

# THE TERRITORY FEDERAL JURISDICTION FORGOT: THE QUESTION OF GREATER FEDERAL JURISDICTION IN AMERICAN SAMOA

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*Abstract:* The United States Territory of American Samoa is over 7000 miles from Washington, D.C., and that distance might explain the United States' limited interest in the territory. The lack of interest has allowed American Samoa to maintain its unique cultural foundations. However, it has also kept American Samoa detached from the federal governmental structure, including the judicial system. In fact, a federal district court does not exist in American Samoa, nor has the territory been incorporated into a federal judicial district. A lack of a federal presence has not been a major issue until recently. In the last few years, the U.S. government has begun to prosecute American Samoan residents for violations of federal law. Without a federal jurisdictional presence, these prosecutions have taken place off-island impacting the constitutional rights of American Samoa residents. These renditions have increased calls for the creation of a federal district court in American Samoa. While a greater federal presence would be helpful, the creation of a district court is unnecessary. A better solution would be to increase the current jurisdiction of the local territorial judiciary to incorporate greater federal jurisdiction.

## I. INTRODUCTION

The United States Territory of American Samoa is unique for many reasons. It is the only inhabited part of the United States south of the equator. American Samoans are U.S. nationals but not automatically U.S. citizens. Over ninety percent of the land is owned communally and strict prohibitions prevent the alienation of land to non-Samoans. It also is the only U.S. territory that does not have a federal district court and has not been incorporated into a federal judicial district.

The United States established American Samoa's judicial system when the island became a U.S. territory. The High Court of American Samoa is the court of general jurisdiction for the territory. Congress has given the high court federal jurisdiction in a number of areas, but it still lacks jurisdiction in a number of important matters, including bankruptcy and federal crimes listed in Title 18 of the United States Code.

Over the years, numerous proposals have been made to create a federal district court, or even to include American Samoa in an existing

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federal judicial district. However, a combination of congressional neglect and Samoan hostility has contributed to the absence of a federal district court. In 2006, American Samoa's Delegate to Congress, Eni F.H. Faleomavaega, introduced a bill that would have established a federal district court in American Samoa.<sup>1</sup> He eventually withdrew it, but the debate continues.

Many Samoans are nervous that a greater federal presence in the territory, through the creation of a federal district court, would destroy the unique foundations of Samoan society, namely the communal land system and the *matai* chiefly title system.<sup>2</sup> However, the creation of a federal district court in the territory is gaining momentum.<sup>3</sup> In recent years, a number of American Samoan residents have been prosecuted for violating federal criminal statutes.<sup>4</sup> Due to the lack of a federal district court, the residents have not been tried in American Samoa and instead have been removed from the territory and tried in jurisdictions thousands of miles away with little connection to the alleged crime.<sup>5</sup> A growing uneasiness is developing in the territory over this type of rendition.<sup>6</sup> Beyond local resentment, these federal prosecutions also implicate the Sixth Amendment right to an impartial jury composed of members from the district where the crime was committed.

A greater federal presence would prevent the rendition of American Samoan residents. However, a federal district court is not necessarily the answer. This article argues for the creation of a new "federal division" within the High Court of American Samoa. The federal division would have jurisdiction over federal laws that would secure the rights of American

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<sup>1</sup> Federal District Court of American Samoa Act of 2006, H.R. 4711, 109th Cong. (2006) [hereinafter H.R. 4711].

<sup>2</sup> See generally FUTURE POLITICAL STATUS STUDY COMM'N, FINAL REPORT: THE FUTURE POLITICAL STATUS STUDY COMM'N OF AMERICAN SAMOA, Jan. 2, 2007, available at [http://americansamoa.gov/fpssc/fpssc\\_report.pdf](http://americansamoa.gov/fpssc/fpssc_report.pdf).

<sup>3</sup> See Press Release, Delegate Eni F.H. Faleomavaega, Faleomavaega Responds to S. Falanai's Letter to the Editor Entitled 'Concern at Large' Regarding Federal District Court in American Samoa (July 24, 2006), available at [http://www.house.gov/list/press/as00\\_faleomavaega/lettertoeditorperfalanai.html](http://www.house.gov/list/press/as00_faleomavaega/lettertoeditorperfalanai.html). Delegate Faleomavaega asserted that seventy-six percent of more than 2000 American Samoans surveyed supported the idea of a federal district court in the territory. *Id.* The supporters included leaders of the *Fono* (described *infra* Part III.A) as well as traditional leaders of the island. *Id.*

<sup>4</sup> See, e.g., Press Release, Department of Justice, Defendant Pleads Guilty in Case Involving Bribery and Fraud Scheme in American Samoa (Jan. 27, 2005), available at [http://www.usdoj.gov/opa/pr/2005/January/05\\_crm\\_036.htm](http://www.usdoj.gov/opa/pr/2005/January/05_crm_036.htm) (listing recent prosecutions of American Samoan residents).

<sup>5</sup> See, e.g., *id.*; see *infra* notes 264-265 and accompanying text (discussing recent prosecutions).

<sup>6</sup> See generally Radio New Zealand, *American Samoan Governor Objects to Growing US Role in Local Affairs*, July 4, 2007, <http://www.rnzi.com/pages/news.php?op=read&id=33422> (outlining the Governor's growing frustration with the increased federal involvement in the territory's affairs).

Samoan residents but still protect their traditional customs. An expansion of the high court's jurisdiction would be a better solution than a federal district court because it avoids creating an entirely alien judicial system in American Samoa.

Part II will provide a brief history of federal district courts and territorial courts as well as examine the existing U.S. territorial courts. Part III will review the unique judiciary of American Samoa. Part IV will discuss the current problems with American Samoan jurisdiction using two recent circuit court of appeals decisions that sanctioned the rendition of American Samoan residents from the territory to be tried in other jurisdictions. Finally, Part V will examine the most recent proposal to create a federal district court in American Samoa and will conclude that the creation of a federal district court is not necessary; instead, empowering the High Court of American Samoa with federal jurisdiction in specific areas would resolve some of the open questions concerning jurisdiction in American Samoa.

## II. EXCEPT FOR AMERICAN SAMOA, THE FEDERAL JUDICIAL STRUCTURE HAS SERVED AS A MODEL FOR U.S. TERRITORIAL JUDICIAL SYSTEMS

United States district courts have been part of the judicial system since the first Judiciary Act of 1789.<sup>7</sup> Altered versions of federal district courts have also been incorporated into many of the existing judicial systems of the U.S. territories.<sup>8</sup> Generally, it is through this structure that federal laws are applied; however, there is no standard or model territorial system. Instead, territorial judicial systems are uniquely structured to fit within the local judicial presence. This variety has created a lack of clarity in how federal law is applied through these territorial courts.

### A. *U.S. District Courts Have Been Modified over Time to Adjust to Alterations of the Federal Judicial System*

Article III, section 1 of the U.S. Constitution vests the judicial power of the United States in a Supreme Court, but it also permits Congress to create inferior courts to exercise federal judicial power.<sup>9</sup> Congress' first

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<sup>7</sup> Judiciary Act of 1789, 1 Stat. 73 (1789).

<sup>8</sup> See *infra* Part II.B.2 (describing the judicial systems of the U.S. territories).

<sup>9</sup> U.S. CONST. art. III, § 1. Article III states:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their Services, a compensation, which shall not be diminished during their continuance in office.

attempt to create Article III Inferior Courts manifested itself in the Judiciary Act of 1789.<sup>10</sup> The Act established the original federal judicial system.<sup>11</sup> In doing so, the Act established three different types of courts: the Supreme Court, the circuit court, and the district court.<sup>12</sup>

The federal judiciary was initially organized into thirteen judicial districts.<sup>13</sup> The district and circuit courts operated as trial courts in each district.<sup>14</sup> As designed, the district courts acted with limited jurisdiction and served as federal trial courts for admiralty and maritime cases and, in some instances, for minor civil and criminal cases.<sup>15</sup> They possessed civil jurisdiction concurrently with circuit courts. Their jurisdiction included cases where an alien brought suit for a tort arising from a violation of the law of nations or a treaty, where the federal government served as plaintiff and the amount in controversy was equal to \$100 or less, and where suits were brought against counsels.<sup>16</sup> By 1815, as Congress progressively increased the district courts' jurisdiction, the courts exercised criminal jurisdiction in all cases except capital offenses.<sup>17</sup> Circuit courts were not

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<sup>10</sup> Judiciary Act of 1789, 1 Stat. 73 (1789). Congress passed the Act in the first session of the First United States Congress, and President George Washington signed it on September 24, 1789. See RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 3 (Federal Judicial Center 1994).

<sup>11</sup> See WHEELER & HARRISON, *supra* note 10, at 4. The Act established five associate justices and one chief justice of the Supreme Court. *Id.* Congress gave the Supreme Court exclusive original jurisdiction over all civil actions between states, or between a state and the United States. *Id.* Under the Act, the Court exercised appellate jurisdiction over certain decisions of the federal circuit courts. The Court was able to review state courts' decisions invalidating any U.S. statute or treaty, and decisions finding a state law inconsistent with the U.S. Constitution, treaties, or federal laws. *Id.*

<sup>12</sup> Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 140-41 (1967). The circuit courts established in 1789 were very different from the circuit courts of appeals established in 1891.

<sup>13</sup> WHEELER & HARRISON, *supra* note 10, at 4. The original districts corresponded with the borders of the eleven states that had ratified the Constitution. *Id.* Maine and Kentucky each had their own district, although they were not yet states; Maine was still part of Massachusetts and Kentucky was still a part of Virginia. *Id.*

<sup>14</sup> *Id.* at 4. The circuit courts also possessed limited appellate jurisdiction. *Id.* The circuit court jurisdiction incorporated all matters triable under federal statutes and not exclusively reserved to the district courts. Surrency, *supra* note 12, at 141. The circuit courts had exclusive original jurisdiction in diversity cases where the amount exceeded \$500. *Id.* They also acted as an appellate court for district court decisions. *Id.*

<sup>15</sup> Surrency, *supra* note 12, at 141; WHEELER & HARRISON, *supra* note 10, at 4. A district court had exclusive admiralty jurisdiction as well as exclusive jurisdiction for seizures under the import, navigation, and trades statutes and seizures on land for the violation of federal statutes. Surrency, *supra* note 12, at 141.

<sup>16</sup> Surrency, *supra* note 12, at 141. Federal question jurisdiction had not been granted to the lower courts in the first Judiciary Act. WHEELER & HARRISON, *supra* note 10, at 5-6. Such jurisdiction was given in 1875. *Id.*

<sup>17</sup> Surrency, *supra* note 12, at 141.

established in every district.<sup>18</sup> In these areas, the district court exercised complete federal jurisdiction.<sup>19</sup> The caseload varied among the district courts and was based primarily on the number of admiralty suits in the district.<sup>20</sup> Each district court had only one judge who held four district court sessions annually and who sat on the circuit court twice yearly.<sup>21</sup>

In 1891, Congress dramatically reorganized the system and established the judicial structure in use today.<sup>22</sup> Under the new system, the majority of the appellate caseload was switched from the U.S. Supreme Court to newly formed circuit courts of appeals.<sup>23</sup> The Act established the newly created circuit courts of appeals as the only appellate courts, abolishing appeals from the district courts to the pre-existing circuit courts.<sup>24</sup> This would eventually lead to the current system of the district courts as trial courts with limited subject matter jurisdiction. Today, the district courts' civil jurisdiction is based mainly on diversity of citizenship jurisdiction and questions arising under federal law.<sup>25</sup>

Currently, the U.S. federal court system includes a Supreme Court, thirteen courts of appeals, and ninety-four district courts.<sup>26</sup> A district may be divided into various divisions and have several places where the court hears cases.<sup>27</sup> The number of judges is based roughly on the caseload of the district.<sup>28</sup> There are approximately 663 district court judgeships.<sup>29</sup> U.S. federal judges are appointed for life.<sup>30</sup>

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<sup>18</sup> *Id.* at 4. In the original Maine and Kentucky districts, as well as in many of the newly formed states, the district courts assumed the jurisdiction of the circuit courts until the district was incorporated into a judicial circuit. *See id.* at 141-42. In 1911, Congress abolished the U.S. circuit courts, making the district courts the sole trial court of the federal judiciary. *Id.* at 142.

