the traditional chiefs, the elected members of the legislature, with officeholders, with jobholders, and with the so-called common people. Nowhere did we find any sentiment whatever for union with Western Samoa in its new, great adventure into independent nationhood.

On the other hand, in several instances, Western Samoans approached us for help in becoming American Samoans.

Your subcommittee is convinced that the people of Eastern Samoa are desirous of remaining a part of the United States, that they are loyal to the United States, and that they are dedicated to political and economic development with the United States.

There remains, then, the not-easy-to-answer question of what form of government shall the Eastern Samoan people have in the American system. Clearly, we do not want to impose forms or ideas we have evolved for ourselves on this gentle, comparatively unsophisticated group of Polynesians against their wishes. Nor do we want to support an elaborate, complex governmental bureacracy for the 20,000 inhabitants of those beautiful, but resource-lacking, islands in the South Seas.

Within the framework of our national security and with due regard to the cost to the American taxpayer, the primary question is, of course, "What form of local self-government do the American Samoans themselves want?"

Interestingly, we found no real dissatisfaction with the present government of American Samoa. At least there seemed to be no burning issue of change or reform on which the Samoans were united. They do, of course, want more money for long overdue rehabilitation of physical plants such as schools, a hospital, roads and the like, as well as leadership and funds with which to stimulate economic development. They do want a voice, even if without a vote, in Washington, in the form of an elected official who will serve as a delegate, deputy, resident commissioner, or whatever title the Congress sees fit to bestow on him. They also want much more of a voice in their budget, and economic planning. Government expenditures have tended to be largely a matter of private discussion between the Governor and officers of the Department of the Interior.

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

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## THE GOVERNORSHIP

There does not at this time appear to be any real demand for an elected governor. Public attitude toward the then Governor, Hon. Peter T. Coleman, a native Samoan, understandably was mixed, as it invariably and inevitably is toward an appointed Governor. (Both of the members of your subcommittee were appointive Governors of territories.)

Governor Coleman was born in Pago Pago, was educated in Hawaii and Washington, D.C., and was named Governor by Secretary of the Interior Fred Seaton in 1956. He very wisely refrained from accepting any Samoan titles or chieftainships which might have given rise to a suspicion that some of his decisions might be influenced by family loyalties in the matai system. He spoke the Samoan tongue, and understood thoroughly Samoan customs and traditions.

From what your subcommittee observed, Peter Coleman was an excellent, perhaps the outstanding, Governor of American Samoa. He was the first native Samoan ever to hold the post, and gave incontrovertible demonstration of the ability of native Samoans to hold the highest offices in the islands.

Former Secretary of the Interior Seaton and former President Eisenhower are to be congratulated on their choice and on what your subcommittee hopes may become a rule of appointing natives or at least established residents to government office in the offshore areas for which the United States has responsibility. Attention is invited to S. 1752, now before the Senate, establishing a 3-year residency requirement for appointment as Governor of an American offshore area.

# WASHINGTON REPRESENTATION

On several occasions the elected Samoan Legislature has memorialized Congress for representation of the people of American Samoa in Washington in the form of a nonvoting delegate, or deputy, or resident commissioner. Washington representation also was a major part of the presentation of the traditional chiefs, the text of whose petition is set forth herein beginning on page 11.

Your subcommittee is convinced that granting these longtime American nationals a voice, but not a vote, in Washington is highly desirable. A Samoan elected by the people of American Samoa and accredited to the National Capital would serve both the people on these islands and the people of the United States. Through such an officer, the Federal Government would have "expertise," to use the phrase of the Supreme Court, on the strategic South Pacific and South Pacific peoples. And granting of such representation would, of course, add tremendously to our prestige as a nation that puts into practice its principles.

The cost would be negligible: not more than \$50,000 or \$60,000 a year. We spend many millions of dollars every year to explain and present America to other peoples. Here is an opportunity for us to take action that would speak far louder than words at a very small cost and with other benefits to ourselves.

Accordingly, the members of your subcommittee have introduced S. 995 into the Senate, providing that "the unincorporated territory of Eastern Samoa shall be represented in Congress by a Deputy to the House of Representatives."

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

# THE LEGISLATURE

To return to the form of government, the subcommittee feels that the constitution drafted and adopted by the people marks a great step forward in the political development of American Samoa. Admittedly it is a compromise: A 2-chamber legislature, with 33 members, to make laws for but 20,000 persons in an area the size of the District of Columbia, could scarcely be hailed as a model of streamlined efficiency. But it does recognize and embody both the traditional Samoan system and the historic American one. The upper house, or Senate, consists exclusively of chiefs, who must be—

the registered head of a Samoan family, who maintains his monotaga; that is, who fulfills his obligations as required by Samoan custom in the county from which he is elected.

The House of Representatives, on the other hand, is in our American tradition, consisting of 24 members elected by secret ballot on the basis of population, but with each county having at least 1 member. The constitution does not require that he be a "titled" man, but such a person is not barred from the office, either.

# THE JUDICIARY

It is earnestly to be hoped that, at the first revision of the constitution, action will be taken to separate, in fact, the executive and judicial branches of the Government of American Samoa. At present judicial power is centered, de facto, in the Chief Judge of the High Court. The Chief Judge is appointed by the Secretary of the Interior and paid through Interior Department appropriations. Term of office is at the pleasure of the Secretary, and it is a "Schedule C" appointment.

The appointive Governor appoints the associate judges on the high court and the presiding officers of the lower courts upon the recommendation of the Chief Judge.

The foregoing observations are not to be construed in any way as a criticism of the incumbent chief justice of American Samoa. As nearly as the subcommittee can determine, the Honorable Arthur A. Morrow has been and is an excellent jurist and has served the people of American Samoa well over a long period of years. However, it is submitted that it is basically contrary to the American system to have the judiciary so clearly and closely associated with the executive, despite the pious sentiment to the contrary expressed in the Samoan constitution.

It is suggested that the chief judge well might be appointed by the Attorney General of the United States, and that the appointment be for a term certain.

Also, there is no appeal from a decision of the High Court except to the High Court itself. That is, the Chief Judge sits in judgment on his own rulings. Your subcommittee was informed that there never has been a single instance in which the three judges of the high court have disagreed, so completely does the stateside chief judge dominate his relatively untrained native colleagues.

Attention is directed to the views of Judge Maris on this subject, set forth in the appendix.

When the constitution is revised, it is recommended that consideration be given to provision for a true appellate procedure, with perhaps a United States judge from Hawaii making periodic visits to Pago Pago to hear appeals. With the advent of jet travel, this trip from Honolulu to Pago Pago is but a matter of a few hours. Such a procedure and grant of powers would of course require Federal legislation. Your subcommittee anticipates and awaits a request for Federal action from the Samoan people through their legislature.

#### REVISION OF CONSTITUTION

Just as the organization of the legislature under the Samoan constitution appears to be a workable compromise between the old ways and the new ways, so too with other provisions of the constitution. By its terms it must be formally and officially reviewed by the people within 5 years.

Therefore, while recognizing its faults and shortcomings as a basis for democratic self-government in the American tradition, your subcommittee nevertheless believes that the American Samoa constitution of 1960 serves as a workable instrument during what is patently a transitional period in American Samoa, and recommends that it continue in force and effect with only those changes that the Samoan people themselves see fit to make in accordance with the procedures they themselves have established.

When this constitution has been tested by practice and time, and the Samoans have had an opportunity to live under it and then review it, the Congress of the United States should consider embodying its provisions into an Organic Act for American Samoa. Until that time, however, your subcommittee believes that flexibility and ease of change is highly desirable during this transitional period.

#### U.S. CITIZENSHIP

In both official meetings and privately, the matter of U.S. citizenship for the American Samoans was perhaps the most widely discussed single topic that came to your subcommittee's attention. Citizenship was recommended in the report submitted in 1931 by the Samoan commission appointed by President Hoover, and has been a provision in a long series of bills before Congress since that time.

It is highly probable that a majority of the American Samoans desire citizenship, yet many are gravely troubled as to whether the "equal protection of laws" doctrine implicit in citizenship would not conflict with the "Samoan land for Samoans" doctrine and the matai system. That is, if the Samoans were U.S. citizens, could they prevent other U.S. citizens who were non-Samoans from acquiring land in American Samoa and engaging in business, the professions, or agriculture there?

Attention is directed to article I, section 3, of the Samoan constitution, previously quoted above, stating in the bill of rights that it shall be a governmental policy to protect persons of Samoan ancestry "against alienation of their lands and the destruction of the Samoan way of life and language \* \* \*."

Would this provision be subject to attack in the courts as contrary to our historic American tenet of equality under the law; would it be in conflict to the U.S. Constitution, that is?

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Of course, the provisions of our Federal Constitution would not be applicable in an unincorporated territory, such as American Samoa would be, according to the rulings of the Supreme Court in the "insular cases." Nevertheless, it is far from certain that if such a provision were written into an Organic Act for American Samoa adopted by Congress, it would be valid.

The Samoans were keenly aware of the action taken by the Congress with respect to a similar provision in the proposed Organic Act for Guam in 1950. The Senate Interior Committee of the 81st Congress deleted such a provision in the House-passed bill for an Organic Act for Guam after going into the matter in some detail. The committee's report pointed out:

The proviso was deleted because it appeared to authorize discriminatory, un-American laws which would penalize persons of non-Guamanian ancestry. Such a proviso would be contrary to American principles of equality (Report of Senate Interior and Insular Affairs Committee on H.R. 7273, 81st Cong. p. 5).

The subcommittee recognizes that the problem is a complex one legally. It is having the matter researched, and is requesting the views of the Attorney General of the United States and the Department of the Interior. Until authoritative opinion can be obtained, and, based upon it, a comprehensive expression of the views of the Samoan people heard, it is recommended that the matter be held in abeyance.

# REHABILITATION AND DEVELOPMENT

As to economic recommendations, the subcommittee generally agrees with and adopts those in the broad economic study made by Nathan Koenig and set forth as part II herein. This study examines and identifies the economic and related problems and pinpoints the needs for improvement and constructive development. The subcommittee believes that this study thus provides a basic guide for the positive action required for developing the economy of American Samoa to meet the needs of the people and otherwise effectively deal with their problems.

As indicated in part II, improvements in agricultural production, together with more adequate roads, ample electric power, unfailing supplies of fresh water, and other essential public works, including the jet airport now under construction, will provide a solid foundation for the development and growth of the economy. Improvement of agriculture to increase production in satisfaction of the population's food needs is vital to the economy of American Samoa and the wellbeing of all its people.

There is urgent need for Federal funds to improve and overcome serious deficiencies in essential public works, in health, and also in education as shown in the study by Dr. Hubert V. Everly set forth as part IV herein. Such expenditures, along with initiative and cooperative leadership on the part of the local government, are necessary to provide the investment climate and encourage the outlay of private capital for developing enterprises that will create more employment opportunities.

While the possibilities for extensive business and industry are limited, there nevertheless are certain potentialities for increasing economic activity in ways that would be of significance to the people of

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America Samoa. For example, there appears to be a sound basis for further expansion and development of the commercial fisheries operation. Also, as stated, there is the possibility of developing tourism.

Completion of the jet airport reasonably can be expected to make American Samoa a crossroads of the south central Pacific. Tourism could become an important source of local revenue derived from persons who might wish to break their journey for a few days, or who would wish to enjoy the superb South Sea scenery, climate, and atmosphere as a vacation spot itself.

Unfortunately, however, the only hotel presently available is a small, boardinghouse type owned by the Government of American Samoa. There is not a single bathing beach accessible to the capital city. Thus, with no hotel worthy of the name and lacking other facilities for recreation and comfort, American Samoa presently has little to offer to the tourist. It is recommended that a survey of recreational resources and recreational needs be undertaken under Interior Department auspices. An adequately financed program to remedy this situation would prove a most valuable investment. The potential for a modest development of tourism in American Samoa should attract the investment of private capital in hotel and other facilities and recreational features that would be required.

The subcommittee would like, especially, to emphasize the need for improving the physical structures essential to governmental operation. We found that these have been allowed to deteriorate dangerously during the decade since administration was transferred from the Navy. Their condition is a grave reflection upon the United States, and immediate rehabilitation is essential in view of the fact that the South Pacific Conference will be held in American Samoa in the summer of 1962. Indigenous leaders from all the remaining Pacific territories, the Kingdom of Tonga, and an independent Western Samoa will attend and inevitably will form lasting judgments of the United States from their observations as to how we have fulfilled our moral and ethical obligations toward a people that have been under our flag for 61 years.

#### PETITION OF THE CHIEFS

As indicative of the needs, desires, and aspirations of the people of American Samoa, there is set forth a petition presented to your subcommittee in an open meeting held in Pago Pago. The circumstances surrounding the adoption of these resolutions and their presentation are ably discussed by Dr. Norman Meller in part II of this report.

The resolutions are:

#### FAGATOGO, TUTUILA, AMERICAN SAMOA, November 18, 1960.

#### Hon. OREN E. LONG,

Chairman, Subcommittee, Senate Committee on Interior and Insular Affairs. DEAR MR. CHAIRMAN: I have the honor to submit herewith the copy of the original resolutions, adopted by the general assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, Wednesday, November 16, 1960. Very respectfully yours,

T. LETULI, High Chief, Chairman of the Assembly.

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

#### OFFICATE

I hereby certify that the attached document is a full, true and correct copy of the original resolutions, adopted by the general assembly of the traditional leaders of Tutuila and Manu'a on the 16th day of November A.D. 1960, convened at the Hall of Representatives, Fagatogo, American Samoa.

#### S. MULITAUAOPELE, High Talking Chief, Secretary of the Assembly.

RESOLUTIONS ADOPTED AT THE SECOND MEETING OF THE GENERAL ASSEMBLY OF THE TRADITIONAL LEADERS OF TUTUILA AND MANU'A, CONVENED AT THE HALL OF REPRESENTATIVES IN FAGATOGO, WEDNESDAY, NOVEMBER 16, 1960.

#### RESOLUTION I

Be it resolved by the General Assembly of the traditional leaders of Tutulla and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested that necessary steps be taken directing the Small Business Administration to establish a Small Business Agency in American Samoa.

#### RESOLUTION II

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled. That the Congress of the United States be, and it is hereby respectfully requested that legislation be enacted conferring U.S. citizenship to all natives of American Samoa wherever they may reside.

#### RESOLUTION III

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested to enact an organic legislation making American Samoa an incorporated territory of the United States, and all appropriate provisions contained in the recent approved Constitution of American Samoa, be incorporated in the said organic law.

#### RESOLUTION IV

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled. That the Congress of the United States be, and it is hereby respectfully requested to enact legislation establishing a Resident Commissioner from American Samoa in the House of Representatives of the Congress of the United States.

#### RESOLUTION V

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled. That the Congress of the United States be, and it is hereby respectfully requested to appropriate the sum of \$25 million as grant-in-aid for American Samoa for the purpose of developing the territory, and that the said sum shall be used solely for schools and educational program, water-works, public roads, hospitals, and dispensaries, electricity, jet airfield and other public utilities.

#### RESOLUTION VI

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested that all possible means be undertaken to improve the economy of American Samoa by making it a steady policy of the Federal Government to induce, urge, and persuade stateside industries to do business in American Samoa; and be it further

Resolved, That the Rockefeller Foundation and other corporations be encouraged to build hotels in American Samoa.



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#### BESOLUTION VII

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested, that the codification of all laws in the field of veterans' affairs, known as the "Veterans' Benefits," be amended wherever required and necessary so that the American Samoa veterans of Woorld War I, World War II, and the Korean conflict, shall receive the same treatment under such laws with the war veterans of all States and territories of the United States.

#### BESOLUTION VIII

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested that possible means be explored to increase the wage scale of American Samoa to cope with the present high cost of living.

#### RESOLUTION IX

Be it resolved by the General Assembly of the traditional leaders of Tutuila and Manu'a in their Fono assembled, That the Congress of the United States be, and it is hereby respectfully requested, that sufficient funds be appropriated to finance the construction of a large building to house the delegates of the 5th South Pacific Conference which shall be held in American Samoa in 1962.

#### THE SOUTH PACIFIC CONFERENCE

The following memorandum was submitted at the specific request of the subcommittee by Curtis Cutter, Dependent Areas Officer of the Department of State, who accompanied the study mission:

#### FIFTH SOUTH PACIFIC CONFERENCE

In July of 1962, American Samoa will be the site of the Fifth South Pacific Conference with the United States as host nation and chairman. This will be the first South Pacific Conference held in Polynesia and the first held in an American territory. Indigenous representatives from 16 Pacific territories will attend. The Conference is organized by the South Pacific Commission of which it is an auxiliary body.

Altogether from 175 to 200 persons can be expected to attend the meeting which will last approximately 3 weeks. Observers from the United Nations' agencies, scientific and cultural institutions, missionary and government organizations, and representatives of press, radio and television attend as observers in addition to the indigenous representatives.

In the light of events in Africa and with the focus of much of world attention on the problems of colonial areas, this Conference should assume even greater importance than previously. This is the one time when representatives of the peoples of these areas can come together to discuss their common problems. It will also be the first opportunity for them to observe the condition of dependent peoples under the American flag.

At present, facilities in Pago Pago are inadequate to handle a conference of this size and duration. Because of this the members of the study group while in Samoa sent a telegram to the Bureau of the Budget urging that \$415,000 be added to the budget for American Samoa. This money will be used to build two new classroom buildings which are sorely needed by the high school. They would be used as dormitories during the Conference. Twenty-four new rooms would also be added to the government hotel which is now totally inadequate.

Even with the addition of these facilities, energy and enthusiasm will be necessary to prepare Pago Pago to receive the Conference. The traditional hospitality of the Samoan people will go far in this regard. However, all the many logistical details will also have to be carefully arranged if this Conference is to be a credit to the United States.

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# STUDY MISSION TO EASTERN (AMERICAN) SAMOA

# CONGRESSIONAL ACTION

As will be seen from the reports and recommendations both of the subcommittee itself and of the specialists, there is a clear and present need for the Congress to face up to its responsibilities in our one South Pacific area. As stated, the American Samoans came under the sovereignty of the United States of their own free will and volition some 61 years ago. Mistakenly, perhaps, they demanded no treaties nor other guarantees to safeguard their rights.

As President Hoover's Samoan Commission report in 1931 stated, the American Samoans, in ceding their islands to the United States, relied "upon a profound faith in the will of a Christian nation to do them justice."

Anyone visiting American Samoa today and seeing the dilapidated condition both of the physical plant of government, and of the economy itself, might well question whether that faith in our Christian nation has been fulfilled.

The Congress, in all conscience, must not only set its Samoan house in order in the way of providing funds for rehabilitation and at least a start on economic development, and do so before the meeting of the South Pacific Conference on behalf of our own national prestige in the South Pacific. The Congress must also continue to be aware of its proud, pure-blooded wards in the islands below the equator and see to it that the benefits of social legislation for the States and other offshore areas are extended to the American Samoans.

It is recognized that many of the subcommittee's suggestions for change, such as the true separation of the executive and judicial branches as well as provisions for appeals, and true legislative authority for the legislature, will require congressional action. The members of your subcommittee pledge themselves, as long as they sit in the Senate, to afford the Samoans an opportunity to be heard and, in the words of the first amendment, "to petition the government for a redress of grievances."

While believing firmly that responsibility for initiation of political change must rest with the people of American Samoa themselves, nevertheless, your subcommittee urges that the Department of the Interior assume a more active and responsible role in giving guidance and help to the people in their political and economic development. As to rehabilitation and development of the physical plant and economy, the Interior Department has a clear-cut responsibility to do far more than it has in the past. Affirmative action is needed, and is needed now. It is long overdue.

# SUMMARY OF RECOMMENDATIONS

In addition to adopting generally the individual reports of the specialists, the subcommittee makes the following recommendations in brief summary based on the members' own osbervations and study:

1. The Department of the Interior should initiate a comprehensive plant and property survey, with the assistance of the General Services Administration and other Federal or private agencies, of American

Samoa to determine needs and requirements for rehabilitation or replacement of existing structures and for development and expansion of the necessary facilities. Such a survey should include a study of recreational resources with a view to attracting tourists. The needs for adequate facilities for the delegates to the South Pacific conference in July of 1962 and for presenting to them a picture of America should be given immediate consideration. The findings, conclusions, and recommendations of this survey should be presented to Congress with goals clearly defined.

2. S. 995, providing that eastern Samoa shall be represented by a Deputy in Congress, should be enacted. Also, consideration should be given to S.1752, establishing a 3-year residence requirement for appointment as Governor of American Samoa, as well as for Governor of Guam and the Virgin Islands.

3. Among the Federal programs that should be extended to include American Samoa are: National School Lunch Act; the Public Health Service Act; the Smith-Hughes, George-Barden and related Vocational Training Acts; the National Defense Education Act; Public Laws 815 and 874, aid to federally impacted school areas; the Federal Highway Act and related legislation; and the Library Services Act.

4. Statutory authorization should be enacted for the Secretary of Agriculture, upon request of the Governor of Samoa, to provide technical and scientific aid for the improvement of agriculture, giving special emphasis to production of food for local consumption, and also developing suitable export and industrial crops.

5. As to U.S. citizenship and organic legislation, the people of American Samoa should be encouraged and aided in every way possible to consider, with legal and factual knowledge readily available to them, just what they really want, and to make their decisions known to Congress through an islandswide plebiscite. They should of course realize that the Congress of the United States cannot commit itself to be bound by any such plebiscite, but that it will give the views of the people full consideration. Such a plebiscite should take place only after a period of trial, in practice, for the new constitution.

# CONCLUSION

In American Samoa, the United States has a tremendous opportunity to show, both in the strategic south Pacific and to the world at large, that we do practice what we preach, and that a Christian nation can and will do justice to a minority group, however small and however far away.

As your subcommittee worked on its assignment, the members became increasingly aware of the devotion of the people of Eastern Samoa to the United States and the degree of their understanding of the American way of life. Anyone working with them must be profoundly impressed by the depth of their friendship and their worthiness, individually and as a group. It is our sincere hope, as a result of our study, that further progress will be made in the development of their way of life in the American tradition without a sacrifice of those qualities of their native culture which have served them so well.

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government. New Zealand civil servants will continue to be employed in these positions, serving under Samoan ministers, until Western Samoans are trained to undertake the assignments. To aid in this transition, the New Zealand Government proposes to spend £400,000 over a 5-year period in the way of an educational crash program designed to facilitate this training. The Western Samoan constitution itself recognizes this inadequacy by specifying that non-Samoan citizens who have practiced law in countries with similar legal systems may be appointed to the highest courts.

The degree of egalitarianism found in American Samoa is absent in the western islands. Compulsory education for all children is considered a luxury and universal suffrage for all adults is unacceptable in Western Samoa. The Fautua, Tupua Tamasese, and Malietoa Tanumafili II, holding two of the four highest titles, will jointly become head of state under the new constitution, and the holder of a third title, Fiame Mata'afa, now is prime minister and it is anticipated he will continue to be designated for this post after independence.

Over the years local political parties have died aborning, and only the Progressive Citizen's League has had a degree of success among the relatively few European voters. Currently, there is no organized majority party or coalition of parties in the legislative assembly. In short, Western Samoa is approaching independence without the accouterments of widespread political participation, parties, or organized opposition normally considered necessary for the working of a parliamentary system. Due to a recent change of the laws relative to the selection of Samoan legislators, the general elections held on February 4, 1961, for candidates for the legislative assembly saw almost as many Samoan members (18) chosen through secret ballot of the matais as through Fa'asamoan consensus (21)-this may be but the prelude to ultimate universal suffrage under the constitution after independence, possibly with only the matais being eligible as candidates.<sup>1</sup> Until it does occur, this difference between the two areas over the possession of title as the sine qua non to political participation, and the relative influence attributed to the rank of one's title in such participation, will continue to exert as material an effect upon the whole problem of Samoan unification as the structural difference between the two systems of government.

# DESIRES OF AMERICAN SAMOAN LEADERS FORMALLY EXPRESSED TO THE SENATE SUBCOMMITTEE

The Senate subcommittee visiting American Samoa in December 1960 was presented with nine resolutions requesting action by the Congress of the United States on a variety of subjects. Three may be grouped as seeking major political changes: U.S. citizenship for Samoans, passage of an organic act making American Samoa an incorporated territory of the United States, and establishment of a Resident Commissioner from American Samoa in the House of Representatives. The balance of the resolutions request a number of eco-

<sup>&</sup>lt;sup>1</sup> In addition, at the general elections, 682 European electors chose 5 European members of the legislative assembly by secret ballot, so that elected members comprised a majority of the new assembly which met on February 14, 1961.

nomic changes, and the extension to American Samoa of the benefits of specific Federal legislation. These were not expressions of the views of individual Samoans, nor even of particular geographic subdivisions, but were adopted by the traditional leaders of all Tutuila and Manu'a, formally meeting in general session. The significance of these requests, and the impact their implementation will have upon the whole of Samoan customary life, warrants detailing the manner in which they were adopted, and a consideration of whether their full implication was appreciated by those participating.

In anticipation of the visit of the Senate subcommittee, the secretary of American Samoa, serving as Acting Governor, asked the traditional leaders of Tutuila and Manu'a to meet with him for the purpose of their planning a proper reception for the subcommittee. At the request of the chiefs attending, the scope of this reception was expanded so as to include the presentation of views on the political, social, and economic development of American Samoa. It was agreed at this preliminary meeting that these matters should first be discussed in the county councils, and that the recommendations of these councils should be forwarded for consideration at a second meeting of the general assembly of chiefs. In response to the query from the floor as to what issues might be raised at the county councils, the following were specified:

1. Do we want to become citizens of the United States?

2. Do we want to become a State of the United States?

3. Do we want to be an independent state?

4. Do we want a union with Western Samoa?

5. Do we want American Samoa to become a legal territory of the United States?

6. When shall we ask for an organic act for American Samoa? Subsequently, these questions were printed in the November 12, 1960, issue of the Failauga Samoa (Samoan Orator, a weekly governmental language newspaper) and were broadcast in the Samoan language over the radio. Consequently, the basic questions concerning the future of American Samoa were brought to the attention of the matais meeting in the various county councils, and the resolutions they forwarded to the second meeting of the assembly on these subjects may be treated as being the best expression of current opinion which it is possible to obtain, short of intensive interviewing throughout American Samoa.

The "General Assembly of the Traditional Leaders of Tutuilla and Manu'a" which convened on November 16, 1960, was composed, according to the official minutes, "of the high chiefs, high orators (tumuas and to'oto'os), leading chiefs and talking chiefs, representing their respective county councils." Actually, neither by its membership nor by its procedure did it strictly meet the description of being "traditional." The representation afforded was not based solely upon Samoan custom, and the delegations which appeared from each county, regardless of their size, were seated. Also, the meeting proceeded in accordance with rules of parliamentary procedure, with a chairman and secretary, so that in this regard, Fa'asamoan conduct was superseded by the introduced procedures of the papalagi.

Attending this general assembly were both presiding officers of the two houses of the Samoan Legislature, a number of legislators, and other important titleholders, many of the last having positions of

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responsibility in the local government structure as well as departments of the central government of American Samoa. As there has long been detected a degree of rivalry for leadership in Samoan political affairs between the members of the Samoan Legislature and the chiefs with offices in the Samoan local government, and also expressed opposition on the part of the legislators to some of the policies of the central government of American Samoa, the presence in one assembly of persons from these different power groups goes far to dismiss the contention that the actions of the general assembly were nothing more than the members of the legislature speaking through another medium.

A range of resolutions was submitted in writing from the different county councils, with many directed to the same subjects. Indeed, the similarity of language in some cases suggests either the copying by one county of another's work or an organized effort to have the councils adopt identical resolutions on these subjects. Most likely the explanation falls somewhere between the two.

American citizenship.—All but 2 counties (12 out of 14) submitted resolutions favoring U.S. citizenship for American Samoans. Itu'au County sought deferring the matter until after discussion by the Samoan Legislature; Sao'le County indicated only a desire to grant Samoan citizenship for Western Samoans resident in American Samoa. The Manu'a area tied citizenship with an organic act while Sua and Vaifanua Counties requested the grant under the new Samoan constitution and not under an organic act. As finally adopted by the general assembly, resolution II asks Congress to enact legislation conferring U.S. citizenship on all natives of American Samoa wherever they may reside.

Territorial status.—Resolution III of the general assembly requests Congress to enact organic legislation making American Samoa an incorporated territory of the United States. As submitted by the Manu'a counties, and first considered by the assembly, the proposal sought the enacting of "organic legislation making American Samoa a legal territory of the United States." Resolutions of Tualatai and Leasina were similarly phrased, although lacking reference to "organic legislation." Maupatasi requested enactment of an organic act effective in October 1961, a time significant because of the new constitution of American Samoa going into effect 1 year prior to that date. The resolution submitted by Tualauta County referred to "unincorporated territory" status for American Samoa, while Lealataua County desired "incorporated territory" status, with the safeguard that organic legislation be deferred until Samoans are convinced that their customs and lands will be adequately protected thereunder. Sua and Vaifanua were inferentially against organic legislation, and the remaining two counties submitted nothing to indicate their stand on this subject.

The debate which ensued in the general assembly revealed both fear that the enactment of organic legislation by Congress might mark the end of Samoan customs and confusion over the differences between a "legal territory," "unincorporated territory," and "incorporated territory." After such explanations as the status of an incorporated territory would make American Samoa an integral part of the United States, and that such status was but the prelude to statehood, delegates were asked to vote on whether they approved of "incorporated"

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or "unincorporated" territorial status. Apparently no reference was made to *Downes* v. *Bidwell* ((1901) 182 U.S. 244), or the rule of the case distinguishing between incorporated and unincorporated territories in the protection of civil rights. The official minutes of the general assembly report a unanimous vote in favor of "incorporated" territorial status, and the final version of the resolution submitted to the Senate subcommittee is the original Manu'a resolution amended so as to include reference to making American Samoa an "incorporated" territory.

The Legislature of American Samoa had previously expressed approval for the enactment of organic legislation for American Samoa along the lines of H.R. 4500 of the 81st Congress. Despite the fact that a number of legislators were delegates to the general assembly and took an active part in the debate on this resolution, the affirmative vote of the assembly represents more than just another expression of the legislators on this subject. Rather, it would appear that the sentiment for organic legislation is more widespread in American Samoa than has been considered to be the case by spokesmen of the administration.

Alternatives to territorial status.—A few resolutions were submitted by the various counties on the subjects of independent status, desire for statehood, and union with Western Samoa. In the last category, none proposed merger with Western Samoa to form a greater independent Samoan state. As it was believed that these county resolutions were antithetical to and therefore covered by the action taken by the general assembly in adopting the request for territorial status through enactment of organic legislation, these resolutions were not brought to the floor of the general assembly for a vote.

The range of resolutions submitted by the various counties at this general assembly of titular chiefs on the future status of Samoa may be represented by the following table (the assembly's choice was for incorporated territorial status under an organic act):

|                                      | Legal<br>territory | Incor-<br>porated<br>territory | Unincor-<br>porated<br>territory | Organic<br>Act                   | Statehood | Unification<br>with West-<br>ern Samoa       | Independence        |
|--------------------------------------|--------------------|--------------------------------|----------------------------------|----------------------------------|-----------|--|---------------------|
| Manu'a<br>Sua and Vaifanua<br>Sa'ole | *****              |                                | *******                          | Yes (3)<br>No, im-<br>plied (1), |           | Not now<br>(3).<br>Do not<br>discuss<br>(2). |                     |
| Itu'au<br>Tualauta                   |                    |                                |                                  |                                  |           |  |                     |
| Leasina.                             | Yes (2)            |                                |                                  | Defer (6).                       | No (2)    | No (4)                                       | Yes, fu-            |
| Mauputasi                            |                    |                                | *********                        | Yes (5)                          | Yes (2)   | Yes, under<br>United<br>States<br>(4).       | tore (3)<br>No (3). |

Future status of American Samoa<sup>1</sup> (resolutions introduced in 1960 general assembly)

1 Number identifies county's resolution on this subject.

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# EXHIBIT 16

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# AMERICAN SAMOA GOVERNMENT



THE SECOND TEMPORARY FUTURE POLITICAL

STATUS STUDY COMMISSION

TO THE

GOVERNOR OF AMERICAN SAMOA

AND THE

16TH LEGISLATURE OF AMERICAN SAMOA

2D PEGULAR SESSION

Septer 14, 1979

Case 1:18-cy-00036-CW Document 55-3 Filed 04/24/18 Page 59 of 117 Appellate Case: 20-4017 Document: 010110346769 Date Filed: 05/12/2020 Page: 45

September 14, 1979

Honorable Tali P. Coleman, Governor Honorable Members of the Fono Fifteenth Legislature American Samoa Covernment Pago Pago, American Samoa 96799

Gentlemen:

The Second Future Political Status Study Commission respectfully submits its Report thus fulfilling its mandate under 2°ASC 1004-06, (PL 15-89, L. of 1978).

Respectfully submitted,

Chairman

Infel lia

Vice-Chairman

Memb IUANA 'ITAU F. TULA

STULT

LEALAIFUANEVA P. E. REID

(Mrs. MERE T.

S. MUASAU

MULITAUACPELE T

**TULAFONO** F

A. U. FUIMAONO

SUKA S.

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# ACKNOWLEDGMENT

The Commission wishes to especially recognize and acknowledge the valuable assistance and aid of Mr. Roger Hazell, Legislative Counsel, Mr. Vaalele Ale of the Fono, and Mr. Fred Rolphing, who gave their time in helping the Commission with its work.

The Commission further wishes to express its gratitude and appreciation to Rev. Falo Tiumalu of San Francisco, Rev. Tofaeono B. Williams of Los Angeles, the late Rev. Suitonu Suitonu of San Diego, and Rev. Folasa Titiali'i of Seattle, Washington, for the warm receptions accorded the Commission during its trip to the United States. Case 1:18-cv-00036-CW Document 55-3 Filed 04/24/18 Page 61 of 117 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 47

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# FINAL RECOMMENDATIONS

1. AFTER CAREFULLY REVIEWING, COMPARING, AND CONTRASTING THE ADVANTAGES AND DISADVANTAGES OF THE POLITICAL ALTERNATIVES CONSIDERED---ALWAYS WITH CONDITIONS IN PRESENT DAY AMERICAN SAMOA IN MIND---THIS COMMISSION BELIEVES THAT THE MOST SUITABLE POLITICAL STATUS FOR AMERICAN SAMOA AT THIS TIME, IS TO CONTINUE AS AN UNINCORPORATED AND UNORGANIZED TERRITORY OF THE UNITED STATES, BUT WITH SOME MODIFICATIONS.

American Samoa needs to maintain its traditional culture, which is embodied in its communal-land and matai systems. Major change in the political and social order would abruptly deprive Samoa of its strong traditional foundation and thrust it into a position it is not yet ready to occupy. It is inevitable, however, that the old ways must make room for the new, and the Commission fully recognizes the need and importance of aiming for more complete democracy. Only with \_\_\_\_\_\_\_ time can people move from one social order to another. American Samoa has taken long strides along the road to full democracy in the recent past and an orderly and painless transition is far more desirable than the arbitrary imposition of a new political and social order.

The modern world has found, much to its sorrow, that the sudden imposition of new forms of government upon people who are not socially, economically and mentally prepared for such changes, can lead only to chaos or dictatorship. Our previous Territorial Motto was: "Proceed with Caution" --- our forefathers, when stuck on the vast Pacific, confused and without force to push their cances, would say: "Wait for the wind".

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# EXHIBIT 17

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# FINAL REPORT

# The Future Political Status Study Commission of American Samoa

January 2nd, 2007

For presentation to the Governor of American Samoa, the Legislature, the Chief Justice and the general public, as per P. L. 29-6; P. L. 29 – 24; and P. L. 29 – 25.

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HON. TUFELE F. LI'AMTUA Chairman FUTURE POLITICAL STATUS STUDY COMMISSION

Executive Office Building - Second Floor Utulei, American Samoa 96799 HTC. FOFO I.F. SUNIA Executive Director

HON. TUAOLO M. FRUEAN Vice Chairman TAPAAU DR. DANIEL MAGEO AGA Assistant Executive Director

December 31, 2006

Pursuant to the requirements of Public Law 29-6, as amended by P.L. 29-24 and P.L. 29-25, the American Samoa Future Political Status Study Commission is pleased to present on this day its final report to the Governor of American Samoa, President of the Senate, Speaker of the House of Representatives, and the Chief Justice of the High Court. In further compliance with the law, copies of this Report are deposited at the Feleti Barstow Foundation Public Library, and the Library of the American Samoa Community College, for information of the general public.

It is our hope that this work will in some small measure contribute to the future political development of our Territory.

Tufele H amabia Chairman

Dr. Minareta Mo ananu Thorr Commissioner

Toaga Sumalo Commissioner

Mapu/Jamias

Mapu/Jamias Commissioner

Lefiti Atrulagi Pe Commissioner

inu'ulelei Falefatu Ala'ilima-

Gommissioner

Tuaolo Vaivao Manaia Frucar Vice Chairman

Janoa Soli Aumoeualogo Commissioner

Faiivae Apelu Galea'i Commissioner

Gabteote Tofau Commissioner

MAR.

Savali Talavou Ale Commissioner

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# PART I - INTRODUCTION

# <u>Creation</u>

The Future Political Status Study Commission (FPSSC) of American Samoa 2006 was created under P.L. No. 29-6, signed on June 13, 2005. Confusion over the date of submission of the Final Report led to the passage of P.L. No. 29-24 to provide a firm date for the termination of the Commission and to provide funding. A third law, P.L. No. 29-25 was signed on August 6, 2006 to extend the final date of the submission of the Final Report.

The FPSSC is American Samoa's third political status study commission. The first Commission was established July 8, 1969 by P.L. 11-39. Its report was submitted to the Eleventh Legislature in 1970. A second political status study report was published in 1975 by the Office of the Delegate at Large to Washington, D.C. in response to a request from the Legislature of American Samoa for a study on whether an organic act was necessary for American Samoa. The title of this report was "Memorandum in Support of Appropriate Organic Act for American Samoa."

# The Commissioners

In accordance with P.L. 29-6, Sec. 2.1401 eleven commissioners were appointed as follows:

- (a) by the President of the Senate Senator Salanoa S.
   Aumoeualogo of Vaifanua, and Senator Tuaolo M. Fruean of Maoputasi;
- (b) by the Speaker of the House of Representatives Vice Speaker Savali Talavou Ale of Alataua, and Rep. Gaoteote Tofau of Vaifanua;
- (c) by the Governor HC Tufele Liamatua, District Governor, Manua; Dr. Minareta Moananu Thompson, Community

College of American Samoa; Lt. Col. Mapu Jamias (U.S.

Army, Ret.); and Mrs. Toaga Seumalo, Director of Nursing;

- (d) by the Chief Justice HC Lefiti Atiulagi Pese, Associate Judge;
- (e) by the Board of Higher Education Mr. Fainuulelei Ala'ilima-Utu, Member, Board of Higher Education;
- (f) by the Delegate to the U. S. Congress HC Senator Faiivae A. Galeai.

<u>Staff</u>

By Executive General Memorandum No. 55-2006 issued on May 23, 2006, Gov. Togiola A. Tulafono appointed a staff to assist the Commission as follows: Fofo I. F. Sunia, Executive Director; Tapa'au Dr. Daniel Mageo Aga, Assistant Executive Director; Marcellus Talaimalo Uiagalelei, legal counsel; Kueni Hisatake, Chief Administrator. Other staff included Fiafia D. Sunia, Recorder.

The diversity of backgrounds of the Commissioners created a rich mixture whose great value would become evident as the study progressed. The mix consisted of five legislators, two attorneys, a district governor who was also the first elected lieutenant governor of American Samoa, one associate judge, two businessmen, four veterans, one college educator with a PhD in Samoan studies, and a Registered Nurse who is the director of nursing services. There were two lady commissioners. The staff included a former U.S. Congressman, and local senator, who is one of the two surviving members of the first future political status study commission (1969), the Dean of the land grant program at the American Samoa Community College, and an attorney.

# The Mission

The law requires the Commission to:

(a) study alternative forms of future political status open to American Samoa and assess the advantages and

disadvantages of each;

- (b) study and appraise the history, the development and the present status of political units comparable or relevant to American Samoa, both within and without the jurisdiction of the United States, and shall assess the advantages and disadvantages of each;
- (c) determine whether a single document is needed to set forth American Samoa's political status and relationship with the United States;
- (d) study and evaluate the impact of American Samoa's political status and relationship with the United States as to the economic, cultural, land tenure, health, safety and social needs of American Samoa;
- (e) assess the need for a comprehensive study of Swains Islands.

The Preamble of P.L. 29-6 declares that a territorial constitution review awaits the report of this Commission. The Commission interpreted this to mean that because its work is to be the basis of the review of the Revised Constitution of American Samoa, political status issues relative to the Constitution are to be included in its scope of study, determination, and report.

# Organization and Launch

The Commission was organized in a meeting at the Governor's Conference Room on May 31, 2006. HC Tufele Liamatua was elected Chairman. Senator Tuaolo M. Fruean was elected Vice Chairman. To draw public attention and generate interest in the matter of the Territory's political status, the Commission decided to launch its work in a formal ceremony to be carried on television and reported in the media. The ceremony was held at the Senate chambers on June 5, 2006 attended by the Governor as well as government,

# PART III - PUBLIC OPINION AND PREFERENCES

A political status can be successful only if understood, appreciated and favored by the governed. On that premise, the Commission took the question to the people. First, publicity and public education were necessary. Television was selected as the most effective media. Programs were designed to make clear the purposes of the law, including the meaning of alternative status studied and their advantages and disadvantages. Literature was printed and circulated. As it soon became obvious, the public awareness programs were well worth the effort.

# Off-island Study-Research Tour

More American Samoans live on the U.S. mainland and the State of Hawaii than on Tutuila, Aunuu, and the Manua islands. There were 91,376 Samoans living in the United States according to the US Bureau of Census in 2000. California has 37,498 Samoans or 41%. While Hawaii has 16,166 Samoans or 18%.

The Commission decided to seek the input of this large group for the following reasons:

- American Samoans who reside off-island are still American Samoans. Their original home is in Samoa. Hawaii and the mainland are second homes where they stay while educating their children, work at better jobs, or to simply spend time visiting children or relatives. The off-island Samoans have a vital interest in what goes on at home and feel strongly about their right to be involved.
- 2. American Samoans have taken their traditions and treasures of heritage to their second homes, including their religiousness. Samoan churches off-island continue the pattern of close ties and formal association with mother churches in Samoa and maintain an atmosphere of
Samoan worship.

- 3. Many families have lived off-island so long that they have second and third generations. Many are well educated and skilled.
- 4. The thinking of many local residents on public issues is influenced by family members living off-island.
- 5. Some *matais* of rank live off-island and visit home only on occasions. For all these reasons and more, the Commission felt obligated to seek out their views, give them the feeling of inclusion, and in the process develop a report that reflected the thinking of all American Samoans.

The following hearing sites were selected: San Diego (with a side visit to the Barona Indian Reservation), Oceanside, Los Angeles, San Franciso, Tacoma, Seattle, Laie (council of chiefs), Honolulu, and the Kuhio-Kalihi Association of Senior Citizens. Sufficient mention of the details of the visits have been publicized that no further elaboration is necessary here. A summary of their views and the Commission's observations follows:

- American Samoans residing off-island are overwhelmingly in favor of remaining a territory of the United States;
- Samoans off-island want to be assured that the culture of Samoa

   customs, matai system, and the Samoan language -- will not be
   adversely impacted by a change in political status. This pride
   in their "Samoanness" was strong even with the second and
   third generations.
- 3. <u>Citizenship</u>. There is uncertainty and confusion as to the process of naturalization and the importance of being U.S. citizens. Some asked for a bill that would make the grant of U.S. citizenship automatic for American Samoans arriving in the U.S. A few felt it was time to seek

the status of U.S. citizenship, as in Guam.

- 4. <u>Civic Participation</u>. American Samoans in all these major cities have formed associations to maintain contacts and continue to exercise and promote customs, to help each other, and attract attention and assistance of state and federal governments. The leaders are young and active and very proud of their heritage. Their efforts are recognized by city and state authorities, a testimony to their aggressive leadership.
- 5. They recognized the historical significance of the Commission's mission and were deeply appreciative of being included.

Other views expressed were directed at constitutional issues or matters of government administration. They will be included in the proper sections of this report. <u>On-Island Study Hearings</u>

A number of public hearings were held on island. Special hearings were organized for the traditional leaders and the local government under the auspices of the Office of Samoan Affairs. Members of the legal profession appeared as a group. A hearing was also held especially for *faifeaus*. [See Appendices for complete listing.]

## PART IV - RECOMMENDATIONS

## Introduction

Commission Recommendations are presented in six sections:

- (A) Main Recommendation;
- (B) Urgent Supporting Recommendations;
- (C) Recommendations for Constitutional Review;
- (D) Issues of Public Concern Social Issues;

(E) Issues for Negotiations with the Department of the Interior;

(F) Recommendations for Negotiations with the U.S. Congress.

Recommendations on two other issues assigned for Commission study - the Deeds

of Cession and Swains Island - are presented as part of the discussion of those issues.

## Two Final Points of Introduction

- To produce its recommendations, the Commission compiled, reviewed, and considered all the information gathered in studies and researches, staff presentations, testimonies, reports by government agencies, and public views. Information learned from study tours of areas outside American Samoa was useful in framing these recommendations. Some recommendations might have been better addressed directly to the attention of the ASG administration. They are included in this Report because they were raised in public hearings and indicate how the people feel about the effectiveness of government under the present political status.
- 2. In forming their recommendations, the Commission recognized the value of public views, in the belief that for any political status to succeed, it should be appreciated and favored by those who will be governed thereby. The Samoan public, from leaders to the rank and file, both on and off-island, overwhelming emphasized two major points:
  - (a) American Samoa must remain part of the American family of states and territories;
  - (b) be certain that a chosen status will not adversely affect customs and culture, and the perpetuation of the Samoan language.

## A. MAIN RECOMMENDATION

 American Samoa shall continue as unorganized and unincorporated territory and that a process of negotiation with the U.S. Congress for a permanent political status be initiated.

## Points:

- (i.) A specially tailored Act of Congress is needed to reaffirm the special protective provisions for lands and titles in the Constitution of American Samoa.
- (ii.) Such an Act may be passed without changing the present political status.
- (iii.) Federal courts have upheld similar special protections provision in the congressionally approved Covenant of CNMI.

## **B. SUPPORTING RECOMMENDATIONS - URGENT**

The Commission found the political status to be basically sound. However, American Samoa must make improvements and take corrective actions immediately to preserve opportunities for present and future generations.

## 1. Immigration

## Background and Policies

American Samoa is not included in the definition of the United States for U. S. immigration law purposes (8 USC 1101(a)(38)). The governing statutes are provided in Sections 41.0202 et seq. of the American Samoa Code Annotated.

The Legislature argues that this provision may have been a sound policy at the early stages of local legislative experience. After 60 years, it has certainly come of age and is sufficiently experienced and matured to handle all local legislation, not in conflict with federal laws. Every Territorial legislature presently enjoys that part of the democratic political system. Why not American Samoa? To allow the American Samoa Legislature the power to override is a step toward balance the power among the three branches of government, and a step forward in the march towards true self-government.

## **RECOMMENDATION**

## 22. Negotiate with DOI to allow the Fono's veto-override to stand final.

## F. ISSUES FOR NEGOTIATIONS WITH CONGRESS

The Commission is aware that only the U.S. Congress has power in matters of nationality, and that the Delegate is the voice of American Samoa in the U.S. Congress. By copy of this Report, the Commission brings these recommendations to his attention. By law, this Report, must be submitted to the Legislature and the Governor, and to those authorities, together with the Delegate to Congress, we leave the disposition of these issues.

## U.S. Nationality

Everyone born in American Samoa is a U.S. National. This includes children born to non-U.S. Nationals and non-U.S. citizens. There is a growing concern among native American Samoans that too many foreign nationals come to American Samoa and give birth to children who then become U. S. Nationals -- equating them to children of native American Samoans. These new nationals, born of two alien parents, are entitled to participate in the political and social life of the Territory. They can run for office and may

even be governor. If the present trend continues, the children of the native American Samoans may soon become a minority in their own home. The problem cries for an urgent solution.

## Parental Birthplace: 2000

| Parental<br>Birthplace | Total   | Both parents born in<br>American Samoa | Only one parent born<br>in American Samoa | Neither parent born<br>in American Samoa |
|------------------------|---------|--|---|--|
|                        | 57, 291 | 10,996                                 | 15,086                                    | 31,209                                   |
|                        |         |  |   |  |
|                        | 100%    | 19.3%                                  | 26.3%                                     | 54.4%                                    |

Source:

US Bureau of Census, American Samoa 2000 Census ASG Department of Commerce

Congress needs to be informed about the effects of the present growing situation on limited land and absence of natural resources, and the need to protect the customs and traditions of the Samoa people against the strong assault of foreigners and their cultures. Immediate action is necessary. Congress can pass a bill -- separate and independent of an Organic legislation for American Samoa -- to address the immediate serious problem.

## **RECOMMENDATION**

23. The Commission urges the Delegate to Congress to introduce and diligently pursue passage of a bill that restricts the status of U. S. National to children born in American Samoa of parents whose ancestors were residents of the Territory in 1900 and Swains Island in 1925.

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### U.S. Citizenship

*To become or not to become*? This is the question American Samoa has debated for a hundred years. At several points during its association with the United States, a number of proposals were introduced in the Congress to grant citizenship to American Samoans. H. R. 4500 was the last serious effort. It was sponsored by the Department of the Interior in 1948 as it was preparing to assume the administration of this Territory [See Appendices]. The bill polarized the community and led to serious political factionalism. DOI sent an officer to survey the local leaders and feel the pulse of the Territory on the issue (Gray, 1960). His report led to the withdrawal of the bill.

The traditional objections had always been: first, American Samoans would be subjected to federal taxation because all citizens must pay taxes; second, outsiders would buy up all Samoa lands.

We know now that taxes are based on income, not on nationality. Also, we know now that land is sold only by agreement of the owner, and that over 90 percent of land in American Samoa is communally owned and may not be alienated without consent of the entire family. In addition, there is very little land available for sale, and most purchases are made between Samoans themselves. Has such knowledge changed attitudes towards citizenship? Public views expressed to the Commission indicate the anti-citizenship attitude remain strong especially among the elders. One of their fears is that if we become U.S. citizens, the constitutional provisions protecting matai titles and communal lands would be more readily challenged.

American Samoans have a right to "immediate citizenship after establishing domicile in one" of the 50 states. (Van Dyke, 2006, 12). Domicile is established after 90 days of continued residence. "Congress could certainly pass legislation to grant citizenship to the people of American Samoa, in an isolated statute, (or) as a part of a more comprehensive organic act regulating affairs with American Samoa, or pursuant to

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a negotiated agreement revising and clarifying the status of American Samoa within the U. S. political community" (Van Dyke, 2006, 13).

In hearings on the mainland, off-island Samoans asked that ASG negotiate an arrangement where they can receive special consideration in their efforts to be naturalized because they are already U.S. Nationals. Some recommended that American Samoa change to a political status which guarantees U.S. citizenship. For while the margin of difference between citizenship and national is minor, there are cases where States and municipalities require U.S. citizenship to qualify for certain programs.

A special provision was approved by the U. S. Congress in Section 302 of the CNMI Covenant, which allowed the choice of becoming a U. S. citizen or remaining a U. S. National. The allowance was made mostly to meet the wishes of a small number of older residents of CNMI who felt much like their counterparts in American Samoa (Sen. Rep. No. 94-433, 94thth Cong., 1st Sess., p. 71 (1975)).

Can American Samoans become U.S. citizens under its current status as an unorganized and unincorporated territory? Yes.

Residents of our sister territories – Guam and Saipan – are U.S. citizens. Saipanese are happy and proud of their status. On the other hand, many Guamanians complain that they are "second class citizens" because they do not vote for the President of the United States.

U.S. citizenship is still the most precious national status in the world, because of the might of the country to which it belongs. As the world faces terrorism and other challenges, citizenship in the most powerful country in the world can be a most comforting and reassuring thought. Case 1:18-cv-00036-CW Document 55-3 Filed 04/24/18 Page 85 of 117 Appellate Case: 20-4017 Document: 010110346469 Date Filed: 05/12/2020 Page: 71

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### **RECOMMENDATION**

24. <u>The Commission recommends that American Samoa not seek</u><u>US citizenship for its people at this time.</u>

## PART V - ADDITIONAL TOPICS OF STUDY

Two additional topics were assigned for study by the Commission:

### 1. Deeds of Cession

### Introduction

Section 2.1402 (c) requires the Commission "to determine whether a single document is needed to set forth American Samoa's political status and relationship with the United States." The issue was raised by the Delegate to Congress on several occasions. He claims that as of today, American Samoa's government is not properly established, because there is no legal document that shows an agreement between Tutuila and Manu'a to unite. He recommends a General Assembly of Tutuila and Manua be convened to formally enter into a contract of unity and then to form a new government on the basis of that agreement (Faleomavega, 2006). Local leaders responded. The Fono wants the Commission to study the issue and *determine* if a single document is needed.

### <u>History</u>

The full history of events leading to the U.S. takeover of Manua and Tutuila in 1900 is well documented and need no further elaboration. Two events that occurred prior to 1900 should be pointed out as it puts the takeover in a more understanding perspective. In 1872, U.S. Commander Richard Meade made an agreement with Mauga and chiefs Case 1:18-cv-00036-CW Document 55-3 Filed 04/24/18 Page 86 of 117 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 72

# EXHIBIT 18

Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 73 United Nations Nations Unies

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THIRD INTERNATIONAL DECADE FOR THE ERADICATION OF COLONIALISM

Caribbean regional seminar on the implementation of the Third International Decade for the Eradication of Colonialism: the future for decolonization in the Non Self-Governing Territories: what are the prospects?

> Kingstown, Saint Vincent and the Grenadines 16 to 18 May 2017

## STATEMENT BY MR. DANIEL AGA

(AMERICAN SAMOA)

\*Revised version for the website submitted by the Author

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### Written Statement of the American Samoa Government On behalf of the Honorable Lolo Matalasi Moliga Governor of American Samoa

### Perspective submitted by Tapaau Dr. Daniel F. Aga

The Caribbean regional seminar on the "Implementation of the Third International Decade for the Eradication of Colonialism: the Future for Decolonization in the Non-Self-Governing Territories. What are the Prospects?"

National Insurance Services Headquarters, Kingstown, St. Vincent and the Grenadines 16-18 May, 2017

E muamua lava ona ou faatulou atu i lenei Seminā Faaitulagi, ae maise i lau susuga o le Taitai Fono ia Rafael Dario Ramírez Carreno, ma le mamalu o le Komiti Faapitoa e To'a 24. Tulou, tulou lava.

E faatulou atu fo'i i le Malo o St. Vincent ma Grenadines -- o le Malo o le To'afilemu ma le Amiotonu.

[First, allow me to respectfully acknowledge this important regional seminar, the Honorable Chairman Rafael Dario Ramirez Carreno and the Special Committee of 24. May I also acknowldge the Government of St. Vincent and the Grenadines – the Government of *Peace and Justice*. Salutations and Greetings.]

Tau ina avea lo'u leo faatauva'a, e fai ma sui o le Afioga o le Kovana ia Lolo Matalasi Moliga ma le faigamalo o Amerika Samoa, e momoli atu ai se faafetai mo lenei valaaulia ma avatu ai se faamatalaga e tusa ai ma ni isi o taumafaiga e tatau i le faagaoioiga o le atina'eina o le pulea ma le tauaveina e o matou tagata – lea e ona le Mālo – lo matou lava Mālo.

[On behalf of Governor Lolo M. Moliga (mo lee ngah) and the American Samoa Government, I offer our expression of gratitude for this invitation, and for the opportunity to comment on the efforts of our people to develop self-government.

O a'u nei o Tapaau Daniel Aga, le Faatonu o le Ofisa o Tulaga Faamalo, le Toe Iloiloina o le Faavae, ma Sootaga tauFeterale o Amerika Samoa.

[I am the Director of the American Samoa Office of Political Status, Constitutional Review, and Federal Relations.]

\*American Samoa Perspective 2017 UN Caribbean Regional Seminar

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### Part I: Are We a Colony?

### Chairman Rafael Carreno,

A) It is important to first acknowledge the UN General Resolution stating "all peoples have the right to self-determination."

Given our present government and way of life, do we, in American Samoa<sup>2</sup>, live under a regime for which colonization must be *eradicated*? Do we consider ourselves *a colonized people*?

The answer to both questions is "No. We do not."

Is there is a widespread yearning for political independence? "No. There is not."

The Committee of 24 might ask if our people do not at least *thirst for freedom*? We answer differently. The Constitution of American Samoa<sup>3</sup> gives our people the right to free and open elections.<sup>4</sup> We know and enjoy great constitutional freedoms such as the freedom of speech and freedom of religion.

B) One constitutional right *key* to **our survival as an indigenous people** is stated in Article I, section 3 of the Constitution of American Samoa making it the policy of our government "... to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language...."

By constitutional design, our traditional leaders are ensured a voice in each branch of government. We are the only US territory that maintains local control of immigration.<sup>5</sup> The indigenous land tenure system remains intact, with 90% of lands owned as communal family lands protected by local laws.<sup>6</sup> Close to 90% of the population is Samoan.<sup>7</sup>

The protection of the Samoan way of life is rooted in the two "Deeds of Cession" which established the legal beginnings of American Samoa as a territory of the United States.<sup>8</sup> In these two documents, the Samoan people ceded sovereignty of our islands to the US but required the protection of the Samoan way of life.

<sup>&</sup>lt;sup>1</sup> UN General Resolution 1514 (XV); 14 Dec 1960 and 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.

<sup>&</sup>lt;sup>2</sup> American Samoa is an unincorporated and unorganized territory. This group of islands is 76 square miles in size with a population of nearly 60,000.

<sup>&</sup>lt;sup>3</sup> Revised Constitution of American Samoa, 1967.

<sup>&</sup>lt;sup>4</sup> Qualifications of electors are established in Article II, section 7 of the American Samoa Constitution.

<sup>&</sup>lt;sup>5</sup> 8 USC 1101 [a] [38]. American Samoa is not included in the definition of the US for US Immigration law purposes.

<sup>&</sup>lt;sup>6</sup>A.S.C.A. tit. 37, particularly in 37.01, Titles to Land, and 37.02, Alienation of Land.

<sup>&</sup>lt;sup>7</sup> <u>American Samoa Statistical Yearbook 2012</u>. Table 1.16 Ethnic Origin and Race: 1980 to 2010.

<sup>&</sup>lt;sup>8</sup> The Tutuila and Aunu'u Deed of Cession, dated April 17, 1900, and Manu'a Deed of Cession, July 14,

<sup>\*</sup>American Samoa Perspective

<sup>2017</sup> UN Caribbean Regional Seminar

A 2017 court ruling re-confirmed the vitality of the Deeds<sup>9</sup>. The District Court of Hawaii concluded that the American Samoans' right to use their "property" to protect and continue their cultural and customary fishing practices is reserved by implication in the Deeds of Cession. The ruling is being appealed.<sup>10</sup>

C) Since the Political Status Study in 1970 and the second in 2006-2007<sup>11</sup>, the people of American Samoa have selected to maintain the *status quo*. One of the most important reasons for staying with the *status quo* lies in the substantial economic benefits made possible by our affiliation with the US. No one wants to risk the economic advantages available to families and the community.<sup>12</sup>

We see and admire the political independence of island nations close to us such as Samoa, Fiji, and Tonga. But while the importance of political independence is paramount, it is the overall **development** of political, economic, and social sectors that our people observe and consider.<sup>13</sup>

Why else this propensity to keep the status quo? Comparison data suggests that compared to independent island countries, non-self-governing territories have, for example, lower infant mortality rates and higher life expectancy rates.<sup>14</sup> This sense of *well-being* correlates favorably with our US relationship.

The desire **not to upset the equilibrium** may simply be a matter of personal and government priorities. Instead of investing our energies in trying to change political status, there is more concern with maintaining a solid enough employment rate to keep the economy from shrinking, being sensitive to raising taxes while raising government revenues, raising federal Medicaid caps to provide affordable healthcare, making jobs available for returning college graduates to prevent brain drain, hiring more qualified teachers to help decrease remedial college placement scores, the global impact of climate

<sup>12</sup> For example, Social Security, Medicare & Medicaid, Student Financial Aid for higher education, FEMA, local Retirement fund, Social Service programs like Food Stamps, School Lunch Program and many others.

<sup>13</sup> In 2010, the median household income was \$23,892. In 2010, about 57.8 percent of all persons or 54.4 percent of families were below the national poverty level. In spite of the contrast with federal levels, American Samoans who have visited neighboring island countries comment on a much wider gap between the elites and the rest of society whereas in American Samoa the basic needs of a higher percentage of families are better served.

<sup>14</sup> Jerome L. McElroy and Katherine Sanborn (2005). THE PROPENSITY FOR DEPENDENCE IN SMALL CARIBBEAN AND PACIFIC ISLANDS.

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<sup>1904 (</sup>collectively "the Deeds of Cession").

<sup>&</sup>lt;sup>9</sup> TERRITORY OF AMERICAN SAMOA VS. NATIONAL MARINE FISHERIES SERVICE, ET AL; CIVIL 16-00095 LEK-KJM; ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

<sup>&</sup>lt;sup>10</sup> The territory of American Samoa has asked the federal court in Honolulu to dismiss defendants' motion for reconsideration and to amend the court's judgment.

<sup>&</sup>lt;sup>11</sup> Final Report of the Future Political Status Study Commission 2007, American Samoa. The 1932 Bingham Commission stalled due to the Great Depression in the US.

change policies at the national level that can damage our fragile ecosystem, geographic isolation and the need to change the cabotage law, federal minimum wage policies and their impact on the fish canneries, road repair costs, public safety and the alarming increase in illegal drug traffic, the critical need to repair a 50 year water system and provide safe drinking water, decreasing land for agriculture and building food security, the increasing rate of non-communicable diseases and many other personal needs and public services aimed at giving our people "Good Government."

D) Yet no lesser figure than Mahatma Ghandi was known to have said "Good government is no substitute for self-government."

The rights and freedoms of American Samoa's constitution are about political processes more *internal* to the territory, whereas its non-self governing status is more concerned with the territory's *external* relationship with the Administering Power. In this external relationship, American Samoa has serious democratic deficiencies.<sup>15</sup>

### Part II. Relationship with the Administering Power

A) All US territories are subject to the unilateral authority of the "Territorial Clause".<sup>16</sup> At one time it was believed that commonwealth status represented a more *highly developed* relationship with the federal government.<sup>17</sup> After CNMI lost local control of immigration to the federal government<sup>18</sup> and Puerto Rico was subjected to the *PROMESA* law to deal with billions in public debt, it is questionable whether commonwealth status is significantly more self-governing.

B) As a result of the Insular Cases<sup>19</sup>, the outlying areas including American Samoa became unincorporated US territory, not recognized as an integral part of the US.

<sup>18</sup> The CNMI Covenant was unilaterally amended by the CNRA, thus altering the CNMI's immigration system. Specifically, CNRA § 702(a) amended the Covenant to state that "the provisions of the

<sup>&</sup>lt;sup>15</sup> Corbin, Carlyle (2017). "A Centennial of United States dependency - Decolonization or Colonial Reform for the U.S. Virgin Islands?" Paper presented at the 58th Annual Convention of the International Studies Association to the panel on Human Rights and Foreign Policy.

<sup>&</sup>lt;sup>16</sup> Article IV, Section 3, Clause 2 of the United States Constitution. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

<sup>&</sup>lt;sup>17</sup> CRS Report for Congress: US Insular Areas and Their Political Development. GAO-07-119 US Insular Areas. "A commonwealth is an unorganized territory US insular area that has established a more highly developed relationship – usually embodied in a written mutual agreement – with the federal government. The agreement between CNMI and the US was enacted by Pub. L. No. 94-241."

<sup>&#</sup>x27;immigration laws' (as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17))) shall apply to the Commonwealth of the Northern Mariana Islands." Further, under CNRA § 702(a), the "immigration laws," as well as the amendments to the Covenant, "shall...supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth."

<sup>&</sup>lt;sup>19</sup>A series of US Supreme Court cases from the early 20<sup>th</sup> century that determined how the US Constitution applies to US territories.

*Fundamental* rights are extended to all territories. If a constitutional right is not fundamental, its extension to a territory would require an Act of Congress.<sup>20</sup>

US constitutional rights not extended to American Samoa are:

- US citizenship<sup>21</sup>. People born in American Samoa are classified as US Nationals.<sup>22</sup>
- 2) the right to vote for the US President<sup>23</sup>; and
- the right for our delegate in Congress to vote for legislation in the full House<sup>24</sup>.

In spite of the democratic deficiencies, our loyalty and patriotism as a people is un-challenged. Our veterans deserve the highest honor and respect for their service and courage.

These deficiencies are made more acute when considering the sons and daughters of American Samoa who serve in the US Armed Forces.

When joining the US military, this young person swears an oath to "support and defend the Constitution of the United States ...."

Therein lies the irony of young men and women serving under a flag with a white star for each of the 50 states and nothing for any of the territories, no star to represent their island home.

How can the sons and daughters of American Samoa give their lives defending a constitution that does not *in turn* give them all its rights? This is the political inequality and unjust application of the US constitution that exists in the unincorporated jurisdictions of America.<sup>25</sup>

C) It's easy to assume that the way to rectify this inequality is for the people of American Samoa to become US citizens. After all, all other US territories enjoy the privilege. Hundreds of thousands of people around the world wish they could become

<sup>&</sup>lt;sup>20</sup> With regards to US territories, See: General Accounting Office, U.S. Insular Areas: Application of the U.S. Constitution, OGC-98-5 (1997).

<sup>&</sup>lt;sup>21</sup> 14<sup>th</sup> amendment, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
<sup>22</sup> 8 U.S.C. §1101 (a) (21), (22).

<sup>&</sup>lt;sup>23</sup> The 15th Amendment of the United States Constitution prohibits the federal and state governments from denying a citizen the right to vote based on that citizen's "race, color, or previous condition of servitude" <sup>24</sup> US Constitution Art I.

<sup>&</sup>lt;sup>25</sup> Note: The Director of the American Samoa Veterans Affairs Office says all veterans are eligible for the same benefits.

US citizens. Why not make a request to the US Congress to grant US citizenship to the people of American Samoa in the same way it was done for all other US territories?<sup>26</sup>

Such a question was raised in the recent case of *Tuaua v. United States of America, et. al.*<sup>27</sup> The question presented was "whether the 14<sup>th</sup> Amendment Citizenship Clause entitles persons born in American Samoa to birthright citizenship." However, the petitioners sought a judicial solution instead of a legislative (or congressional) one.

The democratically elected leaders of American Samoa opposed birthright citizenship.<sup>28</sup>

In a process of appeals, the case reached the doorsteps of the highest court in the land – the US Supreme Court. Citing *Reid v Covert (1957)* the courts ruled "it is 'impractical and anomalous' to impose citizenship by judicial fiat—where doing so requires [the courts] to override the democratic prerogatives of the American Samoan people themselves."<sup>29</sup>

This is the paradox of American Samoa – instead of securing further integration with birthright citizenship, our act of self-determination was to oppose it.

Why was it so critically important for our leaders to commit such an act?

Governor Lolo Moliga warned that birthright citizenship "would have created political complications with a devastating impact on our land tenure system and usurpation of our rights to determine the political format we wish to adopt."

For similar reasons, American Samoa has been careful not to federalize its courts or immigration. American Samoa is the only part of the US not formally included into

<sup>&</sup>lt;sup>26</sup> Guamanians, via the <u>Guam Organic Act of 1950</u>; Puerto Ricans, via the <u>Jones-Shafroth Act of 1917</u>; U.S. Virgin Islanders, via Public Law 414 of 1952 (<u>66 Stat. 237</u>, incorporated as 8 U.S. Code § 1406); and CNMI via Pub. L. No. 94-241. (Native Americans, via the <u>Indian Citizenship Act of 1924</u>.)

<sup>&</sup>lt;sup>27</sup> Petitioners objected to being treated like aliens in naturalization process, to the high costs of re-locating to US, not being eligible for certain federal and state jobs, not being eligible to vote and run for office, and denied the right to own guns. Many legal scholars have argued the Insular Cases are racist and discriminatory.

<sup>&</sup>lt;sup>28</sup> See: 2012 BRIEF OF THE HONORABLE ENI F.H. FALEOMAVAEGA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS; See also: IN THE Supreme Court of the United States LENEUOTI FIAFIA TUAUA, ET AL., Petitioners, v. UNITED STATES OF AMERICA, ET AL., Respondents. On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit; BRIEF IN OPPOSITION BY RESPONDENTS ASG AND THE OFFICE OF CONGRESSWOMAN AUMUA AMATA OF AMERICAN SAMOA.

<sup>&</sup>lt;sup>29</sup> United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT; Argued February 9, 2015 Decided June 5, 2015 No. 13-5272. LENEUOTI FIAFIA TUAUA, ET AL., APPELLANTS v. UNITED STATES OF AMERICA, ET AL., APPELLEES; AMERICAN SAMOA GOVERNMENT AND AUMUA AMATA, INTERVENORS; Appeal from the United States District Court for the District of Columbia (No. 1:12-cv-01143) Before: BROWN, Circuit Judge, and SILBERMAN and SENTELLE, Senior Circuit Judges.

the US federal court system.<sup>30</sup> Nor is it included in the definition of the US for US Immigration law purposes.<sup>31</sup>

Self-determination for the Samoan people must be based on the inextricable link between the land and the ocean and the Samoan way of life. A definition of selfdetermination that severs this link could have the kind of tragic and dehumanizing consequences experienced by colonized peoples.

### Part III: The Samoan Way of Life<sup>32</sup>

A) We are an indigenous people<sup>33</sup>. There is strong archaeological evidence that our ancestors inhabited these islands thousands of years before Western contact.<sup>34</sup> Today we live a distinct way of life with democratic and egalitarian features unique in Polynesian societies.<sup>35</sup> Our greatest hope is to pass on this way of life to future generations.

Also: Aga, Daniel (2001). "An Examination of American Samoa's Political Status." quote from published dissertation. Golden Gate University.

"Fa'aSamoa is a way of life meant to protect and ensure the peaceful survival and well-being of its people by maintaining the bonds of the *aiga* (extended family) through the practice of its *aganu'u* (culture). Strong and benevolent leadership must be exercised by the *matai* (family head) for the benefit of the family, the village of which the family is an integral part, and beyond. The continued practice of traditions and customs reaffirms those communal values upon which rest communal land ownership. Samoans hold that if the fundamental values and practices of the *fa'aSamoa* are not adhered to or effectively adapted to meet today's needs, the family will be put at great risk. This vulnerability exposes the family to the threat of fragmentation which if happens in Samoa, would make the fragmentation of the land inevitable and thus, end a way of life that has given Samoans continued ownership, is held to be the strongest protection against today's outside threats to the survival and integrity of the *fa'aSamoa*." (1993) <sup>33</sup> See Working Group on Indigenous Populations Report, U.N. Doc, E/CN.4/Sub.2/1986/7/Add.4, ¶ 379.

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems."

<sup>34</sup> "Lapita Culture." Encyclopædia Britannica School and Library Subscribers, best modified February 26, 2016. https://www.britannica.com/topic/Lapita-culture accessed November 1, 2016.

<sup>35</sup> Lowell D. Holmes (1980). Factors Contributing to the Cultural Stability of Samoa. Anthropological Quarterly. Vol. 53, No. 3 (Jul., 1980), pp. 188-197. Published by: <u>The George Washington University</u> Institute for Ethnographic Research

"Cultural change will be greatest in those cultures wherein the indigenous systems rewards the fewest number of people, and therefore there would be less tendency on the part of the majority to cling to the old when a new more *egalitarian* system presented itself."

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<sup>&</sup>lt;sup>30</sup> (US Senate 1978, 2) 1978 High Court of American Samoa Appeals Act. Committee on the Judiciary, Report no. 95-1107. 95<sup>th</sup> Congress.

<sup>31 8</sup> USC 1101 [a] [38].

<sup>&</sup>lt;sup>32</sup> See: Kneubuhl, John. The Samoan Identity.

Also: Flag Day Address by the Head of State of Samoa, His Highness Tui Atua Tupua Tamasese Ta'isi Efi, April 17, 2017; published in Samoa News.

The United Nations Declaration on the Rights of Indigenous Peoples Articles 3, 7, 8 state in part that –

> "Indigenous peoples have the right to self-determination ... ... the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide ... and the right not to be subjected to forced assimilation or destruction of their culture."

At the same time, Principle VIII of UN GA Resolution 1541 says an integrated status must conform to calls for the integration to be "on the basis of complete equality" with "equal status and rights of citizenship...."

### Chairman Carenno --

Does the notion of complete equality in Resolution 1541 support and reconcile with the UN's Declaration on the Rights of Indigenous Peoples? Or are there contradictory elements?

B) From the US perspective, the principles of equality and integration were codified in the US Constitution as the 14<sup>th</sup> amendment. It forbids states from denying "any person within its jurisdiction the **equal protection of the laws**."

If enforced vis-à-vis American Samoa's political relationship with the US, the equal protection clause would pose an existential threat to the Samoans.

We do understand how important it is to apply the US constitution in a manner that is **just** for all people. US history and government is taught in all schools in American Samoa. In public awareness sessions, students were reminded of the **selfevident truth** "all men are created equal" written into 1776 Declaration of Independence. They were told about the 1860's Civil War that freed the slaves. American Samoa celebrates the national holiday for Rev. Martin Luther King but did students really understand the 1960's civil rights movement against segregating public accommodations, education, and voting? Students were told of the societal ideal "Equal Justice Under Law" engraved on the front of the US Supreme Court building. The youth are taught to respect diversity, practice tolerance and have empathetic reciprocity for all people and residents in American Samoa.

Yet, we have self-evident truths of our own. They were not written down in books but were passed down in oral traditions from generation to generation. They tell us that these islands are our home and must be protected for the ones we love -- even for those yet unborn. No one takes the land with him or her. We are merely stewards. Ours is a **compelling interest** to *preserve who we are* as a distinct cultural community and to *make fundamentally important decisions* for ourselves.<sup>36</sup> Legally, American Samoa has a

<sup>&</sup>lt;sup>36</sup> Van Dyke, Jon (1996). A legal analysis regarding the Chamorro and Hawaiian right to selfdetermination was written for the University of Hawai'i Law Review.

compelling interest in preserving lands of Samoa for Samoans.<sup>37</sup> Put another way, the Samoans will defend their family lands with their very lives.

In a series of Supreme Court cases called the *Insular Cases*<sup>38</sup>, it was ruled that the US constitution should not be applied or enforced in the territories if the application is "**impractical or anomalous**." "'Impractical' means that the constitutional provision in question would not work because the culture of the island involved would make it unworkable. 'Anomalous' means that applying the provision in the same way it would be applied in a state could damage or destroy the indigenous culture or some aspect of it. Thus, requiring the free alienation of land by 'interposing' the constitutional requirements of the Equal Protection Clause would be both impractical and anomalous in this setting."<sup>39</sup>

A constitutional interpretation that would allow outsiders an equal right to own land might could undermine and eventually destroy Samoan culture. In *Wabol v Villacrusis*, it was explained that the "'Bill of Rights was not intended to operate as a genocide pact for diverse native cultures' – whether genocide is defined as physically destroying a people or killing their cultures." <sup>40</sup>

One attorney insists we are "a 116 year old colony of the United States filled with non-citizens and controlled by a Congress where our delegate has no vote."<sup>41</sup> But even if birthright citizenship became law by judicial fiat, the one exception the courts cannot make is to give citizens in a territory the voting rights that the Constitution grants only to citizens of the 50 states in the union.<sup>42</sup>

Some have argued, there is little to worry about -- that the laws already exist to protect our lands, even saying that losing our lands will never happen. But from the perspective of the people who have the most at risk and the most to lose, there is a great deal of *historical evidence* that says otherwise.<sup>43</sup> What happened to the Native

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<sup>&</sup>lt;sup>37</sup> Case note from Article I, section 3 states "Territory has a compelling interest in preserving lands of Samoa for Samoans; laws in conflict with the US not displace."