<sup>19</sup> *Id.*

<sup>20</sup> *See* WHEELER & HARRISON, *supra* note 10, at 4. As a result of the varied caseloads, the judges received different salaries depending on the district. *Id.*

<sup>21</sup> *Id.* As the caseload of the single district court judge expanded in the late 1800s, many district court judges would end up hearing their own appeals. *See id.* at 16.

<sup>22</sup> *See id.* at 18.

<sup>23</sup> Circuit Courts of Appeals Act, 26 Stat. 826 (Mar. 3, 1891); WHEELER & HARRISON, *supra* note 10, at 18. The Act established nine circuit court of appeals, one for each of the existing judicial circuits. *See id.*

<sup>24</sup> 26 Stat. 826 § 4.

<sup>25</sup> *See* 28 U.S.C. §§ 1331-32 (2000 & Supp. V 2005) (establishing district court jurisdiction).

<sup>26</sup> *See* WHEELER & HARRISON, *supra* note 10, at 23. These numbers include the five district courts in the U.S. territories. *Id.* at 26.

<sup>27</sup> *See, e.g.,* 28 U.S.C. § 93(a)(1)-(2) (2000) (dividing the Northern District of Illinois into two judicial divisions).

<sup>28</sup> U.S. Courts, Federal Judges, <http://www.uscourts.gov/faq.html> (last visited Jan. 23, 2008). The chief judge is the longest serving judge in the district who is under the age of 65. 28 U.S.C. § 136(a)(1) (2000).

<sup>29</sup> *See* 28 U.S.C. § 133 (Supp. V 2005).

<sup>30</sup> *See* U.S. CONST. art. III, § 1; 28 U.S.C. § 134 (2000).

Within the federal system, there are two kinds of district courts: Article III District Courts and Article IV Territorial District Courts. In the U.S. territories, Article IV Territorial District Courts fit within the local judicial system to administer federal law.

*B. While Part of the Federal Judicial System, Territorial District Courts Vary from the District Courts in the States*

Territorial courts have existed within the United States since the early days of the republic.<sup>31</sup> Congress established these courts pursuant to Article IV of the U.S. Constitution to assist in the administration of territories.<sup>32</sup> These “legislative courts” usually have a mixture of federal and local jurisdiction.<sup>33</sup>

The structure of these territorial courts has varied based on the political situation at the time of formation of the territory.<sup>34</sup> For example, in many of the U.S. continental western territories, Congress created a single Article IV federal court and vested it with both federal jurisdiction and the general jurisdiction usually found in a state court.<sup>35</sup> Congress implemented this type of court because many of these territories lacked any local government that could adjudicate local matters.<sup>36</sup> A different structure was used when the territory already possessed a functioning judiciary under a pre-existing local government.<sup>37</sup> In these circumstances, Congress would adopt the local system, but provide the President power to appoint or remove

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<sup>31</sup> See e.g., Act to provide for the Government of the Territory North-west of the river Ohio, 1 Stat. 50 (1789). The Act states:

There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

<sup>32</sup> See U.S. CONST. art. IV, § 3, cl. 2. This Clause of the Constitution states:

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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

*Id.* Congress also has the power to established courts under Article I, section 8 of the U.S. Constitution. U.S. CONST. art. I, § 8 (“The Congress shall have power . . . To constitute tribunals inferior to the Supreme Court”). Article I courts include the U.S. Court of Military Appeals, the U.S. Court of Veterans Appeals, and the U.S. Tax Court. U.S. Courts, Federal Judges, <http://www.uscourts.gov/about.html> (last visited Jan. 23, 2008).

<sup>33</sup> Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 985-88 (2002).

<sup>34</sup> See *infra* Part.II.B.2 (discussing the development of U.S. territorial judicial systems).

<sup>35</sup> See Nicolas, *supra* note 33, at 986-87.

<sup>36</sup> *Id.* at 987.

<sup>37</sup> See *id.* For example, at the time of its annexation, Hawaii’s judiciary included a three-tiered court system. *Id.*

the judges of the local courts.<sup>38</sup> Congress would also create a federal district court for the territory modeled on an Article III District Court.<sup>39</sup>

Territorial courts currently exist in the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. Each of these courts employs structures used in the former continental territories, but with some important modifications, depending on its current territorial status with the United States.

*I. The Application of Federal Law in Territorial Courts Can Be Imprecise and Sometimes Ambiguous*

United States territories are usually categorized as organized or unorganized and as incorporated or unincorporated.<sup>40</sup> An organized territory is a territory where Congress has established a civil government, through the passage of an Organic Act that essentially establishes a territorial constitution.<sup>41</sup> Any changes to the Organic Act, and the territorial constitution, require congressional approval.<sup>42</sup> An unorganized territory may have a civil government but not one which is created by an Organic Act.<sup>43</sup> An unorganized territory is usually under the direct control of the President or his designee.<sup>44</sup>

American Samoa remains the only inhabited unorganized territory. In the 1960s, the President permitted the residents of American Samoa to develop a Constitution, which was not considered an Organic Act because it did not involve congressional authorization.<sup>45</sup> Two decades later, Congress adopted a statute requiring Congress to approve any amendments to the American Samoan Constitution.<sup>46</sup> With this congressional act, one could argue that American Samoa became an organized territory.<sup>47</sup>

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<sup>38</sup> See *id.* at 987-88.

<sup>39</sup> See *id.* at 988. One difference between the court system for local territorial matters and the court system for Article III matters would be the terms of the judges' appointment. In the territories, the judges are only appointed for a specific amount of time, not for life. *Id.*

<sup>40</sup> Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449-53 (1992).

<sup>41</sup> See *id.* at 450.

<sup>42</sup> *Id.* at 459.

<sup>43</sup> *Id.* at 450.

<sup>44</sup> See STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 87 (1995).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*; 48 U.S.C. § 1662(a) (2000) ("Amendments of, or modifications to, the Constitution of American Samoa, as approved by the secretary of the interior pursuant to Executive Order 10264 as in effect January 1, 1983, may be made only by an act of Congress.").

<sup>47</sup> LAUGHLIN, *supra* note 44, at 87-88.

An unincorporated status implies that not all of the provisions of the U.S. Constitution apply to the territory.<sup>48</sup> In contrast, an incorporated territory is one in which the full force of the Constitution applies in the territory.<sup>49</sup> The incorporation doctrine arose at the turn of the twentieth century from a series of U.S. Supreme Court cases, usually referred to as the Insular Cases.<sup>50</sup> The Court officially adopted the doctrine in *Balzac v. Porto Rico*.<sup>51</sup> Essentially, the doctrine asserts that unless the territory is incorporated, only fundamental rights of the U.S. Constitution apply to the territory.<sup>52</sup> However, even with the doctrine's official adoption, many questions about how to apply it remained unresolved.

A generation later, another divided Supreme Court attempted to clarify which fundamental rights applied. The Court crafted a theory that constitutional provisions would extend to the territories unless the provisions were impractical or anomalous.<sup>53</sup> Unfortunately, it was left to the lower courts and academic scholars to flush out the Court's divided opinions on the topic.

The Court of Appeals for the District of Columbia developed a rule to determine the applicability of constitutional provisions in the territories.<sup>54</sup> The court of appeals in *King v. Morton* construed Supreme Court precedent

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<sup>48</sup> Van Dyke, *supra* note 40, at 449. The main distinction is that "the Uniformity Clause of the Constitution does not apply to an unincorporated territory unless it [is] . . . a 'fundamental' aspect of our constitutional system." *Id.*

<sup>49</sup> *See id.* Incorporated territories are normally those territories in a transition stage to statehood. *Id.*

<sup>50</sup> *See id.*; *see* De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901). Specifically, Justice White's concurring opinion in *Downes* established the doctrine. *Downes*, 182 U.S. at 287-344 (White, J., concurring). In *Downes*, the question before the court was whether merchandise brought from Puerto Rico into New York was exempt from duty. *Downes*, 182 U.S. at 247. The Organic Act of Puerto Rico imposed a duty upon goods in apparent conflict with the U.S. Constitution's Uniform Duties Clause. *Id.* at 248-49. The Court did not reach a majority decision and the opinion included two concurring and four dissenting opinions. *See id.* However, the majority of the opinions of the Court concurred that the Uniform Duties Clause did not apply to Puerto Rico as an unincorporated territory of the United States, and thus, duties had to be paid on Puerto Rican imports. *Id.* at 287.

<sup>51</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>52</sup> LAUGHLIN, *supra* note 44, at 129; *see* Van Dyke, *supra* note 40, at 449. The Court made a distinction between "natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence." *Id.* at 460 (quoting *Downes*, 182 U.S. at 282).

<sup>53</sup> Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring); *see* LAUGHLIN, *supra* note 44, at 135-36.

<sup>54</sup> *See* King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975). Jake King, a resident of American Samoa, sued Secretary of the Interior Rogers C. Morton arguing that his Sixth Amendment rights entitled him to a jury trial in the High Court of American Samoa. *King*, 520 F.2d at 1142. The court of appeals remanded the case back to the district court to determine if a jury trial in American Samoa would be impractical or anomalous. *See id.* at 1147. The District Court for the District of Columbia determined that jury trials in criminal cases would not be impractical or anomalous in the territory and imposed the use of such trials in the territory. *See* King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

as suggesting that constitutional provisions are presumptively applicable to the territories unless a particular provision would be impractical or anomalous if applied in a particular situation.<sup>55</sup> The Ninth Circuit adopted the *King* test in *Wabol v. Villacrusis*.<sup>56</sup>

## 2. *While Similar, the Development and Jurisdictional Scope of the Courts Vary in Each Territory*

Territorial courts exist in the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. A federal district court exists in all of these territories except American Samoa. Typically, these federal district courts have jurisdiction similar to an Article III District Court in addition to jurisdiction over local causes of action over which no local court has jurisdiction.<sup>57</sup> However, often the judges who serve on these courts lack life tenure.<sup>58</sup> As a review of each territorial judicial system shows, the federal district courts were a principal and foundational part of the territorial judicial systems.

### a. *Puerto Rico*

Puerto Rico became a U.S. possession in 1898 following the Spanish-American War.<sup>59</sup> Congress created a temporary local civil government in 1900 with the passage of the Foraker Act.<sup>60</sup> This was the first Organic Act for the island. The civil government consisted of a governor, an executive council, a House of Delegates, a Supreme Court of Puerto Rico, and a federal district court judge.<sup>61</sup> The President appointed all of the members of

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<sup>55</sup> See LAUGHLIN, *supra* note 44, at 264.

<sup>56</sup> *Wabol v. Villacrusis*, 908 F.2d 411, 422 (9th Cir. 1990).

<sup>57</sup> Nicolas, *supra* note 33, at 991-92.

<sup>58</sup> *Id.* at 992.

<sup>59</sup> Van Dyke, *supra* note 40, at 472. Spain officially ceded the island to the United States on December 10, 1898, under the terms of the Treaty of Paris. See Treaty of Paris, U.S.–Spain, Dec. 10, 1898, 30 Stat. 1754. Under the Treaty of Paris, Spain conveyed its control of Cuba, Puerto Rico, Guam, and the Philippines to the United States. See *id.* Art. I–III. President McKinley signed the Treaty on February 6, 1899. See *id.*

<sup>60</sup> Van Dyke, *supra* note 40, at 472; Foraker Act, 31 Stat. 77 (1900) (repealed 1917). “The [United States] military governed the island until Congress passed the Foraker Act.” *Id.* The Foraker Act was named after Senator Joseph Benson Foraker of Ohio. Foraker Act: Organic Act of 1900, <http://www.loc.gov/rr/hispanic/1898/foraker.html> (last visited Jan. 23, 2008).