<sup>&</sup>lt;sup>38</sup> This sequence of US Supreme Court cases that determined how the US Constitution will be applied to the territories as long as it was not impractical or anomalous are: Downes v. Bidwell, 182 U.S. 244, 289 (1901), created the distinction between incorporated and unincorporated territories. Balzac v Porto Rico, 258 U.S. 298 (1922), adopted the incorporation doctrine meaning only fundamental rights apply to territories but did not say which rights are fundamental. Reid v Covert 354 U.S. 1, 75 (1957) Harlan, J., concurring, constructed a theory that constitutional provisions apply unless impractical and anomalous. King v Morton F.2d 1140 (D.C. Cir. 1975), developed a rule for the impractical and anomalous test. Wabol v Villacrusis 908 F.2d 411, 422 (9<sup>th</sup> Circuit, 1990), argued equal protection clause on land restrictions in CNMI impractical and anomalous. Boumediene v. Bush 553 U.S. 723 (2008), on constitutional rights of Guantanamo detainee. Tuaua v. USA (2015).

<sup>&</sup>lt;sup>39</sup> Laughlin, Stanley K. Jr. (2005). "Cultural Preservation in Pacific Islands: Still a Good Idea – And Constitutional". 27 University of Hawai'i Law Review 33. Public Law and Legal Theory Working Paper Series No. 73. June 2006.

<sup>40</sup> Wabol, 908 F2d at 424 and Wabol v. Villacrusis, 958 F.2d 1450, 1461 (1992).

<sup>&</sup>lt;sup>41</sup> Samoa News quote by attorney for the petitioners in Tuaua vs USA.

<sup>&</sup>lt;sup>42</sup> Quoting Howard Hills, former counsel for territorial status affairs in the Executive Office of the President and the U.S. Department of State during the Reagan Administration.

<sup>&</sup>lt;sup>43</sup> See: Robert H. Stauffer, Robert H. (2004). Kahana: How the Land Was Lost. Honolulu: University of

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Americans? What happened to the Native Hawaiians? What has happened to the Chamorro? The real danger is not equal protection itself. It's the **toxic mix** of free-market profiteering, artificially altered demographics, and legally sanctioned access that could set us down the slippery slope or deliver that fatal blow.<sup>44</sup> We must exercise all the due diligence we can to prevent this from happening.

We understand our US constitutional rights are limited. But for now, we prefer the **compromise**<sup>45</sup> that limits enforcement of the US constitution's equal protection clause to limit the risk to Samoan lands.

C) This is not to say that Samoans haven't integrated into the US in other ways. American Samoans carry US passports and do not require visas or permits to travel, reside, and work in the US. They can become naturalized as US citizens with equal rights in the states.<sup>46</sup> In 2015, 296 US Nationals became naturalized US citizens.<sup>47</sup>

Since 1951 with the first large-scale migration to the US, generations of Samoans have been born and raised as Samoan-Americans. More than 180,000 people of Samoan descent live stateside. This is 3 times the population of American Samoa. After the Native Hawaiians, **Samoan-Americans** are the second largest Pacific Islander group in the U.S.<sup>48</sup>

Samoan communities or "urban villages" have been established along the West coast and across the nation. Strong family, church, and cultural connections are maintained between the islands and the states.

### IV. What are the future prospects for decolonization in American Samoa?

The Regional Seminar asks "What are the Prospects for the Future for Decolonization in the Non- Self-Governing Territories?"

for respondents/appellees and American Samoa Government.

<sup>47</sup> 2015 Yearbook of Immigration Statistics published by Department of Homeland Security.

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Hawaii Press. Also: Kinalamten Pulitikåt: Siñenten I Chamorro: Issues in Guam's Political Development: The Chamorro Perspective, by the Political Status Education Coordinating Commission, 1996, pp. 2-16.
 Also: "Pa'a Ke Aupuni" The Reel History of Hawaii at <u>http://www.kamakakoi.com</u>. And: Banner, Stuart (2005). <u>How the Indians Lost Their Land Law and Power on the Frontier</u>. Harvard University Press.
 <sup>44</sup> Jacobs, Wilbur. <u>The Fatal Confrontation</u>. "If there is a probable test for survival of a native people, it is found in the answer to the question "how much of their land did they retain after the alien invasion?"
 <sup>45</sup> Or what Michael Williams called a "deliberate distance." Michael Williams was the Counsel of Record

<sup>&</sup>lt;sup>46</sup> See "A Guide to Naturalization, U.S. Citizenship and Immigration Services, U.S. Dep't of Homeland Security, M-476." See also https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartA-Chapter2.html and https://www.uscis.gov/citizenship/learners/apply-citizenship. Or go to: https://www.dhs.gov/how-do-i/become-citizen.

<sup>&</sup>lt;sup>48</sup> 2010 US Census as cited in "Honolulu Mayor honors National Samoan Language Week". Samoa News. 2012-06-05, Retrieved 2012-06-0.

A) To help answer questions like these, Governor Lolo Moliga established in 2016 and for the first time, an "Office of Political Status, Constitutional Review, and Federal Relations".<sup>49</sup>

Its duties include raising awareness in a non-partisan matter and working with government *and the public* on constitutional amendments or other political status issues that may be presented as referendums to the voters of American Samoa. No referendum or plebiscite is planned at this time.

Governor Moliga's executive order was preceded by a **"Panel on Self-Determination."** Representatives from Guam, US Virgin Islands, and American Samoa were selected because these are the three US territories remaining on the UN list of non-self-governing territories. The panel was hosted by then Assistant Secretary of the Department of Interior, Esther Kiaaina, and the Director of the Office of Insular Affairs, Nikolao Pula. Later that year, grant awards were provided to each territory for public education and development.

The Governor established an Advisory Council for the Office. The Secretary of Samoan Affairs is Chair and the Attorney General is Co-Chair.

Early efforts by the Office focused on a long-term public education program by developing curriculum in the public schools, training teachers, and developing learning resources.<sup>50</sup> Student forums were hosted at the island's only community college<sup>51</sup> and for the high schools.<sup>52</sup> The Office will continue its outreach to the workplace, to the villages, and will use various forms of media.

**Before initiating any change** in our political status, it would be prudent to consult with the "*Tamā o le Atunuu*" or the "Fathers of the Country" whether they are with the Office of Samoan Affairs, the Senate, or in traditional village or district councils. The wisdom of women is a valuable resource as well.

B) As for options -- The UN provides three options for a territory to demonstrate a full measure of self-government:

- (a) Emergence as a sovereign independent State;
- (b) Free Association with an independent State; or
- (c) Integration with an independent State."53

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<sup>&</sup>lt;sup>49</sup> Executive Order 002-2106 by Governor Lolo Matalasi Moliga, American Samoa Government.

<sup>&</sup>lt;sup>50</sup> Go to www.faavaeoamerikasamoa.com. This is the Office website.

<sup>&</sup>lt;sup>51</sup> Jan. 26, 2016 ASCC Lecture Hall Student Forum

<sup>&</sup>lt;sup>52</sup> Political Status and Constitutional Review Student Forum, "O Lou Faavae ma Lou Malo". April 10-11, 2017 at the Lee Auditorium.

<sup>&</sup>lt;sup>53</sup> Principle VI; UN General Resolution 1541 (XV); 15 Dec 1960.

At the same time, the UN recognizes that the "specific characteristics and the aspirations of the peoples of the Territories require flexible, practical and innovative approaches to the options for self-determination...."

### Chairman Carreno,

### What does a flexible and innovative approach to self-determination entail?

# What qualitative considerations are there when considering definitions for a "full measure of self-government?"

Without a flexible and innovative approach, prospects for decolonization in the non-self-governing territory of American Samoa are limited.<sup>54</sup> Otherwise, we would have to *radically* change the entire territorial framework. One would have to imagine overturning the Insular Cases, amending the US Constitution's territorial clause, and overcoming the politics between US political parties.<sup>55</sup> This could cease the differentiation between states and territories, remove the unilateral authority of Congress over the territories, and provide American Samoa with the same level of representation in Congress. A change like this would be no small miracle for the territories.

Or, if American Samoa were to pursue free association, it would no longer be under the territorial clause and could exist as a sovereign nation. American Samoa would then have to negotiate the terms of its free association with the US.<sup>56</sup>

### C) What are the chances of American Samoa engaging in an authentic political process?

i. An authentic process would be **vested in the authority of the people** to freely choose its political status.<sup>57</sup> American Samoa's electorate has never had a political status

<sup>&</sup>lt;sup>54</sup> Wesley-Smith, Terence (2007). THE LIMITS OF SELF-DETERMINATION IN OCEANIA. Social and Economic Studies, Vol. 56, No. 1/2, The Caribbean and Pacific in a New World Order (March/June 2007), pp. 182-208. On the limits of nation-state model.

<sup>&</sup>lt;sup>55</sup> Note: If the territories had voting representatives, would they be Republican or Democrat? Partisanship quarrels between the two parties prevent voting rights for territorial delegates because their votes could impact a measure's outcome. Territorial delegates are typically Democrats.

<sup>&</sup>lt;sup>56</sup> Models are the Republics of Palau, FSM, and the Marshalls; New Zealand's freely associated states like Cook Islands and Niue; Greenland and Denmark.

<sup>&</sup>lt;sup>57</sup> The People of American Samoa Are Entitled to Choose Their Own Political Arrangements. (from "BRIEF IN OPPOSITION BY RESPONDENTS AMERICAN SAMOA GOVERNMENT AND THE OFFICE OF CONGRESSWOMAN AUMUA AMATA OF AMERICAN SAMOA; May 11, 2016. MICHAEL F. WILLIAMS *Counsel of Record*) -- "Consent of the governed is the foundational premise of a democratic republic. *Id.* at 20a (*citing Kennett v. Chambers*, 55 U.S. (14 How.) 38, 41 (1852)). As Justice Story explained: [C]ivil society has its foundation in a voluntary consent or submission; and, therefore, it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, *Multitudo, juris consensu et utilitatis communione sociata*; that is . . . a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.

Joseph Story, Commentaries on the Constitution of the United States 225-26 (Thomas M. Cooley ed., 4<sup>th</sup> ed. 1873) (footnotes omitted). Accordingly, the state "arises from, and its legitimacy depends upon, the

plebiscite to freely choose the kind of political relationship it wants with the United States. This means our form of government is vested in the authority of the US Congress and the US Executive but not in the authority of the people of American Samoa.

Puerto Rico has had 4 plebiscites with the 5<sup>th</sup> taking place in June 2017.<sup>58</sup> The Puerto Rico experience can provide American Samoa with a list of "Lessons Learned" for developing a plebiscite of its own.

ii. When will American Samoa have a plebiscite? The 1929 law<sup>59</sup> accepting the Deeds of Cession requires Congress to provide for a government for the islands but Congress has never passed an organic act to organize a government for American Samoa. Instead of an organic act approved by Congress, American Samoa developed a constitution that was approved by the Secretary of Interior and by the voters in 1967.<sup>60</sup>

It has been 88 years since the 1929 Act.

iii. Congressional action on the 1929 law could mean changes in our internal governance or in our external relationship with the US. To the extent the 1929 law is enacted to shape our internal local government, American Samoa could seek **transfers of authority** to strengthen local self-government. In spite of having our own constitution, electing our Governor, and electing our own Legislature, there is *still work to be done*. For example, the Secretary of Interior still has a role in the veto-override process.<sup>61</sup> The Secretary still appoints the Chief Justice<sup>62</sup>. The Secretary can still intervene in local court decisions.<sup>63</sup>

express or tacit consent of individuals. The state, in turn, may rightfully exercise its authority only in accordance with the terms of that 'social contract,'"

<sup>58</sup>Go to: <u>http://plebiscito2017.ceepur.org/en/Documents.html</u>. Or for a more user-friendly site, go to: <u>https://ballotpedia.org/Puerto Rico Referendum\_(2017)</u>.

59 Title 48 U.S.C. § 1661, 1662.

<sup>60</sup> Keesing, F. (1951). Memoranda Relating to the Political Situation in American Samoa. This contains formerly classified information. In 1950's, the Samoans objected to an organic act after learning Congress had removed clauses proposed in an organic act for Guam which would have protected Chamorro land and culture. Congress labeled these clauses "Un-American." If an organic act would not protect Samoan lands and culture, Samoans wanted nothing to do with it.

Also: Gray, A. (1960). <u>Amerika Samoa.</u> "An organic act would bring into local effect all of the provisions of the Constitution of the US. In 1950, the Fono appointed a committee ... to safeguard the matai system against the pending organic act (HE 4500). [The first DOI-appointed Governor] Phelps Phelps brought the personal assurance of Secretary Chapman "that no unacceptable organic act would be rammed down the throats of the Samoans... and he opposed the pending act firmly and consistently." (p. 261)

<sup>61</sup> The veto-over ride referendum has been defeated 4 times in 2008, 2010, 2012 and 2014. 2010 was the "all or nothing" ballot.

62 Article III, section 3: Appointments, AS CON.

<sup>63</sup> From Arnold Leibowitz 2006 "Report to the Political Status Study Commission" on a critique of the role of the Secretary of Interior. "The power of the Secretary of International Affairs arose once more in the case of <u>Corp. of the Presiding Bishop of the Latter Day Saints (LDS) v. Hodel</u>. There, the LDS appealed to the Secretary of the Interior to review and overturn a decision of the High Court of American Samoa regarding ownership of a parcel of land on Tutuila Island. Once again, the Assistant Secretary for OIA

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American Samoa understands the value of its partnership with the Department of Interior and respects the history of this relationship. The people of American Samoa still felt a constitutional amendment was needed to, in effect, transfer the authority of the Secretary of Interior to the American Samoa Government. This proposal did not make it past the local vote.<sup>64</sup> Even if it did, any amendment to American Samoa's constitution requires congressional approval.<sup>65</sup>

iv. The US constitution allows for three **political status options:** independence, statehood, and the territorial option.<sup>66</sup> All options should be considered.

Any future *territorial* political status option for American Samoa would be based on two equally important considerations:

1) keeping and maintaining a strong relationship with the United States and

2) protecting the Samoan way of life.<sup>67</sup>

Many lessons have been learned from Puerto Rico's quest for a permanent political status.<sup>68</sup> In the upcoming June 2017 Puerto Rico plebiscite, voters are given a choice of three options: independence/free association, statehood, or the current territorial status.<sup>69</sup>

v. However, simply offering general categories seems insufficient. Voters will want to know if these general categories address issues of importance to them. They will need to know the specific risks or consequences *within* each option.<sup>70</sup>

confirmed his power to overturn the High Court decision: . . . Pursuant to 48 U.S.C. sec. 1661(c) and Presidential Executive Order No. 10264, the Secretary of the Interior ("Secretary") exercises "all civil, judicial, and military powers of government in American Samoa." *Therefore, it is within the authority of the Secretary to review the decision and determine whether to intervene.* . . Nor does this case appear to present such a clear abuse of judicial discretion that intervention is dictated. For these reasons I choose not to intervene. . . By copy of this decision to the Chief Justice of the High court, I am asking that he undertake to notify the named parties in <u>Reid v. Pualloa</u> of my decision and that he include a copy if it in the court records of the case.<sup>63</sup> (Emphasis Supplied)

<sup>54</sup> In the 2010 Constitutional Convention, it was proposed the "Secretary shall not review, overturn or intervene in the appeal of a decision of the High Court of American Samoa." The 2010 referendum had packaged all the proposed amendments in an all-or-nothing format. This proposal was not approved because the entire package was not.

<sup>66</sup> Raben, Robert (2001). Assistant Attorney General, Office of Legislative Affairs, US Department of Justice. Letter to Frank Murkowski, US Senator, to President Clinton on status options for Puerto Rico.
<sup>67</sup> Sustainable and appropriate economic development would be the third central consideration. Defense and foreign affairs would be treated in its own separate category.

<sup>70</sup> Wolfers, Edward Paul (2015). "Acceleration, Innovation, and Self-Determination: Taking Stock and Looking Ahead, with particular reference to the remaining non-self governing territories in the Pacific." Discussion Paper presented at Regional Seminar, Managua, Nicaragua, 2015.

\*American Samoa Perspective 2017 UN Caribbean Regional Seminar

<sup>65 48</sup> U.S. Code § 1662a. Pub. L. No. 98-213, Dec 8, 1983, 97 Stat. 1462.

<sup>&</sup>lt;sup>68</sup> Garrett, Sam. (2011). "Political Status of Puerto Rico: Options for Congress." Congressional Research Service, RL 32933.

<sup>&</sup>lt;sup>69</sup> These 3 options will be on the June 2017 Puerto Rico plebiscite pursuant to Senate Bills 51 and 427 of the Puerto Rico Legislature. The result of the referendum does not bind Congress to take action.

Individuals in American Samoa have asked questions like:

- 1) Why do this now? Are we in crisis?
- 2) Who said to do such a thing? Is it really our right?
- 3) What advantages would a change give us that we don't already have?
- 4) How can we be assured we will not be *worse off* than we are now?
- 5) Will the US reduce its funding to us if we change?
- 6) What will it mean if American Samoa chooses the status quo?

Is a **comprehensive or incremental approach** to developing self-government the right one? Before deciding on which approach, the public will need to understand the pros and cons of each approach.

# D) Do the people of American Samoa know what they want?<sup>71</sup> What are their hopes and aspirations?

The Political Status, Constitutional Review & Federal Relations Office has developed an *aspirational* set of principles pursuant to the rights of the American Samoan people to self-determination.<sup>72</sup> Subject to an island-wide discussion and review<sup>73</sup>, these principles would help "update" and strengthen the legality and stability of our relationship with the US for the long term. If the people of American Samoa can successfully negotiate an agreement based on these principles, it would serve to:

- clarify the purposes, function, intentions and promises of the Deeds of Cession (and determine whether or not a *new* covenant is needed);
- establish whether American Samoa's Constitution requires further explicit action to serve as the territory's organic act;
- solidify the rights and make clear the responsibilities of the American Samoan people to its lands, marine and natural resources,
- solidify rights to cultural heritage, and the specific role played by matai<sup>74</sup> in American Samoa;
- limit the types of legislation that Congress can impose upon the people of the American Samoa;
- protect and strengthen the internal self-governance of the island consistent

<sup>&</sup>lt;sup>71</sup> as asked by OIA Director Pula at the DOI Panel on Self-Determination.

<sup>&</sup>lt;sup>72</sup> Adapted from the late Jon Van Dyke's 2006 power-point presentation to the American Samoa Future Political Status Commission.

<sup>&</sup>lt;sup>73</sup> Faleomavaega, Eni F. H. (1995). <u>Navigating the Pacific: a Samoan Perspective</u>. The late Congressman Faleomavaega said there should be a "national dialogue" to determine what the people want.

<sup>&</sup>lt;sup>74</sup> See: A.S.C. 1, secs. 701-804 (1973) on registration of matai titles and 1 A.S.C. sec. 751 for statutory eligibility requirements for the matai title.

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with US laws; and

protect the right to control immigration & customs.

A more formal political relationship between the United States and American Samoa would support economic ties with a greater willingness by the federal government to:

- enact laws that promote investments, tax incentives and territory-specific economic federal policies
- enact waivers and exceptions to laws that recognize the unique geographic<sup>75</sup> and physical needs of the islands as well as the impact of international treaties; and
- build a closer economic relationship between the United States and American Samoa and determine appropriate and sustainable economic development of American Samoa's islands.<sup>76</sup>

At all stages, we would need to consult with local leaders, the public, Samoan communities off-island, the Department of Interior, the US Executive branch, Congress, and even regional and international persons<sup>77</sup>. There may be legal challenges in the federal courts. Whatever those challenges, we must ensure that our form of government is firmly vested in the authority of the people of American Samoa. This is **our right and our duty**. We have only to proclaim it.

We recognize there are many truths in our relationship and destiny with the United States. As we navigate the waters of an uncertain future, we cannot allow the political process to be solely dictated by others or taken completely out of our hands. It is a struggle we cannot afford to lose because future generations depend on it.

Still we believe ourselves to be fortunate. We are a people of great faith and we believe "o Samoa e muamua le Atua." (Samoa God is first).

Thank you Chairman Carreno and the Committee of 24. *Soifua* (Farewell).

<sup>&</sup>lt;sup>75</sup> such as the Cabotage law, (Pub. L. 109–304, § 4, Oct. 6, 2006, 120 Stat. 1487.) 46 U.S. Code – SHIPPING.

<sup>&</sup>lt;sup>76</sup> Defense and foreign affairs would be treated in its own separate category.

<sup>&</sup>lt;sup>77</sup> "In a letter dated 2 November 2006 addressed to the delegate of American Samoa to the United States House of Representatives, the United States Assistant Secretary of State for Legislative Affairs, Jeffrey T. Bergner... indicated that the status of the insular areas regarding their political relations with the federal Government was an internal United States issue and not one that came under the purview of the Special Committee... that the Special Committee had no authority to alter in any way the relationship between the United States and those territories and had no mandate to engage the United States in negotiations on their status." See A\_AC.109\_2016\_1.pdf.

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# EXHIBIT 19

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# 2010 Census Summary File 1

Issued September 2012

2010 Census of Population and Housing

SF1/10-4 (RV)

**Technical Documentation**  $\subseteq$ 5  $\leq$ 



U.S. Department of Commerce Economics and Statistics Administration U.S. CENSUS BUREAU For additional information concerning the files, contact the Customer Liaison and Marketing Services Office, Customer Services Center, U.S. Census Bureau, Washington, DC 20233, or phone 301-763-INFO (4636).

For additional information concerning the technical documentation, contact the Administrative and Customer Services Division, Electronic Products Development Branch, U.S. Census Bureau, Washington, DC 20233, or phone 301-763-8004.

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# 2010 Census Summary File 1

2010 Census of Population and Housing

Issued September 2012

SF1/10-4 (RV)

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### **GROUP QUARTERS**

### **INSTITUTIONAL GROUP QUARTERS**

### **Correctional Facilities for Adults**

- 101 Federal Detention Centers
- 102 Federal Prisons
- 103 State Prisons
- 104 Local Jails and Other Municipal Confinement Facilities
- 105 Correctional Residential Facilities
- 106 Military Disciplinary Barracks and Jails

### **Juvenile Facilities**

- 201 Group Homes for Juveniles (Non-Correctional)
- 202 Residential Treatment Centers (Non-Correctional)
- 203 Correctional Facilities Intended for Juveniles

### **Nursing Facilities/Skilled-Nursing Facilities**

301 Nursing Facilities/Skilled-Nursing Facilities

### **Other Institutional Facilities**

- 401 Mental (Psychiatric) Hospitals and Psychiatric Units in Other Hospitals
- 402 Hospitals With Patients Who Have No Usual Home Elsewhere
- 403 In-Patient Hospice Facilities
- 404 Military Treatment Facilities With Assigned Patients
- 405 Residential Schools for People With Disabilities

### NONINSTITUTIONAL GROUP QUARTERS

### **College/University Student Housing**

501 College/University Student Housing

### **Military Quarters**

- 601 Military Quarters
- 602 Military Ships

### **Other Noninstitutional Facilities**

- 701 Emergency and Transitional Shelters (With Sleeping Facilities) for People Experiencing Homelessness
- 702 Soup Kitchens
- 704 Regularly Scheduled Mobile Food Vans
- 706 Targeted Non-Sheltered Outdoor Locations
- 801 Group Homes Intended for Adults
- 802 Residential Treatment Centers for Adults

### Code Lists

### RACE—Con.

### 300–399, A01–Z99 AMERICAN INDIAN AND ALASKA NATIVE—Con.

### CANADIAN AND LATIN AMERICAN INDIAN-Con.

| W81<br>W82<br>W83<br>W84<br>W85<br>W86<br>W87<br>W88<br>W87<br>W88<br>W89<br>W90<br>W91<br>W90<br>W91<br>W92<br>W93<br>W94<br>W95<br>W96<br>W97-X24                                  | South American Indian—Con.<br>Tehuelche<br>Tupi<br>Zaporo<br>Argentinean Indian<br>Bolivian Indian<br>Brazilian Indian<br>Chilean Indian<br>Colombian Indian<br>Ecuadorian Indian<br>Ecuadorian Indian<br>Guyanese South American Indian<br>Paraguayan Indian<br>Peruvian Indian<br>Not Used<br>Uruguayan Indian<br>Venezuelan Indian<br>South American Indian, not elsewhere classified<br>Not Used |
|--|--|
| X25<br>X26–Z99   | <b>Spanish American Indian</b><br>Spanish American Indian<br>Not Used  |
| 400–499  | ASIAN  |
| 400<br>401<br>402<br>403<br>404<br>405<br>406–409<br>410<br>411<br>412<br>413–419<br>420<br>421<br>422<br>423<br>424–429<br>430<br>431<br>432–439<br>440<br>441<br>442<br>443<br>444 | Asian Indian (Checkbox)<br>Asian Indian<br>Bangladeshi<br>Bhutanese<br>Burmese<br>Cambodian<br>Not Used<br>Chinese (Checkbox)<br>Chinese<br>Taiwanese<br>Not Used<br>Filipino (Checkbox)<br>Filipino<br>Hmong<br>Indonesian<br>Not Used<br>Japanese (Checkbox)<br>Japanese<br>Not Used<br>Korean (Checkbox)<br>Korean<br>Laotian<br>Malaysian<br>Okinawan  |

RACE—Con.

| 400-499   | ASIAN—Con.   |
|---|--|
| 445   | Pakistani  |
| 446   | Sri Lankan   |
| 447   | Thai   |
| 448–449   | Not Used   |
| 450   | Vietnamese (Checkbox)  |
| 451   | Vietnamese   |
| 452–459   | Not Used   |
| 460   | Other Asian (Checkbox)   |
| 461   | Not Used   |
| 462   | Asian  |
| 463   | Asiatic  |
| 464   | Not Used   |
| 465   | Mongolian  |
| 466   | Oriental   |
| 467   | Whello   |
| 468   | Yellow   |
| 469   | Indo-Chinese   |
| 470<br>471  | lwo Jiman<br>Maldivian   |
| 471   |  |
| 472   | Nepalese<br>Singaporean  |
| 473 474-479   | Not Used   |
| 480   | Multiple ASIAN responses   |
| 481–499   | Not Used   |
| 101 105   |  |
|   |  |
| 500-599   | NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER   |
| 500-599   | NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER Polynesian  |
| <b>500–599</b><br>500   |  |
|   | Polynesian   |
| 500<br>501<br>502   | <b>Polynesian</b><br>Native Hawaiian (Checkbox)  |
| 500<br>501<br>502<br>503  | <b>Polynesian</b><br>Native Hawaiian (Checkbox)<br>Native Hawaiian   |
| 500<br>501<br>502<br>503<br>504–509   | <b>Polynesian</b><br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used  |
| 500<br>501<br>502<br>503<br>504–509<br><mark>510</mark>   | <b>Polynesian</b><br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br><mark>Samoan (Checkbox)</mark>  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511   | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512  | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513   | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514  | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515   | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan   |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514  | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519  | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520   | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521  | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian   |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522                                 | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian<br>Chamorro   |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522<br>523–529                      | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian<br>Chamorro<br>Not Used   |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522<br>523–529<br>530               | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian<br>Chamorro<br>Not Used<br>(see under Other Pacific Islander)                     |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522<br>523–529<br>530<br>531        | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian<br>Chamorro<br>Not Used<br>(see under Other Pacific Islander)<br>Mariana Islander |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522<br>523–529<br>530<br>531<br>532 | PolynesianNative Hawaiian (Checkbox)Native HawaiianHawaiianPart HawaiianNot UsedSamoan (Checkbox)SamoanTahitianTonganPolynesianTokelauanNot UsedMicronesianGuamanian or Chamorro (Checkbox)GuamanianChamorroNot Used(see under Other Pacific Islander)Mariana IslanderMarshallese  |
| 500<br>501<br>502<br>503<br>504–509<br>510<br>511<br>512<br>513<br>514<br>515<br>516–519<br>520<br>521<br>522<br>523–529<br>530<br>531        | Polynesian<br>Native Hawaiian (Checkbox)<br>Native Hawaiian<br>Hawaiian<br>Part Hawaiian<br>Not Used<br>Samoan (Checkbox)<br>Samoan<br>Tahitian<br>Tongan<br>Polynesian<br>Tokelauan<br>Not Used<br>Micronesian<br>Guamanian or Chamorro (Checkbox)<br>Guamanian<br>Chamorro<br>Not Used<br>(see under Other Pacific Islander)<br>Mariana Islander |

### Code Lists

F-45
RACE—Con.

| 500-599        | NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER—Con.                           |     |
|----------------|---|-----|
|                | Micronesian—Con.  |     |
| 535            | Kosraean  |     |
| 536            | Micronesian   |     |
| 537            | Pohnpeian   |     |
| 538            | Saipanese   |     |
| 539            | I-Kiribati  |     |
| 540            | Chuukese  |     |
| 541            | Yapese  |     |
|                | Melanesian  |     |
| 542            | Fijian  |     |
| 543            | Melanesian  |     |
| 544            | Papua New Guinean   |     |
| 545            | Solomon Islander  |     |
| 546            | Ni-Vanuatu (New Hebrides Islander)  |     |
|                | Other Pacific Islander  |     |
| 530            | Other Pacific Islander (Checkbox)   |     |
| 547            | Pacific Islander  |     |
|                |   |     |
| 548-549        | Not Used  |     |
| 550<br>551–599 | Multiple NATIVE HAWAIIAN and OTHER PACIFIC ISLANDER responses<br>Not Used |     |
|                |   |     |
| 600–999        | SOME OTHER RACE   |     |
| 600            | Some Other Race (Checkbox)  |     |
| 601            | Argentinean   |     |
| 602            | Bolivian  |     |
| 603            | Californio  |     |
| 604            | Central American  |     |
| 605            | Chicano   |     |
| 606            | Chilean   |     |
| 607            | Colombian   |     |
| 608            | Costa Rican   |     |
| 609            | Cuban   |     |
| 610            | Ecuadorian  |     |
| 611            | Salvadoran  |     |
| 612            | Guatemalan  |     |
| 613            | Hispanic  |     |
| 614            | Honduran  |     |
| 615            | Latin American  |     |
| 616            | Mestizo   |     |
| 617            | Mexican   |     |
| 618            | Nicaraguan  |     |
| 619            | Panamanian  |     |
| 620            | Paraguayan  |     |
| 621            | Peruvian  |     |
| 622            | Puerto Rican  |     |
| 623            | Morena  |     |
| 624            | South American  |     |
| 625            | Spanish   |     |
| 626            | Spanish-American  |     |
|                | •                                   |     |
| F-46           | c c   | -od |

RACE—Con.

| 600-999    | SOME OTHER RACE—Con.                 |
|------------|--------------------------------------|
| 627        | Sudamericano                         |
| 628        | Uruguayan                            |
| 629        | Venezuelan                           |
| 630        | Spaniard                             |
| 631        | Tejano                               |
| 632        | Cayman Islander                      |
| 633–639    | Not Used                             |
| 640        | Dominican/Dominican Republic         |
| 641        | Not Used                             |
| 642        | Belizean                             |
| 643        | Bermudan<br>Aruba Jalandar           |
| 644<br>645 | Aruba Islander<br>Not Used           |
| 646        | Guyanese                             |
| 647        | Surinamer                            |
| 648        | Sudanese                             |
| 649        | Amerasian                            |
| 650        | Eurasian                             |
| 651        | Brazilian                            |
| 652        | Brown                                |
| 653        | Bushwacker                           |
| 654        | Not Used                             |
| 655        | Cape Verdean                         |
| 656        | Chocolate                            |
| 657        | Coe Clan                             |
| 658        | Coffee                               |
| 659        | Cosmopolitan                         |
| 660        | Issues                               |
| 661        | Jackson White                        |
| 662        | Melungeon                            |
| 663        | Mixed                                |
| 664<br>665 | Ramp                                 |
| 665<br>666 | Wesort<br>Mulatto                    |
| 667        | Mulatto<br>Moor                      |
| 668        | Biracial                             |
| 669        | Creole                               |
| 670        | Indian                               |
| 671        | Turk                                 |
| 672        | Half-Breed                           |
| 673        | Rainbow                              |
| 674        | Octoroon                             |
| 675        | Quadroon                             |
| 676        | Multiracial                          |
| 677        | Interracial                          |
| 678        | Multiethnic                          |
| 679        | Multinational                        |
| 680–689    | Not Used                             |
| 690        | Multiple SOME OTHER RACE responses   |
| 691–698    | Not Used                             |
| 699        | Other race, not elsewhere classified |
| 700–999    | Not Used                             |

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## EXHIBIT 20

Census 2010 News | U.S. Census Bureau Releases 2010 Census Population Counts for A... Page 1 of 2 Case 1:18-cv-00036-CW Document 55-3 Filed 04/24/18 Page 116 of 117 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 102

## U.S. Census Bureau News

U.S. Department of Commerce • Washington, D.C. 20233 FOR IMMEDIATE RELEASE: WEDNESDAY, AUG. 24, 2011

## U.S. Census Bureau Releases 2010 Census Population Counts for American Samoa

CB11-CN.177 <u>Public Information Office</u> 301-763-3030

 Table

 Map: Reference (PDF|JPEG)

 Map: Population Totals (PDF|JPEG)

 Map: Population Change (PDF|JPEG)

 Press Kit

 2010 Census Block Map Series

 2010 TIGER/Line Shapefiles

The U.S. Census Bureau today released the 2010 Census population counts for American Samoa. On April 1, 2010, the population was 55,519. This represented a decrease of 3.1 percent from the 2000 Census population of 57,291. The population counts have been provided to the governor.

The accompanying data table shows population totals and percent changes from 2000 to 2010 for American Samoa as well as several lower-level geographies. The attached custom maps include a reference map and maps showing the population by county and percent change in population by county.

As part of the 2010 Census, the Census Bureau worked with the American Samoa government to enumerate and gather detailed data on population and housing characteristics. Next year, more 2010 Census statistics will be available for American Samoa in a demographic profile. The demographic profile will show a set of basic demographic, social, economic and housing characteristics for the Island Area and lower levels of geography.

#### **Additional Geographic Resources**

Two key geographic resources have been released for American Samoa this summer: a series of maps showing the 2010 Census blocks and 2010 TIGER/Line Shapefiles. The series of large-scale block maps provide a reference guide for geographic entities down to the census block level and display the boundaries and numbers for all census blocks. The 2010 Census TIGER/Line Shapefiles provide a base layer for mapping and contain the

Census 2010 News | U.S. Census Bureau Releases 2010 Census Population Counts for A... Page 2 of 2 Case 1:18-cv-00036-CW Document 55-3 Filed 04/24/18 Page 117 of 117 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 103

location and relationship of streets, rivers and other features to one another. The shapefiles also show the numerous geographic entities for which Census Bureau statistics are available.

-X-

Follow @uscensusbureau on Twitter, Facebook, Flickr, YouTube and Ustream.

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## ORGANIZATIONAL DESCRIPTIONS



**Empowering Pacific Islander Communities** (EPIC) was founded in 2009 by a group of young Native Hawaiian and Pacific Islander (NHPI) professionals based in

Southern California. EPIC's mission is to promote social justice by fostering opportunities that empower the NHPI community through culturally relevant advocacy, research, and development. Since then, EPIC serves the community through its development of an NHPI Policy Platform, leadership empowerment programs, nonpartisan civic engagement campaigns, and continued advocacy at the local and national level.



Asian Americans Advancing Justice is ADVANCING a national affiliation of four leading organizations advocating for the civil and human rights of Asian Americans

and other underserved communities to promote a fair and equitable society for all. The affiliation's members are: Advancing Justice - AAJC (Washington, D.C.), Advancing Justice - Asian Law Caucus (San Francisco), Advancing Justice - Chicago, and Advancing Justice - Los Angeles.

## **COVER & INTERIOR ARTWORK**

Jason Pereira of JP Design Company was given the difficult task of designing a cover that combined a celebration of the diversity of Native Hawaiians and Pacific Islanders with the connective theme of traditional seafaring. He achieved this by using a wood-grained background, reminiscent of materials used in traditional canoes, set in hues of blue that recall the deep waters of the Pacific Ocean. The lettering bears a texture similar to traditional tapa cloth. The top horizontal pattern, accompanied by lines and dots, is Melanesian. The linear horizontal pattern at the base of the cover is Micronesian. The triangular pattern above Community is Native Hawaiian. The remaining patterns surrounding the title are Polynesian. The interior artwork extends the celebration of diversity by featuring Melanesian, Micronesian, and Polynesian patterns.

Photographs were taken by M. Jamie Watson, Daniel Naha-Ve'evalu, Melody Seanoa, and Kelani Silk. Data design and layout were provided by Michael Sund of SunDried Penguin.

Please e-mail any questions regarding the report to demographics@empoweredpi.org or askdemographics@advancingjustice-la.org.

## WELCOME

In 2009, a group of young Native Hawaiian and Pacific Islander (NHPI) leaders came together to discuss the development of the next generation of community advocates. These leaders, through their various capacities in community service, recognized the need to prepare young advocates for supporting the work of existing community-based organizations and entities by building partnerships and encouraging collaborative efforts. This group formed Empowering Pacific Islander Communities (EPIC), whose mission is to foster opportunities that empower the NHPI community and promote social justice through culturally relevant advocacy, research, and development.

Over the past five years, EPIC and Asian Americans Advancing Justice (Advancing Justice) have partnered on statewide policy advocacy, local voter engagement, college student leadership training, and most recently, demographic research. *A Community of Contrasts: Native Hawaiians and Pacific Islanders in the United States, 2014* is the latest collaborative effort between our organizations. The report was conceptualized nearly a decade ago after Advancing Justice released the first *A Community of Contrasts* report featuring rich disaggregated ethnic data on Asian Americans, Native Hawaiians, and Pacific Islanders from the U.S. Census Bureau. While our communities share common ground, we recognized the importance of producing a report focused on NHPI communities. A report focused primarily on NHPI data would provide a more accurate and sophisticated picture of the NHPI community that is often rendered invisible under the broader "Asian Pacific Islander" umbrella.

We hope this report serves as an additional tool for the NHPI community and others who seek to better understand and serve this diverse community. This report is the result of countless hours of collaboration with many NHPI community leaders from across the country. EPIC and Advancing Justice extend a heartfelt thanks to all of its community partners from Alaska, Arizona, Arkansas, California, Hawai'i, Nevada, New Mexico, Oregon, Utah, Washington, Virginia, and Washington, DC, for providing crucial input and feedback. We also extend our gratitude to the Wallace H. Coulter Foundation, Cyrus Chung Ying Tang Foundation, and Bank of America for making this report possible.



Tana Lepule Executive Director Empowering Pacific Islander Communities



Stewart Twoh

Stewart Kwoh Executive Director Asian Americans Advancing Justice - Los Angeles

### INTRODUCTION

The journey of Native Hawaiians and Pacific Islanders (NHPI) began centuries ago with ancestors who navigated between islands and across an ocean so vast it could encompass every land mass on Earth. Skilled in seafaring, they mastered the science of environmental observation and were guided by celestial patterns, ocean swells, and habits of birds and sea creatures. They planted the seeds of Pacific Islander communities across more than 20,000 Pacific Islands thousands of years before European explorers landed there. During the 18th and 19th centuries, European explorers divided those communities into three regions now known as Melanesia, Micronesia, and Polynesia. Today there are more than 1.2 million NHPI from over 20 distinct cultural groups living in the United States, some among the fastest-growing groups nationwide.

Although every NHPI ethnic group has its own distinct traditions and language, the groups also share many commonalities unique to island cultures like having a strong oral tradition, placing great importance on family and community, and having profound respect for elders. Understanding and acknowledging both the overlapping and diverging characteristics of NHPI communities are critical to finding ways to better understand, respect, and effectively serve these populations. In the United States, the NHPI label encompasses at least 20 distinct communities, including larger communities such as Native Hawaiians, Samoans, Chamorros, Fijians, Tongans, and smaller communities such as Marshallese, Chuukese, and Tahitians, just to name a few. Cultural values, linguistic needs, and governmental relationships are complex strands woven into every issue faced by NHPI, making the need for data that reflect these distinctions vital. For example, the particular relationship between Pacific Islander entities and the U.S. government must be considered. These relationships, the majority defined by wars and colonization, vary greatly and include statehood; territorial status; sovereignty; special relationships by treaties, such as with Compact of Free Association countries; and indigenous rights. The specific relationships often determine whether their members are considered citizens, immigrants, or migrants in the United States and if their families are eligible for U.S. resources and programs.

The difficulty of addressing the challenges faced by small populations like NHPI is further compounded when

agencies and organizations rely on default labels. like the overly broad Asian Pacific Islander (API) racial category, in their collection and publication of data. Such labels mask significant disparities between NHPI and Asian Americans across key socioeconomic characteristics. Since 1997, the Office of Management and Budget (OMB), the federal agency that provides standards for how race and ethnicity should be reported and collected, has required federal agencies to collect and report data on NHPI as a separate racial category. This policy is mandated by OMB Statistical Policy Directive No. 15 (OMB 15), which was revised to disaggregate NHPI data from the API category as a result of advocacy efforts by the NHPI community. In 2000, the Census Bureau began disaggregating NHPI data from Asian American data to comply with OMB 15. Unfortunately OMB 15 has not been fully implemented in all facets of federal data collection and reporting, and the needs of NHPI remain masked in too many critical areas, inflicting harm on and perpetuating myths about the NHPI community.

In this context, A Community of Contrasts: Native Hawaiians and Pacific Islanders in the United States, 2014 is a useful tool for navigating a broad array of pressing issues facing the NHPI community while encouraging meaningful partnerships to address those issues. The authors acknowledge that many of the issues deserve more in-depth treatment than is possible to give in this report. The goals of this report are threefold.

First, this report presents data that disaggregate NHPI groups to the extent possible. Consistent with OMB 15, NHPI data by race are presented separately from Asian American data in this report. In addition, NHPI ethnic group disaggregation is provided for a limited set of ethnic groups based on data availability. For example, this report includes national population counts for 20 NHPI ethnic groups and more in-depth social and economic characteristic data for 7 of these NHPI ethnic groups, though there are many more Pacific Islander ethnic groups for which data are not available both nationally and in local areas.

Second, this report is a user-friendly reference for community organizations, government officials and agencies, foundations, and businesses that wish to partner meaningfully with the NHPI community. We hope that providing data in an accessible format will unpack the complexities of the

## INTRODUCTION

challenges facing the NHPI community. Though not comprehensive, this report provides general demographic data as well as data highlighting some of the critical issues facing NHPI such as education, health, economic justice and housing, immigration, civic engagement, and civil rights.

Third, while a majority of the report features national data, this report also attempts to provide local data by highlighting a few areas within the United States with sizable populations of NHPI. Using data obtained by the U.S. Census Bureau, we selected six regions that are home to large populations of Native Hawaiians and Samoan, Tongan, Chamorro, Fijian, and Marshallese Americans: Arkansas, Los Angeles, Oʻahu, Salt Lake City, San Francisco, and Seattle. While we recognize that NHPI live in every state in the nation, space constraints limited the number of local communities we could include.

This demographic profile relies on data from numerous federal, state, and local agencies. Much of the data come from the U.S. Census Bureau, including the 2010 Census, American Community Survey, and Current Population Survey. However, because these data are not comprehensive, this profile also utilizes data from other sources including the Centers for Disease Control and Prevention, Office of Hawaiian Affairs, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. State Department, the National Center for Education Statistics, Transactional Records Access Clearinghouse at Syracuse University, and many others.

In 1976, faced with steeply declining interest in traditional seafaring techniques, Satawalan master navigator Mau Piailug broke with centuries of tradition and shared closely guarded way-finding secrets with the crew of the  $H\bar{o}k\bar{u}le'a$ . However, the significance of Mau's decision went beyond simply assisting Native Hawaiians. He considered his students and himself as members of a larger Pacific Islander family that transcended political boundaries and geographic borders. In his eyes, the ocean did not divide Pacific Islander communities as much as it connected them. The authors thank our elders for inspiring us to continue advocating for the diverse needs of the NHPI community while moving forward in the same spirit of mutual support and family.

The statements and recommendations expressed in this report are solely the responsibility of the authors.

NHPI: Native Hawaiian(s) and Pacific Islander(s)

## **EXECUTIVE SUMMARY**

A Community of Contrasts: Native Hawaiians and Pacific Islanders in the United States, 2014 compiles the latest data on Native Hawaiians and Pacific Islanders (NHPI) at the national level and includes highlights from a few local regions with large numbers of NHPI. Produced in collaboration with Empowering Pacific Islander Communities (EPIC) and Asian Americans Advancing Justice - Los Angeles, this report is a resource for community organizations, elected and appointed officials, government agencies, foundations, corporations, and others looking to better understand and serve one of the country's fastest-growing and most-diverse racial groups. While this report features rich disaggregated data on Native Hawaiians and many Pacific Islander ethnic groups, there are still more Pacific Islander groups that are not captured due to data limitations. Some of the key findings are the following:

# Native Hawaiians and Pacific Islanders are one of the fastest-growing racial groups in the United States and are incredibly diverse.

The NHPI population grew 40% between 2000 and 2010, a rate that approached that of Asian Americans and Latinos. Now over 1.2 million NHPI live in the United States. Though about 43% of the population is Native Hawaiian, the NHPI racial group is incredibly diverse and includes over 20 distinct ethnic groups, all of which are growing at a faster pace than the total population. Micronesian groups such as Chuukese, Kosraean, Marshallese, Carolinian, and Pohnpeian are some of the fastest-growing NHPI ethnic groups. NHPI live in every state in the country, with a majority residing in Hawai'i and California. Arkansas, Nevada, and Alaska had the fastest-growing populations over the decade. The majority of NHPI are multiracial (56%). As the population grows and becomes more diverse, it is critical that NHPI data be collected and available to the public by racial group and by distinct ethnic group.

## Native Hawaiians and Pacific Islanders are contributing to the economic and political fabric of American life.

The growth in NHPI is reflected in every aspect of civic life. NHPI are contributing to the economy; the number of NHPI-owned businesses increased 30% between 2002 and 2007, a growth rate higher than average (18%). One in 10 NHPI-owned businesses is a small business. NHPI are active in America's labor force and most likely to work in retail, health care, and accommodation and food services industries. About 1 in 8 NHPI are veterans, a rate higher than average. Though a small community, there is also considerable untapped potential in the NHPI community to influence the political process. About a quarter of a million NHPI voted in the November 2012 election. However, according to a postelection survey, three-quarters said that no political party or campaign contacted them about the election. Increasing civic participation through voter registration, outreach, and education and increasing entrepreneurship through effective, culturally appropriate small-business development programs are important in engaging this growing racial group.

## Native Hawaiians and Pacific Islanders face challenges with higher-education access and retention.

About 18% of NHPI adults have a bachelor's degree, a rate identical to Blacks or African Americans. Marshallese and Samoan American adults are less likely to hold a bachelor's degree than those from any racial group. About 38% of NHPI college-aged youth were enrolled in college in 2011, a rate lower than average. Disaggregated ethnic data provided by the University of California Office of the President shows that 2011 admission rates for NHPI freshman and transfers are similar to and even below the rate of admission for other underrepresented groups. Tongan American, Samoan American, and Native Hawaiian freshmen had lower admission rates than average. Educational data on NHPI are often aggregated with Asian American data, which masks the distinct challenges that many NHPI face in the area of education. For example, according to National Center for Education Statistics data, only 23% of NHPI undergraduates completed a degree within four years, compared with the aggregate figure of 45% for API students.<sup>1</sup> Disaggregating NHPI data by race and ethnic group is the first step toward understanding how to improve educational opportunities. Promoting equal opportunity and diversity in public education are important steps toward addressing disparities. Institutions of higher education can support those goals by developing and funding culturally relevant higher-education retention programs and youth programs that encourage enrollment in higher-education institutions.

<sup>&</sup>lt;sup>1</sup>National Center for Education Statistics. Digest of Education Statistics: 2011. Table 376. Figures derived from Integrated Postsecondary Education Data System. Note: Students are first-time, full-time bachelor's degree-seeking students at four-year institutions.

### **EXECUTIVE SUMMARY**

#### Certain diseases disproportionately impact Native Hawaiians and Pacific Islanders, yet many lack access to affordable and culturally appropriate health care.

Heart disease is the leading cause of death for NHPI. Cancer is the fastest-growing cause of death among many NHPI groups including Native Hawaiians, Samoan Americans, and Guamanian or Chamorro<sup>1</sup> Americans. NHPI have higher rates of diabetes and obesity than average. The number of suicide deaths among NHPI increased 170% between 2005 and 2010. Despite these challenges, many NHPI experience barriers to care. About 1 in 7 NHPI do not have health insurance. Immigration status, language barriers, and cost are barriers to care for NHPI. Nearly 253,000 NHPI speak a language other than English at home. Marshallese, Fijian, Palauan, Tongan, and Samoan Americans have higherthan-average rates of limited English proficiency. About 18% of NHPI did not see a doctor because of cost in 2012. Government, foundation, and private funding are needed to support culturally and linguistically appropriate outreach, education, and preventive services to NHPI communities through avenues such as federally qualified health clinics.

#### Native Hawaiians and Pacific Islanders have been impacted by the economic crisis and many struggle to find affordable housing.

Between 2007 and 2011, the number of unemployed NHPI increased 123%, a rate higher than any other racial group. During the same time, the number of NHPI who were living in poverty increased 56%, a rate higher than any other racial group. Today NHPI fare worse than the national average across multiple measures of income. NHPI have a higher poverty rate, a greater proportion who are low-income, and a lower per capita income than average. Marshallese, Tongan, Samoan, and Palauan Americans, for example, have higher-than-average poverty rates and lower per capita incomes than any racial group. A larger-than-average proportion of Marshallese, Tongan, and Samoan Americans are rent burdened, spending more than 30% of their income on rent. NHPI have lower-than-average rates of homeownership and larger-than-average household sizes. Increasing social safety nets, creating living-wage jobs, and funding programs to address homeownership, small-business ownership and employment disparities can aid in helping many NHPI get back on their feet after the economic downturn.

#### <sup>1</sup>"Guamanian or Chamorro" may include individuals who identify as being Chamorro and individuals from Guam who are not Chamorro.

# Pacific Islanders face diverse and distinct immigration challenges that can affect their ability to access critical services.

Immigration is a complex but critical issue for Pacific Islanders. While Native Hawaiians and many Pacific Islanders are U.S. citizens, some Pacific Islanders are foreign-born and, depending on their country of birth, hold different types of immigration statuses. Many immigrants come from islands that have political relationships with the United States due to the colonization and militarization of their home islands. For example, some Pacific Islanders are considered U.S. nationals because they come from U.S. territories, while some may be migrants from countries that entered into a Compact of Free Association (COFA) agreement with the United States. In other cases, many Pacific Islanders are foreign nationals from countries with no U.S. association and must apply for legal permanent resident status to move to the United States. Many undocumented Pacific Islanders also live in the United States, similar to other immigrant communities. These unique distinctions create a host of challenges once immigrants arrive in the United States. For example, U.S. nationals and COFA migrants are free to live and work in the United States but do not immediately gualify for many public benefits. The lack of in-language and culturally competent programs compounds the difficulty Pacific Islander immigrants face when navigating a complex immigration system and accessing critical services. Policy makers and service providers need to understand these diverse immigrant experiences in order to address the needs of Pacific Islanders and work toward developing comprehensive and compassionate immigration reform, including a pathway to citizenship.

#### A disproportionate number of NHPI are being incarcerated.

In 2010, about 12,000 NHPI were under the supervision of the U.S. correctional system. The number of NHPI prisoners in custody increased 144% between 2002 and 2010, a rate higher than average. California and Utah had disproportionate growth in the number of incarcerated NHPI. Disproportionate numbers of Native Hawaiian prisoners from Hawai'i are being sent to out-of-state private facilities. Publishing disaggregated data on the number of incarcerated NHPI is critical in understanding the criminal justice system's disproportionate impact on NHPI. Culturally competent training for law enforcement about NHPI communities is critical in addressing civil rights violations against NHPI. Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 10 of 179 Appellate Case: 20-4017 Document: 010110346469 Date Filed: 05/12/2020 Page: 112

## United States DEMOGRAPHICS



U.S. Census Bureau, 2010 Census SF1, Table P6. Note: Population figures are shown for states with largest, fastest-growing, or highest percentage of NHPI population. Alaska and Hawai'i are not to scale.

#### **Population Growth by Race & Hispanic Origin**

United States 2000 to 2010



U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.

Note: Figures for each racial group include both single race/ethnicity and multiracial/multiethnic people, except for White, which is single race, non-Latino.

**AIAN:** Native American(s) or Alaska Native(s) **NHPI:** Native Hawaiian(s) and Pacific Islander(s)

- There are over 1.2 million NHPI living in the United States.<sup>2</sup>
- NHPI make up about 0.4% of the nation's total population.<sup>3</sup>
- The NHPI population grew 40% between 2000 and 2010, a rate that rivals those of Latinos and Asian Americans.
- By 2030, the U.S. NHPI population is expected to be over 2 million.<sup>4</sup>

<sup>2</sup>U.S. Census Bureau, 2010 Census SF1, Table P6. <sup>3</sup>Ibid., Tables P5 and P6.

<sup>4</sup>U.S. Census Bureau, 2012 National Population Projections, Table 4. Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 11 of 179 Appellate Case: 20-4017 Document: 010110346469 Date Filed: 05/12/2020 Page: 113

#### United States DEMOGRAPHICS

#### **NHPI Population**

by Top Five States United States 2010, Ranked by Population

| State      | Number  |  |
|------------|---------|--|
| Hawaiʻi    | 355,816 |  |
| California | 286,145 |  |
| Washington | 70,322  |  |
| Texas      | 47,646  |  |
| Florida    | 39,914  |  |

#### **NHPI Population Growth**

by Top Five States United States 2000 to 2010, Ranked by Percent Growth

| State    | Number | % Growth<br>2000 to<br>2010 |
|----------|--------|-----------------------------|
| Arkansas | 7,849  | 151%                        |
| Nevada   | 32,848 | 102%                        |
| Alaska   | 11,154 | 102%                        |
| Arizona  | 25,106 | 87%                         |
| Alabama  | 5,914  | 87%                         |

- Hawai'i's and California's NHPI populations remain the largest among all states. Over 355,000 NHPI live in Hawai'i while over 286,000 live in California.
- NHPI comprise more than onequarter of Hawai'i's population.
- Though still relatively small in number, NHPI populations grew the fastest in Arkansas, Nevada, and Alaska, with populations that more than doubled over the decade.

#### **NHPI Population**

NHPI Population as a Percent of Total Population by Top Five States, United States 2010, *Ranked by Percent of State Population* 

| State      | Number  | Percent |  |
|------------|---------|---------|--|
| Hawai'i    | 355,816 | 26.16%  |  |
| Alaska     | 11,154  | 1.57%   |  |
| Utah       | 36,777  | 1.33%   |  |
| Nevada     | 32,848  | 1.22%   |  |
| Washington | 70,322  | 1.05%   |  |

U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.

#### There are over

1.2 million NHPI

living in the United States.



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#### **United States** DEMOGRAPHICS

#### **Population by Ethnic Group**

United States 2010

| Ethnic Group          | Number  |
|-----------------------|---------|
| Native Hawaiian       | 527,077 |
| Samoan                | 184,440 |
| Guamanian or Chamorro | 147,798 |
| Tongan                | 57,183  |
| Fijian                | 32,304  |
| Marshallese           | 22,434  |
| Palauan               | 7,450   |
| Tahitian              | 5,062   |
| Chuukese              | 4,211   |
| Pohnpeian             | 2,060   |
| Saipanese             | 1,031   |
| Yapese                | 1,018   |
| Tokelauan             | 925     |
| Kosraean              | 906     |
| Carolinian            | 521     |
| Papua New Guinean     | 416     |
| I-Kiribati            | 401     |
| Mariana Islander      | 391     |
| Solomon Islander      | 122     |
| Ni-Vanuatu            | 91      |

U.S. Census Bureau, 2010 Census SF1, Table PCT10; 2010 Census SF2, Table PCT1. Figure for Ni-Vanuatu from U.S. Census Bureau, 2010 Census Special Tabulation. Note: Figures are based on self-reporting. In some cases, individuals may report a national origin. For example, the "Guamanian or Chamorro" category may include individuals who identify as being Chamorro and individuals from Guam who are not Chamorro. Approximately 20% of NHPI did not report an ethnicity in the 2010 Census. Some Pacific Islander groups are not included if the population was less than 90 in 2010.

#### **ETHNIC GROUP REPORTING** IN THE U.S. CENSUS

Census Bureau develops ethnic group names based on respondent self-reporting. In some cases, respondents reported a national origin rather than an ethnic group. For example, because "Mariana Islander" is a national origin and not an ethnic group, the category may include some who are not NHPI. Given these complications, some ethnic group names may not be wholly accurate but are included in this report to stay consistent with Census terminology.

#### **Population Growth by Ethnic Group**

United States 2000 to 2010



U.S. Census Bureau, 2000 Census SF1, Tables P1 and PCT10; 2010 Census SF1, Tables P1 and PCT10; 2010 Census SF2, Table PCT1; 2010 Census Special Tabulation. Note: Figures for ethnic groups excluded if (1) groups did not meet 2000 Census population threshold for reporting or (2) number less than 100 in 2010.

- in size by Samoan and Guamanian or
- All NHPI ethnic groups grew faster than the total population between 2000 and 2010.
- Micronesian and Melanesian ethnic groups, though smaller in number, grew significantly over the decade. Among the larger groups, the number of Marshallese and Fijian Americans grew 237% and 138% over the decade, respectively.

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#### United States DEMOGRAPHICS

#### **Multiracial Population**

by Race, Hispanic Origin, and Ethnic Group, United States 2010



U.S. Census Bureau, 2010 Census SF1, Tables QT-P3, QT-P6, QT-P9, P8, and P9. Given significant diversity among ethnic groups, data on Asian Americans should only be used to illustrate differences or similarities between NHPI and Asian Americans. For data on Asian Americans, refer to A Community of Contrasts: Asian Americans in the United States, 2011 at advancingjustice.org.

- The majority of NHPI are multiracial (56%). All NHPI ethnic groups are proportionally more multiracial than average (3%).<sup>1</sup> Over two-thirds of Native Hawaiians are multiracial (69%). One in 10 Marshallese Americans are multiracial.
- The median age for NHPI is 26.5, the lowest among racial groups. Median ages for all NHPI ethnic groups are far below the national average (37.2). The median age for Marshallese Americans is 19.5.<sup>2</sup>
- Over one in three NHPI are youth under the age of 18 (34%). Among NHPI ethnic groups, Marshallese (48%), Tongan (43%), and Samoan American (42%) populations have the highest proportion of youth.<sup>3</sup>
- Among racial groups, the NHPI population is disproportionately college-aged youth, ages 18 to 24 (13%, compared to 10% on average).<sup>4</sup>



<sup>1</sup> U.S. Census Bureau, 2010 Census SF1, Table QT-P3.
 <sup>2</sup> U.S. Census Bureau, 2010 Census SF2, Table DP-1.
 <sup>3</sup> Ibid.
 <sup>4</sup> Ibid., Table PCT3.

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U.S. Census Bureau, 2010 Census SF1, Table P6.

Native Hawaiians and Pacific Islanders (NHPI) have a rich history in the San Francisco Bay Area. The first wave of NHPI migrating to northern California occurred during the California Gold Rush in the mid-1800s and in 1885 featured the first account of surfing in the continental United States in Santa Cruz. The next large wave of NHPI migrating to the area occurred after World War II and included many who had joined the United States military and settled close to local bases. Today the Bay Area is home to the Tongan consulate general's office. Significant Samoan and Tongan American communities have been established in East Palo Alto, San Mateo, San Bruno, and Redwood City. Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 15 of 179 Appellate Case: 20-4017 Document: 010110346469 Date Filed: 05/12/2020 Page: 117

### Bay Area CSA DEMOGRAPHICS

#### Population, Growth by Race & Ethnic Group

Bay Area CSA 2000 to 2010, Ranked by 2010 Population

| Ethnic Group                  | 2000      | 2010      | Growth |
|-------------------------------|-----------|-----------|--------|
| Native Hawaiian               | 17,901    | 20,072    | 12%    |
| Samoan                        | 12,509    | 14,928    | 19%    |
| Tongan                        | 8,155     | 12,110    | 48%    |
| Guamanian or Chamorro         | 9,494     | 11,446    | 21%    |
| Fijian                        | 5,071     | 10,180    | 101%   |
| Palauan                       | NR        | 368       | NR     |
| Tahitian                      | NR        | 240       | NR     |
| Marshallese                   | NR        | 99        | NR     |
| Total NHPI Population         | 67,878    | 82,576    | 22%    |
| Total Bay Area CSA Population | 7,092,596 | 7,468,390 | 5%     |



U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10; 2010 Census SF2, Table PCT1. Figures for NHPI and each ethnic group include both single race/ethnicity and multiracial/ multiethnic people, except for White, which is single race, non-Latino. Approximately 17% of NHPI in this region did not report an ethnicity in the 2010 Census. Figures do not sum to total. NR = Not reported.

- The number of NHPI living in the Bay Area Combined Statistical Area (CSA)<sup>1</sup> grew 22% between 2000 and 2010, a rate higher than the regional average (5%). There are now about 83,000 NHPI living in the 11-county Bay Area CSA, about 1% of the region's population.<sup>2</sup>
- The Bay Area CSA has the secondlargest number of NHPI of any CSA in the continental United States. The region also has the largest number of Tongan and Fijian Americans, the second-largest number of Native Hawaiians, and the third-largest population of Guamanian or Chamorro and Samoan Americans of any CSA.<sup>3</sup>
- Fijian Americans are the region's fastest-growing NHPI ethnic group, doubling over the decade. The Tongan American population grew 48% over the decade. Both rates were higher than any racial group.<sup>4</sup>
- Alameda County has 22,322 NHPI residents, the largest number among Bay Area counties; 15,069 NHPI live in San Mateo County, and 14,468 live in Santa Clara County.<sup>5</sup>
- East Palo Alto and Oakland have the fourth- and fifth-largest populations of Tongan Americans among U.S cities (1,526 and 1,463, respectively).<sup>6</sup>

The Bay Area CSA has the secondlargest NHPI population

of any on

the continent.

<sup>&</sup>lt;sup>1</sup>The Bay Area CSA includes Alameda, Contra Costa, Marin, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma Counties. Combined statistical areas are groupings of metropolitan areas defined by the U.S. Office of Management and Budget.

<sup>&</sup>lt;sup>2</sup>U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.

<sup>&</sup>lt;sup>3</sup> U.S. Census Bureau, 2010 Census SF1, Tables P6 and PCT10.

<sup>&</sup>lt;sup>4</sup>U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10.

<sup>&</sup>lt;sup>5</sup> U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.

<sup>&</sup>lt;sup>6</sup> U.S. Census Bureau, 2010 Census SF1, Table PCT10.

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### Honolulu MSA INTRODUCTION



U.S. Census Bureau, 2010 Census SF1, Table P6. Note: Population data for 'Ewa, Honolulu, Mākaha, Mililani, and Waimānalo are aggregated figures that combined at least two Censusdesignated places (CDP) that are considered to be the same town or city. (For example, Waimānalo CDP and Waimānalo Beach CDP are labeled as "Waimānalo.")

The Honolulu Metropolitan Statistical Area (MSA) encompasses the entire island of Oahu. While Oahu includes Honolulu, the state capital, almost twice as many people reside in surrounding communities including rural areas. Many of the issues faced by NHPI on Oahu must be seen in the context of the overthrow of the Hawaiian Kingdom in 1893 by American colonists and current efforts to return Native Hawaiians to their land.<sup>1</sup> Oahu is also home to over 70% of the state of Hawai'i's diverse population, with no single racial group comprising a majority. While Oahu has a deep history in the agriculture industry, many Oahu residents are currently attracted by job opportunities provided by the tourist industry which attracts an estimated four million tourists each year.

<sup>1</sup> More information on this topic is available at the Department of Hawaiian Home Lands, http://dhhl.hawaii.gov.

#### Honolulu MSA DEMOGRAPHICS

#### Population, Growth by Race & Ethnic Group

Honolulu MSA 2000 to 2010,

Ranked by 2010 Population

| Ethnic Group                  | 2000    | 2010    | Growth |
|-------------------------------|---------|---------|--------|
| Native Hawaiian               | 153,117 | 182,120 | 19%    |
| Samoan                        | 25,856  | 33,272  | 29%    |
| Guamanian or Chamorro         | 3,493   | 5,455   | 56%    |
| Tongan                        | 4,021   | 5,263   | 31%    |
| Marshallese                   | NR      | 4,173   | NR     |
| Chuukese                      | NR      | 2,086   | NR     |
| Tahitian                      | NR      | 1,741   | NR     |
| Palauan                       | NR      | 987     | NR     |
| Fijian                        | 357     | 562     | 57%    |
| Tokelauan                     | NR      | 518     | NR     |
| Pohnpeian                     | NR      | 390     | NR     |
| Kosraean                      | NR      | 319     | NR     |
| Yapese                        | NR      | 123     | NR     |
| Total NHPI Population         | 189,292 | 233,637 | 23%    |
| Total Honolulu MSA Population | 876,156 | 953,207 | 9%     |

U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10; 2010 Census SF2, Table PCT1. Figures for NHPI and each ethnic group include both single race/ethnicity and multiracial/multiethnic people, except for White, which is single race, non-Latino. Approximately 0.2% of NHPI in this region did not report an ethnicity in the 2010 Census. Figures do not sum to total. NR = Not reported in 2000 Census.



- The number of NHPI living in the Honolulu MSA<sup>1</sup> grew 23% between 2000 and 2010, a rate higher than the regional average (9%). There are now over 230,000 NHPI living in the Honolulu MSA, about one-quarter of the island's population.<sup>2</sup>
- Native Hawaiians are the largest NHPI group living in the Honolulu MSA, comprising about 78% of the NHPI population.<sup>3</sup>
- The Micronesian population in the Honolulu MSA grew 130% between 2000 and 2010.<sup>4</sup>
- There are 12 cities in the Honolulu MSA with majority NHPI populations. While the city of Honolulu has the highest number of NHPI, Waimānalo Beach (83%), Nānākuli (81%), and Hau'ula (70%) are most proportionately NHPI. Most NHPI in these areas are Native Hawaiian.<sup>5</sup>
- Outside of the city of Honolulu, Kāne'ohe (10,685), 'Ewa (10,389), Nānākuli (9,051), Kailua (9,028), Mililani (8,656), Wai'anae (8,018), Pearl City (7,464), and Waimānalo (6,435) have the largest populations of Native Hawaiians. Waipahu has large populations of Samoan (2,831), Micronesian including Chuukese (240), and Marshallese Americans (984).<sup>6</sup>

- <sup>1</sup>The Honolulu MSA is composed of the island of Oahu and is also known as the county of Honolulu. Metropolitan statistical areas are defined by the U.S. Office of Management and Budget.
- $^2$  U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.
- $^{\rm 3}$  U.S. Census Bureau, 2010 Census SF1, Tables P6 and PCT10

- <sup>4</sup>U.S. Census Bureau, 2000 Census SF1, Table PCT10; 2010 Census SF1, Table PCT10. Data for smaller ethnic groups such as Marshallese were not available in 2000.
- <sup>5</sup> U.S. Census Bureau, 2010 Census SF1, Tables P1, P6, and PCT10.
- <sup>6</sup> U.S. Census Bureau, 2010 Census SF1, Table PCT10; 2010 Census SF2, Table PCT1. Note: 'Ewa is composed of 'Ewa Beach, 'Ewa Gentry, 'Ewa Villages, and Ocean Pointe, and Waimānalo includes both Waimānalo and Waimānalo Beach.

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U.S. Census Bureau, 2010 Census SF1, Table P6.

The Los Angeles area has a rich history of Native Hawaiian and Pacific Islander (NHPI) residents, who first began migrating to the area during the late 1800s. The number increased dramatically following World War II, with many Pacific Islanders from American Samoa and Guam who served in the military moving to cities near military bases where they were stationed. Many NHPI also faced increasing costs of living on their respective islands after World War II and moved to California in search of better economic and educational opportunities. Today the region is home to some of the largest NHPI communities on the continent.

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#### **Los Angeles CSA** DEMOGRAPHICS

#### Population, Growth by Race & Ethnic Group

Los Angeles CSA 2000 to 2010, Ranked by 2010 Population

| Ethnic Group                     | 2000       | 2010       | Growth |
|----------------------------------|------------|------------|--------|
| Samoan                           | 25,770     | 29,848     | 16%    |
| Native Hawaiian                  | 23,452     | 28,615     | 22%    |
| Guamanian or Chamorro            | 10,767     | 14,107     | 31%    |
| Tongan                           | 4,744      | 6,616      | 39%    |
| Fijian                           | 1,104      | 2,123      | 92%    |
| Marshallese                      | NR         | 579        | NR     |
| Tahitian                         | NR         | 478        | NR     |
| Palauan                          | NR         | 286        | NR     |
| Total NHPI Population            | 86,637     | 105,348    | 22%    |
| Total Los Angeles CSA Population | 16,373,645 | 17,877,006 | 9%     |



U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10; 2010 Census SF2, Table PCT1. Figures for NHPI and each ethnic group include both single race/ethnicity and multiracial/multiethnic people, except for White, which is single race, non-Latino. Approximately 23% of NHPI in this region did not report an ethnicity in the 2010 Census. Figures do not sum to total. NR = Not reported.

- The number of NHPI living in the Los Angeles Combined Statistical Area (CSA)<sup>1</sup> grew 22% between 2000 and 2010, a rate higher than the regional average (9%). There are now close to 110,000 NHPI living in the Los Angeles CSA, just under 1% of the total population.<sup>2</sup>
- The Los Angeles CSA has the largest number of NHPI of any CSA in the continental United States. The region also has the largest number of Native Hawaiians, Guamanian or Chamorro Americans, and Samoan Americans on the continent. It has the third-largest population of Tongan Americans of any CSA on the continent.3
- The largest number of NHPI in the Los Angeles CSA region live in Los Angeles County (54,169),

followed by Orange (19,484), Riverside (14,108), and San Bernardino Counties  $(13,517).^{4}$ 

- Fijian Americans were the fastestgrowing NHPI ethnic group, nearly doubling over the decade. Both Fijian and Tongan American populations grew faster than any racial group in the region.5
- Though relatively small in number, the NHPI population in Riverside County grew faster than in any other county in the Los Angeles CSA, 86% over the decade, a rate higher than the county's total growth (42%).6
- The City of Los Angeles has more Native Hawaiians than any other United States city outside of the state of Hawai'i.7

The Los Angeles CSA

has the largest

NHPI population

of any on the continent.

<sup>&</sup>lt;sup>1</sup>The Los Angeles CSA includes Los Angeles, Orange, Riverside, San Bernardino, and Ventura Counties, Combined statistical areas are groupings of metropolitan areas defined by the U.S. Office of Management and Budget. <sup>2</sup> U.S. Census Bureau, 2010 Census SF1, Tables P5 and P6.

<sup>&</sup>lt;sup>3</sup> Ibid., Table P6.

<sup>&</sup>lt;sup>4</sup> Ibid.

<sup>&</sup>lt;sup>5</sup>U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10.

<sup>&</sup>lt;sup>6</sup>U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P1 and P6.

<sup>7</sup> U.S. Census Bureau, 2010 Census SF1, Table P6.

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U.S. Census Bureau, 2010 Census SF1, Table P6.

The Native Hawaiian and Pacific Islander (NHPI) community in the Pacific Northwest dates back to 1787, making it one of the oldest NHPI communities in the continental United States. NHPI were hired to work in the fur trade and merchant shipping industries, with many choosing to remain in the Seattle area as laborers. After World War II, many Samoans and Chamorro Americans who enlisted in the United States military migrated to Seattle. Today the community's growth continues to outpace that of Seattle's general population, motivated by access to education, employment, and a lower cost of living.

#### Seattle CSA DEMOGRAPHICS

#### Population, Growth by Race & Ethnic Group

Seattle CSA 2000 to 2010,

Ranked by 2010 Population

| Ethnic Group                 | 2000      | 2010      | Growth |
|------------------------------|-----------|-----------|--------|
| Samoan                       | 9,422     | 16,562    | 76%    |
| Native Hawaiian              | 10,486    | 14,890    | 42%    |
| Guamanian or Chamorro        | 7,320     | 12,316    | 68%    |
| Fijian                       | 940       | 2,130     | 127%   |
| Tongan                       | 851       | 1,629     | 91%    |
| Marshallese                  | NR        | 1,437     | NR     |
| Palauan                      | NR        | 714       | NR     |
| Saipanese                    | NR        | 165       | NR     |
| Chuukese                     | NR        | 124       | NR     |
| Carolinian                   | NR        | 116       | NR     |
| Tahitian                     | NR        | 111       | NR     |
| Total NHPI Population        | 35,106    | 56,364    | 61%    |
| Total Seattle CSA Population | 3,707,144 | 4,199,312 | 13%    |

U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10; 2010 Census SF2, Table PCT1. Figures for NHPI and each ethnic group include both single race/ethnicity and multiracial/multiethnic people, except for White, which is single race, non-Latino. Approximately 23% of NHPI in this region did not report an ethnicity in the 2010 Census. Figures do not sum to total. NR = Not reported.



- The number of NHPI in the Seattle Combined Statistical Area (CSA)<sup>1</sup> grew 61% between 2000 and 2010, a rate second only to Latinos (88%). There are now over 56,000 NHPI living in the Seattle CSA, just over 1% of the total population.<sup>2</sup>
- The Seattle CSA has the third-largest number of NHPI of any CSA in the continental United States. The region has the second-largest population of Guamanian or Chamorro and Samoan Americans and the third-largest population of Native Hawaiians and Fijian Americans on the continent.<sup>3</sup>
- Within the Seattle CSA, the largest number of NHPI live in King County (23,664), followed by Pierce (16,785), Snohomish (6,481), Kitsap (4,265), and Thurston Counties (3,467).<sup>4</sup>
- Washington State has the largest population of Carolinian and Saipanese Americans, the second-largest population of Kosraean Americans, and the third-largest population of Palauan and Marshallese Americans of any state in the United States.<sup>5</sup>

<sup>5</sup> U.S. Census Bureau, 2010 Census SF2, Table PCT1.

<sup>&</sup>lt;sup>1</sup> The Seattle CSA includes Island, King, Kitsap, Mason, Pierce, Skagit, Snohomish, and Thurston Counties. Combined statistical areas are groupings of metropolitan areas defined by the U.S. Office of Management and Budget.

<sup>&</sup>lt;sup>2</sup> U.S. Census Bureau, 2000 Census SF1, Tables P8 and P9; 2010 Census SF1, Tables P5 and P6.

<sup>&</sup>lt;sup>3</sup> U.S. Census Bureau, 2010 Census SF1, Table P6. <sup>4</sup> Ibid.

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## Salt Lake City CSA INTRODUCTION



U.S. Census Bureau, 2010 Census SF1, Table P6.

Native Hawaiians and Pacific Islanders (NHPI) began settling in the Salt Lake City area in 1875 and came in larger numbers after World War II. Many were drawn by their desire to live close to other members of the Church of Latter Day Saints and the United Methodist Church, whose missionaries had established a significant presence in the Pacific. The number of NHPI, particularly Tongan and Samoan Americans, continues to grow as families look for educational and economic opportunities and a means of supporting relatives still living in the Pacific Islands. Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 23 of 179 Appellate Case: 20-4017 Document: 010110346469 Date Filed: 05/12/2020 Page: 125

### Salt Lake City CSA DEMOGRAPHICS

#### Population, Growth by Race & Ethnic Group

Salt Lake City CSA 2000 to 2010, Ranked by 2010 Population

| Ethnic Group                        | 2000      | 2010      | Growth |
|-------------------------------------|-----------|-----------|--------|
| Tongan                              | 7,252     | 10,267    | 42%    |
| Samoan                              | 4,915     | 9,113     | 85%    |
| Native Hawaiian                     | 2,107     | 3,402     | 61%    |
| Guamanian or Chamorro               | 272       | 700       | 157%   |
| Marshallese                         | NR        | 611       | NR     |
| Fijian                              | 96        | 188       | 96%    |
| Tahitian                            | NR        | 138       | NR     |
| Total NHPI                          | 16,326    | 25,719    | 58%    |
| Total Salt Lake City CSA Population | 1,469,474 | 1,744,886 | 19%    |

U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10; 2010 Census SF2, Table PCT1. Figures for NHPI and each ethnic group include both single race/ethnicity and multiracial/multiethnic people, except for White, which is single race, non-Latino. Approximately 6% of NHPI in this region did not report an ethnicity in the 2010 Census. Figures do not sum to total. NR = Not reported.