<sup>61</sup> See Dorian A. Shaw, *The Status of Puerto Rico Revisited: Does The Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT’L L.J. 1006, 1019 (1994). The governor’s term was for four years. Foraker Act, 31 Stat. at 81. The executive council consisted of a secretary, attorney general, treasurer, auditor, commissioner of the interior and commissioner of education, and five others “of good repute”; there was also a requirement that five members be native inhabitants of Puerto Rico. *Id.*

the civil government except for the members of the House of Delegates.<sup>62</sup> The Foraker Act retained the existing local courts in Puerto Rico.<sup>63</sup> It also established a federal district court.<sup>64</sup> The district court was granted the jurisdiction of both the district courts and circuit courts established in the Judiciary Act of 1789.<sup>65</sup> The U.S. Supreme Court heard appeals from the district court and the Supreme Court of Puerto Rico.<sup>66</sup>

Seventeen years later, Congress passed a more comprehensive organic act: the Jones Act.<sup>67</sup> This Act conferred U.S. citizenship on Puerto Ricans and granted the territory greater local autonomy, though it was still subject to Congress' control.<sup>68</sup> The Act extended to Puerto Rico a bill of rights that includes the right to due process and equal protection.<sup>69</sup> The jurisdiction of the district court was extended to cover disputes between parties who were both citizens of a foreign state not residing in Puerto Rico.<sup>70</sup> The district court was incorporated into the U.S. Court of Appeals for the First Circuit for appellate review.<sup>71</sup>

The Puerto Rico Elective Governor Act of 1947 was the next major step in the development of local autonomy; it established the direct election of the governor.<sup>72</sup> On the heels of the Governor's Act, under the direction of Congress, Puerto Rico held a plebiscite in 1951 to approve a constituent assembly in order to draft a constitution.<sup>73</sup> Within a year, Puerto Rico had

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<sup>62</sup> Shaw, *supra* note 61, at 1019.

<sup>63</sup> Foraker Act, 31 Stat. at 84.

<sup>64</sup> *Id.* A single judge presided over the federal court and served for a term of four years. Nicolas, *supra* note 33, at 988-89.

<sup>65</sup> Foraker Act, 31 Stat. at 84.

<sup>66</sup> *Id.* at 85.

<sup>67</sup> Organic Act of Puerto Rico, 39 Stat. 951 (1917). The Jones Act created a directly-elected bicameral legislature. Shaw, *supra* note 61, at 1020. The Act also made the statutory laws of the United States fully applicable in Puerto Rico, except for internal revenue laws and other laws deemed inapplicable by Congress. *Id.*

<sup>68</sup> See Van Dyke, *supra* note 40, at 472.

<sup>69</sup> Karina Camacho, Note & Comment, *The United States-Puerto Rico Relationship: Incomplete Decolonization*, 48 How. L.J. 491, 497 (2004).

<sup>70</sup> See Organic Act of Puerto Rico, 39 Stat. at 965. For jurisdiction to be conferred, the matter in dispute must have exceeded \$3000. *Id.* This type of jurisdiction allowed citizens of Spain, the former colonial power, to sue each other in the district court. See Nicolas, *supra* note 33, at 989. This kind of jurisdiction would not be available for Article III courts because of the Diversity Clause, but appears to be valid for an Article IV legislative court. *Id.* at 989-90.

<sup>71</sup> Nicolas, *supra* note 33, at 1037; 28 U.S.C. § 41 (2000).

<sup>72</sup> See Camacho, *supra* note 69, at 498. The Act allowed for the direct election of the governor, removing the power of the President to appoint the governor for the territory. See *id.*

<sup>73</sup> See Shaw, *supra* note 61, at 1007-08, 1021. Congress passed Public Law 600, which allowed Puerto Ricans to draft their own constitution subject to congressional approval. Camacho, *supra* note 69, at 499. The plebiscite to authorize a constituent assembly was held on June 4, 1951. See Shaw, *supra* note 61, at 1021.

adopted a constitution.<sup>74</sup> Congress and Puerto Rico jointly agreed to the creation of a Puerto Rican Constitution and greater autonomy for the island.<sup>75</sup> Through this process, Puerto Rico achieved commonwealth status.<sup>76</sup> Commonwealth status ended direct U.S. control over the local affairs of Puerto Rico.<sup>77</sup> Nevertheless, following the establishment of the commonwealth, Congress passed the Puerto Rico Federal Relations Act.<sup>78</sup> The Act affirmed that the laws of the United States still applied to Puerto Rico.<sup>79</sup>

The establishment of the commonwealth itself did not alter the jurisdiction of the federal court.<sup>80</sup> Subsequently, however, Congress brought the Article IV Territorial District Court into closer conformity with Article III District Courts: judges now have life tenure and fixed salaries<sup>81</sup> and the courts' jurisdictions are now identical to that of an Article III District Court.<sup>82</sup>

*b. U.S. Virgin Islands*

The U.S. Virgin Islands consist of more than fifty islands in the Caribbean, but the majority of the population lives on the islands of St. Thomas, St. John, and St. Croix.<sup>83</sup> The United States purchased the Virgin Islands from Denmark in 1916 for twenty-five million dollars in order to

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<sup>74</sup> Shaw, *supra* note 61, at 1021. A constituent assembly drafted a constitution, and the Puerto Rico voters approved it on March 3, 1952. *Id.* With some alterations, Congress approved the Constitution. *Id.*

<sup>75</sup> Van Dyke, *supra* note 40, at 451. The authority is created by both an act of Congress as well as the consent of the citizens. *Id.* The sweeping power of the Territorial Clause is theoretically limited by commonwealth status. *Id.* at 452.

<sup>76</sup> *Id.* at 451. Van Dyke describes the commonwealth as:

[T]he concept of a 'commonwealth' anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of that entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time.

*Id.*

<sup>77</sup> See Shaw, *supra* note 61, at 1022. Puerto Rico can amend its Constitution without congressional approval, as long as the amendment is consistent with the Compact and U.S. Constitution. Van Dyke, *supra* note 40, at 451; see *Hodgson v. Union de Empleados de los Supermercados Pueblos*, 371 F. Supp. 56, 60 (D.P.R. 1974) (finding that after the implementation of the Compact, congressional authority derives from the Compact and not the Territorial Clause of the U.S. Constitution).

<sup>78</sup> See Camacho, *supra* note 69, at 501; 48 U.S.C. § 734 (2000).

<sup>79</sup> Camacho, *supra* note 69, at 501.

<sup>80</sup> Van Dyke, *supra* note 40, at 480.

<sup>81</sup> Nicolas, *supra* note 33, at 990.

<sup>82</sup> *Id.*

<sup>83</sup> Ediberto Roman & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV 437, 495 (2002). The three islands have a combined surface area of approximately 130 square miles. *Id.*

prevent Germany from buying them.<sup>84</sup> The residents of the islands had no voice in the transaction.<sup>85</sup>

The first Organic Act for the U.S. Virgin Islands was passed in 1917.<sup>86</sup> The Act created a temporary government.<sup>87</sup> U.S. citizenship was granted in 1927.<sup>88</sup> In 1931, President Hoover placed the administration of the island under the secretary of the interior.<sup>89</sup> A Second Organic Act in 1936 established a local government, but the territory was still predominately controlled by the secretary of the interior.<sup>90</sup> A Revised Organic Act was developed in 1954 and increased local autonomy.<sup>91</sup> The citizens of the Virgin Islands held a constitutional convention in 1964 to propose a number of goals for territorial governance.<sup>92</sup> The Elective Governor Act of 1968 achieved many of the proposed goals of the constitutional convention: providing for the direct election of a governor, ending presidential veto power over local legislation, and eliminating the secretary of the interior's direct control over the territory.<sup>93</sup> Similar to Puerto Rico, the islands still lack any autonomy from federal regulation.<sup>94</sup>

Congress established a federal district court in the territory in 1936.<sup>95</sup> The islands' judicial power is vested in the district court and courts established by local law.<sup>96</sup> The federal district is comprised of one judicial

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<sup>84</sup> Van Dyke, *supra* note 40, at 495; *see also* 48 U.S.C. § 1541(a) (2000). Before becoming a U.S. territory, the Spanish, the Dutch, the British, the French, the Knights of Malta, and the Danish all asserted control over the islands at one point. Roman & Simmons, *supra* note 83, at 495.

<sup>85</sup> *See* Van Dyke, *supra* note 40, at 495. However, the Danish approved the sale through a plebiscite. *Id.*

<sup>86</sup> Roman & Simmons, *supra* note 83, at 496.

<sup>87</sup> *Id.* The Organic Act created a judicial system, a bicameral legislature, and a governor appointed by the United States President. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Executive Order 5566 (Feb. 27, 1931).

<sup>90</sup> *See, e.g., id.* at 1808 ("the secretary of the interior shall be authorized to lease or to sell...any property of the United States under his administrative supervision in the Virgin Islands . . ."); Organic Act of the Virgin Islands, 49 Stat. 1807 (1936).

<sup>91</sup> *See* Revised Organic Act of the Virgin Islands, 68 Stat. 497 (1954). The Revised Act contained a bill of rights. *Id.* at 497-98. The Act also centralized the local government. Van Dyke, *supra* note 40, at 497.

<sup>92</sup> Van Dyke, *supra* note 40, at 497. The Convention proposed a number of goals, but a Constitution for the island was not passed until 1981. *See id.* at 497-98.

<sup>93</sup> *See id.* at 498.

<sup>94</sup> *Id.*

<sup>95</sup> Organic Act of the Virgin Islands, 49 Stat. at 1813.

<sup>96</sup> *See* Joycelyn Hewlett, *The Virgin Islands: Grand Jury Denied*, 35 How. L.J. 263, 267 (1992). The local courts of the Virgin Islands include a supreme court as well as a superior court. 4 V.I.C. § 2 (2006). The supreme court has jurisdiction over all appeals from the superior court. 4 V.I.C. § 32(a) (2006). The supreme court is a recent creation—it only assumed jurisdiction starting January 29, 2007. Press Release, Sup. Ct of the U.S. V.I., Supreme Court of the Virgin Islands Assumes Jurisdiction and Announces Filing Locations, <http://www.visupremecourt.org/index.aspx> (last visited Mar. 4, 2007). Previously, the "appellate division" of the District Court of the Virgin Islands heard appeals from the

district, but it is divided into two judicial divisions.<sup>97</sup> The Virgin Islands federal district court parallels the jurisdiction of the other U.S. federal district courts.<sup>98</sup> It also incorporates the jurisdiction of a bankruptcy court.<sup>99</sup> The district court possesses exclusive jurisdiction over U.S. income tax laws applicable to the Virgin Islands.<sup>100</sup> The court also has general jurisdiction, except where limited by statute, for all other cases in the Virgin Islands and exclusive jurisdiction over matters not conferred upon the inferior courts of the Virgin Islands.<sup>101</sup> The Third Circuit Court of Appeals reviews the decisions of the district court and the Supreme Court of the Virgin Islands.<sup>102</sup>

c. *Guam*

Guam is the southernmost island of the Mariana Island chain and the largest island in the northern Pacific.<sup>103</sup> The United States gained possession of the island following the Spanish-American War of 1898.<sup>104</sup> From the onset of U.S. control, the U.S. Navy administered Guam's government. A military governor held all legislative, executive, and judicial authority.<sup>105</sup> The Japanese invasion of Guam at the close of 1941 began a rapid transformation of the island.<sup>106</sup> Beyond the physical destruction associated with Japanese domination and U.S. liberation, the creation of a significant

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superior court. *Id.* The appellate division consisted of a three-member panel of judges. Hewlett, *supra* at 267. The two district court judges sat on the panel as well as a judge from the superior court. *Id.* The superior court is the trial court of general jurisdiction for the territory and has exclusive original jurisdiction:

- (1) of all civil actions wherein the matter in controversy does not exceed the sum or value of \$500, exclusive of interest and costs;
- (2) of all criminal cases wherein the maximum punishment that may be imposed does not exceed a fine of \$100 or imprisonment of six (6) months, or both;
- (3) of all violations of police and executive regulations, unless otherwise provided by law; . . .