- The number of NHPI living in the Salt Lake City Combined Statistical Area (CSA)<sup>1</sup> increased 58% between 2000 and 2010, a rate higher than average. There are about 26,000 NHPI living in the Salt Lake City CSA.
- Though relatively small, NHPI make up 1.5% of the Salt Lake City CSA's total residents, a proportion larger than any other CSA in the continental United States.<sup>2</sup>
- Tongan and Samoan Americans are the largest NHPI ethnic groups in the region. Guamanian or Chamorro, Fijian, and Samoan American populations grew faster than any racial group over the decade.<sup>3</sup>

- The Salt Lake City CSA has the second-largest population of Tongan Americans and the fourth-largest population of Samoan Americans in the United States.<sup>4</sup>
- Salt Lake City and West Valley City have the largest and second-largest populations of Tongan Americans of any city in the United States.<sup>5</sup>

Salt Lake City

has the largest population of Tongan Americans of any U.S. city.

**NHPI IN UTAH COUNTY** 

Though not in the Salt Lake City CSA, there are nearly 7,500 NHPI in neighboring Utah County, concentrated in the cities of Provo and Orem (about 2,300 and 1,700, respectively).<sup>6</sup>

<sup>&</sup>lt;sup>1</sup>The Salt Lake City CSA includes Box Elder, Davis, Morgan, Salt Lake, Summit, Tooele, Wasatch, and Weber Counties. Combined statistical areas are groupings of metropolitan areas defined by the U.S. Office of Management and Budget. <sup>2</sup>U.S. Census Bureau. 2010 Census SF1. Table P6.

<sup>&</sup>lt;sup>3</sup>U.S. Census Bureau, 2000 Census SF1, Tables P8, P9, and PCT10; 2010 Census SF1, Tables P5, P6, and PCT10.

<sup>&</sup>lt;sup>4</sup> U.S. Census Bureau, 2010 Census SF1, Table PCT10.

<sup>&</sup>lt;sup>5</sup> Ibid.

<sup>&</sup>lt;sup>6</sup> U.S. Census Bureau, 2010 Census SF1, Table P6.

## Appendix D NHPI ETHNIC GROUP POPULATION BY STATE

#### Ethnic Group Population 2010

Ethnic Groups listed in Alphabetical Order

| State      | Carolinian |
|------------|------------|
| Washington | 127        |
|            |            |
| State      | Chuukese   |
| Hawaiʻi    | 2,563      |
| Oregon     | 537        |
| Washington | 225        |
| Texas      | 119        |

| State      | Fijian |
|------------|--------|
| California | 24,059 |
| Washington | 2,639  |
| Oregon     | 888    |
| Hawai'i    | 711    |
| Texas      | 454    |
| Nevada     | 369    |
| Utah       | 366    |
| New York   | 321    |
| Florida    | 255    |
| Arizona    | 237    |

| State          | Guamanian or<br>Chamorro |
|----------------|--------------------------|
| California     | 44,425                   |
| Washington     | 14,829                   |
| Texas          | 10,167                   |
| Hawai'i        | 6,647                    |
| Florida        | 5,904                    |
| Nevada         | 5,512                    |
| Arizona        | 4,276                    |
| Georgia        | 3,856                    |
| North Carolina | 3,682                    |
| Virginia       | 3,592                    |

| State   | Kiribati |
|---------|----------|
| Hawai'i | 141      |
|         |          |

| State      | Kosraean |
|------------|----------|
| Hawaiʻi    | 484      |
| Washington | 100      |

| State      | Marshallese |
|------------|-------------|
| Hawai'i    | 7,412       |
| Arkansas   | 4,324       |
| Washington | 2,207       |
| California | 1,761       |
| Oklahoma   | 1,028       |
| Oregon     | 970         |
| Utah       | 793         |
| Arizona    | 666         |
| Texas      | 550         |
| lowa       | 406         |

| State      | Native Hawaiian |
|------------|-----------------|
| Hawai'i    | 289,970         |
| California | 74,932          |
| Washington | 19,863          |
| Nevada     | 16,339          |
| Texas      | 13,192          |
| Oregon     | 9,719           |
| Arizona    | 9,549           |
| Florida    | 8,023           |
| Utah       | 6,525           |
| Colorado   | 5,670           |

| State      | Palauan |
|------------|---------|
| California | 1,404   |
| Hawai'i    | 1,216   |
| Washington | 917     |
| Oregon     | 602     |
| Texas      | 541     |
| Arizona    | 257     |
| Colorado   | 213     |
| Florida    | 198     |
| Nevada     | 143     |
| Virginia   | 137     |

| State          | Pohnpeian |
|----------------|-----------|
| Hawaiʻi        | 775       |
| Texas          | 136       |
| California     | 108       |
| Missouri       | 106       |
| North Carolina | 101       |

| State      | Saipanese |
|------------|-----------|
| Washington | 194       |
| California | 168       |

| State      | Samoan              |
|------------|---------------------|
| California | 60,876              |
| Hawai'i    | 37,463              |
| Washington | <mark>18,351</mark> |
| Utah       | 13,086              |
| Alaska     | <mark>5,953</mark>  |
| Texas      | 5,490               |
| Nevada     | 5,257               |
| Arizona    | 3,547               |
| Oregon     | 2,892               |
| Missouri   | 2,740               |

| State      | Tahitian |
|------------|----------|
| Hawai'i    | 2,513    |
| California | 969      |
| Utah       | 290      |
| Florida    | 170      |
| Washington | 157      |
| Nevada     | 128      |

| State      | Tokelauan |
|------------|-----------|
| Hawai'i    | 547       |
| California | 138       |

| State      | Tongan |
|------------|--------|
| California | 22,893 |
| Utah       | 13,235 |
| Hawaiʻi    | 8,085  |
| Texas      | 2,287  |
| Washington | 1,934  |
| Arizona    | 1,792  |
| Nevada     | 1,590  |
| Oregon     | 1,006  |
| Alaska     | 762    |
| Florida    | 683    |

| State      | Yapese |
|------------|--------|
| Hawaiʻi    | 260    |
| California | 138    |

U.S. Census Bureau, 2010 Census SF1, Table PCT10; 2010 Census SF2, Table PCT1. Note: Top 10 states are reported for Fijian, Guamanian or Chamorro, Marshallese, Native Hawaiian, Palauan, Samoan, and Tongan tables. State population data for other ethnic groups are limited. Smaller ethnic groups reported in 2010 Census SF2, Table PCT1, are subject to suppression if population is less than 100.

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## EXHIBIT 22

## AMERICAN SAMOA CONSTITUTION

#### **REVISED CONSTITUTION OF AMERICAN SAMOA**

## Article I Bill of Rights

Section

1. Freedom of religion, speech, press, rights of assembly and petition.

2. No deprivation of life, liberty or property without due process.

- 3. Policy protective legislation.
- 4. Dignity of the individual.

5. Protection against unreasonable searchesand seizures.

- 6. Rights of an accused.
- 7. Habeas corpus.
- 8. Quartering of militia.
- 9. Imprisonment for debt.
- 10. Slavery prohibited.
- 11. Treason.
- 12. Subversives ineligible to hold public office.
- 13. Retroactive laws and bills of attainder.
- 14. Health, safety, morals and general welfare.
- 15. Education.
- 16. Unspecified rights and privileges and immunities.

### Article II The Legislature

1. Legislature.

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- 2. Membership.
- 3. Qualifications of members.
- 4. Manner of election.
- 5. Elections.
- 6. Term of office.
- 7. Qualifications of electors.
- 8. Legislative sessions.
- 9. Enactment of law; vetoes.
- 10. Passage of bills.
- 11. Powers of each house.
- 12. Freedom from arrest.
- 13. Vacancies.
- 14. Public sessions.
- 15. Reading-Passage of bills.
- 16. Title
- 17. Amendments and revisions by reference.
- 18. Appointment to new offices.
- 19. Effective date of laws.
- 20. Legislative counsel
- 21. Quorum.
- 22. Qualifications and officers.
- 23. Adjourning Legislature.
- 24. Special or exclusive privileges not to be granted; local or special laws.
- 25. Compensation of the Legislature.

## Article III Judicial Branch

- 1. Judicial power.
- 2. Independence of the courts.
- 3. Appointments.

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### Article IV Executive Branch

- 1. Appointments.
- 2. Governor.
- 3. Secretary.
- 4. Secretary of Samoan Affairs.
- 5. Militia and posse comitatus.
- 6. Executive regulations.
- 7. Supervision and control by Governor.
- 8. Annual report.
- 9. Pardoning power.
- 10. Recommendation of laws.
- 11. Appointment of officials.
- 12. Removal of officers; powers and duties of officers.
- 13. Publication of laws.

## Article V Miscellaneous

- 1. Officers.
- 2. Existing laws.
- 3. Amendments.
- 4. Revision of the Constitution.
- 5. Existing rights and liabilities.
- 6. Oaths.
- 7. Construction.
- 8. Provisions self-executing.
- 9. Seat of Government.
- 10. Political districts and counties.
- 11. Effective date.

Whereas the Congress of the United States, in its Act of February 20, 1929, provided that until the Congress shall provide for the Government of the islands of American Samoa, all civil, judicial, and military powers shall be vested in such person or persons and exercised in such manner as the President of the United States shall direct; and

Whereas by Executive Order No. 10264 the President of the United States directed that the Secretary of the Interior should take such action as may be necessary and appropriate and in harmony with applicable law, for the administration of civil government in American Samoa; and

Whereas it is appropriate that, in the process of developing selfgovernment, the people of American Samoa should enjoy certain rights and responsibilities inherent in the representative form of government; and

Whereas it is desirable that these rights and responsibilities be clearly set forth in a Constitution, and the adoption of a Constitution is in harmony with applicable law; and

Whereas the Constitution adopted in 1960 provided for a revision thereof:

Now, therefore, this revised Constitution, having been ratified and approved by the Secretary of the Interior and having been approved by a Constitutional Convention of the people of American Samoa and a majority of the voters of American Samoa voting at the 1966 election, is established to further advance government of the people, by the people, and for the people of American Samoa.

## Article I

## **Bill of Rights**

Section 1. Freedom of religion, speech, press, rights of assembly and petition. There shall be separation of church and government, and no law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2. No deprivation of life, liberty or property without due process. No person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

**Amendments**: 1967 Section formerly provided for payment of compensation "before" the taking of property and for reversion to owner after 3 years of non-user. H.C.R. No. 45, 10th Leg. 1st Spec. Sess., requested Secty. of Int. to revise the section to its present form. This was done at the time of ratification and approval on June 2, 196 7.

#### **Case Notes:**

Due process clause does not require jury trial; however the Chief Justice may so provide by rule. Pelesasa v. Te'o, ASR (1978). Substantive due process is a fundamental right as such must be accorded litigants, nurses suspended by Personnel Advisory Board. Reed v. Personnel Advisory Board, ASR (1977).

**Section 3. Policy protective legislation.** It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.

#### **Case Notes:**

Territory has compelling interest in preserving the lands of Samoa for Samoans; laws in conflict with U.S. not displaced. Craddick v. Territorial Registrar, ASR (1979).

#### **Cross-References**:

Government policy to protect persons against alienation of their lands.

Treaty of Cession of Tutuila and Aunu'u.

U.S. obligated to protect Samoan property rights.

14th Amendment, U.S. Constitution.

**Section 4. Dignity of the individual.** The dignity of the individual shall be respected and every person is entitled to protection of the law against malicious and unjustifiable public attacks on the name, reputation, or honor of himself or of his family.

#### Section 5. Protection against unreasonable searches and

**seizures**. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Evidence obtained in violation of this section shall not be admitted in any court.

**Section 6. Rights of an accused**. No person shall be subject for the same offense to be twice put in jeopardy of life or liberty; nor shall he be compelled in any criminal case to be a witness against himself; and the failure of the accused to testify shall not be commented upon nor taken against him. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, to be informed of the nature and the cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Every man is presumed innocent until he is pronounced guilty by law, and no act of severity which is not reasonably necessary to secure the arrest of an accused person shall be permitted. All persons shall be bailable by sufficient sureties except where the judicial authorities shall determine that the presumption is great that an infamous crime, which term shall include murder and rape, has been committed and that the granting of bail would constitute a danger to the community. Bail shall be set by such judicial authorities. Excessive bail shall not be required, nor excessive fines imposed nor cruel or unusual punishments inflicted.

#### **Case Notes:**

Delay in setting trial is violative. Government of American Samoa v. Tapusoa,ASR (1979). "Double jeopardy" protection not violated where crime for which defendant pled guilty and was convicted, was considered a different offense rather than a lesser included part of same offense.

A.S.G. v. Moafanua, 4 ASR 2d 33 (1987).

Right to public trial not violated where courtroom cleared during testimony of juvenile victim in rape case where such exclusion was requested by victim to avoid describing sexual acts in front of family members. A.S.G. v. Masaniai 4 ASR2d 156 (1987) (mem).

**Section 7. Habeas corpus.** The writ of habeas corpus shall be granted without delay and free of costs. The privilege of the writ of habeas corpus shall not be suspended except by the Governor and then only when the public safety requires it in case of war, rebellion, insurrection or invasion.
**Section 8. Quartering of militia**. No soldier or member of the militia shall, in time of peace, be quartered in any house without the consent of the owner or the lawful occupant, nor in time of war, except in a manner prescribed by law. The military authority shall always be subordinate to the civil authority in time of peace.

**Section 9. Imprisonment for debt.** There shall be no imprisonment for debt except in cases of fraud.

**Section 10. Slavery prohibited.** Neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in American Samoa.

**Section 11. Treason.** Treason against the Government of American Samoa shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or a confession in open court.

Section 12. Subversives ineligible to hold public office. No person who advocates, or who aids or belongs to any party, organization, or association which advocates the overthrow by force or violence of the Government of American Samoa or of the United States shall be qualified to hold any public office of trust or profit under the Government of American Samoa.

Section 13. Retroactive laws and bills of attainder. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts shall be passed.

Section 14. Health, safety, morals and general welfare. Laws may be enacted for the protection of the health, safety, morals and general welfare, of the people of American Samoa.

**Section 15. Education.** The Government shall operate a system of free and non-sectarian public education. The government will also

encourage qualified persons of good character to acquire further education, locally and abroad, both general and technical, and thereafter to return to American Samoa to the end that the people thereof may be benefited.

### Section 16. Unspecified rights and privileges and immunities.

The enumeration of certain rights in this Constitution shall not be construed to impair or deny other rights retained by the people. No law shall be made or enforced which shall abridge the privileges or immunities of the citizens of American Samoa.

# Article II

# The Legislature

**Section 1. Legislature.** There shall be a Legislature which shall consist of a Senate and House of Representatives. The Legislature shall have authority to pass legislation with respect to subjects of local application, except that:

(a) No such legislation may be inconsistent with this Constitution or the laws of the United States applicable in American Samoa;

(b) No such legislation may conflict with treaties or international agreements of the United States;

(c) Money bills enacted by the Legislature of American Samoa shall not provide for the appropriation of funds in excess of such amounts as are available from revenues raised pursuant to the tax laws and other revenue laws of American Samoa. Prior to his final submission to the Secretary of the Interior of requests for Federal funds necessary for the support of governmental functions in American Samoa, the Governor shall prepare a preliminary budget plan. He shall submit such plan to the Legislature in joint session for its review and approval with respect to such portions as relate to expenditures of funds proposed to be appropriated by the Congress of the United States. Amended 1971, S.J.R. No. 4, effective March 19, 1971.

(d) Legislation involving the expenditure of funds other than as budgeted shall include revenue measures to provide the needed funds.

Amendments: 1971 SJ.R. No. 4, llth Leg. 2nd Reg. Sess., in paragraph (c), at end of first sentence, deleted the words "but excluding therefrom such income as is derived from user charges or service related reimbursements to the Government of American Samoa which is segregated for the use of the activity to which such charges or reimbursements are related"; in present last sentence the word "approval" following "review and" was substituted for the word "recommendation"; the former last sentence was deleted, it read: "With respect to such portions of the preliminary budget plan, the Governor shall adopt such recommendations of the Legislature as he may deem appropriate, but he shall it to the Secretary all recommendations he has not adopted".

#### **Case Notes:**

Subject to supervision in its exercise, the Legislature of American Samoa has been delegated unimpaired power, through the executive branch of the federal government, to give territorial courts authority to sit in admiralty and, as a consequence, to entertain in rem actions and provide procedures for arresting vessels or other property which is the subject of a maritime action. Vessel Fijian Swift v. Trial Division, High Court of American Samoa, 4 ASR. 983 (1975). **Section 2**. **Membership.** The Senate shall consist of eighteen members, three from the Manu'a District, six from the Western District, and nine from the Eastern District.

The House of Representatives shall consist of twenty members elected from the following representative districts, the number of representatives from each of the districts to be as indicated:

| Representative District No. 1, composed of Ta'u, Fitiuta and Faleasao,   | two<br>representatives; |
|--|-------------------------|
| Representative District No. 2, composed of Ofu,<br>Olosega and Sili,   | one<br>representative;  |
| Representative District No. 3, Vaifanua - composed of the Villages of Alao, Aoa, Onenoa, Tula and Vatia,                           | one<br>representative;  |
| Representative District No. 4, Saole - composed of the Villages of Aunuu, Amouli, Utumea and Alofau,                               | one<br>representative;  |
| Representative District No. 5, Sua No. I - composed of<br>the Villages of Fagaitua, Amaua, Auto, Avaio, Alega,<br>Aumi and Laulii, | one<br>representative;  |
| Representative District No. 6, Sua No. 2 - composed of the Villages of Sailele, Masausi, Masefau and Afono,                        | one<br>representative;  |
| Representative District No. 7. Ma'uputasi No. I -<br>composed of the Villages of Fatumafuti, Fagaalu and<br>Utulei,                | one<br>representative;  |
| Representative District No. 8, Ma'uputasi No. 2 - composed of the Village of Fagatogo,   | one<br>representative;  |
| Representative District No. 9, Ma'uputasi No. 3 -<br>composed of the Village of Pago Pago,   | one<br>representative;  |
| Representative District No. 10, Ma'uputasi No. 4 - composed of the Villages of Satala, Atuu and Leloaloa,                          | one<br>representative;  |
| Representative District No. 11, Ma'uputasi No. 5 - composed of the Village of Aua  | one<br>representative;  |

| Representative District No. 12, Ituau - composed of the Villages of Nu'uuli, Fagasa, Matuu and Faganeanea,                                    | two<br>representativs;  |
|---|-------------------------|
| Representative District No. 13, Fofo - composed of the Villages of Leone and Auma,  | one<br>representative;  |
| Representative District No. 14, Lealataua - composed of the Villages of Fagamalo, Fagalii, Poloa, Amanave,                                    |                         |
| Failolo, Agagulu, Seetaga, Nua, Atauloma, Afao,<br>Amaluia and Asili,   | one<br>representative;  |
| Representative District No. 15, Ma'upu - composed of<br>the Villages of Tafuna, Mesepa, Faleniu, Mapusap Fou,<br>Pavaiai, Iliili and Vaitogi, | two<br>representatives; |
| Representative District No. 16, Tualatai - composed of<br>the Villages of Futiga, Ituau (Malaeloa), Taputimu and<br>Vailoatai,                | one<br>representative;  |
| Representative District No. 17, Leasina - composed of<br>the Villages of Aitulagi (Malaeloa), Aoloau and Aasu.                                | one<br>representative;  |

Senators and representatives shall be reapportioned by law at intervals of not less than 5 years.

The adult permanent residents of Swains Island who are United States nationals may elect at an open meeting a delegate to the House of Representatives who shall have all the privileges of a member of the House except the right to vote.

### Section 3. Qualifications of members.

#### A Senator shall -

(a) be a United States National;

(b) be at least 30 years of age at the time of his election;

(c) have lived in American Samoa at least 5 years and have been a bona fide resident thereof for at least 1 year next preceding his election; and (d) be the registered matai of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected.

### A Representative shall -

(a) be a United States National;

(b) be at least 25 years of age at the time of his election; and have lived in American Samoa for a total of at least 5 years and have been a bona fide resident of the representative district from which he is elected for at least 1 year next preceding his election.

A delegate from Swains Island shall have the qualifications of a Representative except that in lieu of residence in a representative district, he shall have been a bona fide resident of Swains Island for at least one year next preceding his election.

No person who shall have been expelled from the Legislature for giving or receiving a bribe or being an accessory thereto, and no person who shall have been convicted of a felony under the laws of American Samoa, the United States, or the laws of any state of the United States, shall sit in the Legislature, unless the person so convicted shall have been pardoned and have had his civil rights restored to him.

No employee or public officer of the Government shall be eligible to serve in the Legislature while holding such position. The prohibition contained herein shall become effective on July 1, 1971. Amended 1971, S.J.R. No. 3, approved by Secretary of the Interior, March 19, 1971.

**Amendments:** 1971 S.J.R. No. 3, 11th Leg. 2nd Reg. Sess., amended last paragraph generally by changing former references to specific government positions to present language covering all employees or public officers. **Section 4. Manner of election.** Senators shall be elected in accordance with Samoan custom by the county councils of the counties they are to represent, the number of senators from a county or counties to be as indicated: Fitiuta, Faleasao and Ta'u, two senators; Olosega and Ofu, one senator; Saole, one senator; Vaifanua, one senator; Sua, two senators; Ma'uputasi, three senators; Ituau, two senators; Ma'upu, two senators; Leasina, one senator; Tualatai, one senator; Fofo, one senator; and Lealataua, one senator. The decisions of the members of the county councils of the counties concerned shall be certified by the county chiefs of such counties.

Representatives shall be chosen by secret ballot of the qualified electors of their respective representative districts.

#### **Case Notes:**

"Lived in Samoa for a total of at least 5 years" does not mean last 5 years. Section 6.0212 used to explain rules for determining bona ride residence of candidate. King v. Watson, ASR (1978). Where county council announced its decision as to who should be new senator, and the entire council was not in agreement with the decision, county chief who certified the decision wrongly ascertained for himself the decision of the majority and certified another person; and the certification would be set aside and the matter referred back to the council for a proper decision and certification in accordance with Samoan custom. Faiivae v. Mola, 4 ASR 834 (1975).

High Court had subject matter jurisdiction in case involving a contested senatorial election by county council where there was a case or controversy, it arose under the constitution, laws or treaties, and the cause was described in jurisdictional statutes. Meredith v. Mola, 4 ASR 773 (1973).

Constitution requires that senators be chosen by county council and court cannot submit names to senate for election. Meredith v. Mola, 4 ASR 773 (1973). Court cannot declare one senatorial candidate victor over another, since it lacks jurisdiction to so do, such being the exclusive province of senate. Meredith v. Mola, 4 ASR 773 (1973).

**Section 5. Elections.** Elections shall be held biennially in each even numbered year beginning on the first Tuesday following the first Monday in November and ending not later than 4 weeks thereafter.

**Section 6. Term of office.** Each senator shall hold office for a term of four years. Representatives including any delegates from Swains Island shall each hold office for a term of two years. The terms of all members of the Legislature including any delegate from Swains Island shall commence at noon on the third day of January following their election, except as otherwise provided.

**Section 7. Qualifications of electors.** Every person of the age of 18 years or upwards who is a United States national and who has lived in American Samoa for a total of at least two years and has been a bona fide resident of the election district where he offers to vote for at least one year next preceding the election and who meets such registration requirements as may be prescribed by law shall be deemed a qualified elector at such election. No person under guardianship, non compos mentis, or insane shall be qualified to vote at any election; nor shall any person who has been convicted of a felony be qualified to vote at any election unless he has had his civil rights previously restored to him or unless he has maintained good behavior for 2 years following the date of his conviction or his release from prison whichever is the later.

**Section 8. Legislative sessions.** There shall be two regular sessions of the Legislature held each year, each session to last 45 days, the first session to begin on the second Monday in January each year and the second session to begin on the second Monday in July of each year. The Legislature may meet in special session at the call of the Governor who shall set the time for the beginning of

such session and the number of days it may last. - Amended H.J.R. No. 1, adopted Feb. 18, 1977, approved by voters Nov. 7, 1978, approved by Sec. of Int. Mar. 1, 1979; amended 1971 S.J.R. No. 5, effective March 19, 1971.

**Amendments:** 1979 Changed length of sessions from 30 to 45 days.

1971 S J.R. No. 5, 11th Leg. 2nd Reg. Sess., substituted present two 30 day sessions for former annual 40 day session commencing on the 2nd Monday in February.

**Section 9. Enactment of law; vetoes.** The enacting clause of all bills shall be: "Be it enacted by the Legislature of American Samoa," and no law shall be enacted except by bill. Bills may originate in either House, and may be amended or rejected by the other. The Governor may submit proposed legislation to the Legislature for consideration by it. He may designate any such proposed legislation is urgent, if he so considers it.

Every bill, having passed both Houses, shall be signed by the President of the Senate and the Speaker of the House, and shall, before it becomes a law, be presented to the Governor for his approval. If he approves it, he shall sign it and it shall become a law, and he shall deposit it in the office of the Secretary of American Samoa. But if it be not approved by him, he shall return it with his objections to the House in which it originated which shall enter the same in their journal. Any bill not returned by the Governor within 10 days (Sundays excepted) after having been presented to him, shall become a law, whether signed by him or not, unless the Legislature by adjournment prevent such return, in which case it shall not become a law unless the Governor, within 30 days after adjournment shall sign it, in which case it shall become a law in like manner as if it had been signed by him before adjournment; and the Governor shall deposit it in the office of the Secretary of American Samoa.

Not later than 14 months after a bill has been vetoed by the Governor, it may be passed over his veto by a two-thirds majority of the entire membership of each House at any session of the Legislature, regular or special. A bill so repassed shall be represented to the Governor for his approval. If he does not approve it within 15 days, he shall send it together with his comment thereon to the Secretary of the Interior. If the Secretary of the Interior approves it within 90 days after its receipt by him, it shall become a law; otherwise it shall not.

If a bill presented to the Governor should contain several items of appropriation of money, he may object to one or more of such items, or any part or parts thereof, portion or portions thereof, while approving the other items, parts, or portions of the bill. In such a case he shall append to the bill, at the time of signing it, a statement of the items, or parts or portions thereof, to which he objects and the items, or parts or portions thereof, so objected to shall not take effect. As used in this paragraph, the terms 'items', 'part', 'portion' and 'portions' shall include a proviso or provisos, a directive, a limitation, or other extraneous substantive legislation included in an appropriations bill or appended to any item of appropriation in such an appropriations bill.

Furthermore, nothing in this section shall be deemed to permit any change in the law respecting the alienation or transfer of land or any interest therein to be effective unless such change shall have been approved by two successive Legislatures by a two-thirds vote of the entire membership of each House and by the Governor as provided in Section 3 of Article I.

# **Case Notes:**

Concurrent resolution, given binding effect by law to veto executive branch action, is not a "1aw" subject to enactment by bill. Tuika Tuika v. Governor of American Samoa, 4 ASR2d 85 (1987). Section 10. Passage of bills. A majority of all the members of each House, voting in the affirmative, shall be necessary to pass any bill or joint resolution.

**Section 11. Powers of each house.** Each house shall keep a journal of its proceedings and publish the same, determine its rules of procedure, punish members for disorderly behavior, and, with the consent of two-thirds of its entire membership, may expel a member, but not a second time for the same offense. Each House shall sit upon its own adjournments, but neither House shall, without the concurrence of the other, adjourn for more than 3 days, nor to any other place than that in which it may be sitting.

Section 12. Freedom from arrest. Senators and representatives and any delegate from

Swains Island in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during a session (including a special joint session) of the Legislature, and in going to and returning from the same. No member of the Legislature shall be held to answer before any tribunal other than the Legislature itself for any speech or debate in the Legislature.

**Section 13. Vacancies**. When vacancies occur in either House, the Governor or the person exercising the functions of Governor shall issue writs of election to fill such vacancies except that if any such vacancy shall occur within three months of the next regular election, no special election shall be held and the Governor shall appoint a qualified person to fill such vacancy. Prior to appointing such person, the Governor shall in the case of a representative consult with the county chief or county chiefs in the representative district concerned; and in the case of a senator, with the District Governor and county chiefs in the district concerned. A person elected to fill a vacancy or appointed by the Governor to fill a vacancy shall hold office during the remainder of the term of his predecessor.

Section 14. Public sessions. The business of each House, and of the Committee of the Whole, shall be transacted openly and not in secret session.

**Section 15. Reading - Passage of bills.** No bill shall be passed until copies of the same with amendments thereto shall have been made available for the use of the members; nor shall a bill become a law unless the same shall have been read on two separate days in each House previous to the day of the final vote thereon. On final passage of all bills, they shall be read at length, section by section, and the votes shall be by yeas and nays upon each bill separately, and shall be entered upon the journal. The provisions of this section respecting the reading of bills shall be subject to the exception that a bill which has been vetoed by the Governor and re-introduced for passage over the Governor's veto need only be read on the day of the final vote thereon.

**Section 16. Title.** Every legislative act shall embrace but one subject and matters properly connected therewith, which shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such an act shall be void only as to so much thereof as shall not be expressed in the title.

Section 17. Amendments and revisions by reference. No law shall be amended or revised by reference to its title only; but in such case the act, as revised, or section or sub-section as amended, shall be reenacted and published at full length.

**Section 18. Appointment to new offices.** No member of the Legislature shall, during the term for which he was elected and for one year thereafter, be appointed to any office which shall have been created or the salary of which shall have been increased by the Legislature during such term.

**Section 19. Effective date of laws.** An act of the Legislature required to be approved and approved by the Governor only shall

take effect no sooner than 60 days from the end of the session at which the same shall have been passed, while an act required to be approved by the Secretary of the Interior only after its veto by the Governor and so approved shall take effect no sooner than 40 days after its return to the Governor by the Secretary of the Interior. The foregoing is subject to the exception that in case of an emergency the act may take effect at an earlier date stated in the act provided that the emergency be declared in the preamble and in the body of the act.

**Section 20. Legislative counsel.** A legislative counsel, who shall be learned in the law, shall be appointed by the President of the Senate and the Speaker of the House, to advise and assist the Legislature. The position of legislative counsel shall be a full-time position and compensation for the counsel shall be budgeted by the Legislature at a grade level equivalent to that of Deputy Attorney General of the Government of American Samoa. The legislative counsel shall also be the director of the Legislative Reference Bureau. - Amended H.J.R. No. 3, Feb. 18, 1977, approved by voters Nov. 7, 1978, approved by Sec. of Int. Mar. 1, 1979.

Amendments: 1979 Changed manner of appointment of the counsel and changed grade level.

**Section 21. Quorum**. A majority of each House shall constitute a quorum for the transaction of business, but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner as each House may provide.

**Section 22**. **Qualifications and officers.** Each House of the Legislature shall be the judge of the elections, returns, and qualifications of its own members and shall choose its officers.

### **Case Notes:**

This section does not give the senate adjudicatory power to determine what needs to be done for the selection of a senator to

conform to constitutional requirements and whether those requirements were met; such determinations are for the courts, as the questions are judicial, not political, and are matters of constitutional interpretation. Meredith v. Mota, 4 ASR 773 (1973). If jurisdictional criteria are met, court will consider claim to legislative seat despite this section's provision granting legislature power to judge elections and qualifications of its members. Meredith v. Mola, 4 ASR 773 (1973).

Court cannot declare one senatorial candidate victor over another, since it lacks jurisdiction to so do, such being the exclusive province of senate. Meredith v. Mola, 4 ASR 773 (1973).

Constitution requires that senators be chosen by county council and court cannot submit two names to senate for election. Meredith v. Mota, 4 ASR 773 (1973).

In view of this section, High Court could not adjudicate dispute whereby candidate for senate claimed that he had been duly qualified and elected and that senator who was sitting had not been; the dispute was for the senate to decide. Tuitasi v. Lualemaga, 4 ASR 798 (1973).

This section is a textually demonstrated constitutional commitment to the senate to judge who received the most votes; therefore, such issue is a political question and not justiciable. Tuitasi v. Lualemaga, 4 ASR 798 (1973).

This section is a textually demonstrated constitutional commitment to the senate to judge the qualifications set forth in this constitution for the position of senator; thus, issue of whether a person is qualified is a political question and for the senate and is not justiciable. Tuitasi v. Lualemaga, 4 ASR 798 (1973).

High Court had subject matter jurisdiction in case involving a contested senatorial election by county council where there was a case or controversy, it arose under the constitution, laws or treaties, and the cause was described in jurisdictional statutes. Meredith v. Mola, 4 ASR 773 (1973).

Section 23. Adjourning legislature. In case of disagreement between the two Houses with respect to the time of adjournment, the Governor shall have power to adjourn the Legislature to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the next regular session of the Legislature.

Section 24. Special or exclusive privileges not to be granted; local or special laws. The power of the Government to act for the general welfare of the people of American Samoa shall never be impaired by the making of any irrevocable grant of special or exclusive privileges or immunities. Corporations may be formed under general laws but shall not be created by special act except for municipal, governmental or quasi-governmental purposes in cases where the objects of the corporation cannot be attained under general laws. All general laws or special acts passed pursuant to this section may be amended or repealed. The Legislature shall pass no local or special act if a general act can be made applicable.

Section 25. Compensation of the legislature. The compensation of the members of the Legislature is provided by law. - Amended 1977, H.J.R. No. 6, eff. April 8, 1977.

**Amendments:** 1971 SJ.R. No. 4, 11th Leg. 2nd Reg. Sess., amended section generally and increased the annual legislative pay to \$6,000.00.

**Cross-references:** Compensation of legislators, see 2.0102 and 2.0103.

# Article III

# **Judicial Branch**

**Section 1. Judicial power.** The judicial power shall be vested in the High Court, the District Courts, and such other courts as may from time to time be created by law.

High Court had subject matter jurisdiction in case involving a contested senatorial election by county council where there was a case or controversy, it arose under the constitution, laws or treaties, and the cause was described in jurisdictional statutes. Meredith v. Mola, 4 ASR 773 (1973).

It cannot be said that the "judicial power" vested in the High Court by this section is plenary and thus comprehends the authority to sit as a court of admiralty; the question whether the court has power to so sit is one of jurisdiction, and such jurisdiction has not been conferred on any court in the territory by the American Samoa Constitution or the American Samoa Code. Vessel Fijian Swift v. Trial Division, High Court of American Samoa, 4 AS R983 (1975).

Subject to supervision in its exercise, the Legislature of American Samoa has been delegated unimpaired power, through the executive branch of the federal government, to give territorial courts authority to sit in admiralty and, as a consequence, to entertain in rem actions and provide procedures for arresting vessels or other property that is the subject of a maritime action. Vessel Fijian Swift v. Trial Division, High Court of American Samoa, 4 ASR 983 (1975).

In rem admiralty and maritime jurisdiction in the Trial Division of the High Court cannot be grounded upon "the necessity and importance of in rem Admiralty jurisdiction ... in the orderly administration of justice in this maritime territory"; such determination is for the legislature. Vessel Fijian Swift v. Trial Division, High Court of American Samoa, 4 ASR 983 (1975).

**Section 2. Independence of the courts.** The judicial branch of the Government of American Samoa shall be independent of the executive and legislative branches.

**Section 3. Appointments.** The Secretary of the Interior shall appoint a Chief Justice of American Samoa and such Associate Justices as he may deem necessary.

# Article IV

### **Executive Branch**

# Section 1.

Superseded by U.S. Dept. of the Int. Secretary's Order No. 3009, §§ 2 and 4, Sept. 13, 1977, eff. Sept. 13, 1977, as amended in § 2 by U.S. Dept. of the Int. Secretary's Order No. 3009, Amendment No. 1, Nov. 3, 1977, eff. Nov. 3, 1977.

### **Reviser's Comment:**

This section, which provided that "The Governor of American Samoa and the Secretary of American Samoa shall be appointed as provided in the laws of the United States", was impliedly superseded by the above-referred to secretarial orders. See note on the subject under 2 of this article.

Section 2. Governor and lieutenant governor. The Governor and the Lieutenant Governor of American Samoa shall, commencing with the first Tuesday following the first Monday of November 1977, be popularly elected and serve in accordance with the laws of American Samoa. - Amended 1977, U.S. Dept. of the Int. Secretary's Order No. 3009, §§ 2, 4, Sept. 13, 1977, as amended by U.S. Dept. of the Int. Secretary's Order No. 3009, Amendment No. 1, Nov. 3, 1977, eff. Nov. 3, 1977.

Amendments: 1977 U.S. Dept. of the Int. Secretary's Order No. 3009, §§ 2 and 4, Sept. 13, 1977, amended this section to read "The Governor and the lieutenant Governor of American Samoa shall, commencing with the first Tuesday in November, 1977, be popularly elected and serve in accordance with the laws of

American Samoa."

U.S. Dept. of the Int. Secretary's Order No. 3009, Amendment No. 1, Nov. 3, 1977, amended Order No. 3009, § 2, effective Nov. 3, 1977, by substituting "following the first Monday of" for the word "in" preceding "November 1977".

**Section 3. Secretary.** The Secretary of American Samoa, who may be referred to as Lieutenant Governor of American Samoa, shall have all the powers and duties of the Governor in the case of a vacancy in the office of Governor or the disability or temporary absence of the Governor. He shall record and preserve the laws and executive orders, and transmit copies thereof to the Secretary of the Interior. He shall have and perform such other duties as may be prescribed by law or assigned to him by the Governor.

**Section 4. Secretary of Samoan affairs.** The Secretary of Samoan Affairs shall be appointed by the Governor from among the leading registered matais. He shall hold office during the pleasure of the Governor. The Secretary of Samoan Affairs shall be the head of the Department of Local Government. In conjunction with the District Governors he shall coordinate the administration of the district, county, and village affairs as provided by law and also in conjunction with the District Governors he shall supervise all ceremonial functions as provided by law.

Section 5. Militia and posse comitatus. The Governor may summon the posse comitatus or call out the militia to prevent or suppress violence, invasion, insurrection, or rebellion.

**Section 6. Executive regulations.** The Governor shall have the power to issue executive regulations not in conflict with laws of the United States applicable to American Samoa, laws of American Samoa, or with this Constitution.

**Section 7. Supervision and control by Governor.** The Governor shall have general supervision and control of all executive

departments, agencies and instrumentalities of the Government of American Samoa.

**Section 8. Annual report.** The Governor shall make an official report of the transactions of the Government of American Samoa to the Secretary of the Interior and the Legislature within three months after the close of each fiscal year.

**Section 9. Pardoning power.** The Governor shall have the power to remit fines and forfeitures, commute sentences, and grant reprieves and pardons after conviction for offenses against the laws of American Samoa.

**Section 10. Recommendation of laws.** The Governor shall give the Legislature information on the state of the Government and recommend for its consideration such measures as he may deem necessary and expedient. He may attend or depute another person to represent him at the meetings of the Legislature, and may give expression to his views on any matter before that body.

**Section 11. Appointment of officials.** With the exception of elective officials, those appointed by the Secretary of the Interior, and those whose appointments are otherwise provided for, the officials of the Government of American Samoa including district, county, and village officials shall be appointed by the Governor. Prior to appointing a district governor, a county chief, or a pulenuu, the Governor through the Secretary of Samoan Affairs shall request the recommendation of the appropriate district council as to who shall be appointed in the case of a district governor, in the case of a county chief; and of the appropriate village council, district governor and. county chief, in the case of a pulenuu. The Secretary of Samoan Affairs may also make his own recommendations to the Governor.

### Section 12. Removal of officers; powers and duties of officers.

The Governor may appoint or remove any officer whose appointment is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed upon them by law or by executive regulation of the Governor not inconsistent with any law.

**Section 13. Publication of laws.** The Governor shall make provision for publishing laws within 55 days after the close of each session of the Legislature and for their distribution to public officials and sale to the public.

### Article V

### Miscellaneous

**Section 1. Officers.** For the public convenience and to insure continuity in the operation of the Government all officers of American Samoa, including district, county, and village officers, shall, subject to the right of resignation or removal as may be provided by law, continue to hold their respective offices until the expiration of the time for which they were respectively elected or appointed, except that senators elected at the general election in 1966 shall go out of office at noon on January 3, 1969.

Regardless of any other provision or provisions in this Constitution the House of Representatives shall, prior to noon, January 3, 1969, consist only of those members elected at the general election in 1966 while the Senate prior to noon, January 3, 1969, shall consist only of the hold-over senators plus those elected at the general election in 1966. Also regardless of any other provision or provisions in this Constitution any vacancies occurring in either House prior to January 3, 1969 may be filled as provided in Article II, Section 13 of the Constitution which became effective on October 17, 1960. **Section 2. Existing laws.** All laws of American Samoa not inconsistent with this Constitution shall continue in force until they expire by their own limitation, or are altered or repealed by competent authority.

**Section 3. Amendments.** Any amendment to this Constitution may be proposed in either House of the Legislature, and if the same be agreed to by three-fifths of all members of each House, voting separately, such proposed amendment shall be entered on the journals, with the yeas and nays taken thereon. The Governor shall then be requested to submit such proposed amendment to the voters eligible to vote for members of the House of Representatives at the next general election. If a majority of such voters voting approve such amendment, the Governor shall, within 30 days after such approval shall have been officially determined, submit the same to the Secretary of the Interior for approval or disapproval within 4 months after its receipt.

Section 4. Revision of the constitution. In view of the changing conditions in American Samoa, the Governor shall appoint a new Constitutional Committee five years after the effective date of this Constitution to prepare amendments or a revised draft constitution to be submitted to the Governor who shall call a constitutional convention to consider the same. The delegates to the convention shall be selected by their respective county councils. The number of delegates from each county shall be the number obtained by dividing the population of the county, as shown by the last preceding Federal census, by 400, any fraction in the quotient obtained to be disregarded if such fraction shall be less than onehalf and if such fraction shall be one-half or more it shall be considered to be one unit, provided that each county shall have at least one delegate, and provided further that Swains Island shall have one delegate selected in open meeting by the adult permanent residents of the island who are United States nationals. If the convention approves such amendments or draft constitution either

with changes made therein by the convention or without changes, the same as approved shall be submitted by the Governor to the voters eligible to vote for members of the House of Representatives at the next general election; and if a majority of the voters voting approve the amendments or proposed revised constitution, the Governor shall submit the same to the Secretary of the Interior for his approval, and if he approves the same, then the amendments shall become part of the Constitution or the proposed revised constitution shall replace this constitution, as the case may be. Salaries of employees of the Convention and per them for delegates shall be provided by law. The Government shall furnish the Convention with necessary supplies and other necessary services.

**Section 5. Existing rights and liabilities.** Except as otherwise provided in this Constitution all existing actions, writs, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, decrees, sentences, orders, appeals, causes of action, contracts, claims, demands, titles, and rights shall continue unaffected notwithstanding the taking effect of this Constitution.

Section 6. Oaths. All officers of American Samoa including district, county, and village officers, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath: "I, \_\_\_\_\_, of \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, and that I will well and faithfully uphold the laws of the United States applicable to American Samoa, and the Constitution and laws of American Samoa. So help me God."

**Section 7. Construction.** In this Constitution titles shall not be used for the purposes of construction and wherever any personal pronoun appears it shall be construed to mean either sex; also in this Constitution a special or particular provision shall control a general provision should there be any inconsistency between a special or particular provision and a general provision.

**Section 8. Provisions self-executing.** The provisions of this Constitution shall be self-executing to the fullest extent that their respective natures permit.

**Section 9. Seat of government.** The seat of Government shall be at Fagatogo.

**Section 10. Political districts and counties.** It is hereby recognized that there are three political districts in American Samoa, viz, Manu'a, composed of the political counties of Ta'u, Faleasao, Fitiuta, Olosega and Ofu; Eastern, composed of the political counties of Sua, Vaifanua, Saole, Ituau and Ma'uputasi; and Western, composed of the political counties of Fofo, Leasina, Tualatai, Lealataua and Ma'upu.

**Section 11. Effective date.** This Constitution ratified and approved on June 2, 1967, by the Secretary of the Interior, action pursuant to the authority vested in him by Executive Order No. 10264, dated June 29, 1951, of the President of the United States, and approved by the Constitutional Convention of the people of American Samoa at its meeting in Fagatogo, American Samoa, begun on September 26, 1966, and by a majority of the voters of American Samoa voting in the general election in 1966, shall become effective on July 1, 1967.

**Ratified and Approved**: Subject to the deletion from Article I, section 2 of all after the title and the insertion in lieu thereof of the text of Article 1, section 2 of the Constitution of American Samoa effective October 17, 1960, to wit: "No person shall be deprived of

life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

> Stewart L. Udall Secretary of the Interior

We the undersigned, being the duly appointed Delegates to the Constitutional Convention, do hereby certify that the above and foregoing document was approved by us in Convention assembled as the revised Constitution of American Samoa.

For and on behalf of Sua County. Le'iato, T. Mulitauaopele-Sui'ava Fautanu, P. Mulitauaopele-Tamotu

For and on behalf of Vaifanua County. Masaniai, T. Tagoa'i, L. Tuiasosopo, T.

For and on behalf of Saole County. Utu, S. Lauvao-Sisifo Fonoti, G.

For and on behalf of Ma'uputasi County. Leota, T. Fano, S. Fanene, F. Pula, N.T. Tua'olo-Lemoe Unutoa, S.L.T. Tua'olo-Maliuga Liufau, M. Mageo, F. Faumuina-Ioane Lutu, S.A. Paopaoailua, S. Mailo, P.

For and on behalf of Ta'u County. Rapi Sotoa Tauala, M.

For and on behalf of Fitiuta County. Laapui, F.

For and on behalf of Faleasao County. Ma'o, T.

For and on behalf of Olosega County. Tuiolosega-Tuumamao

For and on behalf of Alataua County. Faiivae, E.H. Salave'a, O. Leoso, M. Tuveve, S.A. Toomata, T. Noa, L.

For and on behalf of Ituau County. Lagafuaina, L. Atuatasi, M. Savusa, S. Alo, S. Savea, P. For and on behalf of Ofu County. Misa, T. Velega, P.

For and on behalf of Tualatai County. Satele, M. Uiagalelei, S. Taulapapa, E.L.

For and on behalf of Leasina County. Asuemu U. Fuimaono

For and on behalf of Tualauta County. Letuli, T. Sagapolutele, T. Magalei, T. Paogofie-Sasae Muagututi'a-Tuia

For and on behalf of Swains Island. Paul Pedro

> A.P. Lauvao-Lolo Chairman of the Constitutional Convention Attest: Mulitauaopele-Sui'ava Secretary of the Constitutional Convention

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# EXHIBIT 23

Case 1:18-cy-00036-CW Document 55-4 Filed 04/24/18 Page 60 of 179 Appellate Case #19-5972 Document #19928346469 Filed 05/12/2014/2020 Page 1age 162 ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5272

#### UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

LENEUOTI F. TUAUA, *et al.*, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, *et al.* Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

#### BRIEF OF AMICUS CURIAE DAVID B. COHEN IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DECISION BELOW

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Counsel for Amicus Curiae David B. Cohen

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<sup>&</sup>lt;sup>\*</sup> Authorities upon which we chiefly rely are marked with asterisks.

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## **INTEREST OF AMICUS CURIAE**

This case presents an issue of first impression in this Circuit and in any federal appellate court: whether people born in the U.S. territory of American Samoa are U.S. citizens by virtue of the Fourteenth Amendment's guarantee that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1, cl.1. Despite this guarantee of birthright citizenship, federal law currently designates those born in American Samoa as "nationals, but not citizens, of the United States." 8 U.S.C. § 1408(1). Because citizenship confers a variety of rights, this case raises important questions regarding the civil rights of individuals born in American Samoa.

Those questions are of both professional and personal significance to *amicus* David B. Cohen. Mr. Cohen has spent a significant part of his career addressing these issues while serving in the federal government: from June 2002 through January 2008, Mr. Cohen served in the Bush Administration as Deputy Assistant Secretary of the Interior for Insular Affairs. In that capacity, Mr. Cohen oversaw the Office of Insular Affairs, which administers the federal government's relationship with the U.S. territories, including American Samoa. In addition, in 2001, Mr. Cohen was appointed by President Bush to serve on the President's Advisory Commission on Asian Americans and Pacific Islanders. Currently, Mr.

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Cohen is the Vice Chair of the National Asian Pacific Center on Aging. Elderly American Samoans are a main constituency of that organization, and the Center often helps those individuals navigate the limitations on their rights and benefits imposed by federal, state, and local laws. Through his past and current work, Mr. Cohen has a professional interest in the issues addressed in this case.

These issues are also of personal interest to Mr. Cohen, who is of American Samoan heritage and whose father was born in American Samoa. Mr. Cohen's family includes many American Samoans, including individuals who, like several of the Plaintiff-Appellants here, were born in American Samoa and have moved to the United States. Mr. Cohen therefore has a personal interest in the rights of these individuals.

#### **INTRODUCTION**

American Samoans have been denied their rights under the Fourteenth Amendment to United States citizenship. To appreciate the harm that American Samoans as non-citizen nationals suffer in being denied United States citizenship, it is necessary to understand what citizenship means and to take stock of the benefits it confers. This brief endeavors to do both. Section I discusses the various meanings and values of citizenship in order to explain, from a theoretical standpoint, what American Samoans are denied as non-citizen nationals. Section II identifies a sample of the many benefits and privileges that are limited to U.S.

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citizens, and thus denied to American Samoans living in one of the fifty states or the District of Columbia. These practical disadvantages demonstrate that every day, American Samoans suffer from Defendants-Appellees' determination that they are less than full Americans.

#### **ARGUMENT**

## I. The Meaning of Citizenship

Legal scholars, political scientists, and sociologists alike have recognized that what it means to be both a citizen of a nation generally, and of the United States specifically, cannot be answered with a single definition. *See generally* Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 31-51 (2006); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S History* 13-39 (1997); Rogers Brubaker, *Citizenship and Nationhood in France and Germany* 21-34 (1992); T.H. Marshall, *Citizenship and Social Class* 40-48 (1950). In part, this is because the understanding of what it means to be a U.S. citizen—including both to whom that term may apply and what rights and privileges are endemic to it—has been tested and revised throughout American history. *See* Smith, *supra*, at 13-39.

Most notably, in *Dred Scott v. Sanford*, the Supreme Court excluded slaves and free blacks from the status of U.S. citizenship as an "inferior class of beings" outside "the political community formed and brought into existence by the

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Constitution of the United States," and thereby justified denying them the rights afforded by membership in that community. 60 U.S. 393, 403, 405 (1856). In response, the Reconstruction Congress drafted the Fourteenth and Fifteenth Amendments to overturn *Dred Scott* and guarantee to African Americans the status of citizenship, as well as the scope of rights that status unlocks. *See* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 Ind. L.J. 1571, 1580 (2012). So too, the Nineteenth Amendment and the civil rights movements of the Twentieth Century invoked the status and prestige of citizenship to expand equal access to its rights and privileges. *Id.* 

Even today, what it means to be a U.S. citizen still requires a multi-faceted answer. Indeed, citizenship "can invoke different meanings in varying contexts." Kerry Abrams, *Citizen Spouse*, 101 Cal. L. Rev. 407, 409 (2013) (discussing Brubaker, *supra* at 23, 31). To fully understand the extent of the harm American Samoans suffer in being denied U.S. citizenship, it is necessary first to explain these varied meanings and then the benefits derived from them.

At the most tangible level, citizenship is a "turn-key"—a right that unlocks a set of other rights that federal, state, and local laws have keyed to the legal concept of citizenship. Bosniak, *supra* at 21-23. These rights range from the foundational and broad, such as the right to vote or to serve on a jury, to the more routine and specific, such as the right to obtain a certain job or public benefit. At this level, the

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harm inflicted on American Samoans is clear—the denial of certain benefits, privileges, and protections afforded only to citizens, and the resulting restrictions on how American Samoans can participate in their communities and direct their lives.

Yet citizenship is not simply a right that happens to afford other rights. Rather, it is "nothing less than the right to have rights." Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (emphasis added), overruled in part by Afroyim v. Rusk, 387 U.S. 253 (1967). Citizenship is not just a turn-key for other rights, but also is a status with value in and of itself. Citizenship is at once both "a prerequisite for the enjoyment of certain rights, or for participation in certain types of interaction," and "a status to which access is restricted." Brubaker, supra, at 29. As a status, citizenship is an honorific—a determination that the bearer of the title "citizen" is worthy of the nation's full protection and most sacred rights, Bosniak, supra at 31-as well as a membership card-a demarcation of those who are fully within the national community as distinguished from those who are not, *id.* at 34; see also Marshall, supra at 8 (noting that within citizenship) "there is a kind of basic human equality associated with the concept of full membership of a community").

Although these two meanings of citizenship—as turn-key and as status—are conceptually distinct, they are nearly always intertwined in reality. When

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American Samoans are denied citizenship, they are denied the meaning of citizenship in both of these senses. They are not merely excluded from an abstract legal concept, they are denied access to fundamental and routine rights and privileges granted exclusively to citizens. And yet, the harm to American Samoans cannot simply be quantified by the number of rights and privileges they are denied. Each denial, even where the right or privilege may seem mundane, trivial, or merely symbolic, reinforces their inferior status as non-citizens and marks them as not wholly part of their national and local communities. Each denial communicates that they are not worthy of the title of citizen.

# II. The Rights and Benefits Denied American Samoans as Non-citizen Nationals

The importance of citizenship, both as turn-key and status, is particularly salient for American Samoans, who occupy the unique status of having been born in the United States while being denied American citizenship. American Samoans owe permanent allegiance to the United States, and thus it is often unclear what the national interest is in distinguishing American Samoans from citizens. *See* 8 U.S.C. § 1101(a)(22), (29); *id.* § 1408(1). Yet American Samoans who live in one of the fifty states or the District of Columbia must confront a patchwork of federal, state, and local laws that reference citizenship and are limited to citizens. As a result, the rights and privileges afforded to American Samoans can actually change as they move from one state or locality to another.

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For those who are citizens, citizenship unlocks these patchwork rights and saves the citizen the substantial work of determining how his or her rights change from place to place. At the same time, the availability of these special rights in each jurisdiction affirms that the citizen belongs and is privileged wherever he or she travels in the United States. For American Samoans, this legal patchwork does the opposite—it reinforces that even when simply moving from state to state or city to city, American Samoans always remain at least partially outsiders.

This section details just some of those federal, state, and local rights and privileges that are keyed to citizenship. In many cases, denial of specific rights for non-citizen nationals is clear—a particular constitutional or other legal provision applies only to U.S. citizens and excludes all others. In other cases, it is less clear, as some laws reference rights that apply to citizens, lawful aliens, and other immigration statuses while simply omitting reference to "non-citizen nationals."<sup>1</sup> Still other laws omit reference to non-citizen nationals on the surface, and only reveal after further research or cross-reference to other provisions that they apply to non-citizen nationals as well as citizens.<sup>2</sup> This complexity exists at national,

<sup>&</sup>lt;sup>1</sup> For example, California law requires that a "peace officer" "[b]e a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship . . . ." Cal. Gov't Code § 1031(a). On the face of that requirement, American Samoans either cannot be peace officers, or, despite being Americans by birth, are considered by the statute to be "permanent resident aliens."

<sup>&</sup>lt;sup>2</sup> For instance, an American Samoan seeking a security clearance from the Department of Defense in order to obtain a position with the federal government or

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state and local levels. If an American Samoan were to attempt to determine his or her eligibility to participate in Arizona's Medicaid program, for example, he or she would find a requirement to "provide verification of United States citizenship or documented verification of qualified alien status." Ariz. Rev. Stat. Ann. § 36-2903.03(A). Only by following a reference to a provision of the Federal Deficit Reduction Act, codified at 42 U.S.C. § 1396b, would the American Samoan learn that, for the purposes of Medicaid, non-citizen nationals are treated like citizens.

Of course, where a law clearly applies only to citizens, the harm to American Samoans is most tangible. But even where laws have or ultimately may be interpreted to apply to non-citizen nationals, real harm results from the ambiguity. As an initial matter, American Samoans, particularly those with no legal training, may not be able to determine their rights. And if they persist in navigating complicated and ambiguous provisions, American Samoans may face

government contractor would see that relevant Executive Orders, various other resources (including the Department of State website), and even Department of Defense regulations clearly state that one must be a citizen to obtain a security clearance. *See* 32 C.F.R. § 154.6(a) ("[o]nly U.S. citizens shall be granted a personnel security clearance, assigned to sensitive duties, or granted access to classified information."); Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995) (subject to specific exceptions, "eligibility for access to classified information shall be granted only to employees who are United States citizens...."); U.S. Dep't of State, FAQs for Obtaining Security Clearances, http://www.state.gov/m/ds/clearances/c10977.htm (last visited May 9, 2014) ("... eligibility for access to classified information may only be granted to employees who are United States citizens). Only by referencing the regulation's definition of "United States Citizen (Native Born)" in a separate section would one find that the regulation considers American Samoans to be citizens. 32 C.F.R. § 154.3(dd).

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administrative hurdles from government officials or private parties who are unfamiliar with non-citizen national status or unsure of how the law applies to it. One of the most glaring examples of this is the U.S. Citizenship and Immigration Service's (USCIS) Systematic Alien Verification for Entitlements (SAVE) program. While SAVE was designed to help federal, state, and local governments quickly verify a non-citizen's lawful residence in the United States before providing public benefits, the federal government's guidance on SAVE offers no explanation of whether the system is intended to verify the status of non-citizen nationals, or how the system could be used to do so. See U.S. Citizenship and Immigration Services, Information for Noncitizens Applying for a Public Benefit (Aug. 19. 2011). http://www.uscis.gov/save/benefit-applicants/information-That guidance only makes reference to noncitizens-applying-public-benefit. documentation that would not apply to American Samoans, such as an Arrival/Departure Form or Permanent Resident Card. Thus, even if an American Samoan is legally entitled to a benefit, a government official using SAVE—such as an official in Georgia determining whether an American Samoan is entitled to a state driver's license<sup>3</sup>—might decline to approve the benefit if the American

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<sup>&</sup>lt;sup>3</sup> See Ga. Dep't of Driver Servs., S.A.V.E. (Jan. 13, 2014), available at http://www.dds.ga.gov/drivers/Dldata.aspx?con=1746571759&ty=dl (stating that Georgia law requires the use of SAVE to verify all immigration documents presented by non-citizens in order to obtain a license).

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Samoan's lawful residence cannot be confirmed in the system, especially if the official is unaware of the status of non-citizen nationals.

Moreover, the very fact that many laws omit mention of non-citizen nationals, or imply that despite being Americans, non-citizen nationals are "resident aliens" (or a similar term), reinforces American Samoans' outsider status. In some cases, this outsider status is made explicit. For example, a number of states issue special driver's licenses to non-citizens that explicitly label the holder as a non-citizen. See, e.g., Bertrand M. Gutierrez, New N.C. Driver's Licenses Will Flag Non-U.S. Citizens, Winston-Salem J. (Feb. 20, 2013), available at http://www.journalnow.com/article\_c2edaaa8-7bc4-11e2-860d-0019bb30f31a.html ("Newly designed North Carolina driver's licenses ... will be used to distinguish people who are not U.S. citizens  $\dots$ .").<sup>4</sup> A similar special endorsement is put on U.S. passports for non-citizen nationals, which clearly states their non-citizen See U.S. Dep't of State, Certificates of Non Citizen Nationality, status. http://travel.state.gov/content/travel/english/legal-considerations/us-citizenshiplaws-policies/certificates-of-non-citizen-nationality.html (last visited May 3, 2014).

<sup>&</sup>lt;sup>4</sup> Nor is the North Carolina provision unique: a 2002 survey of 40 states revealed that at least four others issue non-citizens driver's licenses that bear a notation indicating non-citizen or special status. *See* Danielle O'Connell, Conn. Gen. Assembly, Office of Legislative Research, *Issuing Driver's Licenses to Noncitizens* (Oct. 18, 2002), *available at* http://www.cga.ct.gov/2002/rpt/2002-R-0767.htm (Louisiana, Minnesota, Ohio, South Carolina).

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To be sure, American Samoans may avoid these hardships and indignities by naturalizing after establishing a three-month residency in one of the fifty states or the District of Columbia. See 8 U.S.C. § 1427(a)(1). But naturalization is not necessarily an easy process—and more importantly, it is one that is inappropriate for American Samoans, who are already part of American society and already owe permanent allegiance to the United States. The naturalization process requires American Samoans, like foreign nationals, to take and pass an English and civics test—even though the public education curriculum in American Samoa already reflects U.S. standards. Moreover, American Samoans must submit to fingerprinting and a good moral character review (including an in-person interview), and take the same Oath of Allegiance as other non-citizens seeking to naturalize, see 8 C.F.R. § 1337.1, even though American Samoans already owe permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B) (defining "national of the United States" as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States"). Requiring American Samoans to prove their knowledge of and commitment to the United States and American civic life is yet another reminder that despite being born Americans, they are treated as second-class citizens. Finally, naturalization may be prohibitively expensive for American Samoans of limited means, as government fees total \$680. See U.S. Citizenship and Immigration Servs., N-400 Application

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*for Naturalization*, http://www.uscis.gov/n-400 (last visited May 11, 2014). American Samoans should not have to navigate these hardships when they are already Americans; indeed, they are the *only* people born in the United States, including the territories, who must do so.

Keeping in mind these practical barriers to citizenship, as well as the indignity of being required to obtain citizenship despite being born an American, *amicus* offers herein a synopsis of some of the numerous federal, state, and local laws that treat American Samoans differently based on their non-citizen national status.

## a. Voting

Because of their status as non-citizen nationals, American Samoans who live in the fifty states and the District of Columbia cannot vote in most elections.<sup>5</sup> Although this restriction is nearly universal, it does not come from the Constitution or federal statute. Rather, the Constitution grants to the states the power to define voter qualifications for elections for members of Congress and the President. *See* U.S. Const. art. I, § 2, cl. 1 (the members of the House of Representatives from

<sup>&</sup>lt;sup>5</sup> A distinct question is whether Americans living in American Samoa and other territories have a right to vote in national elections from within those territories. Americans living in American Samoa cannot vote in Presidential elections because Article II, § 1 of the Constitution affords Electoral College votes to only the States. *See also* U.S. Const. amend. XXIII (granting Electoral College votes to the District of Columbia). This brief, however, focuses on the right to vote of American Samoans living in the fifty states or the District of Columbia.

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each state shall be elected by electors with the same qualifications as those for the most numerous branch of the state legislature); *id.* art. II, § 1, cl. 2 (the legislature) of each state may direct the manner in which electors are appointed); *id.* amend. XVII, cl. 1 (Senators from each state shall be elected by electors with the same qualifications as those for the most numerous branch of the state legislature); see also Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2257-58 (2013). In fact, voting by non-citizens at every level of government under state laws was once relatively commonplace. See Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. Pa. L. Rev. 1391, 1399-1417 (1993). The Supreme Court recognized the practice of non-citizen voting in *Minor v. Happersett*, 88 U.S. 162, 177 (1874), explaining that certain non-citizens in several states—"enjoy[ed] ... the right of suffrage." Id.

Today, however, every state, and nearly every locality, has exercised its power to require U.S. citizenship as a prerequisite to voting.<sup>6</sup> Although the Supreme Court has never directly held that the right to vote can be limited to citizens, it has "impl[ied]" that "citizenship is a permissible criterion" for limiting the right to vote. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (collecting

<sup>&</sup>lt;sup>6</sup> See, e.g., Cal. Const. art. II, § 2; Nev. Const. art. II, § 1; Haw. Const. art. II, § 1; Tex. Const. art. VI, § 2(a); Fla. Const. art. VI, § 2; Wash. Const. art. VI, § 1; S.C. Const. Art. II, § 4; Colo. Rev. Stat. § 1-2-101(1); Md. Code Ann., Elec. Law § 3-102; Neb. Rev. Stat. Ann. § 32-110; Wis. Stat. § 6.02.

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authority). Indeed, just last Term, in *Arizona v. Inter Tribal Council of Arizona*, the Court examined Arizona's requirement that voters provide proof of their United States citizenship, in addition to averring under penalty of perjury that they are U.S. citizens, as required by a federal form. 133 S. Ct. at 2251. Although the Court ultimately held that the National Voter Registration Act ("NVRA") preempted Arizona's requirement for proof of citizenship to register to vote in federal elections, it expressed no doubt that Arizona's citizenship requirement was constitutionally permissible. *See id.* at 2258-59 (explaining that states have the power to set voter qualifications and stating that "it would raise serious constitutional doubts" if the NVRA prohibited Arizona from enforcing the proof-of-citizenship requirement).

States and localities have decided to deny American Samoans the right to vote even though many state and local elections have little implication for national policy or foreign affairs.<sup>7</sup> See Simon Thompson, Voting Rights: Earned or

<sup>&</sup>lt;sup>7</sup> Non-citizens are permitted to vote in a very small number of local elections. For example, Chicago allows non-citizens to vote in school board elections. *See* Bryant Yuan Fu Yang, Notes and Comments, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 Asian Am. L.J. 57 (2006). Six municipalities in Maryland, including Takoma Park, allow non-citizens to vote in city elections. *See* Charter of Takoma Park, art. VI, §§ 601, 603; Charter of the Town of Somerset, art. V, § 83-21; Charter of Barnesville, § 74-3; Charter of the Village of Chevy Chase, art. III, § 301; Charter of the Village of Martin's Addition, art. III, § 301; Charter of the Town of Garrett Park, art. III, § 78-20; *see also* Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 Cal. L. Rev. 271, 296 & n.138 (2005).

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*Entitled?* Harv. Pol. Rev. (Dec. 3, 2010), *available at* http://harvardpolitics.com/united-states/voting-rights-earned-or-entitled/; Gabriela Evia, Note, *Consent By All The Governed: Reenfranchising Noncitizens As Partners In America's Democracy*, 77 S. Cal. L. Rev. 151, 163 (2003). Moreover, these restrictions are a particularly poor fit for American Samoans, who owe permanent allegiance to the United States and thus make up a permanent part of the American polity.

The nearly across-the-board denial of the right to vote to American Samoans is especially significant and harmful. The right to vote is not simply a routine privilege; it is "the essence of a democratic society," and the principal mechanism by which individuals engage with and exercise control over the governance of the community. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . a fundamental political right, because preservative of all other rights."); Bosniak, *supra* at 34. In addition, *how* this denial is effectuated—on a state-by-state basis—compounds the harm. Although American Samoans may have deep and long-developed connections with particular states and localities, nearly every jurisdiction deems them unworthy to fully participate in the civic life of the community because they lack the status of U.S. citizens.

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## b. Jury Service

American Samoans are also uniformly denied another primary mechanism of civil engagement and participation—service on federal and state juries. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1052-66 (1995) (discussing the civil importance of the jury). Similar to voting, qualifications for jury service are defined jurisdiction by jurisdiction. Federal law requires jurors in federal courts to be U.S. citizens, 28 U.S.C. § 1865(b) ("[A]ny person [shall be deemed] qualified to serve on grand and petit juries in the district court unless he—(1) is not a citizen of the United States ...."), and almost all states impose a similar explicit qualification.

Like voting, jury service is a quintessential means of participating in American society and civic life. "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). The inability to serve on a jury is "practically a brand upon [an individual], affixed by the law, [and] an assertion of [his] inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975). American Samoans are deprived of the experience of serving on juries, and

<sup>&</sup>lt;sup>8</sup> See, e.g., Cal. Civ. Proc. Code § 203(a); Colo. Rev. Stat. § 13-71-105(1); Haw. Rev. Stat. § 612-4(a); Wash. Rev. Code § 2.36.070; see also Amy R. Motomura, Note, *The American Jury: Can Noncitizens Still be Excluded?*, 64 Stan. L. Rev. 1503, 1504 (2012).

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branded inferior, because they are not U.S. citizens—even though, once again, they owe permanent allegiance to the United States and constitute permanent members of the political community.

Moreover, the exclusion of American Samoans from jury service is particularly harmful to American Samoan litigants and—most of all—American Samoan criminal defendants. "The very idea of a jury is a body … composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, *persons having the same legal status in society as that which he holds.*" *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder*, 100 U.S. at 308) (emphasis added). For American Samoans, the reality of trial by jury is a far cry from this ideal.

## c. Military Advancement

American Samoans also face hurdles within the United States Armed Services, even though they have bravely fought for this country for the past century. Available data shows that per capita, American Samoa provides more recruits to serve in the military than the vast majority of American states.<sup>9</sup> Every

<sup>&</sup>lt;sup>9</sup> In 2004, the U.S. military recruited 6.911 per 10,000 people from American Samoa. In that same period, only the states of Alabama, Oklahoma, Hawaii, and Montana provided more recruits per capita. *See* Total Military Recruits: Army, Navy, Air Force (per capita) by state, National Priorities Project Database, 2004, available at http://www.StateMaster.com/graph/mil\_tot\_mil\_rec\_arm\_nav\_air\_for\_percap-navy-air-force-per-capita (last visited May 9, 2014); *see also, e.g.*, Kirsten Scharnberg, *Where the U.S. military is the family business*, Chicago Trib.

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year, the number of American Samoans enlisting in the Armed Services far exceeds recruitment quotas. See Mark Potter, Eager to Serve in American Samoa, NBC News (Mar. 5, 2006).<sup>10</sup>

Despite their valiant service, American Samoans who join the military face limited opportunities due to their status as non-citizen nationals because many military occupations are closed to non-citizens. In the Air Force, only about one quarter of enlisted active-duty positions are in occupations that do not require Also, once a non-citizen has finished the initial enlistment citizenship. commitment with the Air Force, he or she is prohibited from reenlisting without citizenship. Molly F. McIntosh & Seema Sayala, Noncitizens in the Enlisted U.S. *Military*, Center for Naval Analyses, 22 (Nov. 2011);<sup>11</sup> Secretary of the Air Force, AFI 36-2606, § 5.14 (May 9, 2011).<sup>12</sup> American Samoan service members in the other branches of the armed services face similar restrictions: non-citizens are eligible for only two-fifths of enlisted active-duty positions in the Navy and one half of those positions in the Army and Marine Corps. McIntosh & Sayala, supra

available at http://articles.chicagotribune.com/2007-03-(Mar. 11. 2007), 11/news/0703110486\_1\_military-recruiters-american-samoans-boot-camp (last visited May 9, 2014).

<sup>&</sup>lt;sup>10</sup> Available at http://www.nbcnews.com/id/11537737/ns/nbc\_nightly\_news\_with\_ brian williams/t/eager-serve-rican-samoa/#.U2DqlIFdV8F.

<sup>&</sup>lt;sup>11</sup> Available at https://www.cna.org/sites/default/files/research/Non%20Citizens% 20in%20the%20Enlisted%20US%20Military%20D0025768%20A2.pdf. <sup>12</sup> Available at http://static.e-

publishing.af.mil/production/1/af a1/publication/afi36-2606/afi36-2606.pdf.

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at 21-22. Moreover, there is no guarantee that these positions will not be taken by recruits with full citizenship, leaving non-citizen enlistees with access to only a fraction of all military jobs.

Advancement of non-citizens in the military is also limited. Non-citizens may not be appointed or commissioned as officers or reserve officers in any branch of the armed forces. 10 U.S.C. § 532(a)(1); 10 U.S.C. § 12201(b)(1); *see* 10 U.S.C. § 504(b)(1)(A) (referring to 8 U.S.C. § 1101(a)(22), which distinguishes between citizens and those owing permanent allegiance to the United States). Although such limitations may make some sense when a non-citizen's relationship with the United States is not permanent, that same logic does not apply to American Samoans, who enjoy a permanent—albeit unfairly diminished—relationship with the United States.

Finally, even when they die serving their country, American Samoan service members are treated less favorably than American citizens. Spouses, children, and parents of deceased service members who were citizens may apply for naturalization without demonstrating residence or physical presence in the United States. 8 U.S.C. § 1430(d). However, the law denies this benefit to the families of service members who were not citizens at death. *Id.* The spouse, child, or parent of the deceased service member may overcome this slight only if they first obtain posthumous citizenship for their deceased loved one. *Id.; see also* 8 U.S.C. §

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1440-1(a)-(b) (explaining that non-citizen nationals are eligible for posthumous citizenship). Thus, although American Samoans continue to fight and even to die to protect America, they are denied the benefits American citizenship.

## d. Right to Bear Arms

As the Supreme Court has recently affirmed, individuals possess the right to keep and bear arms for the purpose of self-defense. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). However, the right to bear arms is another area in which the rights of non-citizens are often restricted—if not clouded in substantial uncertainty.

Certain states and municipalities abridge entirely the ability of non-citizens, including non-citizen nationals, to keep and bear arms, based solely on their citizenship status. The law of the City of San Francisco, for example, flatly requires that "[a]ny person carrying a firearm or any other deadly or dangerous weapon . . . in the City and County of San Francisco, must ... [b]e a citizen of the United States." S.F. Police Code Art. 13, § 841; *see also* R.I. Gen. Laws §§ 11-47-35, 11-47-35.2 (restricting the sale of concealable weapons and rifles/shotguns to U.S. citizens). Similarly, in North Carolina, the qualifications for a concealed carry permit include the requirement that the applicant be "a citizen of the United States." N.C. Gen. Stat. § 14-415.12(a)(1); *see also* Omaha Mun. Code § 20-253(c)(9) (requiring citizenship for a concealed carry permit).

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In other jurisdictions, the law regarding the ability of non-citizen nationals to bear arms is cloudy at best. Michigan law, for example, requires that an individual seeking a handgun permit be either a "citizen of the United States" or an "alien lawfully admitted into the United States." Mich. Comp. Laws § 28.422(3)(c). But non-citizen nationals are neither "citizens" nor "aliens," and thus do not squarely fit within the confines of this provision, casting a cloud on their ability to exercise their rights under the literal terms of this provision. A similar uncertainty exists under the laws of numerous states, creating an additional burden on any noncitizen national seeking to exercise the basic rights that may be easily secured by both citizens and even those non-citizens with lawful permanent resident status.<sup>13</sup>

## e. Sponsoring Non-American Family Members for Immigration

Another important area in which citizenship plays a significant role is the nation's family-based immigration laws. Under those laws, American Samoans, as non-citizens, are afforded only the rights and benefits granted to legal permanent residents. *See Matter of Ah San*, 15 I. & N. Dec. 315 (BIA 1975). Thus, American Samoans who live in the fifty States and the District of Columbia do not enjoy the

<sup>&</sup>lt;sup>13</sup> See, e.g., Haw. Rev. Stat. § 134-2 (requiring that an applicant for a firearm permit be either a citizen or verify his or her citizenship status with Immigrant and Customs Enforcement); Wash. Rev. Code §§ 9.41.010(11), 9.41.171 (making it a felony for a non-citizen to carry a weapon absent a special "alien firearm license" and using a definition of "lawful permanent resident" that does not contemplate non-citizen nationals).

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same advantages as U.S. citizens in their ability to sponsor their non-American family members for visas to immigrate to the United States.

Perhaps most significantly, there are entire classes of non-American relatives that non-citizen nationals simply may not sponsor to immigrate to the United States, even though U.S. citizens would have that ability. For example, a U.S. citizen may sponsor his or her parents to *immediately* immigrate to the United States under the "immediate relatives" provision. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Non-citizen nationals simply do not have that right: there is no provision that accords non-citizens the ability to sponsor their parents for immigration to the United States, immediately or otherwise. This problem is particularly acute in American Samoa, where, owing in large part to the close ties many people have with the nearby independent nation of Samoa, only about 30 percent of people born in American Samoa were born to parents who were themselves born there. See Ti'otala Lewis Wolman, Commentary: Samoa for Samoans? 2010 Census Provides Insights, Samoan News (Jan. 16, 2013), available at http://www.samoanews.com/node/71437. Similarly, under different provisions of the immigration law, U.S. citizens may sponsor their married sons or daughters, or their brothers and sisters, for immigration to the United States and eventual citizenship (although such immigration is subject to the waiting periods that are part of the family-based visa program), INA § 203(a)(3), (4), 8 U.S.C.

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§ 1153(a)(3), (4), but non-citizen nationals are afforded no correlate right. They cannot sponsor their non-American married children or brothers and sisters to immigrate to the States the way they would if they were permitted full citizenship.