4 V.I.C. § 75 (2006).

<sup>97</sup> Hewlett, *supra* note 96, at 267. One division contains the Islands of St. Thomas and St. John and the other comprises the island of St. Croix. *Id.* The President of the United States appoints the two district court judges for ten years terms. 48 U.S.C. § 1614(a) (2000).

<sup>98</sup> 48 U.S.C. § 1612(a) (2000).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* A few ancillary laws enacted by the Virgin Islands Legislature are exempted from the district court's jurisdiction. Hewlett, *supra* note 96, at 267.

<sup>101</sup> Hewlett, *supra* note 96, at 267.

<sup>102</sup> See 48 U.S.C. § 1613 (2000).

<sup>103</sup> Robert C. Kiste, *United States, in TIDES OF HISTORY: THE PACIFIC ISLANDS IN THE TWENTIETH CENTURY* 227, 239 (K.R. Howe et al. eds., 1994).

<sup>104</sup> See *id.*

<sup>105</sup> See Van Dyke, *supra* note 40, at 488; Hannah M.T. Gutierrez, Comment, *Guam's Future Political Status: An Argument for Free Association with U.S. Citizenship*, 4 ASIAN-PAC. L. & POL'Y J. 122, 127 (2003).

<sup>106</sup> See Kiste, *supra* note 103, at 239-40.

military presence on the island altered the social structure.<sup>107</sup> The U.S. military quickly transformed the territory from a primarily rural, agriculture-based society to an “americanized” society.<sup>108</sup>

Congress passed the Guam Organic Act in 1950.<sup>109</sup> The Act granted U.S. citizenship and a bill of rights to the residents of the territory.<sup>110</sup> While the Act provided for a lawmaking legislative body, Guam did not gain much local autonomy.<sup>111</sup> The U.S. Navy maintained control over the island, including the ability to decide who could enter the territory.<sup>112</sup> Eventually, Guam gained greater autonomy through an amended Organic Act in 1968.<sup>113</sup> However, the military still maintains a significant presence, and the indigenous Chamorros population is now a minority on the island.<sup>114</sup>

Section 22(a) of the Organic Act established the judicial branch of the territorial government.<sup>115</sup> The section created a dual structure within Guam: a district court and “a judicial branch of Guam which branch shall constitute a unified judicial system” with jurisdiction over local matters.<sup>116</sup> The district court has the same jurisdiction as a U.S. district court plus that of a bankruptcy court.<sup>117</sup> In addition, the district court has original jurisdiction over all matters that have not been vested in another court in Guam by the Guam Legislature.<sup>118</sup>

d. *The Commonwealth of the Northern Mariana Islands*

The Northern Mariana Islands consist of sixteen small islands north of Guam in the Pacific Ocean. The Northern Mariana Islands became part of the post-World War II United Nations’ Trust Territory of the Pacific Islands

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<sup>107</sup> See *id.* at 241. At the start of World War II, the population of Guam was roughly 22,000 with Chamorros, the indigenous ethnic group, representing ninety-one percent of the population. *Id.* By 1949, the population grew to only 27,000, but Chamorros represented only sixty percent of the population. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 242. President Truman signed the Guam Organic Act on August 1, 1950. Gutierrez, *supra* note 105, at 130.

<sup>110</sup> Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950).

<sup>111</sup> Kiste, *supra* note 103, at 242.

<sup>112</sup> *Id.* Guamanians and other American citizens needed military permission to enter or exit Guam. *Id.* These restrictions were lifted in 1962. *Id.* at 243.

<sup>113</sup> *Id.* at 242. Congress amended the Organic Act in 1968 to provide for the direct election of the governor. *Id.* The first election was held in 1970. *Id.*; see 48 U.S.C. § 1422 (2000) (providing for the direct election of the governor and lieutenant governor).

<sup>114</sup> Kiste, *supra* note 103, at 243. By 1990, the population of Guam was about 133,000, with the Chamorros representing less than forty percent of the population. *Id.*

<sup>115</sup> 48 U.S.C. § 1424(a) (Supp. IV 2004). Appeals were directed to the U.S. Court of Appeals for the Ninth Circuit. 64 Stat. at 390.

<sup>116</sup> 48 U.S.C. § 1424(a)(1) (Supp. IV 2004).

<sup>117</sup> 48 U.S.C. § 1424(b) (2000).

<sup>118</sup> 48 U.S.C. § 1424(c) (2000).

in 1947.<sup>119</sup> The United States administered the islands under the terms of the Trusteeship Agreement.<sup>120</sup> Under the Trusteeship Agreement, the United States agreed to support independence and self-government.<sup>121</sup> The United States also agreed to protect the indigenous population from losing their lands.<sup>122</sup> Eventually, the United States entered into negotiations with the residents of the Northern Mariana Islands regarding their political future.<sup>123</sup>

In 1976, Congress passed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States.<sup>124</sup> The Covenant granted the island chain commonwealth status and provided the islands with the right to self-government and internal autonomy.<sup>125</sup> As part of the Covenant, the Commonwealth adopted a constitution in 1977,

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<sup>119</sup> Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 181 (2003); Gretchen Kirschensheiter, Comment, *Resolving the Hostility: Which Laws Apply to the Commonwealth of the Northern Mariana Islands Where Federal and Local Laws Conflict*, 21 U. Haw. L. Rev. 237 (1999). After World War II, the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands created the Trust Territory of the Pacific Islands ("TTPI"). Kirschensheiter, *supra* at 241. The TTPI, administered by the United States, included the Northern Mariana Islands and other Micronesian islands. *Id.*

<sup>120</sup> *Id.* at 241. The United States had full control over the administration, legislation, and jurisdiction over the Trust Territories. *Id.*

<sup>121</sup> Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-fourth Meeting of the Security Council, 61 Stat. 3301 (1947).

<sup>122</sup> *Id.*

<sup>123</sup> Kirschensheiter, *supra* note 119, at 241. The United States negotiated separately with the Northern Mariana Islands from the other members of the Trusteeship. *Id.* The United States had greater interest in a more permanent relationship with the island chain due to its strategic location in the Northern Pacific. *Id.* at 241-42.

<sup>124</sup> *Id.* at 242. On February 15, 1975, representatives from the United States and the Northern Mariana Islands signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. *Id.* The Covenant took twenty-seven months to negotiate between representatives of the Northern Mariana Islands and the United States. Commonwealth Law Revision Comm'n, <http://cnmilaw.org/covenant.htm> (last visited on Mar. 5, 2007).

<sup>125</sup> Kirschensheiter, *supra* note 119, at 242-43. Unlike other territories governed by organic acts, the United States has a limited ability to alter the Covenant unilaterally. *Id.* at 243 n.38. The Covenant explicitly states which provisions of the United States Constitution apply to the Commonwealth. *Id.*; see Commonwealth Law Revision Comm'n, Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Art. V, § 501(a), *available at* <http://cnmilaw.org/covenant.htm> (last visited on Mar. 5, 2007). This section of the Covenant states:

To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.

which went into effect in January 1978.<sup>126</sup> The Covenant was fully implemented on November 3, 1986.<sup>127</sup> The United Nations terminated the trusteeship in 1990.<sup>128</sup>

The Covenant granted U.S. citizenship to Northern Mariana Island residents.<sup>129</sup> It exempted the island chain from specific federal laws including immigration and minimum wage laws.<sup>130</sup> It also prohibited the alienation of land to individuals who are not part of the indigenous population.<sup>131</sup>

The Covenant created a district court for the island chain.<sup>132</sup> The District Court for the Northern Mariana Islands has the same type of jurisdiction as U.S. district and bankruptcy courts.<sup>133</sup> It also has jurisdiction over matters involving local issues where local courts of commonwealth were not given jurisdiction.<sup>134</sup> With this jurisdictional structure, the district court is either a federal or a local court, depending on the subject matter before it. In May 1989, the Commonwealth established the Northern Mariana Islands Supreme Court.<sup>135</sup> Before the creation of the Supreme Court, the district court also served as the appellate court for local cases.<sup>136</sup>

### III. UNLIKE THE OTHER TERRITORIES, AMERICAN SAMOA DEVELOPED A UNIQUE JUDICIAL SYSTEM SEPARATE FROM THE FEDERAL STRUCTURE

American Samoa, which consists of five volcanic islands and two coral atolls, sits roughly 2300 miles southwest of Hawaii and comprises approximately 76.2 square miles, which is the equivalent size of Washington, D.C.<sup>137</sup> American Samoa is also arguably the most culturally distinctive among U.S. states and territories. From the start, the United

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<sup>126</sup> Kirschensheiter, *supra* note 119, at 242; Commonwealth Law Revision Comm'n, Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 1801, available at <http://cnmilaw.org/covenant.htm> (last visited on Mar. 5, 2007).

<sup>127</sup> Van Dyke, *supra* note 40, at 480.

<sup>128</sup> *Id.* at n. 193.

<sup>129</sup> Kirschensheiter, *supra* note 119, at 243-44.

<sup>130</sup> *Id.* at 245.

<sup>131</sup> *Id.* at 244. "The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent." N. MAR. I. CONST. art. XII, § 1; see The Covenant to Establish a Commonwealth in Political Union with the United States of American, § 805, available at <http://cnmilaw.org/covenant.htm>.

<sup>132</sup> 48 U.S.C. § 1821(a) (2000). The Northern Mariana Islands were incorporated into the same judicial circuit as Guam. *Id.*

<sup>133</sup> 48 U.S.C. § 1822(a) (2000).

<sup>134</sup> 48 U.S.C. § 1822(b) (2000).

<sup>135</sup> LAUGHLIN, *supra* note 44, at 450.

<sup>136</sup> *Id.* at 448-49.

<sup>137</sup> The five islands of American Samoa are Tutuila, Aunu'u, Ofu, Olosega, and Ta'u. The two coral atolls are the Rose Atoll and the Swains Islands.

States pledged to protect the unique cultural institutions of American Samoa, which has created a relationship distinct from that of the other territories.

A. *The Fa'a Samoa Impacts All Aspects of Samoan Society and Shapes Its Judicial System*

In order to understand American Samoa, it is necessary to appreciate *fa'a Samoa*, or the Samoan way,<sup>138</sup> expressed through the two main underpinnings of society: the *matai* (mah-TIE) title system and the communal land structure.

The village, subdivided by the *aiga* (ah-ING-ah) and their *matai*, has been the traditional center of Samoan society.<sup>139</sup> An *aiga* is roughly equivalent to a large extended family.<sup>140</sup> An *aiga* is headed by several *matai*, or high chiefs. A *matai* leads the *aiga* and wields considerable power depending on the *matai* title. The *matai* title becomes the public identity of the individual, and one is normally referred to by their *matai* title instead of their birth name. *Matai* are categorized and ranked by the importance given to the actual *matai* title, which is based on the history and origin of the title. Some of the titles date back to the creation stories of the Samoan islands.<sup>141</sup>

A *matai* must be at least one-half Samoan blood and have been born either in American Samoa or, if his parents temporarily resided outside of American Samoa, on American soil.<sup>142</sup> When a vacant *matai* title arises, normally upon the death of the current titleholder, the adult members of the

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<sup>138</sup> Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 2 (1999-2000). *Fa'a Samoa* is roughly defined as the fundamental essence of being Samoan, including a "unique attitude" toward Samoans and non-Samoans, its concept of right and wrong, and the Samoan heritage. *Id.*; see generally Michael J. Keyser, *The Best Kept Secrets in the Law: How to Get Paid to Live on a Tropical Island*, 15 J. TRANSNAT'L L. & POL'Y 219 (2006) (discussing the life of an assistant attorney general in American Samoa).

<sup>139</sup> NAPOLEONE A. TUIELEAPAGA, SAMOA: YESTERDAY, TODAY, AND TOMORROW 136 (1980).