Even where American Samoans *can* sponsor their relatives' immigration, their ability to do so is more limited than that of U.S. citizens. For instance, both American Samoans and U.S. citizens may sponsor their non-American spouses or unmarried children under the age of 21 for immigration to the United States. However, only citizens may take advantage of the "immediate relatives" provision of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), which allows citizens to *immediately* sponsor those relatives (as well as their parents) for permanent residence and eventual citizenship. This has significant practical consequences, because the "immediate relatives" provision allows citizens and their sponsored family members to avoid the complicated system of per-year and per-country limits on immigration that are part of the family-based visa program generally—a system that often entails a substantial waiting period before an individual is finally eligible for a visa. *Compare* INA § 201(b), 8 U.S.C. § 1151(b) (exempting such immediate relatives from the statutory annual cap on the number of immigrants) with INA § 201(a)(3), 8 U.S.C. § 1151(a)(3) (providing numerical limit to the number of family-based immigrant visas available in each year) and INA 202(a)(2), 8 U.S.C. § 1152(a)(2) (providing that no more than seven percent of

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immigrants within each category may come from a particular country). While a U.S. citizen may *immediately* sponsor his or her spouse or unmarried child under 21 for immigration to the United States, regardless of any per-year or per-country caps, the same family member of an American Samoan must wait before he or she can even file an application to come to the United States. As of May 2013, that waiting period was approximately nine months for individuals from most countries, and longer in some cases. See U.S. Dep't of State, Visa Bulletin for May 2014 2 F2A) 9, 2014), at (Row (Apr. available at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin\_may2014.pdf. Moreover, according to Department of Homeland Security statistics for 2012, more

than four times as many relatives of U.S. citizens were able to immigrate under the "immediate relatives" provision as were the same set of relatives of non-citizens in total. *See* U.S. Dep't of Homeland Security, *Yearbook of Immigration Statistics* 2012 (Legal Permanent Residents, Table 6), *available at:* https://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents.

U.S. citizens have a significantly greater ability to unite their families within the fifty states and the District of Columbia than American Samoans do. Thus, citizenship is a concept that provides not only significant benefits, but relates to the most intimate and profound aspects of one's life—the family associations

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that are of so high an order, and so fundamental an aspect of one's liberty interests, that the Supreme Court has recognized them as constitutionally protected. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

## f. Public Employment

Many professional opportunities in the public sector are limited to U.S. citizens. As is well known, the Constitution requires that the President be a "natural born citizen." U.S. Const. art. II, § 1, cl. 4. The Constitution also requires that members of the Senate and the House of Representatives be citizens for seven years. *Id.* at art. I, §§ 2, 3. But it is not only these high-level federal offices that are so restricted. Professional restrictions on non-citizens extend to all levels of government and public service.

State and local laws often impose significant restrictions on the public positions that American Samoans may hold. Many states require that state governors, legislators, judges and other state leaders be U.S. citizens.<sup>14</sup> Numerous state and local laws also require U.S. citizenship to hold a number of ordinary but

<sup>&</sup>lt;sup>14</sup> See Cal. Const. art. V, § 2 (Governor must be a citizen); Ga. Const. art. V, § 1, ¶ iv (Governor and Lieutenant Governor); Ind. Const. art. V, § 7 (same); Me. Const. art. V, pt. 1, § 4 (Governor); Mo. Const. art. IV, § 3 (same); Cal. Const. art. IV, § 2(c) (members of the Legislature must be citizens); Ariz. Const. art. 4, pt. 2, § 2 (same); Wash. Const. art. II, § 7 (same); N.Y. Const. art. III, § 7 (same); Haw. Const. art. VI, § 3 (justices and judges must be citizens); Ill. Const. art. VI, § 11 (judges and associate judges); Mo. Const. art. V, § 21 (judges of the supreme court and court of appeals); Tex. Const. art. V, § 2(b) (Justices of the Supreme Court).

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vital public positions, such as that of police officer or state trooper,<sup>15</sup> firefighter or paramedic,<sup>16</sup> and public school teacher.<sup>17</sup> Those laws also prohibit non-citizens from holding various public and quasi-public leadership positions, such as a member of a state board of nursing,<sup>18</sup> a state pharmacy commission,<sup>19</sup> a school board,<sup>20</sup> or a real estate commission,<sup>21</sup> among a wide variety of others. The State

<sup>&</sup>lt;sup>15</sup> See, e.g., Cal. Gov't Code § 1031(a); Virginia State Police, Advertisement for Position of State Trooper, *available at* http://www.vsp.state.va.us/Employment\_Trooper\_Recruitment\_Ad.shtm (last visited May 2, 2014).

<sup>&</sup>lt;sup>16</sup> See, e.g., D.C. Mun. Regs. Subt. 6-B, § 808.1 ("Appointments to uniformed positions in the Police and Fire Departments shall be limited to persons who are citizens of the United States."); City of Los Angeles, CA, Police Officer Qualifications, available at http://www.joinlapd.com/qualifications.html (last visited May 3, 2014) (stating that a police officer candidate must be a U.S. citizen or permanent resident alien who has applied for citizenship); City of Memphis, TN. Notice Job Openings for Firefighter, available of at http://www.memphisfire.net/docs/firerecruitposting-jan07-final.pdf (Jan. 3, 2007); Career Firefighter/Paramedic, City Geneva, Ill., available of at http://www.geneva.il.us/index.aspx?nid=169 (last visited May 2, 2014).

<sup>&</sup>lt;sup>17</sup> *See* Pa. Cons. Stat. § 12-1202 (state certificates for public school teachers shall not be granted to persons who are not United States citizens, except for legal resident aliens who declare in writing their intent to become citizens); N.J. Admin. Code § 6A:9-5.6 (requiring that one be a United States citizen to be eligible for a teaching certificate; non-citizens may receive provisional certificates if they declare their intent to become citizens, and must become citizens within a period of time).

<sup>&</sup>lt;sup>18</sup> See La. Rev. Stat. § 37:916(A)(1) ("Each member of the board shall . . . [b]e a citizen of the United States .....").

<sup>&</sup>lt;sup>19</sup> *See* Wash. Rev. Code § 18.64.001 ("Each pharmacist member shall be a citizen of the United States").

<sup>&</sup>lt;sup>20</sup> See, e.g., Mich. Comp. Laws § 168.302 ("An individual is eligible for election as a school board member if the individual is a citizen of the United States ....").

<sup>&</sup>lt;sup>21</sup> *See* Haw. Rev. Stat. § 467-3 (each member of the real estate commission "shall be a citizen of the United States ....").

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of Washington, which is home to one of the largest communities of ethnic American Samoans in the country, broadly prohibits any non-citizen from "hold[ing] any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision."<sup>22</sup>

Public employment, like private employment, provides a means of income as well as opportunities for personal and professional development. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (discussing the practical benefits of employment and the consequences of being denied advancement for impermissible reasons). For that reason alone, restrictions on the types of positions American Samoans can hold is harmful. But public employment, similar to voting and jury service, *see* Sections II.a-b, *supra*, provides an opportunity to shape and serve one's community, whether by working in national security or serving on a local school board. Laws denying these opportunities to American Samoans based on their lack of citizenship serve as yet another reminder of their outsider status.

\* \* \*

In sum, American Samoans' status as non-citizen nationals harms them in a variety of ways, including by limiting their ability to participate in American democracy, to serve their country in the military and in certain professions, and to

<sup>&</sup>lt;sup>22</sup> Wash. Rev. Code § 42.04.020.

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sponsor family members' immigration into the United States. These practical, everyday harms—which are in addition to the dignity harms associated with American Samoans' lesser status—are wholly unnecessary because American Samoans are permanent members of the American community. The Fourteenth Amendment's Citizenship Clause should not be used to perpetuate such injuries.



## **CONCLUSION**

As non-citizen nationals, American Samoans are denied both the status of citizenship and the many rights and opportunities that accompany it. By overturning the decision below and holding that American Samoans are entitled to citizenship, this Court will not simply extend the meaning of an abstract legal concept. It will permit American Samoans to engage fully in the civic life of their communities, will unlock new rights and opportunities, and will send a powerful message that American Samoans are indeed worthy of the title of U.S. citizen.

Dated: May 12, 2014

Respectfully Submitted,

By: <u>/s/ Jessica Ring Amunson</u> Jessica Ring Amunson Michael T. Borgia Erica L. Ross Nicholas W. Tarasen\* JENNER & BLOCK LLP 1099 New York Avenue, NW Suite 900 Washington, DC 20001 Telephone: 202-639-6000 Facsimile: 202-639-6066 jamunson@jenner.com

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## **CERTIFICATE OF COMPLIANCE**

I, Jessica Ring Amunson, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 2014-point font.

Dated: May 12, 2014

/s/ Jessica Ring Amunson Jessica Ring Amunson

Counsel for Amicus Curiae David B. Cohen



## **CERTIFICATE OF SERVICE**

I, Jessica Ring Amunson, hereby certify that on this 12th day of May 2014, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system pursuant to Circuit Rule 25, causing a true and correct copy to be served on all counsel of record.

<u>/s/ Jessica Ring Amunson</u> Jessica Ring Amunson

Counsel for Amicus Curiae David B. Cohen

## Exhibit 24

to Brief of the Samoan Federation of America, Inc. as *Amicus Curiae* in Support of Plaintiffs:

Brief in Opposition by Respondents American Samoa Government & Office of Congressman Aumua Amata of American Samoa, Tuaua v. United States, (U.S. May 11, 2016) (No. 15-981), petition for cert. denied, (U.S. June 13, 2016), (Dkt. No. 55-4) (Apr. 24, 2018)

## **Purposely Omitted**.

See Brief of Intervenor Defendants-Appellants, the American Samoa Government & the Honorable Aumua Amata, (Doc. 010110333840) (April 14, 2020) "Intervenor Defs.-Appellants Br." Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 140 of 179 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 204

# EXHIBIT 25

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Christina Duffy Ponsa, Opinion, *Are American Samoans American?* N.Y. Times (June 8, 2016), <u>https://tinyurl.com/y9wtsvcm</u>.

https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html

## **OP-ED CONTRIBUTOR**

# Are American Samoans American?Are American Samoans American?



Anthony Russo

By Christina Duffy Ponsa

June 8, 2016

THE Supreme Court will soon decide whether to hear an appeal in Tuaua v. United States, which poses the question of whether the Citizenship Clause of the 14th Amendment applies to American Samoa. That this is a question at all is puzzling, and not just because it's called American Samoa.

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The 14th Amendment to the Constitution guarantees citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The United States annexed the eastern half of a group of Pacific islands known as the Samoas at the end of the 19th century. As a result, those islands became American Samoa. Surely, people born in American Samoa are legally speaking born in the United States and therefore citizens by birth. Easy, right?

Not so easy. The answer is that no one knows for sure.

How is it possible that a question as basic as who is a citizen at birth under our Constitution remains unresolved in a place subject to the sovereignty of the United States? To understand, you have to dive into the muck that is the law of the United States territories.

When the United States closed the deal to annex American Samoa in 1899, it left open whether the islands had become part of the United States for purposes of citizenship. The previous year, the United States had defeated Spain in the Spanish-American War and had taken sovereignty over Spain's former colonies — Puerto Rico, the Philippines and Guam.

It was left to the Supreme Court to figure out the constitutional relationship between these new territories and the rest of the United States. In the rhetoric of the day, must the Constitution "follow the flag"? In the Insular Cases of 1901, the court handed imperialists a victory. According to Downes v. Bidwell, the new territories belonged to the United States but were not necessarily a part of it. They could be governed as colonies, with fewer constitutional constraints. The places affected by the court's ruling came to be known as "unincorporated" territories. Today, they include Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam and American Samoa.

To be an unincorporated territory is to be caught in limbo: although unquestionably subject to American sovereignty, they are considered part of the United States for certain purposes but not others. Whether they are part of the United States for purposes of the Citizenship Clause remains unresolved.

By statute, persons born in all of the unincorporated territories except American Samoa are citizens at birth: In American Samoa, you become a "national," not a citizen. Congress originally refused to give the inhabitants of the new territories citizenship, but the court decided that they weren't quite foreigners, either. Eventually, the State Department came up with the label "nationals." Although Congress later extended statutory citizenship to other territories, American Samoans remained "nationals," in part to accommodate their cultural distinctiveness.

Yet if American Samoa is part of the United States under the 14th Amendment, then this arrangement obviously violates the Citizenship Clause.
The painful colonial politics of the United States territories often feature deep internal divisions, further reducing their already weak leverage. The Tuaua case (in which I am an author of an amicus brief) is no exception. The American Samoan plaintiffs seeking constitutional birthright citizenship have found themselves at odds with the American Samoan government, which intervened in the case on the side of the United States.

The plaintiffs in Tuaua, including several veterans of the American military, describe the discrimination American Samoans face if they move to the mainland United States (which as "nationals" they have the right to do). Because of their lack of citizenship, they are ineligible for many Civil Service jobs, disadvantaged in sponsoring family members for immigration and denied the right to vote.

Yet the American Samoan government opposes citizenship for American Samoans on the ground that it would threaten their cultural practices — an argument more emotionally than legally compelling, since the constitutional provisions that could threaten these practices, like the First Amendment's religion clauses, have nothing to do with birthright citizenship.

The United States presumably has less interest in denying citizenship to American Samoans than in defending the validity of the underlying legal regime that was constructed to allow the United States to project power in its territories and abroad with fewer constitutional constraints.

Whatever the answer to the question raised in Tuaua is, it is long overdue. To be subjected to uncertainty with respect to something as fundamental as one's citizenship is in and of itself a severe harm. Even in the other territories, where statutory birthright citizenship has provided a makeshift solution for many decades, doubt, confusion and anxiety over the extent to which citizenship is constitutionally guaranteed have persisted for more than a century.

The 14th Amendment is supposed to protect people not only from arbitrary and unjust denials of their citizenship, but from uncertainty about whether they are citizens at all. Both the insult of second-class status and the injury of uncertainty are the ugly legal legacies of 19th century American expansionism. The court should hear the Tuaua appeal and clarify the scope of the Citizenship Clause once and for all.

Christina Duffy Ponsa is a law professor at Columbia and an editor of "Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution."

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# EXHIBIT 26

# LAW People of American Samoa Aren't Fully American



MARCH 13, 2016 11:00 AM EDT

## By Noah Feldman

The circumstances of the birth of Republican presidential candidate Ted Cruz put constitutional citizenship into the headlines. Also in the news: A federal judge in Puerto Rico ruled last week that the U.S. Supreme Court's gay-marriage decision doesn't follow the flag to the island. What would happen if you mashed the two issues together, mixing birthright citizenship with the Constitution's applicability to U.S. territories?

The answer to this otherwise random-seeming question is in fact before the Supreme Court right now. At issue is whether it's constitutional for Congress to deny birthright citizenship to people born in American Samoa, which has been a U.S. territory since 1900. In June, a conservative panel of the U.S. Court of Appeals for the D.C. Circuit upheld the congressional rule, which uniquely applies to American Samoa and no other U.S. territory. Now the Samoan-born plaintiffs are asking the Supreme Court to review the D.C. Circuit's decision -- and asking Congress to change the rules.

American Samoa, a group of five islands and two atolls in the South Pacific, became a U.S. possession in 1899 as the result of a treaty between Germany, the U.K and the U.S. Western Samoa, which went to Germany under the treaty, eventually became the independent country of Samoa in 1962 after many years as a protectorate of the League of Nations and then a United Nations trust territory. The eastern part, now called American Samoa, has been part of the U.S. ever since, as an unorganized territory. The label "unorganized" means that Congress has never passed a law called an "organic act" that would function as the constitution of the territory. American Samoa has a constitution of its own, enacted in 1960 and redone in 1967. But that constitution begins by relying on the authority of Congress. The UN considers American Samoa a non-selfgoverning territory.

About 55,000 people live in American Samoa. Unless they become naturalized, they aren't U.S. citizens. Their passports read, "The bearer is a U.S. national and not a U.S. citizen."

The lawsuit, which features some plaintiffs who've served the U.S. in the military without ever becoming citizens, arises from the 14th Amendment, which says that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

There's a Supreme Court precedent from 1898 that explains the meaning of this sentence. The amendment was intended to codify to the Constitution the old English rule of subjecthood to the crown -- known as jus soli, or the right of the soil. If you were born in the king's dominions and had a duty of loyalty to the crown, you were a subject.

Remarkably, the D.C. Circuit didn't apply this precedent to the Samoans' case. Instead, persuaded by the U.S. government, a randomly drawn panel of three stalwart conservative judges -- Janice Rogers Brown, David Sentelle and Laurence Silberman -- held that the 14th Amendment doesn't fully apply in American Samoa, the same way it doesn't fully apply in other territories like Puerto Rico. 1

For good measure, the judges said it wasn't clear that people born in American Samoa owe allegiance to the U.S.

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Just about the only plausible argument in the court's opinion was its observation that the government of American Samoa opposes citizenship for those born there. According to the court, the government is worried that if its residents become citizens, it might lead a court to invalidate the "traditional, racially-based land alienation rules" that apply there.

Concern for the self-government of indigenous first peoples is legitimate. And indeed, the American Samoan constitution doesn't have an equal protection clause, lending some credence to the idea that at least some residents of the island don't want to displace a traditional form of self-governance that might be discriminatory.

The trouble with this argument is that, under existing precedent, the equal protection clause of the 14th Amendment does follow the flag -- and so it should already apply in American Samoa, regardless of whether the residents are citizens. The tension between traditional self-government and constitutional equality will have to be worked out regardless of the residents' citizenship status.

There can't be a split between the circuit courts of appeal on this issue, because there's only one American Samoa. Although the Supreme Court doesn't ordinarily take cases to correct the errors of courts below, this case should be an exception. The most fundamental constitutional rights are at stake -- and the D.C. Circuit panel's opinion almost certainly got the law wrong.

1. This was the same principle relied upon by the Puerto Rico judge to say that Supreme Court's gay marriage decision doesn't apply there.

*This column does not necessarily reflect the opinion of the editorial board or Bloomberg LP and its owners.* 

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# EXHIBIT 27

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# Reconsidering the Insular Cases

# The Past and Future of the American Empire

Edited by Gerald L. Neuman and Tomiko Brown-Nagin

Human Rights Program Series Harvard Law School

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#### Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 151 of 179 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 215

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cultural and linguistic uniqueness and would impose an additional federal tax burden on the island's residents. At the same time, unlike the option of independence without association, it could offer an opportunity for Puerto Rico to negotiate long-term security and defense guarantees and economic assistance from the United States, while removing residual congressional authority over Puerto Rican affairs and enabling Puerto Rico to become a fullfledged member of the international community. No solution to Puerto Rico's status dilemma will garner uniform support, but genuine free association remains an option worth exploring. Case 1:18-cv-00036-CW Document 55-4 Filed 04/24/18 Page 154 of 179 Appellate Case: 20-4017 Document: 010110346466 Date Filed: 05/12/2020 Page: 218 CHAPTER SIX

# The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century

Rogers M. Smith\*

## Introduction

The Insular Cases are central to American political development because, in considering the applicability of the US Constitution to the territories acquired in the Spanish-American War, they addressed some of the most fundamental questions concerning appropriate forms of membership in modern republics. The answers they gave—that Congress had the power to decide whether residents of "unincorporated" territories would be US citizens, US "nationals," or perhaps something else—were and remain controversial.<sup>1</sup> In those cases, as in others of the Progressive Era (including ones scrutinizing race and gender classifications), the US Supreme Court upheld legislative powers to create what scholars have come to call "differentiated citizenship."<sup>2</sup> Several of the

<sup>\*</sup> I would like to thank Jaime Lluch and Gerald L. Neuman for helpful discussions of the themes of this chapter and Reed Smith for invaluable research assistance.

Bartholomew H. Sparrow, The Insular Cases and the Emergence of American Empire (Lawrence: University Press of Kansas, 2006), 215-16, 221-25.

<sup>2</sup> The late political philosopher Iris Young probably did most to establish the term. See, e.g., Iris Marion Young, "Residential Segregation and Differentiated Citizenship," Citizenship Studies 3 (1999): 237-52.

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most important forms of differentiated citizenship then sustained have since been repudiated as systems of unjust inequality.

But in the twenty-first century, many are contending that various contemporary forms of differentiated citizenship are necessary to achieve meaningfully equal membership statuses. These include distinct forms of territorial membership. And though all claims for particular types of differentiated citizenship are in some respects unique, they also make up a more general pattern that controversies over territorial membership can illuminate. That is because here-perhaps more starkly than in any other area of modern American citizenship laws-some of the most basic, enduring, and still unsettled questions of civic equality are again being explicitly contested. Disturbingly, many of the answers that still prevail with regard to territorial residents' rights of voting, expatriation, and birthright citizenship appear to do more to perpetuate past policies of inegalitarian differentiation than to establish statuses that are defensibly "different but equal." There are, however, also developments that provide legal support for the aspirations of many territorial residents to maintain distinct cultural identities while simultaneously being full American citizens. Whether these represent appropriate accommodations or abdications of core constitutional values remains deeply disputed.

The roots of these contested issues around civic equality are deep. However we view the complex history of political ideas that contributed to the rise of large-scale republics since the end of the eighteenth century, beginning with the American and French Republics, it is impossible to deny the existence of powerful strains insisting that the citizens of republics must be equal before the law, possessed of identical bundles of basic rights and duties. Those themes were robustly strengthened in the United States during the twentieth century by civil rights struggles against many forms of what came to be deemed second-class citizenship, especially for nonwhites and women but also for unpopular religious minorities, the disabled, the elderly, and people with unconventional sexual identities, among others. For a time, most of the intertwined versions of "liberalism," "democracy," and "republicanism" that became predominant in academia during the last half of the twentieth century, and to a lesser degree in mainstream political discourses, presumed that citizenship should, in principle and in practice, be a nearly or wholly universal status, and a nearly or wholly uniform status, for the residents of any and all liberal democracies or republics.3

Nonetheless, as many scholars are now stressing, that presumption has

<sup>3</sup> I sketch these developments briefly in "Equality and Differentiated Citizenship: A Modern Democratic Dilemma in Tocquevillean Perspective," in Anxieties of Democracy: Tocquevillean Reflections on India and the United States, ed. Partha Chatterjee and Ira Katznelson (New Delhi: Oxford University Press, 2012), 90-99.

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never matched the real structures of citizenship laws in the United States or, in varying ways, other modern democracies.<sup>4</sup> To grasp the character and significance of controversies over citizenship in the US territories today, it will be helpful to begin with a brief overview of the broader sources and types of civic differentiation, and to then lay out the main variations in modern territorial forms of political membership.

## An Overview of Civic Differentiation

The specific sources of civic differentiation are as varied as its many forms, but they can be placed under four general headings:

- Remedial differentiations: policies aimed at overcoming inegalitarian consequences of past unjust differentiations and at combating current forms of invidious discrimination, often by providing temporary special aid to longdisadvantaged groups.
- 2. Accommodationist differentiations: policies structured to give enduring legal recognition to various persons' and groups' distinctive senses of their identities, values, and interests by modifying legal regulations and public services so that these people can flourish in their own ways, yet equally with other citizens.
- 3. Preservationist differentiations: policies reflecting the desires of powerful political actors to distinguish—usually by limiting—the civic status of some who they see, for economic, national security, cultural, or ideological reasons, as threats to current arrangements that these powerful actors value. Proponents of preservationist differentiations are generally conservative opponents of remedial and accommodationist reform measures, but sometimes the preservation of their interests requires innovations in civic statuses to respond to new challenges.
- 4. Legacy differentiations: inherited policies created for reasons that today have lost force, so that these policies actually have few strong supporters. But in a path-dependent manner, these differentiations persist because no clear or intensely

<sup>4</sup> See, e.g., Elizabeth F. Cohen, Semi-Citizenship in Democratic Politics (New York: Cambridge University Press, 2009); Kamal Sadiq, Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries (New York: Oxford University Press, 2008).

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motivated consensus on alternative policies exists that is capable of producing change. The contrasting views of the first three positions on which differentiations are appropriate can contribute to this kind of persistence, working against agreements on changes despite the lack of powerful contemporary advocates for the status quo. Such lack of consensus has arguably contributed to the perpetuation of the commonwealth status of Puerto Rico, for example. In three nonbinding referenda between 1967 and 1998, Puerto Ricans showed increasing dissatisfaction with remaining a commonwealth, but they were closely divided on what alternative to pursue.5 In a fourth referendum in November 2012, for the first time, 54% of those voting opposed the status quo, and more than 61% of those who then chose between several status alternatives favored statehood.6 The consequences of this vote remain to be seen.

The first two rationales, remedial and accommodationist, are often blended. Accommodations are often advocated for groups as a means of remedying past or current injustices against them, especially when it seems impractical to identify and correct every particular act of unjust discrimination. Still, they are analytically distinct. Special accommodations, such as exemptions from certain civic education requirements or the provision of multilingual ballots, have been provided in America to religious groups like the Amish and to recent European immigrants who have not experienced any substantial discrimination. The aim of special accommodations defended in modern multicultural theories and movements is often simply to enable distinctive groups to thrive as well as others while sustaining defining aspects of their group identities. Nonetheless, it is probably true that calls for special accommodations often garner broadest support when they are made on behalf of groups that have at least arguably been treated unfairly in the past-as in the case of persons who use wheelchairs, who were long unable to ride buses or enter public buildings because facilities had been designed without consideration for those who could not walk or climb stairs without aids beyond handrails.

But strikingly, although remedial arguments for policies of civic differentiation have long been persuasive to many ears, it is accommodationist

<sup>5</sup> D.R., "Could Puerto Rico Become America's 51st State?," The Economist, Oct. 21, 2013, http://www.economist.com/blogs/economist-explains/2013/10/economistexplains-15.

<sup>6</sup> Mariano Castillo, "Puerto Ricans Favor Statehood for First Time," CNN.com, Nov. 8, 2012, http://www.cnn.com/2012/11/07/politics/election-puerto-rico.

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rationales, not remedial ones, that are multiplying and gaining broader support in the twenty-first century. They are the chief reason why the political phenomenon of differentiated citizenship is in many ways expanding beyond older "preservationist" and "legacy" forms, despite the popularity of ideals of uniform citizenship.

Among the contributing factors to this multiplication, two are especially pertinent here. First is the replacement of early twentieth-century doctrines and practices of imperialism by commitments to the rights of political selfdetermination for a wide range of groups defining themselves as "nations" or "peoples." The 1945 United Nations Charter committed its members who had responsibilities for "the administration of territories whose peoples have not yet attained a full measure of self-government" not only to provide for the interests of those peoples but "to develop self-government" according to "the particular circumstances of each territory and its peoples."7 That goal suggested that self-governance, and thus citizenship rights, might take many different forms. Then, in 1960, the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, reasserting that "all peoples have the right to selfdetermination" and urging "immediate steps" to "transfer all powers to the peoples" of all "Non-Self-Governing" territories so that they could "enjoy complete independence and freedom."8 That language appears to imply fully independent self-governance, but in practice it has often fostered varying degrees of greater autonomy for former colonies that retain many formal and informal affiliations with their former imperial metropole. The United States, which historically often justified its acquisitions of overseas territories as a means to provide tutelary preparation for self-governance, has long claimed that it seeks to adhere to these international commitments; however, in all the territorial cases considered here, since 1960, the United States has supported increases in self-governance but not full independence. The result has been dissimilar patterns of citizenship rights.

The second major contributor to that still-proliferating modern pattern is the continuing expansion of transnational networks of economic production and exchange, communications, transportation, social affiliation, and outright migration, including networks of actors and institutions promoting human rights goals-phenomena often collectively termed globalization. Somewhat paradoxically, by expanding the range of economic and political allies and options available to those discontented with their civic status quo, these developments have strengthened political movements to achieve greater devolution of political power to culturally distinct regions (such as Quebec,

<sup>7</sup> United Nations Charter, art. 73.

G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. 8 A/4684 (Dec. 14, 1960).

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Catalonia, Scotland, and many indigenous peoples and tribes) and also efforts to create new forms of transnational political communities (such as the European Union, the much less developed African Union, and the Union of South American Nations). They have thereby encouraged more widespread governmental acceptances of multilevel citizenships; dual or multinational citizenships for persons and corporations; policies of "quasi-citizenship" that extend special privileges to ethnic affiliates outside a nation's boundaries; "overseas citizens" statuses for former colonial subjects; and diverse policies of multiculturalism in many countries.<sup>9</sup>

Most of these developments have been promoted as methods of creating more meaningful equality of status and opportunities for persons while recognizing their distinct histories, aspirations, and needs, rather than as departures from norms of equal membership. But if they are forms of equal citizenship, they are also generally forms of differentiated citizenship. They mean that members of different nations within a transnational union; inhabitants of different locales in a country that offers special autonomous self-governing powers to some provinces, departments, states, or indigenous or immigrant communities; persons able to claim two or more national citizenships (in whole or in part); and members of religious and ethnic communities exempt from some general laws all possess bundles of rights and duties different from those of most other citizens in the states that issue their passports and promise protection in exchange for at least partial allegiance.

Territorial memberships are obviously among the forms of political membership that have been and are being transformed by these developments. Probably most significant has been the shift from the embrace of overtly imperialistic, if often professedly paternalistic, governance to varied forms of greater political autonomy and self-governance, amidst an international climate that teems with calls for further movement in those directions. But concerns to accommodate cultural differences and remedy injustices in ways that do not eradicate bases of common civic identity, as well as desires to

<sup>9</sup> For pertinent recent discussions, see, e.g., David Cook-Martin, The Scramble for Citizens: Dual Nationality and State Competition for Immigrants (Stanford, CA: Stanford University Press, 2013); Kees Groenendijk, "The Status of Quasi-Citizenship in EU Member States: Why Some States Have 'Almost-Citizens," in Acquisition and Loss of Nationality: Policy Trends in 15 European Countries, vol. 1, ed. Rainer Baubock, Eva Ebersoll, Kees Groenendijk, and Harald Waldrauch (Amsterdam: Amsterdam University Press, 2007), 411-29; Will Kymlicka, Multicultural Odysseys: Navigating the New International Politics of Diversity (New York: Oxford University Press, 2007); Jean-Michel Lafleur, Transnational Politics and the State: The External Voting Rights of Diasporas (New York: Routledge, 2013); Willem Maas, ed., Multilevel Citizenship (Philadelphia: University of Pennsylvania Press, 2013).

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preserve arrangements seen as beneficial to powerful interests, are also strongly at work. The next section maps out the differentiated forms of territorial citizenship that exist today in the United States. It is then followed by a brief comparison with France, the second-oldest modern republic and the one most avowedly committed to unitary citizenship.

# The Differentiated Forms of Modern Territorial Membership

As Bartholomew Sparrow has noted, few though its territorial possessions may seem in comparison to past empires, the United States currently asserts sovereignty over more land outside its member states or provinces than any other country in the world. The list includes the Commonwealths of Puerto Rico and the Northern Mariana Islands, along with the territories of Guam, American Samoa, the US Virgin Islands, and some virtually and wholly uninhabited Pacific Islands.<sup>10</sup> Although the total population of these territories is just a little over four million people—a tiny portion of the US population of 317 million—the 2010 census showed Puerto Rico to be more populated than twenty-two states (though it has since lost residents rapidly).<sup>11</sup> Puerto Rico and Guam each have more citizens than the Federated States of Micronesia and Andorra, and every one of the inhabited US territories is more populous than Liechtenstein and Monaco.<sup>12</sup> Only China's territories have larger populations.<sup>13</sup>

The legacy of the Insular Cases is that all these entities under US sovereignty are "unincorporated" territories, a legal status that is now widely understood to mean territories for which Congress has never yet anticipated statehood.<sup>14</sup> Like other former colonial powers, the United States has been affected by, and indeed has sometimes led, the international movements to promote the rights of political self-determination for a wide range of communities, which began at the end of World War I and accelerated after

<sup>10</sup> Sparrow, The Insular Cases and the Emergence of American Empire, 215.

<sup>11</sup> Ibid.; Lizette Alvarez, "Economy and Crime Spur New Puerto Rican Exodus," New York Times, Feb. 9, 2014; US Census Bureau, "2010 Census Data," accessed Oct. 29, 2014, http://www.census.gov/2010census/data.

<sup>12</sup> Cf. US Census Bureau, "Statistical Abstract of the United States: Section 29; Puerto Rico and the Island Areas," accessed Oct. 29, 2014, http://www.census.gov/ prod/2011pubs/12statab/outlying.pdf; and World Atlas, "Countries of the World," accessed Oct. 29, 2014, http://worldatlas.com/aatlas/populations/ctypopls.htm.

<sup>13</sup> Sparrow, The Insular Cases and the Emergence of American Empire, 216.

<sup>14</sup> See, e.g., Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600 n.30 (1976).

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World War II. But as in other former empires, in the United States there has been no common path or solution to the forms of greater self-governance, or the forms of political membership, established for (and, to some disputed degree, by) the American territories. Congress has conferred—or in the eyes of some, imposed—US citizenship on most of the inhabitants of US territories, with the exception of American Samoans, who are designated US "nationals." Still, the rights and duties of US citizens in these territories vary from those of citizens in the states and from one another. A full mapping of the variations is unnecessary to show the prevalence of civic differentiation, but some contrasts are worth noting.

One of the two surviving Spanish-American War acquisitions, Puerto Rico became a "commonwealth" as a result of a process initiated by Congress in 1950 that included a constitution written and approved by Puerto Ricans but modified to satisfy congressional demands before it went into effect in 1952.<sup>15</sup> Puerto Rico now has broad powers of local self-governance; but in the eyes of the US government, including its courts, the island has these powers only at the sufferance of Congress. US citizens in Puerto Rico do not have voting representation in Congress, nor do they vote for the president. Partly in return, they also do not pay federal income taxes. Yet Puerto Rico is the only US territory that falls legally within the United States' customs borders: while goods entering it from outside the United States must pay US duties, its goods are not subject to tariffs when sent to the fifty states.<sup>16</sup>

Guam, in contrast, remains a territory broadly governed by Congress's 1950 Organic Act of Guam, which conferred American citizenship on Guamanians.<sup>17</sup> In 1968, as America's civil rights era reinforced international pressures for territorial self-governance, Congress authorized popular elections for the governors of Guam and the Virgin Islands. It provided both with nonvoting delegates to Congress in 1972. But in the late 1980s, the United States refused to approve Guam's efforts to gain commonwealth status with self-governing powers comparable to those of the territory's prospering neighbor, the Commonwealth of the Northern Mariana Islands.<sup>18</sup> Guam continues to be of significant strategic importance to the United States, and

<sup>15</sup> T. Alexander Aleinikoff, Semblances of Sovereignty: The Constitution, the State, and American Citizenship (Cambridge, MA: Harvard University Press, 2002), 76-77.

<sup>16</sup> Ibid.; Sparrow, The Insular Cases and the Emergence of American Empire, 226.

<sup>17</sup> Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421 (2013)); Robert F. Rogers, "Guam's Quest for Political Identity," *Pacific Studies* 12 (1988): 49-70, 49.

<sup>18</sup> Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations (Dordrecht: Martinus Nijhoff, 1989), 335-42; Dominica Tolentino, "Chammoro Quest for Self-Determination," Guampedia: The Encyclopedia of Guam, http://guampedia.com/chamorro-quest-for-selfdetermination.

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many US officials have expressed concern that with greater autonomy, Guam might resist US military policies, especially because of the rising power of indigenous Chamorro activists in Guam's politics.<sup>19</sup> Some in Guam have also sought to have their citizenship status altered from congressionally based to constitutionally based through a declaration that their status derives from the citizenship clause in Section 1 of the Fourteenth Amendment, a position the United States has resisted.<sup>20</sup> As in the other territories, dissatisfactions and contestation over its status continues today.

The United States acquired the eastern group of the Samoan Islands via the 1899 Tripartite Convention with Germany and the United Kingdom.21 President McKinley quickly issued an executive order proclaiming US authority over the American Samoan islands. But in 1900 and 1904, various chiefs of the eastern islands signed a "deed of cession" accepting US territorial status for "American Samoa" (and Congress added another privately owned Samoan island in 1925).22 These agreements arguably made the process of Samoa's acquisition more consensual than in the other American territories: in all these measures, the rights of native Samoans to keep their lands for themselves and their posterity were repeatedly guaranteed.23 The United States never passed an organic act for the islands, and many of its leaders have resisted efforts to incorporate American Samoa fully into the United States or to become US citizens instead of nationals. In 1967, Samoa adopted a constitution that has since structured its governance.24 Nonetheless, the US secretary of the interior claims supervisory authority over all American Samoan governmental structures, a position that both Samoans and a leading scholar of American territories, Arnold H. Leibowitz, dispute.25

In still further contrast, the US Virgin Islands, purchased from Denmark in 1917 for their strategic value during World War I, are governed

<sup>19</sup> Rogers, "Guam's Quest for Political Identity," 50, 56-67.

<sup>20</sup> Leibowitz, Defining Status, 334. Guam Congresswoman Madeleine Z. Bordallo and former Guam Governor Carl Gutierrez both joined in a "Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials" arguing on behalf of Fourteenth Amendment citizenship for those born in Guam in the nowpending case of Tuaua v. United States, discussed below. See Case No. 13-5272, U.S. Court of Appeals for the District of Columbia Circuit, Document #1492654, filed May 12, 2014.

<sup>21</sup> Convention between the United States, Germany, and Great Britain to Adjust Amicably the Questions between the Three Governments in respect to the Samoan Group of Islands, Dec. 2, 1899, 31 Stat. 1878.

<sup>22</sup> Leibowitz, Defining Status, 402-3, 414-15.

<sup>23</sup> Ibid.

<sup>24</sup> Sparrow, The Insular Cases and the Emergence of American Empire, 38; Rose Cuison Villazor, "Blood Quantum Land Laws and the Race versus Political Identity Dilemma," California Law Review 96 (2008): 801-37, 826.

<sup>25</sup> Leibowitz, Defining Status, 418-21.

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by the congressional Revised Organic Act of 1954,<sup>26</sup> modifying a 1936 act that created a senate that makes up the islands' unicameral legislature. Like the citizens of Guam, Virgin Islanders gained authority to elect their governor and have a delegate to Congress in the early 1970s, following US promises of movement toward greater self-governance.<sup>27</sup> But in part because of internal disputes over who should count as a Virgin Islander and over the distribution of power among the islands, four constitutional conventions from 1964 to 1980 failed to produce a popularly approved constitution for Congress to approve.<sup>28</sup> In 2009, a fifth constitutional convention did produce a charter that the Virgin Islands governor submitted to the US government, but in 2010 Congress sent it back for reconsideration, concerned that it inadequately recognized US sovereignty and unduly favored persons of local birth and ancestry, among other matters.<sup>29</sup>

The United States invaded its most recent territorial acquisition, the Marianas, in 1944, when the islands were under Japanese control. The United States then formally acquired the fifteen Northern Mariana Islands in 1947, when the United Nations appointed it to serve as trustee for a trust territory consisting of these and other Pacific Islands. In 1976, the United States entered into a "covenant" that established the Commonwealth of the Northern Mariana Islands (CNMI) in political union with the United States, in part because the United States regarded the islands, like neighboring Guam, as key to its strategic interests in the Pacific, and this change promised to still discontents.<sup>30</sup> The new CNMI did well economically, and in 1986, after the commonwealth had adopted and implemented its own constitution modeled on that of the United States, President Reagan formally terminated the United States' trusteeship over the islands. Most of its residents then became US citizens, and they eventually gained an elected but, again, nonvoting delegate to Congress.<sup>31</sup> Until 2009, the CNMI had its own immigration system, but

<sup>26</sup> Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954).