<sup>140</sup> Kiste, *supra* note 103, at 245. An *aiga* is a family group related by blood, marriage, or adoption. CAPTAIN J. A. C. GRAY, AMERIKA SAMOA, A HISTORY OF AMERICAN SAMOA AND ITS UNITED STATES NAVAL ADMINISTRATION 20 (1960). Its size can range from a few members to a couple hundred people. *Id.* A large *aiga* can be subdivided into clans. TUIELEAPAGA, *supra* note 139, at 136. Traditionally, members of an *aiga* view themselves to be as connected to the *matai* of the *aiga* as they are to their biological parents. GRAY, *supra* at 20.

<sup>141</sup> By January 1, 1969, every *matai* title had to be registered with the Territorial Registrar or the government would no longer recognize it. AM. SAMOA CODE ANN. § 1.0401 (Mar. 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink).

<sup>142</sup> AM. SAMOA CODE ANN. § 1.0403 (Mar. 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink). In addition, the *matai* holder must "live with Samoans as a Samoan." *Id.* § 1.0403(d).

*aiga* select a new titleholder.<sup>143</sup> Reaching consensus within the family on who the titleholder is has great importance; consensus furthers harmony within the family and forestalls objections to the future titleholder's status. If the family is unable to reach consensus, however, the matter is referred to the High Court of American Samoa.<sup>144</sup> The high court uses specific statutory factors, derived from Samoan custom, to determine the proper titleholder.<sup>145</sup>

The senior *matai* of an *aiga* is the *sa'o* (SAH-oh) of the family.<sup>146</sup> As the high chief, the *sa'o* has authority, or *pule* (POO-leigh), over the family, and almost every important decision requires his knowledge and approval.<sup>147</sup> The *sa'o* is the final arbitrator of disputes in the family and determines the usage of the family's communal land.

A number of *aigas* form a village. Usually, one *aiga* is viewed as the senior family of the village and its *matai* is considered the paramount chief of the village.<sup>148</sup> Each village has at least one paramount chief, a few high chiefs and high talking chiefs, and many ordinary chiefs and talking chiefs.<sup>149</sup> All the *matai* of a village are members of the village council, or *fono* (FOE-no). The village council exercises significant control over the village and regulates much of village life. Five to twenty villages form a county, or *itu* (ee-TOO), and five or six counties comprise a district.<sup>150</sup>

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<sup>143</sup> GRAY, *supra* note 140, at 21. Twenty-five blood members of the title can remove a *matai* for cause by filing a petition with the high court. AM. SAMOA CODE ANN. § 1.0411 (Mar. 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink).

<sup>144</sup> AM. SAMOA CODE ANN. § 1.0409 (Mar. 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink). A person claiming title to a *matai* title must file a claim for succession with the territorial registrar. *Id.* § 1.0405(a). A certificate must be attached and signed by twenty-five blood members of the title who support the claimant. *Id.* § 1.0405(b). Within sixty days, counterclaimants can file an objection to the registration. *Id.* § 1.0407(a). If a dispute arises, the territorial registrar attempts to mediate the dispute within the family and, if unsuccessful, the territorial registrar refers the matter to the high court. *Id.* § 1.0409(a).

<sup>145</sup> *Id.* § 1.0409(c)(1)-(4). The high court, in ranking order, reviews the "best hereditary right" of the claimants to the title; the wish of the majority or plurality of the customary clans of the family; the forcefulness, character and personality of the claimants, as well as their knowledge of Samoan customs; and the value of the titleholder to his family, village, and country. *Id.*

<sup>146</sup> TUIELELEAPAGA, *supra* note 139, at 136; Kiste, *supra* note 103, at 245.

<sup>147</sup> TUIELELEAPAGA, *supra* note 139, at 136. His authority can only be challenged in specific instances. *Fairholt v. High Talking Chief Aulava*, 1 Am. Samoa 2d. 73 (Land & Titles Div. 1983). The actions of the *sa'o* must be arbitrary and capricious to warrant judicial reversal. *Id.* at 79.

<sup>148</sup> GRAY, *supra* note 140, at 21.

<sup>149</sup> TUIELELEAPAGA, *supra* note 139, at 136. A talking chief is the spokesperson for the high chief and the representative of the people in larger gatherings. *Id.* at 137.

<sup>150</sup> *Id.* at 136.

Samoan culture has developed an elaborate system of protocol to maintain this system.<sup>151</sup> The protocol includes intricate ceremonies and a tightly enforced respect for elders and *matai* holders throughout society.<sup>152</sup> For example, each member of the *aiga* must provide *tautua* (TAU-tu-a), or “service,” to their *matai*.<sup>153</sup> This service can include physical labor on the communal land but more recently has taken the form of monetary gifts. Despite the impact of the United States’ influence on the island, the *matai* still hold considerable power and influence in Samoan culture.<sup>154</sup>

Communal land structure, another pillar of *fa’a Samoa*, is closely connected to the *matai* title structure. Over ninety percent of the land is communally owned by *aigas*.<sup>155</sup> The *sa’o* has ultimate authority over the administration of communal land and allocates land among family members.<sup>156</sup> American Samoan law strictly prohibits the alienation of communal land.<sup>157</sup> The land restrictions are wholly based on race, which forbids the ownership of land by anyone without at least fifty-percent Samoan blood.<sup>158</sup> In addition, the governor must approve all transfers of land.<sup>159</sup> Penalties are enforced if anyone violates these restrictions.<sup>160</sup>

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<sup>151</sup> Kiste, *supra* note 103, at 246. It also includes criminal penalties for the use of a *matai* title without prior registration. AM. SAMOA CODE ANN. § 1.0414 (Mar. 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

<sup>152</sup> Kiste, *supra* note 103, at 246.

<sup>153</sup> *Id.*

<sup>154</sup> LAUGHLIN, *supra* note 44, at 54. *Matai* functions include: 1) the allocation of communal land among the clans of the *aiga*; 2) the assessment of labor, goods, and money for family sponsored events; 3) control over *aiga* assets, such as family bank accounts; 4) mediation of interfamily disputes; 5) representing the *aiga* to village councils or other populations. *Id.*

<sup>155</sup> *Id.* at 318-19. Three other types of land exist in American Samoa: 1) freehold land, which is land given to individuals before the United States took control over the islands; 2) the judicially created concept of individually owned land, which is controlled by individual Samoans; and 3) government land normally obtained in the early stages of navy administration. *Id.*

<sup>156</sup> *Id.* at 316. See Fairholt, *supra* note 147, 1 Am. Samoa 2d. 73.

<sup>157</sup> AM. SAMOA CODE ANN. § 37.0204 (Mar. 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

<sup>158</sup> *Id.* § 37.0204(b). This statute states:

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 5 years and has officially declared his intention of making American Samoa his home for life.

<sup>159</sup> *Id.* § 37.0204(a). This statute states:

It is prohibited for any *matai* of a Samoan family who is, as such, in control of the communal family lands or any part thereof, to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa.

<sup>160</sup> *Id.* § 37.0230. This statute states:

Any alienation in violation of this chapter shall be void; and any person committing, or attempting to commit, a breach of a provision of this chapter, except 37.0210 and 37.0211, shall be liable to a fine not to exceed \$200, and any nonnative failing to

B. *The Relationship Between the United States and American Samoa Has Always Been at Arm's-Length*

Colonialism did not neglect the Samoan Island chain. Germany, the United Kingdom, and the United States all had colonial interests in the islands mainly due to the natural deep-water harbor of Pago Pago.<sup>161</sup> They engaged in various struggles to exert control over the islands.<sup>162</sup> The three powers eventually attempted to settle their disputes. The Berlin Treaty of 1889 established an independent Samoa but with substantial advisory powers given to the three nations.<sup>163</sup> However, the Berlin Treaty did not resolve the disputes, and ten years later, the Tripartite Treaty of 1899 divided the island chain between Germany and the United States.<sup>164</sup>

Under the terms of the 1899 Treaty, the United Kingdom and Germany renounced all rights and claims over the eastern islands of Samoa in favor of the United States.<sup>165</sup> On April 17, 1900, the *matai* of Tutuila

conform to this chapter, except 37.0210 and 37.0211, shall be liable to the forfeiture to the owner of the land, of all improvements he may have erected or made on the land and no action shall lie for the recovery of any payment he may have made or other expenditure he may have incurred in respect thereof.

<sup>161</sup> ARTHUR A. MORROW, *MY THIRTY-TWO YEARS IN AMERICAN SAMOA* 5 (1974). U.S. Navy Commander Meade of the U.S.S. Narragansett visited Pago Pago in 1872 in order to obtain permission to construct a coaling station at the harbor. *Id.*

<sup>162</sup> Van Dyke, *supra* note 40, at 492.

<sup>163</sup> *Id.*

<sup>164</sup> GRAY, *supra* note 140, at 101. The United States did not push for partition and when it was given control over the islands many decisions regarding the islands' administration were made on the fly. *Id.* at 107.

<sup>165</sup> Van Dyke, *supra* note 40, at 493. The United States gained rights to Tutuila and the other Samoan Islands east of 171 degrees West Longitude. *Id.* The Treaty states:

Article I

The General Act concluded and signed by the aforesaid Powers at Berlin on the 14th day of June, A.D. 1889, and all previous treaties, conventions and agreements relating to Samoa, are annulled.

Article II

Germany renounces in favor of the United States of American all rights and claims over and in respect to the Islands of Tutuila and all other islands of the Samoan group east of Longitude 171 degrees west of Greenwich.

Great Britain in like manner renounces in favor of the United States of American all her rights and claims over and in respect to the Island of Tutuila and all other islands of the Samoan group east of Longitude 171 degrees west of Greenwich.

Reciprocally, the United States of American renounces in favor of Germany all her rights and claims over and in respect to the Islands of Upolu and Savai'i and all other Islands of the Samoan group west of Longitude 171 degrees west of Greenwich.

Article III

It is understood and agreed that each of the three signatory Powers shall continue to enjoy, in respect to their commerce and commercial vessels, in all the islands

formally ceded the island of Tutuila and Aunu'u to the United States.<sup>166</sup> Four years later, the King of Manu'a ceded the islands of Ta'u, Ofu, Olosega, and the Rose Atoll to the United States.<sup>167</sup> In exchange for a military base and coaling station, the United States agreed to protect the traditional rights of the indigenous Samoans.<sup>168</sup> An early indication of the United States' lack of interest is shown by the fact that Congress did not formally ratify the Deeds of Cession until 1929.<sup>169</sup>

The islands were placed under the control of the United States Department of the Navy.<sup>170</sup> The U.S. naval commander served as governor for the territory and had administrative authority over it.<sup>171</sup> The Navy attempted to step lightly and maintain the pre-existing Samoan social and political structure.<sup>172</sup> The territory was divided into three divisions: the Western District of Tutuila, the Eastern District of Tutuila, and the District of Manu'a. The highest-ranking *matai* of the district administered the division.<sup>173</sup> One of the first acts of the navy commander was to issue the

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of the Samoan group, privileges and conditions equal to those enjoyed by the sovereign Powers, in all ports which may be open to the commerce of either of them.

Convention of 1899, available at <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "Territorial Organic Documents" hyperlink). This act of colonialism divided a culturally homogenous culture into two distinct political structures.

<sup>166</sup> Van Dyke, *supra* note 40, at 493.

<sup>167</sup> MORROW, *supra* note 161, at 6. Manu'a was considered a separate kingdom from the rest of the Samoan Island chain. *Id.* At the time of the cession, the King of Manu'a or the *Tuimanua*, ruled over the islands of the Manu'a group. *Id.* Upon his death the *Tuimanua* title was ended, as the United States became sovereign over the Manu'a island group. *Id.*

<sup>168</sup> See GRAY, *supra* note 140, at 65, 209; Van Dyke, *supra* note 40, at 492-93. One of the reasons that the *matai* chiefs ceded the island to the United States was to protect the communal land system. MORROW, *supra* note 161, at 3. The *matai* realized that foreigners were already gaining land in Western Samoa. *Id.* At the time of the signing of the Deed of Cession, the Germans had acquired 75,000 acres, the English 36,000 acres, and the Americans 21,000 acres, all in Western Samoa. *Id.*

<sup>169</sup> Swains Island became part of American Samoa by a joint resolution of Congress in 1925. 48 U.S.C. § 1662 (2000).

<sup>170</sup> GRAY, *supra* note 140, at 108. Commander Benjamin F. Tilley of the U.S.S. Abarenda became the first military commander of the territory when he arrived on August 13, 1899. *Id.* at 105.

<sup>171</sup> *Id.* at 108. In 1905, the navy commander was officially given the title of governor. *Id.* at 158. Commander C.B.T. Moore received the first presidential appointment as governor. *Id.*

<sup>172</sup> *Id.* at 108. Assistant Secretary of the Navy Charles H. Allen wrote to Commander Tilley:

[W]hile your position as commandant will invest you with authority over the islands embraced within the limits of the station, you will at all times exercise care to conciliate and cultivate friendly relations with the natives. A simple, straightforward method of administration, such as to win and hold the confidence of the people, is expected of you.

*Id.*

<sup>173</sup> MORROW, *supra* note 161, at 4-5. The navy commander would have a yearly meeting with delegates from each of the three districts. *Id.* At these meetings, the navy commander would preside, with the chief justice and attorney general sitting on either side of him. *Id.* at 5. A high-ranking *matai* would speak for each district outlining the changes in the law desired by his district. *Id.* The navy commander would meet with the chief justice, the attorney general, and relevant department heads to determine if the request would be in the "best interests of the Samoan people" and either grant the change or deny it. *Id.*

Native Lands Ordinance, which prohibited the alienation of land to non-Samoans.<sup>174</sup> In addition, within the first few years of the naval administration, Governor Moore established rules of succession to *matai* titles when Samoans were unable to select a new titleholder on their own.<sup>175</sup>

With the advent of oil, instead of coal, as the main fuel for naval vessels following World War I, the United States' interest in the territory declined.<sup>176</sup> Nevertheless, World War II brought a major upgrade to the territory's infrastructure in preparation for potential hostilities.<sup>177</sup> Unlike many of the other Pacific Islands, American Samoa never became a site for serious combat.<sup>178</sup> However, many Samoans served in the local marine guard and eventually transferred into the U.S. Navy.<sup>179</sup> Following the war, the Navy established an official advisory body, or *Fono*, for the territory.<sup>180</sup>

The Navy administered the territory until 1951 when President Truman delegated management of the territory to the United States secretary of the interior.<sup>181</sup> Administration by the Department of Interior began a new era for American Samoa. Instead of the U.S. naval commander serving in the role of governor, the secretary of the interior appointed a civilian

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<sup>174</sup> GRAY, *supra* note 140, at 125-26.

<sup>175</sup> *Id.* at 161. The rules required official registration of *matai* titles. *Id.*

<sup>176</sup> Kiste, *supra* note 103, at 245. Before that time, the island was a major coaling station for U.S. Naval vessels. *Id.*

<sup>177</sup> *Id.* at 246. The upgrades included paved roads, airstrips, and numerous buildings. *Id.*

<sup>178</sup> GRAY, *supra* note 140, at 241. On January 11, 1942, a Japanese submarine lobbed a number of shells into the Pago Pago Bay. *Id.* Ironically, the first shell struck the house of a Japanese resident. *Id.* Only one minor casualty was reported to the local authorities. *Id.*

<sup>179</sup> Kiste, *supra* note 103, at 246. The Samoan marine guard, or *fitafita*, provided employment opportunities to many Samoans. *Id.* The *fitafita* began the tradition of Samoan service in the U.S. military. *Id.* There are more Samoans, per capita, serving in the U.S. military than inhabitants of any other state or territory, and Samoans also die at a higher rate, per capita, than residents of any other state or territory. Kirsten Schamberg, *Where the U.S. Military is the Family Business*, CHI. TRIB., Mar. 10, 2007, at C.

<sup>180</sup> Kiste, *supra* note 103, at 247. An advisory body had been established almost from the start of American rule, but it was not until after World War II that it was given an official role in the government of the territory. *Id.* Mariota Tuiasosopo, the high talking chief for the eastern district of Tutuila organized the other *matai* chiefs to petition the navy commander, Vernon Huber, for a Samoan legislature. MORROW, *supra* note 161, at 17-18. As originally created, the House of *Alli*, House of Chiefs, consisted of the twelve paramount chief title holders of the Faumuina, Fuimaono, Lefiti, Leiato, Letuli, Mauga, Misa, Satele, Sotoa, Tufele, Tuiolosega, and Tuitele titles. *Id.* at 18. The House of Representatives included fifty-four members. *Id.* Fifty-two members represented each of the fifty-two traditional villages of American Samoa. *Id.* The permanent residents not living under the *matai* system elected the other two members. *Id.* A Senate replaced the House of *Alli* with eighteen members elected in accordance with Samoan custom by the county councils. Twenty members are in the House of Representatives, elected from seventeen representative districts. *Id.*

<sup>181</sup> Exec. Order No. 10,265, 16 Fed. Reg. 6419 (June 29, 1951). Captain Thomas F. Darden served as the last naval governor of the territory. GRAY, *supra* note 140, at 259. A total of twenty-seven naval governors administered the territory during the Navy's tenure. *Id.* Harold L. Ickes, secretary of the interior, campaigned for the transfer of the territory to Department of Interior administration. *Id.* at 257.

governor.<sup>182</sup> The *Fono* maintained its advisory role, but reorganized itself into a twelve-member Senate and an eighteen-member House of Representatives.<sup>183</sup> In addition, the Judiciary Act for American Samoa was drafted to create a separate judicial branch of the government.<sup>184</sup>

Eventually, under the supervision of the secretary of the interior, American Samoa leaders began the process of adopting a constitution.<sup>185</sup> In many of the other U.S. territories, Congress created their constitutions through the passage of an Organic Act. However, American Samoan leaders fought against an Organic Act for the territory.<sup>186</sup> It was generally feared that the creation of an Organic Act would bring with it all of the provisions of the U.S. Constitution and, in the process, destroy the *matai* and communal land systems.<sup>187</sup>

The first American Samoan Constitution was adopted in 1960.<sup>188</sup> A Revised Constitution was adopted in 1966 with a bit more control given to local leaders.<sup>189</sup> The Revised Constitution included a bill of rights and established three branches of government: executive, legislative, and judicial.<sup>190</sup>

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<sup>182</sup> Kiste, *supra* note 103, at 247.

<sup>183</sup> *Id.* Senate members were *matai* and were selected by other *matai*. *Id.* The House members were elected by secret ballot. *Id.*

<sup>184</sup> MORROW, *supra* note 161, at 12. Former Chief Judge Albert B. Maris of the Third Circuit Court of Appeals drafted the Judiciary Act at the request of the Department of Interior. *Id.* The Act went into effect on January 17, 1953. *Id.* Prior to the Act, the judiciary was simply another department of the government. *Id.* at 13.

<sup>185</sup> Kiste, *supra* note 103, at 247. A Constitutional Committee was formed consisting of Samoan representatives from the three districts, the attorney general, and the chief justice. MORROW, *supra* note 161, at 25. Chief Justice Morrow explains how the Constitution was drafted:

It was my practice to write out in long-hand three or four sections, give them to the Clerk of the Court who typed up a copy for each member of the Committee. I took the three or four sections before the Committee and they were usually adopted verbatim after my explanation of the sections.

*Id.*

<sup>186</sup> Kiste, *supra* note 103, at 247; MORROW, *supra* note 161, at 14. The first civilian governor, Phelps Phelps, assured American Samoans that “no unacceptable organic act would be rammed down the throats of the Samoans.” GRAY *supra* note 140, at 261.

<sup>187</sup> Kiste, *supra* note 103, at 247.

<sup>188</sup> MORROW, *supra* note 161, at 26. A Constitutional Convention reviewed the draft Constitution and adopted it. *Id.* It went into effect on October 17, 1960. *Id.* The Constitution mandated that another Constitutional Committee would be formed after five years to “prepare amendments or a revised draft Constitution” for consideration. *Id.* The second Constitution was substantially similar to the first one and went into effect on July 1, 1967. *Id.* The Revised Constitution included another five-year update clause. *Id.* A third convention made significant alterations to the Constitution. *Id.* at 27. The voters rejected it by an almost two-to-one vote in 1973. *Id.*

<sup>189</sup> Kiste, *supra* note 103, at 247. Congressional approval is now required to amend the Revised Constitution. 48 U.S.C. § 1662(a) (2000).

<sup>190</sup> See generally REV. CONST. AM. SAM., <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Constitution” hyperlink). The *Fono* became a law-making body and the

C. *The Arm's-Length Relationship Allowed for the Development of an American Samoa Judiciary Distinct from the Federal Judicial System*

On May 1, 1900, Commander Benjamin F. Tilley issued a "Declaration of the Form of Government," which organized the local administration.<sup>191</sup> This created a judicial structure for the territory,<sup>192</sup> including a high court, district courts, and a number of village magistrates with jurisdiction over local affairs.<sup>193</sup> The American Samoan government provided a bill of rights in the 1930s.<sup>194</sup> At the same time, the positions of secretary of native affairs and judge, which had been held by the same person, were separated.<sup>195</sup> Judge H. P. Wood was the first non-naval officer to serve as chief justice of the high court.<sup>196</sup>

Today, the judicial power of American Samoa is vested in a high court, a district court, and a village court for each village.<sup>197</sup> The district court adjudicates minor civil, criminal, small claims, and traffic cases. The court also hears public health cases and conducts preliminary examinations in serious criminal matters.<sup>198</sup> Each village is permitted to have a village court consisting of an associate judge of the high court.<sup>199</sup> While the statutory authority exists for village courts, they have not been employed as part of the judiciary for at least two decades. Local laws and regulations enacted by the *Fono*, along with select federal statutes, constitute the body of law adjudicated in the courts. The personal jurisdiction of the American Samoan judiciary is similar to the personal jurisdiction of the various states.<sup>200</sup>

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powers of the secretary of the interior and governor were reduced. However, it was not until 1977 that American Samoans directly elected the governor and lieutenant governor. Kiste, *supra* note 103, at 247-48.

<sup>191</sup> GRAY, *supra* note 140, at 126. Commander Tilley appointed E.W. Gurr, a New Zealander, as his civil assistant, or secretary of native affairs. *Id.* at 127. In this role, Gurr also served as a judge for the local district court and presided along with Commander Tilley at the high court. *Id.*

<sup>192</sup> LAUGHLIN, *supra* note 44, at 219. At the time of the Deed of Cession, E.W. Gurr became the district judge of Tutuila. MORROW, *supra* note 161, at 27. It appears that no other attorney of record lived on Tutuila at the time. *Id.*

<sup>193</sup> GRAY, *supra* note 140, at 126.

<sup>194</sup> *Id.* at 231.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* The chief judge was still appointed by the secretary of navy with the President's consent. However, the position was completely independent of the other branches of the territory's government. *Id.* at 231-32.

<sup>197</sup> AM. SAMOA CODE ANN. § 3.0101 (Mar. 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink).

<sup>198</sup> *Id.* § 3.0302.

<sup>199</sup> *Id.* § 3.0401. The village court jurisdiction includes matters arising from regulations of the village. *Id.* § 3.0402.

<sup>200</sup> *Id.* § 3.0103. This statute states:

The high court is composed of the chief justice, an associate justice, and a number of associate judges.<sup>201</sup> The secretary of the interior appoints the chief justice and associate justice based on recommendations from the governor.<sup>202</sup> In theory, the secretary of the interior can remove the justices without cause, but in practice the secretaries have not employed this power. The associate judges are *matai* holders with knowledge of Samoan custom and are appointed by the governor.<sup>203</sup> The associate judges are involved in the deliberations for communal land and *matai* title disputes.<sup>204</sup> They are not law-trained judges. However, the associate judges provide guidance to the justices regarding Samoan culture. Most importantly, the associate judges, due to their place in society, provide the high court with a greater aura of authority to Samoans.<sup>205</sup>

The high court is divided into three divisions: the trial division, land and titles division, and the appellate division.<sup>206</sup> The trial division is the

(a) A court may exercise personal jurisdiction in civil cases over persons residing or found in American Samoa, or who have been duly summoned or voluntarily appear.