<sup>27</sup> Leibowitz, Defining Status, 272-73.

<sup>28</sup> Ibid., 276-78.

<sup>29</sup> See Joint Resolution to Provide for the Reconsideration and Revision of the Proposed Constitution of the United States Virgin Islands to Correct Provisions Inconsistent with the Constitution and Federal Law, Pub. L. No. 111-194, 124 Stat. 1309 (2010). Virgin Islands Congresswoman Donna Christensen and former Virgin Islands Governor Charles W. Turnbull also joined the "Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials" in *Tuaua v. United States*, arguing for Fourteenth Amendment birthright citizenship for all persons born in US territories.

<sup>30</sup> Rogers, "Guam's Quest for Political Identity," 53-54.

<sup>31</sup> See, e.g., Guerrero v. United States, 691 F. Supp. 260, 261-64 (D. N. Mar. I. 1988); Lizabeth A. McKibben, "The Political Relationship between the United States and

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in 2008 Congress imposed US immigration laws on it via the Consolidated Natural Resources Act.<sup>32</sup>

That last fact underlines the most salient political reality of the US territories: in the cases of the two commonwealths, the organized territories of Guam and the Virgin Islands, and what may be deemed the self-organized territory of American Samoa, the United States continues to assert its legal authority to engage in substantial administrative supervision and to legislate over many, if not all, territorial matters, including decisions on the scope of the US government's own authority. It does so ultimately on the basis of Congress's constitutional powers to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>33</sup> This includes the power to treat the citizens of territories differently from state citizens and from one another, and US statutes and judicial rulings often do so—in ways that many territorial inhabitants are contesting.

## France in Comparison

Before turning to some of the most revealing of those contests, it is worth observing that although the United States, as the world's military superpower, may weigh strategic national security concerns in relation to its territories more heavily than any other nation, there is nothing unusual about its pattern of diverse territorial statuses and diverse political rights for many whom it proclaims to be its equal citizens. Probably no country in the world is more insistent on its dedication to equal citizenship for all members of its republic than France; yet French territories display a startling array of differences in their organization and rights that in some respects are being deliberately increased in the twenty-first century.<sup>34</sup>

Nathalie Mrgudovic notes that in 1962, France had eleven overseas territories—four overseas departments (DOMs, for their French acronym) (Martinique, Guadeloupe, French Guiana, and Réunion Island) largely identical in status to the *départements* in mainland France, and seven overseas territories (TOMs, for their French acronym) (New Caledonia, French

Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam," Harvard International Law Journal 3 (1990): 257-93, 271-75.

<sup>32</sup> Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, §§ 701-18, 122 Stat. 754, 853-69.

<sup>33</sup> U.S. CONST., art. IV, § 3, cl. 2.

<sup>34</sup> Nathalie Mrgudovic, "The French Overseas Territories in Transition," in The Non-Independent Territories of the Caribbean and the Pacific: Continuity of Change?, ed. Peter Clegg and David Killingray (London: Institute of Commonwealth Studies, 2012).

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Polynesia, Wallis and Futuna, the Comoros Islands, French Somaliland, the French Southern and Antarctic Lands, and Saint Pierre and Miquelon). The TOMs, unlike the DOMs, were guaranteed rights of "free-determination" expressed in diverse forms of relatively autonomous governing structures; and whereas the DOMs were treated almost the same as domestic *départements*, French national policy determined which otherwise generally applicable laws did and did not apply to particular TOMs.<sup>35</sup> Even so, all members of the DOMs and TOMs were French citizens, and they, in principle, enjoyed the same legal status as other French citizens—but in practice, they had a wide range of rights of political self-determination.<sup>36</sup>

Since then, the Comoros Islands have gained independence, though the island of Mayotte decided to remain French and become a CTOM, a status in between a DOM and a TOM; this status has since also been adopted by Saint Pierre and Miquelon.<sup>37</sup> The TOMs have also been subdivided into two new categories, and French officials have encouraged further redefinitions of statuses and self-governing powers.<sup>38</sup> They first sought to encourage DOMs to join in new regional entities, ROMs, so that they would be more economically self-supporting and require less aid from France. But the French Constitutional Council insisted that to be equal with metropolitan collectivities in France, they instead had to become Départements et Régions d'Outre-Mer, or DROMs.<sup>39</sup> How this solved the problem of equal status with French metropolitan regions is unclear.

In fact, the proliferation of statuses is greater than this listing of TOMs, DOMs, CTOMs, and DROMs indicates (there are also COMs). That is because French policy since 2000, largely in an effort to reduce the economic dependency of most territories on France, has held, in the words of President Chirac, that "uniform statuses are over and each overseas collectivity should evolve, if it so wishes, toward a somehow tailored status."<sup>40</sup> Chirac's successor, Nicolas Sarkozy, also contended that the "unity of the Republic does not imply a uniformity of its institutions," and he endorsed for each overseas territory "an organization adapted to its own characteristics as long as this does not affect the principle of unity of the Republic," which meant specifically that the "overseas territories are French and will remain French" (despite French commitments to their "free-determination").<sup>41</sup> But in 2010, more than 70% of voters in referenda in Martinique and French Guiana emphatically rejected Sarkozy's proposals to give their governments greater autonomy while

37 Ibid.

- 40 Ibid., 95.
- 41 Ibid., 95-96.

<sup>35</sup> Ibid., 86-87.

<sup>36</sup> Ibid., 87.

<sup>38</sup> Ibid., 88-89.

<sup>39</sup> Ibid., 90-91.

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remaining part of France (and Guadeloupe refused to hold a referendum).<sup>42</sup> In 1998, New Caledonia independence supporters and French loyalists agreed to hold a similar status referendum between 2014 and 2018, and in the territory's 2014 parliamentary elections, independence supporters won twenty-five of fifty-four seats, a gain of two since the last election in 2009, while loyalists held the remaining twenty-nine.<sup>43</sup> This close division leaves the future status of New Caledonia very much in doubt.

Though arguments for greater French territorial autonomy and diversity are often cast in "accommodationist" rhetoric, stressing the desire to tailor policies to the distinct needs and aspirations of each locale, they are obviously also driven by a very strong "preservationist" motive—that is, the desire to keep France's wealth from draining into the territories. For the same reason, many territorial inhabitants resist them, believing that greater autonomy will leave them economically vulnerable. As in New Caledonia, exactly what all this means for the civic identities of the French territories is a contested, evolving work in progress. The point that these facts about France underline is that a wide array of varying forms of differentiated citizenship can be found everywhere—so the US territories are not exceptional in that regard. But what those forms should be remains unclear. Selecting from a range of possible topics, this chapter's analysis of contemporary struggles over US territorial citizenship will focus on four issues that have recently been subjects of litigation and continuing political battles.

# Modern Controversies over Citizenship in the US Territories

The four issues are (i) whether US citizens in the territories possess constitutional rights to vote in American national elections; (ii) whether they can expatriate themselves from their US citizenship while retaining their territorial residences and citizenships; (iii) whether they are birthright citizens of the United States under the Fourteenth Amendment; and (iv) whether the US Constitution, especially its equal protection clause, permits them to maintain forms of owning and transmitting land that accord with their traditional customs, even when such land ownership would be deemed impermissible racial "restrictive covenants" within the fifty states. The answers that US officials and courts have given are that territorial citizens do not

<sup>42</sup> Rodolphe Lamy, "French Guiana, Martinique reject autonomy proposal," Boston.com, Jan. 11, 2010, http://www.boston.com/cars/news/articles/2010/01/11/ french\_guiana\_martinique\_reject\_autonomy\_proposal.

<sup>43 &</sup>quot;New Caledonia Elections: French Loyalists Win, Independence Supporters Gain Ground," Australian Network News, May 12, 2014, http://www.abc.net.au/ news/2014-05-12/an-new-caledonia-elections/5445380.

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possess a constitutional right to vote in federal elections, or any right to divest themselves of US citizenship without relinquishing residency in US territories and thus their territorial citizenship—nor are territorial citizens Fourteenth Amendment birthright citizens. Courts have held, however, in regard to both American Samoa and the Northern Mariana Islands, that it is constitutionally permissible for territories to maintain land laws and other culturally valued customs that would not be permissible in the states, regardless of whether territorial residents are US nationals or US citizens. These last rulings clearly represent "accommodationist" forms of differentiation, albeit controversial ones. The decisions on the first three topics, on the other hand, appear to be chiefly "preservationist" efforts to limit the rights and powers of territorial citizens relative to the US government.

## Voting Rights

In 1994, Gregorio Igartúa de la Rosa began a series of cases in which he and other US citizens residing in Puerto Rico have claimed to have constitutional rights to vote for the president and for members of the House of Representatives-assertions that US courts have regularly rejected, though not without passionate dissents. Citing the rejection of an earlier similar claim by US citizens residing in Guam, federal courts have consistently held that the Constitution provides for the president to be elected by electors chosen by the states, and Puerto Rico is not a state.<sup>44</sup> In 2000, however, the United States District Court for the District of Puerto Rico ruled that the right to vote in national elections was a national right guaranteed by the First Amendment principle of freedom of association and the due process and equal protection clauses, and was not dependent on federalism. It also interpreted the congressional Uniformed and Overseas Citizens Absentee Voting Act45 as confirmation that the right to vote rests on national citizenship, not residence in a state.46 But that ruling was quickly overturned, with Circuit Judge Juan R. Torruella regretfully acknowledging that "the federal courts continue to recognize the almost absolute power of Congress to unilaterally dictate the affairs of Puerto Rico and her people," so that "the practicality of the matter is that Puerto Rico remains a colony."47 He thought that this status violated "the very principles upon which this Nation was founded," but felt that the court's only recourse was to call on "the political branches of government" to correct

<sup>44</sup> Igartúa de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994).

<sup>45</sup> Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924 (codified at 52 U.S.C. § 20301 (2013)).

<sup>46</sup> Igartúa de la Rosa v. United States, 113 F. Supp. 2d 228, 232 (D.P.R. 2000).

<sup>47</sup> Igartúa de la Rosa v. United States, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, C.J., concurring).

"what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry."48

Igartúa de la Rosa pursued the litigation, adding claims that several treaties committing the United States to human rights and to rights of self-determination required recognizing the national voting rights of citizens; but the First Circuit Court of Appeals ruled that these treaties were incapable of overriding the constitutional structuring of presidential elections by states.<sup>49</sup> This time, Torruella, now senior circuit judge, dissented. He assailed the "unincorporated/incorporated" territorial distinction as a judicial invention rooted in racism, stressed that voting rights had long been judicially deemed "fundamental," and insisted that the treaties revealed "the emergence of a norm of customary international law" in favor of rights of political participation that has "an independent and binding juridical status."<sup>50</sup>

After that defeat, Igartúa returned with a slightly different argument. He contended that the language of Article I of the Constitution-which states that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States"51-should be read as conferring voting rights on all who were part of "We the People of the United States," not simply people residing in "the several States."52 The government of the Commonwealth of Puerto Rico added that because the US government has treated Puerto Rico as "the functional equivalent of a state" for many purposes, its citizens are entitled to representation in the House of Representatives in the manner of a state; and it added that the recent Supreme Court decision in Boumediene v. Bush53 gives new recognition to the status claims of territories. The circuit court found nothing in that decision pertinent to voting rights, however.54 Judge Torruella concurred in part and dissented in part, continuing to assail the "status of second-class citizenship" that he believed the courts had fostered through the Insular Cases' distinction between unincorporated and incorporated territories.55 Igartúa has since continued to litigate without success. Throughout these cases both the Bush and Obama Justice Departments have filed briefs against him. Each administration has stressed that Puerto Ricans have had the opportunity to vote for statehood but have not yet committed to pursuing that option.56

<sup>48</sup> Ibid., 89-90.

<sup>49</sup> Igartúa de la Rosa v. United States, 417 F.3d 145, 147-49 (1st Cir. 2005).

<sup>50</sup> Ibid., 169, 176 (Torruella, J., dissenting).

<sup>51</sup> U.S. CONST., art. I, § 2, cl. 1.

<sup>52</sup> Igartúa v. United States, 626 F.3d 592, 596-97 (1st Cir. 2010).

<sup>53</sup> Boumediene v. Bush, 553 U.S. 723 (2008).

<sup>54</sup> Igartúa v. United States, 626 F.3d 592, 598 (1st Cir. 2010).

<sup>55</sup> Ibid., 638 (Torruella, J., concurring in part and dissenting in part).

<sup>56</sup> See Brief for the United States in Opposition at 8, Igartúa de la Rosa v. United

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Administrations of both parties have thus argued in "accommodationist" or, at most, "legacy" terms: up into 2012, Puerto Ricans appeared to favor maintaining their distinctive status, or at least appeared to be too deeply divided regarding which option might be preferable for the United States to act on. The strong vote in favor of statehood in 2012, though still disputed, is spurring further action to gain that status. But even if Puerto Ricans persist in that pursuit, it is likely that Republicans in Congress will oppose it for "preservationist" reasons: statehood would probably increase the political power of Democrats.<sup>57</sup>

### Expatriation

In response to being denied voting rights in US national elections, some Puerto Ricans have insisted that they should be allowed to give up the US citizenship conferred on them by Congress while continuing to reside in Puerto Rico and vote in Puerto Rico elections strictly as Puerto Rican citizens. The modern controversies stem chiefly from the 1994 decision of Puerto Rican independence activist Juan Mari Brás to renounce his US citizenship at the US Embassy in Caracas, Venezuela, and then return to Puerto Rico and participate in politics. The embassy gave him a "certificate of loss of nationality of the United States." But as other Puerto Ricans followed suit, the US State Department began refusing to permit persons to expatriate themselves from the United States while remaining Puerto Ricans, contending that expatriation requires giving up residence within the United States and its territories.<sup>58</sup>

The US government was concerned in part by the decision of the Supreme Court of Puerto Rico in 1997 that Mari Brás was in fact still a citizen of Puerto Rico, entitled to full political rights there, despite his renunciation.<sup>59</sup> Justice Fuster Berlingeri's opinion contended that when Puerto Rico gained commonwealth status from 1950 through 1952, "the public authority and governmental powers of the people of Puerto Rico were not, as before, merely delegated by Congress, but rather, *stemmed from itself and were free* 

States, No. 05-650 (Sup. Ct. Feb. 2006); Brief for the Respondents in Opposition, Igartúa v. U.S., No. 11-876 (Sup. Ct. Apr. 2012).

<sup>57</sup> Jason Koebler, "Despite Referendum, Puerto Rican Statehood Unlikely Until at Least 2015," U.S. News and World Report, Nov. 7, 2012, http://www.usnews.com/ news/articles/2012/11/07/despite-referendum-puerto-rican-statehood-unlikelyuntil-at-least-2015.

<sup>58</sup> I have previously discussed this case in "The Bitter Roots of Puerto Rican Citizenship," in Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution, ed. Christina Duffy Burnett and Burke Marshall (Durham: Duke University Press, 2001), 373-74, 380-84.

<sup>59</sup> Ramírez de Ferrer v. Mari Brás, Tribunal Supremo de Puerto Rico [Sup. Ct. of P.R.], No. CT-96-14 (Nov. 18, 1997).

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from higher authority." Though Puerto Rican citizenship had been "initially established by federal law" of the United States, he maintained, "its legal foundation no longer rests on such federal law," stemming instead from the Constitution of the Commonwealth of Puerto Rico.60 In a 2006 memorandum, Puerto Rico's secretary of justice affirmed the ruling's holding, and Mari Brás became the first-but not the last-person to receive a state certificate of Puerto Rican citizenship.61

Before then, however, the United States District Court for the District of Columbia had stated a different view, which the State Department has treated as authoritative. In 1996, Alberto O. Lozada Colón executed an oath renouncing his US citizenship at a US consulate in the Dominican Republic and, like Mari Brás, then resumed his residence in Puerto Rico. The following year, he sought to obtain a writ compelling the US State Department to supply him with a certificate of loss of nationality. The department refused to do so, and Colón sued. District Court Judge Stanley Sporkin upheld the department's decision, holding that while Colón claimed to be renouncing "all rights and privileges of United States citizenship," he in fact wished to "continue to exercise one of the fundamental rights of citizenship, namely the right to travel freely throughout the world and when he wants, to return and reside in the United States"-since "it is unmistakably clear that Puerto Rico is part of the United States."62 Because Colón had not fully renounced his US citizenship, the State Department had no obligation to certify his expatriation.

Here, the United States opposed what, from the point of view of the litigants, amounted to a claim for a kind of "remedial" and "accommodationist" citizenship. Colón and Mari Brás thought that their US citizenship, with its limited political rights, was an unjust imperialist imposition, and they believed that the United States owed it to them to allow them to continue to be Puerto Rican citizens without having to pledge allegiance to the United States. The rejection of their claims by the State Department and US courts probably expressed, at least in part, worries that if these expatriations were upheld, increasing numbers of Puerto Ricans would profess loyalty to the commonwealth but not the United States, thereby threatening American civic unity and sovereignty. It is hard to describe this reasoning as anything other than "preservationist," regardless of whether one views it as right or wrong. The fact that Puerto Rican authorities have since rejected the US government's position shows that the issue is by no means settled. It may or may not be resolved by efforts to transform Puerto Rico's status after the 2012 referendum.

<sup>60</sup> Ibid., 3-6, 14, 32,

<sup>61</sup> Roberto J. Sánchez Ramos, letter to Fernando Bonilla, Oct. 13, 2006, http:// derechoupr.com/dmdocuments/Opinion\_2006\_7.pdf.

<sup>62</sup> Lozada Colón v. U.S. Dept. of State, 2 F. Supp. 2d 43, 45-46 (D.D.C. 1998).

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## Birthright Citizenship

While some Puerto Ricans wish to relinquish the US citizenship bestowed on them by Congress, other Puerto Ricans and many other territorial residents have long insisted that they are constitutionally entitled to it by virtue of Section 1 of the Fourteenth Amendment, which holds that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof. are citizens of the United States and the State wherein they reside."63 In 1994, Senior Circuit Judge Thomas Tang wrote for the United States Court of Appeals for the Ninth Circuit in regard to the claim of Rodolfo Rabang and six others, all facing deportation proceedings, that they were constitutional birthright citizens because either they or their parents were born in the Philippines while it was still a US territory.<sup>64</sup> Noting that the courts had not previously decided this question, Tang followed the reasoning of the Supreme Court in Downes v. Bidwell<sup>65</sup> and contrasted the Fourteenth Amendment's wording with that of the Thirteenth Amendment, which bans slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction."66 The court reasoned that because the Fourteenth Amendment did not include any such reference, it meant to confine birthright citizenship to birth within the states, not any other places "subject to the jurisdiction" of the United States.

Circuit Judge Harry Pregerson dissented at length. He contended that the *Downes* court had been concerned with distinctions for the purposes of revenue laws, not citizenship; and he argued that the framers of the Fourteenth Amendment were focused not on the language of the Thirteenth Amendment but on longstanding common law views of birthright status going back to the 1608 *Calvin's Case*,<sup>67</sup> in which political membership at birth was understood to be assigned to all born within a sovereign's dominion and protection.<sup>68</sup> Pregerson also maintained that the Supreme Court's decisions in *Inglis v. Sailor's Snug Harbor*<sup>69</sup> in 1830 and *United States v. Wong Kim Ark*<sup>70</sup> in 1898 showed that it accepted these common law understandings extending

<sup>63</sup> U.S. CONST., amend. XIV, § 1. Former Puerto Rico Governor Pedro Roselló also joined the "Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials" in *Tuaua v. U.S.* 

<sup>64</sup> Rabang v. Immigration and Naturalization Serv., 35 F.3d 1449 (9th Cir. 1994).

<sup>65</sup> Downes v. Bidwell, 182 U.S. 244 (1901).

<sup>66</sup> Rabang v. Immigration and Naturalization Serv., 35 F.3d 1449, 1452-53 (9th Cir. 1994).

<sup>67</sup> Calvin v. Smith (1608), 77 Eng. Rep. 377 (K.B.).

<sup>68</sup> Rabang v. Immigration and Naturalization Serv., 35 F.3d 1449, 1455, 1457 (9th Cir. 1994) (Pregerson, J., dissenting).

<sup>69</sup> Inglis v. Trs. of Sailor's Snug Harbor, 28 U.S. 99 (1830).

<sup>70</sup> United States v. Wong Kim Ark, 169 U.S. 649 (1898).

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birthright citizenship to any territory under a sovereign's governance.<sup>71</sup> And Pregerson noted that the Insular Cases' efforts to distinguish the civic statuses of territorial inhabitants were based "in part, on fears of other races," which is why the modern court had recommended against giving their reasoning "any further expansion."<sup>72</sup> He also insisted that even if the Insular Cases were to be followed, birthright citizenship should be deemed one of the limited "fundamental rights" that applied to unincorporated territories as well as incorporated territories and states.<sup>73</sup> Tang's majority opinion replied that whether or not citizenship was a fundamental right for those who possessed it, territorial residents were not citizens under the Fourteenth Amendment.

Though the Ninth Circuit was thus divided on the issues, four years later, the United States Court of Appeals for the Second Circuit strongly endorsed Judge Tang's reasoning. In rejecting the claim of a Filipina, Rosario Valmonte, also seeking to resist deportation, this court, too, contrasted the language of the Thirteenth and Fourteenth Amendments to hold that the Fourteenth Amendment's citizenship clause is "limited to persons born or naturalized in the states of the Union."<sup>74</sup> Other circuits have followed suit, so there the issue has stood; but it is currently being litigated again in the case of *Leneuoti Fiafia Tuaua v. United States*.

In *Tuaua*, five American Samoans contend that they are not merely US nationals but US citizens under the Fourteenth Amendment's citizenship clause. They contrast their claims with those made in *Rabang* in part by contending that the United States had always intended to ultimately give independence to the Philippines, whereas American Samoa and the United States have agreed to an enduring union.<sup>75</sup> Judge Richard Leon of the United States District Court for the District of Columbia felt there was too much precedent against this claim and dismissed it, but it is currently under appeal.<sup>76</sup> One of the striking features of the case is that Congressman Eni F. H. Faleomavaega, the elected nonvoting representative of American Samoa to Congress, has filed repeated briefs in opposition to these other Samoans' claim to citizenship. Like many of his constituents, he is concerned that a

<sup>71</sup> Rabang v. Immigration and Naturalization Serv., 35 F.3d 1449, 1458-60 (9th Cir. 1994) (Pregerson, J., dissenting).

<sup>72</sup> Ibid., 1463-64.

<sup>73</sup> Ibid., 1465.

<sup>74</sup> Santillan Valmonte v. Immigration and Naturalization Serv., 136 F.3d 914, 919 (2d Cir, 1998).

<sup>75</sup> Tuaua v. United States, 951 F. Supp. 2d 88, 94 (D.D.C. 2013).

<sup>76</sup> Ibid., 93-98. I participated in two briefs filed in the pending appeal of this case: Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, Tuaua v. United States, No. 13-5272 (D.C. May 12, 2014); and Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal, Tuaua v. United States, No. 13-5272 (D.C. May 12, 2014).

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number of distinctive features of Samoans' customary ways of life, especially their provisions for keeping land in the hands of native Samoans, might be banned if they were deemed US citizens and fully subject to US constitutional restrictions.<sup>77</sup> His position opposes those of the congressional representatives of Guam and the Virgin Islands and many Puerto Rican officials, whose constituents already have congressionally based US citizenship but wish to see their citizenships granted constitutional status.<sup>78</sup>

This last birthright citizenship case, then, raises the question whether a denial of citizenship that seems a "preservationist" form of civic differentiation, born from racial fears and antagonisms as argued by Judge Pregerson, and maintained against the claims of Filipinos whom the United States wished to deport, may nonetheless be a desirable form of accommodation, at least in the case of American Samoa. In the eyes of many Samoans, that is indeed the case. It is hard, however, to make "accommodationist" defenses of the rejections of claims by residents of the other American territories. Even in regard to Samoa, the force of this accommodationist argument for not recognizing birthright citizenship is less than clear, since courts have already ruled in favor of claims of special accommodations for territorial land laws and other cultural customs.

### Customary Land Laws

In 1978, the Territorial Registrar of American Samoa refused to register a deed that sought to convey land in Samoa to Douglas Craddick, a non-Samoan American citizen married to a native Samoan wife. The registrar asserted that the American Samoan Code banned the alienation of lands there to non-Samoans.<sup>79</sup> The Craddicks contended that the code imposed a racial restriction on economic rights in violation of the equal protection and due process clauses of the US Constitution. The High Court of American Samoa disagreed; while it accepted that equal protection and due process

79 Am. Samoa Code Ann. § 37.0204(b) (2007) provides:

It is prohibited to alienate any lands except freehold lands to any person who has less than one-half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than five years and has officially declared his intention of making American Samoa his home for life.

<sup>77</sup> Brief of the Honorable Eni F. H. Faleomavaega as Amicus Curiae in Support of Defendants at 12-18, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013).

<sup>78</sup> Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiffs-Appellants and in Support of Reversal, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013).

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applied to American Samoa and that racial classifications were suspect, it found "a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa, or Samoan culture."80 It noted that this policy was guaranteed in the Constitution of American Samoa and had been the policy of the Samoan government throughout its history; and, observing that American Samoa is only 76.2 square miles, it contended that "each acre is precious, and the government of American Samoa has a vital interest in protecting the Samoan people from improvident deprivation of their lands."81

Similarly, the United States Court of Appeals for the District of Columbia ruled in 1987 against land claims in American Samoa advanced by the Church of Jesus Christ of Latter-Day Saints.82 Circuit Judge Douglas Ginsburg, a Republican appointee, specified that Congress, when acting under the authority of Article IV, could treat a territory "differently from States so long as there is a rational basis for its actions."83 He therefore affirmed the legitimacy of the congressional policy of "preserving the Fa'a Samoa by respecting Samoan traditions concerning land ownership," a policy stated in the instruments of cession and in the Samoan Constitution, which "Congress may be viewed as having ratified . . . at least in principle."84 The opinion thus suggested that US courts were actually willing to employ the deferential "rational basis" scrutiny for congressional accommodations of Samoa's distinctive customs.

Several years later, Concepcion S. and Elias S. Wabol sued to void a lease through which they had agreed to confer land in the Northern Mariana Islands to Philippine Goods, Inc. They contended that the lease violated article XII of the CNMI Constitution, which bans the sale of a freehold, or a leasehold exceeding forty years, to those not of CNMI descent. Philippine Goods responded that article XII violated the equal protection clause of the US Constitution, which had sovereign authority.85

The United States Court of Appeals for the Ninth Circuit ruled that in "the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures."86 The court was accordingly reluctant to restrict the powers of Congress "to accommodate the unique social and cultural conditions and values" of a particular territory.87 It

<sup>80</sup> Craddick v. Territorial Registrar of Am. Sam., 1 A.S.R.2d 11, 12 (App. Div. 1980).

<sup>81</sup> Ibid., 14.

<sup>82</sup> Corp. of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 830 F. 2d 374 (D.C. Cir. 1987).

<sup>83</sup> Ibid., 385 (quoting Harris v. Rosario, 446 U.S. 651 (1980)).

<sup>84</sup> Ibid., 386.

<sup>85</sup> Wabol v. Villacrusis, 908 F.2d 411, 413 (9th Cir. 1990).

<sup>86</sup> Ibid., 421.

<sup>87</sup> Ibid., 422.

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added that, here, "the preservation of local culture and land ... is a solemn and binding undertaking memorialized in the Trusteeship Agreement" through which the United States had acquired its authority over what had become the CNMI.<sup>88</sup> Since the court understood both Congress and the Trusteeship Agreement to have committed the United States to honoring the CNMI restrictions on land alienation, it also upheld those restrictions against this equal protection challenge. Circuit Judge Cecil Poole wrote that "interposing this constitutional provision would be both impractical and anomalous," for it "would hamper the United States' ability to form political alliances and acquire necessary military outposts" and would "operate as a genocide pact for diverse native cultures." The purpose of the equal protection clause, in his view, "was to protect minority rights, not to enforce homogeneity."<sup>89</sup>

In all of these cases, then-two involving American Samoa's US nationals and one involving the CNMI's US citizens-the courts ruled that ethnically or racially based land restrictions that would not be permissible in the states were valid, and, indeed, supported by compelling interests, in these territories. Those compelling interests included both preservationist US concerns to be able to take actions in the Pacific deemed necessary for national security and passionately worded commitments to accommodate practices deemed essential for the survival of distinctive territorial cultures. The rulings suggest that, at least when accommodationist and preservationist interests coincide, US courts and government officials have little difficulty sustaining differential customary rights for territorial residents, whether they are deemed US nationals or citizens, against constitutional challenges. Perhaps this situation might be altered if territorial residents were judged to be Fourteenth Amendment birthright citizens, not citizens granted that status by Congress. It is not evident, however, why treating their citizenship as constitutionally based would raise the bar against accommodationist policies.

# Normative Reflections

American constitutional thought and political traditions include, among other elements, powerful strains holding that membership in a republic should arise from the explicit or implicit mutual consent of the existing citizenry and applicants for naturalization.<sup>90</sup> Most American citizens and many, if not most, academic theorists agree that current citizens can give weight to many considerations in their decisions on citizenship policies, including

<sup>88</sup> Ibid., 423.

<sup>89</sup> Ibid.

<sup>90</sup> See generally Peter H. Schuck and Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (New Haven: Yale University Press, 1985).

their economic, national security, foreign policy, law enforcement, and civil rights concerns. There is less agreement on whether Americans can or should create many forms of differentiated citizenship. But as the previous sections demonstrate, in fact they have always done so and continue to do so.

In recent writings, I have argued that one (but not the only) important moral consideration in American citizenship policies should be what I call, in an all-too-academic phrase, a "principle of coercively constituted identities."91 The core argument begins with Abraham Lincoln's premise that America's constitutional democracy is best seen as dedicated to realizing the goals of the Declaration of Independence-securing the rights to life, liberty, and the pursuit of happiness-first for its citizens, and then for all of humanity insofar as possible. The second step is to accept the influential contention of Will Kymlicka that persons rarely can conceive of free, happy, and meaningful lives in ways that do not deeply reflect the values and traditions of the societies that have governed them, including the uses of public coercive powers to define the forms of educational, religious, cultural, familial, economic, and political activities that they can legitimately pursue.92 The final step is to recognize that whenever the United States uses its coercive powers to shape persons' identities and aspirations-that is, their notions of how can they pursue happiness-its founding values require it to adopt policies consistent with their realization of those aspirations. Such policies may well include ones that offer these individuals the forms of citizenship they seek, including differentiated forms, if doing so does not unduly threaten other core American values and interests.

If we provisionally accept this understanding of the morality of American constitutionalism, what does it imply for the controversies over the territorial civic statuses just reviewed? There is little doubt that the US government has long coercively shaped many elements of the identities, interests, and aspirations of the inhabitants of its territories. It acquired Puerto Rico, Guam, and the Northern Mariana Islands through military actions, and it obtained the Virgin Islands and American Samoa through negotiations with other colonial powers. It has since claimed and often exerted powers to decide what political and legal rights, what kinds of economic endeavors, and what sorts of allegiances and political memberships the territorial inhabitants can have. It is true that American Samoa was also obtained in part through negotiations with Samoan leaders and that the US government has supported expanded powers of self-governance in all its territories over time. But in regard to

<sup>91</sup> See, e.g., Rogers M. Smith, "Constitutional Democracies, Coercion, and Obligations to Include," in *The Limits of Constitutional Democracy*, ed. Jeffrey Tulis and Stephen Macedo (Princeton: Princeton University Press, 2010).

<sup>92</sup> Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (New York: Oxford University Press, 1995), 82-83.

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these territories (including American Samoa), the United States has never relinquished the claim that Congress retains extensive, if not plenary, powers under Article IV to govern them as it wishes, in alliance with US executive officials and courts; and the US government has never ceased to exercise the powers it asserts over the territories on many vital matters.

As the preceding survey shows, although some American judges and officials have criticized the incorporated/unincorporated territories distinction and the differentiated civic statuses as partly originating in racism, the US government has rarely defined or defended its territorial citizenship policies in "remedial" terms. Instead, it has primarily stressed its "preservationist" interests in American national security, economic welfare, and law enforcement, on the one hand, while increasingly expressing willingness to accommodate the status desires of current territorial populations, on the other. Those emphases are understandable and I believe that they advance legitimate themes. Nonetheless, it is also appropriate for the US government to recognize that its policies have often worked to constrain profoundly, rather than to assist, the liberties and pursuits of happiness of many people in the territories it has governed for so long.

It therefore seems morally imperative, even if politically difficult, for the United States in the twenty-first century to seek as much as possible to allow territorial inhabitants to have the forms of citizenship they desire. There is no good reason why US citizens in the territories should not have the right to vote in elections for president and for full members of Congress, even if a constitutional amendment might be required to bring that about. It is wildly unlikely that doing so would give territorial citizens political power sufficient to threaten any American core interests. And this change would eliminate a form of civic differentiation that historically accompanied others that the nation has rightly repudiated. Ending it would expunge from American law the ugly taint of the origins of territorial residents' limited political statuses, the racist assertion that most are not capable of participating in self-governance on an equal basis with white Americans.

More controversial is the desire of some Puerto Ricans to be Puerto Rican citizens but not US citizens. I have long believed, however, that if citizenship by consent is to be a meaningful status, there must be practical opportunities to give up an undesired citizenship, as the American revolutionaries did, and as enshrined in the 1868 Expatriation Act.<sup>93</sup> Conditioning expatriation on the renunciation of every right conceivably associated with citizenship, including

<sup>93</sup> Act concerning the Rights of American Citizens in Foreign States (1868 Expatriation Act), 15 Stat. 223. See Schuck and Smith, Citizenship Without Consent, 62, 86-88, 122-25.

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rights held by resident aliens, amounts to a deliberate effort to prevent people from exercising expatriation rights they may reasonably see as vital to their pursuits of happiness, given their frustration with the statuses the United States has unilaterally imposed on them. It is chiefly Puerto Ricans who have sought to expatriate themselves in this way, and if their commonwealth status gives way to statehood and full political rights, there would likely be few who would still want this option. But it still seems a form of differentiated citizenship the United States should accept.

Most difficult are the current disputes over birthright citizenship, for two reasons. First, the recognition of Filipino claims to US citizenship would likely have a nontrivial impact on Filipino immigration to the United States, a development that many would see as threatening to American economic, if not cultural and political, interests. Second, the views of many American Samoans, including their elected congressman, that they do not wish to be seen as Fourteenth Amendment birthright citizens deserve respect, as much as the desires of other territorial residents for constitutional citizenship.

As much, but no more; and one of the difficulties here is that despite the different process of acquiring American Samoa and its considerable degree of autonomous self-governance, it is difficult to separate American Samoa's legal status from that of the other American territories, many of whose inhabitants do want Fourteenth Amendment-based US citizenship. The reality is that the United States claims the same ultimate sovereignty over American Samoa that it does over its other territories, even if many American Samoans and legal authorities disagree. So if the other territories should be deemed part of the United States and subject to its jurisdiction, making their residents Fourteenth Amendment birthright citizens, it seems the same should be true for American Samoa.

The rulings in the *Craddick* and *Wabol* cases, moreover, show that courts are already willing—indeed, rhetorically eager—to find that territorial inhabitants can be US citizens but differentiated citizens, entitled to maintain land laws and other practices vital to the survival of their distinct cultures that would otherwise not be constitutional. Undeniably, predominant judicial views can change; and there is also ample room for dispute about what differentiations are really necessary and appropriate accommodations, and which ones are simply unjust deprivations of due process, equal protection, or other rights. But those circumstances are true whether Samoans are deemed American nationals or whether they are American citizens. As the case law reviewed here shows, neither alternative is full proof against judicial rulings or American legislative and executive policies that contravene the perceived interests of members of the territories. Perhaps the only difference is that if territorial inhabitants were viewed as Fourteenth Amendment birthright citizens, it is inconceivable that they could be deprived of their US citizenship by Congress—something that is clearly legally possible, if politically difficult, at present.

The central arguments of Circuit Judge Pregerson's dissent in *Rabang* also seem compelling. My own studies of the Fourteenth Amendment and the surrounding case law on birthright citizenship suggest that when the amendment's framers wrote the amendment's citizenship clause, they had in mind primarily common law traditions, along with often dissonant international law traditions, rather than the wording of the Thirteenth Amendment. They did seek to deny birthright citizenship to those born into the native tribes, though they used language ill adapted to that purpose; and it is certainly possible to argue that the territories should be viewed as "domestic dependent nations," similar to the tribes. That is, in my view, the strongest argument for ruling against claims of Fourteenth Amendment birthright citizenship in the territories.

But the reality is that throughout much of the history of US territories, which were long administered by US-appointed governors, the territories were accorded even less recognition of their rights to autonomous self-governance than most of the native tribes. And in any case, as Judge Pregerson admonished, some features of US law, including some forms of civic differentiation, are so deeply tied to America's history of racial inequalities that they should not be interpreted expansively. The denial of birthright citizenship to those born into Native American tribes, like the Insular Cases' unincorporated/ incorporated distinction on which the courts have relied in the Fourteenth Amendment citizenship cases, is such a feature. It is the kind of invidious civic differentiation that Americans since World War II have sought to erase from their laws.

I conclude, then, that there are strong normative reasons for providing residents of US territories with the civic statuses many are contending for today—expanded political rights, the right to expatriate themselves without losing residency, constitutionally grounded citizenship, and accommodations of distinctive features of their ways of life that seem essential to their cultural survival. The safest empirical prediction, however, is that we will see continuing struggles over these civic statuses that will be heavily shaped by the preservationist concerns of powerful actors in the United States. And whatever the outcome, American law is still likely to display differentiated forms of territorial citizenship, with debates over which ones are and are not truly equal. Though in some ways unique, those disputes will echo contests over many other civic statuses in the American Republic and most nations of the modern world.