(b) Any person, firm or corporation, whether or not a citizen or resident of this Territory, who, in person or through an agent, takes any of the following actions, thereby submits, and if a corporation, submits its personal representative, to the jurisdiction of the courts of this Territory, as to any cause of action, suit or proceeding arising out of such action:

- (1) the transaction of any business within this Territory;
- (2) the commission of a tortious act within this Territory;
- (3) the ownership, use, or possession of any real estate in this Territory;
- (4) contracting to insure any person, property or risk within this Territory at the time of contracting.

(c) Criminal cases shall be prosecuted and tried only in a court having Territorial jurisdiction over the place where the crime was committed.

<sup>201</sup> *Id.* § 3.1001(a); *Id.* § 3.1004(a). “The associate judges shall be entitled to be heard on all questions before any division of the High Court and to examine any party or witness in the proceedings, and shall also advise the court on such questions as the court may refer to them.” *Id.* § 3.0210.

<sup>202</sup> REV. CONST. AM. SAM. Art. III, § 3, <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Constitution” hyperlink).

<sup>203</sup> *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987); AM. SAMOA CODE ANN. § 3.0230 (Mar. 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink). “In the trial division of the High Court, if there remains, after conference, any difference of opinion between the justice and the associate judges, the opinion of the justice prevails and is recorded by the clerk as the opinion and decision of the court.” *Id.* § 3.0231.

<sup>204</sup> *Id.* § 3.0240.

<sup>205</sup> The current chief justice is the first native Samoan to serve as a justice on the high court. However, to maintain the appearance of impartiality, the chief justice is not a *matai* title holder.

<sup>206</sup> *Id.* § 3.0207(a). A fourth division, the Family, Drug and Alcohol Court, was established by local statute for a trial period of three years, but has not been approved by the Department of Interior. The *Fono* recently renewed the Family, Drug and Alcohol Court for another three years. The family court deals with family related matters, similar to Family, Drug and Alcohol Courts found in the States. AM. SAMOA CODE ANN. § 3.050 (Mar. 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

court of general jurisdiction for the territory.<sup>207</sup> The trial division hears all criminal and civil matters as well as federal matters specifically assigned to it by Congress. The trial division maintains Rules of Civil and Criminal Procedure and Rules of Evidence, which are modeled on the Federal Rules. A full panel of the trial division includes one justice and two associate judges, but only one justice and one associate judge are needed to constitute a quorum.<sup>208</sup>

The land and titles division deals with all controversies related to land and *matai* titles.<sup>209</sup> The division has wide latitude in resolving such disputes.<sup>210</sup> One justice presides over the division, but normally four associate judges sit with the justice.<sup>211</sup> In the event of a disagreement between the justice and the associate judges regarding a land dispute, the judgment of the justice prevails; if the disagreement regards a *matai* title dispute, the judgment of the judges prevails.<sup>212</sup> In *matai* title cases, the justice has tie-breaking power.<sup>213</sup>

The appellate division reviews final decisions of the trial division and land and titles division, certain appeals from the district court, and appeals from administrative agency decisions.<sup>214</sup> Normally, three justices and two associate judges sit in an appellate session.<sup>215</sup> As there are only two

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<sup>207</sup> *Id.* § 3.0208. This statute states:

The trial division of the High Court shall have original jurisdiction of the following classes of cases and controversies:

- (1) civil cases in which the amount in controversy exceeds \$5,000, except land and titles matters as provided in subsection (b);
- (2) criminal cases in which a felony is charged;
- (3) admiralty and maritime matters, of which the trial division shall have both in rem and in personam jurisdiction;
- (4) juvenile cases;
- (5) the probate of wills and administration of estates;
- (6) domestic relations, except adoptions and actions arising under the Uniform Reciprocal Enforcement of Support Act;
- (7) all writs; and
- (8) all matters of which the trial division has jurisdiction by statute.

<sup>208</sup> *Id.* § 3.0230(a).

<sup>209</sup> *Id.* § 3.0208(b)(1)-(2).

<sup>210</sup> *Id.* § 3.0242. This statute states:

In any matter of practice or procedure not provided for, or where the strict compliance with any rule of practice or procedure may be inequitable or inconvenient, the land and titles division may act in each case in such manner as it considers to be most consistent with natural justice and convenience.

<sup>211</sup> *Id.* § 3.0240. For cases or controversies pertaining to land, one justice and one associate judge are required to constitute a quorum; for cases or controversies pertaining to *matai* titles, three associate judges and one justice are required to constitute a quorum. *Id.*

<sup>212</sup> *Id.* § 3.0241.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* § 3.0208(c).

<sup>215</sup> *Id.* § 3.0220.

permanent justices of the high court, the secretary of the interior appoints acting associate justices to serve on the high court. These acting justices are normally federal judges from the Ninth Circuit. About once a year, the high court will hold a special appellate session where two acting justices will travel from the mainland to American Samoa and, with the permanent justice who did not serve as the trial court justice, hear appeals before the appellate division.<sup>216</sup>

The appellate division is the court of last resort in American Samoa. Direct appeals to other courts, such as the U.S. Supreme Court, are not available.<sup>217</sup> In theory, the secretary of the interior could overrule high court decisions, but that has never happened during the more than one-hundred-year history of the court.<sup>218</sup> However, by suing the secretary of the interior in the United States District Court for the District of Columbia, one can challenge decisions of the high court.<sup>219</sup> This procedure is very rare and only occurred twice in recent memory, but both cases have had an important impact in American Samoa.<sup>220</sup>

Unlike any other territory or state, American Samoa is outside the jurisdiction of any United States District Court or United States Court of Appeals.<sup>221</sup> While the high court is an effective judicial system for the territory, the lack of a federal district creates possible constitutional violations when the federal government prosecutes American Samoan residents. The absence of a federal district also keeps alive the question of whether the communal land system and the *matai* title system in the territory are constitutional.

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<sup>216</sup> *Id.* While a circuit judge of the Ninth Circuit, U.S. Supreme Court Justice Kennedy served as an acting associate justice. High court lore maintains that he actually received the phone call from Washington, D.C., regarding his nomination to the Supreme Court while he was in American Samoa.

<sup>217</sup> *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 385-86 (D.C. Cir. 1987); *see also* 28 U.S.C. § 41 (2000) (failing to include American Samoa within the constitution of any Federal Circuit Courts of Appeals).

<sup>218</sup> FUTURE POLITICAL STATUS STUDY COMM'N, *supra* note 2, at 60-61; *see e.g.*, *Hodel*, 830 F.2d at 378-79.

<sup>219</sup> Two examples include *Hodel*, 830 F.2d 374 and *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). It should be noted that these are not direct appeals of the high court decision but a separate suit against the secretary of the interior alleging the existence of a constitutional violation.

<sup>220</sup> *King* required the implementation of a jury system in felony criminal trials. *King*, 520 F.2d 1140. *Hodel*, affirming the high court decision, authorized the loss of close to three hundred acres of land owned by the Mormon Church, despite the Church's pleas of a violation of due process of law. *Hodel*, 830 F.2d 374.

<sup>221</sup> LAUGHLIN, *supra* note 44, at 298.

IV. THE CURRENT SYSTEM CREATES A SCHEME THAT LIMITS AMERICAN SAMOA RESIDENTS FROM ENJOYING THE FULL EXTENT OF THEIR RIGHTS

The lack of a cohesive federal judicial presence creates problems for both the federal government and residents of American Samoa. The limited federal jurisdiction requires the removal of American Samoan residents to other jurisdictions to be tried for violations of federal law. Due to these renditions, American Samoan residents are not afforded the opportunity to be tried by a jury of their peers.

A. *The Lack of a Federal Court Requires the Rendition of American Samoan Residents*

Two recent decisions in the Ninth and District of Columbia Circuit Courts of Appeals illustrate the impact of not having a federal district court in American Samoa.<sup>222</sup> In both cases, the defendants challenged the jurisdiction and venue of the courts in which they were charged and were eventually convicted.<sup>223</sup> Both lost their appeals.<sup>224</sup>

I. United States v. Gurr

Bernard Gurr served as the manager of the American Samoa Government Employees Federal Credit Union (“Credit Union”) from June 1986 to October 1993.<sup>225</sup> An investigation by the National Credit Union Administration revealed massive fraud within the Credit Union.<sup>226</sup> In December 1999, Gurr was indicted in the District of Columbia for conspiring to defraud the United States.<sup>227</sup> On December 11, 1999, Gurr left American Samoa and flew to Honolulu, Hawaii.<sup>228</sup> Upon arriving at the Honolulu International Airport, Gurr was arrested for fraud.<sup>229</sup> A jury found

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<sup>222</sup> United States v. Gurr, 471 F.3d 144 (D.C. Cir. 2006); United States v. Lee, 472 F.3d 638 (9th Cir. 2006).

<sup>223</sup> Gurr, 471 F.3d at 146; Lee, 472 F.3d at 639.

<sup>224</sup> The U.S. Supreme Court declined to hear their appeals. Gurr v. United States, 127 S. Ct. 2146 (2007); Kil Soo Lee v. United States, 127 S. Ct. 2284 (2007).

<sup>225</sup> Gurr, 471 F.3d at 146.

<sup>226</sup> Id. at 146-47.

<sup>227</sup> Id. at 147. Gurr was originally indicted for conspiring to defraud the United States. However, in 2000, Gurr was charged in a superseding twenty-count indictment. Id.

<sup>228</sup> Id.

<sup>229</sup> Id.

Gurr guilty on nineteen counts of fraud, and the district court eventually sentenced Gurr to seventy months of imprisonment.<sup>230</sup>

On appeal, Gurr challenged the district court's jurisdiction and argued venue was improper.<sup>231</sup> Gurr argued that only the courts of American Samoa had jurisdiction because that is where the crimes occurred.<sup>232</sup> The circuit court ruled that U.S. Code Title 18 is applicable to American Samoa, regardless of whether the secretary of the interior explicitly stated that it actually does apply to American Samoa.<sup>233</sup> However, it also ruled that the high court does not have jurisdiction over violations of Title 18.<sup>234</sup> The circuit court stated that district courts of the United States have exclusive and original jurisdiction over all offenses against the laws of the United States pursuant to 18 U.S.C. § 3231.<sup>235</sup>

As to venue, the circuit court found Gurr's objection without merit.<sup>236</sup> Gurr was indicted in the District of Columbia, even though he was a resident of American Samoa.<sup>237</sup> He left American Samoa to travel to Hawaii after being indicted.<sup>238</sup> The circuit court viewed 18 U.S.C. § 3238 as providing the proper ground for venue in the District of Columbia. Gurr was indicted before he was arrested or first brought into the jurisdiction of a federal district.<sup>239</sup> Therefore, according to the court, the location where the indictment was filed became the proper venue under the statute.<sup>240</sup>

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<sup>230</sup> *Id.* During the trial, the government dismissed one count of indictment. *Id.*

<sup>231</sup> *Id.* at 146. In addition to subject matter jurisdiction and venue, Gurr also challenged the admission of documents obtained upon his arrival at the Honolulu International Airport, a report by an examiner from the NCUA, and the denial of his motion for judgment of acquittal on the embezzlement and witness tampering charges. *Id.* The appeals court affirmed the district court decision. *Id.*

<sup>232</sup> *Id.* at 154.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 155.

<sup>235</sup> *Id.* "The district courts of the United States shall have original jurisdiction, exclusive of the court of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U.S.C. § 3231 (2000).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* The relevant statute states:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C. § 3238 (2000).

<sup>240</sup> *Id.*

## 2. United States v. Lee

Kil Soo Lee owned and operated a garment factory in American Samoa.<sup>241</sup> The factory workers lived in a nightmare—they were imprisoned, starved, and physically abused.<sup>242</sup> The American Samoan government investigated the factory, but the federal government brought charges against Lee.<sup>243</sup> Federal authorities traveled to American Samoa and arrested Lee in the territory.<sup>244</sup> They then transported Lee to Hawaii to face charges of involuntary servitude.<sup>245</sup> Lee moved to dismiss the indictment for lack of jurisdiction and venue.<sup>246</sup> The District Court of Hawaii denied the motions.<sup>247</sup> After a four-month trial, a jury convicted Lee of fourteen counts ranging from conspiracy to violate civil rights and involuntary servitude to extortion and money laundering.<sup>248</sup>

Lee appealed his conviction, again raising the argument that the district court lacked jurisdiction and proper venue.<sup>249</sup> Lee argued that Congress conferred jurisdiction on the high court to enforce American Samoan law through various statutory provisions.<sup>250</sup> He then asserted that the high court's jurisdiction trumped federal district court jurisdiction in American Samoa because the high court's jurisdiction is based on executive delegations.<sup>251</sup>

The Ninth Circuit agreed that the high court has jurisdiction to enforce American Samoan law.<sup>252</sup> However, it did not agree with Lee's second argument that the high court has exclusive jurisdiction to try federal Title 18 crimes occurring in American Samoa.<sup>253</sup> The court dismissed Lee's argument that § 1.0201 of the American Samoa Code incorporates Title 18 into American Samoan law.<sup>254</sup> In dismissing Lee's argument of

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<sup>241</sup> United States v. Lee, 472 F.3d 638, 639-40 (9th Cir. 2006).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 640.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* The government eventually brought a twenty-two count superceding indictment against Lee. *Id.* at 641.

<sup>246</sup> *Id.* at 640.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 641.

<sup>249</sup> *Id.* at 642-45.

<sup>250</sup> *Id.* at 642. Lee cited 48 U.S.C. § 1661 (2000) as the foundation for High Court jurisdiction. *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* The Ninth Circuit traced the authority starting from 48 U.S.C. § 1661 to the delegation of authority to the secretary of the interior by Executive Order 10,264 (June 29, 1951) and then to the ratification of the Revised Constitution of American Samoa. *Id.* at 642-3.

<sup>253</sup> *Id.* at 642.

<sup>254</sup> *Id.* AM. SAMOA CODE ANN. § 1.0201 provides that "the parts of the Constitution of the United States of America and the laws of the United States of America [that], by their own force, are in effect in

incorporation, the court noted that the statute does not refer to incorporation, nor has the high court ever tried a defendant for a violation of Title 18.<sup>255</sup> The circuit court noted that even if Title 18 were incorporated into American Samoan law, it would not trump the jurisdiction of a federal district court in Hawaii.<sup>256</sup> Congress provided federal district courts with jurisdiction over federal crimes regardless of the type of jurisdiction possessed by the high court.<sup>257</sup>

The court relied on 18 U.S.C. § 3238 to deal with the issue of venue.<sup>258</sup> When a crime is not committed in a federal district, venue is properly found in the district where the offender is arrested or where the offender is first brought.<sup>259</sup> The circuit court highlighted that Congress had not yet authorized a federal district court in American Samoa.<sup>260</sup> The court determined that the federal judicial district of Hawaii had proper venue because American Samoa is not a district under the statute, and Lee was arrested in American Samoa and first brought to Hawaii.<sup>261</sup>

*B. The Rendition of American Samoan Residents Raises Concerns over the Possible Violation of the Sixth Amendment*

The decisions in *Gurr* and *Lee* illustrate an important reason to establish a greater federal jurisdictional presence in American Samoa. A general concept of American jurisprudence is that criminal defendants have the right to a jury of their peers. While these words do not literally appear in the Constitution, the Sixth Amendment provides defendants “[i]n all criminal prosecutions . . . the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”<sup>262</sup> This clause of the amendment has been interpreted to guarantee a right to trial by a jury of one’s peers.<sup>263</sup> Under the current system, criminal defendants residing in American Samoa who are prosecuted by the federal

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American Samoa” have “the effect of law in American Samoa.” AM. SAMOA CODE ANN. § 1.0201 (March 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

<sup>255</sup> *Lee*, 472 F.3d at 642-43.

<sup>256</sup> *Id.* at 643.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 644.

<sup>259</sup> 18 U.S.C. § 3238 (2000).

<sup>260</sup> *Lee*, 472 F.3d at 643-44.

<sup>261</sup> *Id.* at 644.

<sup>262</sup> U.S. CONST. amend. VI.

<sup>263</sup> *United States v. Esquivel*, 88 F.3d 722 (9th Cir. 1996); *United States v. Alix*, 86 F.3d 429 (5th Cir. 1996).

government do not receive a jury trial in the community where the crime occurred.

The defendants in *Gurr* and *Lee* both committed their crimes in American Samoa.<sup>264</sup> However, they were not tried by an impartial jury in American Samoa. Instead, they faced a jury in the District of Columbia and the State of Hawaii, both thousands of miles away with very little connection to the territory.<sup>265</sup> These were not juries of their peers.

The Constitution requires that criminal defendants be tried in the state or district where the crime occurred.<sup>266</sup> Unlike the other U.S. territories, American Samoa is not part of a federal district.<sup>267</sup> As provided for by statute, when a crime is not committed in a federal district, venue is proper where the offender is arrested or first brought.<sup>268</sup> The rendition of American Samoan residents may be within constitutional bounds, but the current jurisdictional structure prevents the enjoyment of a basic right provided in every other state and territory—a right that should exist in American Samoa based on the *King* decision, which mandated jury trials in criminal cases.<sup>269</sup> The Sixth Amendment protection, which includes the right to a jury of one's peers, is provided to American Samoan criminal defendants in local criminal prosecutions.<sup>270</sup> It is inequitable that due to jurisdictional boundaries this right is not provided to criminal defendants who reside in American Samoa and face federal charges.

While *Gurr* and *Lee* are not the most sympathetic defendants, they are not the only residents who have been removed from American Samoa and tried in other jurisdictions.<sup>271</sup> In the last few years, a number of high ranking government officials have been indicted and pled guilty to a range of federal fraud charges.<sup>272</sup> The U.S. government removed the defendants from American Samoa and prosecuted them in the District Court of Hawaii.<sup>273</sup>

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<sup>264</sup> *Lee*, 472 F.3d at 639-40; *Gurr* 473 F.3d at 146-47.

<sup>265</sup> *Id.*

<sup>266</sup> U.S. CONST. art. III, § 2, cl. 3; *see* 18 U.S.C. 3238 (2000).

<sup>267</sup> *See* 18 U.S.C. 3238 (2000).

<sup>268</sup> 18 U.S.C. § 3238 (2000).

<sup>269</sup> *See King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975).

<sup>270</sup> AM. SAMOA CODE ANN. § 3.0232 (March 2007), <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink).

<sup>271</sup> Press Release, Dep't of Justice, Defendant Pleads Guilty in Case Involving Bribery and Fraud Scheme in American Samoa (Jan. 27, 2005), [http://www.usdoj.gov/opa/pr/2005/January/05\\_crm\\_036.htm](http://www.usdoj.gov/opa/pr/2005/January/05_crm_036.htm).

<sup>272</sup> *Id.* The government officials include: Kerisiano Sili Sataua, former director of the American Samoa Department of Education, Fa'au Seumanutafa, former chief procurement officer for American Samoa Government, Toetu Solaita, former program director of the American Samoa School Lunch Program and Patolo Mageo, former director of the American Samoa Department of Health and Social Services. *Id.*

<sup>273</sup> *Id.*

According to the Federal Bureau of Investigations, these actions were the first public corruption cases prosecuted by federal officials involving American Samoa in more than fifteen years.<sup>274</sup> The federal government interest has continued with the recent indictment of the lieutenant governor for public corruption.<sup>275</sup>

Beyond criminal prosecutions, there is a general sense of greater U.S. interference in American Samoan affairs. For example, Congress recently imposed the federal minimum wage rate in American Samoa with limited consultation by local officials.<sup>276</sup> This pattern of U.S. government interest in American Samoa does not seem to be receding and many worry over this new federal oversight. The governor even referred to the recent federal government actions as a new kind of colonialism.<sup>277</sup>

#### V. GREATER FEDERAL JURISDICTION IS NECESSARY BUT NOT THROUGH THE CREATION OF A FEDERAL DISTRICT COURT

In order to solve the current jurisdictional problems, the most common proposal is to create a federal district court in the territory. However, American Samoan residents worry that greater federal jurisdiction, specifically the application of the Fourteenth Amendment's Equal Protection Clause, will destroy the foundations of Samoan society. Instead of creating a district court, the better method for expanding federal judicial authority while protecting the *fa'a Samoa* and avoiding potential constitutional violations is to incorporate limited federal jurisdiction into a new division of the high court.

##### A. *The Application of the Fourteenth Amendment Does Not Equal the End of Fa'a Samoa*

One of the major arguments against the creation of a federal district court is the impact that the Fourteenth Amendment's Equal Protection Clause may have on the territory. Samoans generally fear that a federal district court would find the foundational principles of American Samoa, the

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<sup>274</sup> *Id.*

<sup>275</sup> Press Release, Dep't of Justice, Lieutenant Governor and Territorial Senator for American Samoa Indicted for Public Corruption Charges (Sept. 10, 2007), [http://www.usdoj.gov/opa/pr/2007/September/07\\_crm\\_698.html](http://www.usdoj.gov/opa/pr/2007/September/07_crm_698.html).

<sup>276</sup> Press Release, Delegate Eni F.H. Faleomavaega, House and Senate Vote to Increase Minimum Wage for American Samoa and CNMI (May 24, 2007), [http://www.house.gov/list/press/as00\\_faleomavaega/amsamoa50centwageincrease.html](http://www.house.gov/list/press/as00_faleomavaega/amsamoa50centwageincrease.html); see also *U.S. Minimum Wage for American Samoa a Looming Disaster*, PAC. MAG., Jan. 14, 2007, available at <http://www.pacificmagazine.net/news/2007/01/14/looming-disaster-for-american-samoa>.

<sup>277</sup> Radio New Zealand, *supra* note 6.

*matai* title system and communal land structure, unconstitutional under the Equal Protection Clause, and in one stroke of the pen destroy the *fa'a Samoa*.<sup>278</sup>

Greater federal jurisdiction in American Samoa neither requires nor implies that the Fourteenth Amendment would apply automatically to the territory. Rather, the application of constitutional provisions varies in each territory. For example, specific statutory authority has made parts of the Fourteenth Amendment applicable to Puerto Rico and Guam,<sup>279</sup> but no such statutory measure applies to American Samoa. Absent congressional extension, only fundamental constitutional rights that would not be impractical or anomalous apply to the territories.<sup>280</sup>

Under this standard, it appears that the Equal Protection Clause would not even apply to the territory in *matai* or communal land cases. The Ninth Circuit decision in *Wabol v. Villacrusis* supports this conclusion.<sup>281</sup> Similar to American Samoa, the laws of the Northern Mariana Islands prohibit the acquisition of land in the island chain by individuals not of Northern Mariana Islands descent.<sup>282</sup> In *Wabol*, the Ninth Circuit found that the alienation restrictions in the Northern Mariana Islands were valid.<sup>283</sup>

In determining the legality of the land restrictions, the Ninth Circuit had to decide whether the Equal Protection Clause of the Fourteenth Amendment was a fundamental provision that applied of its own force to the commonwealth.<sup>284</sup> The *Wabol* court reasoned that fundamental rights are those shared by all free governments and must be framed narrowly to incorporate only those beliefs actually shared by diverse cultures.<sup>285</sup> This

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<sup>278</sup> FUTURE POLITICAL STATUS STUDY COMM'N, *supra* note 2, at 29, 58-59; Press Release, Delegate Eni F.H. Faleomavaega, Chairman and Ranking Member of Resources Committee Join Faleomavaega in Requesting GAO Study of American Samoa's Judicial System (July 20, 2006), [http://www.house.gov/list/press/as00\\_faleomavaega/chairandrangingjoineni.html](http://www.house.gov/list/press/as00_faleomavaega/chairandrangingjoineni.html).

<sup>279</sup> See 48 U.S.C. § 1421b(u) (2000); *Guam Soc. Of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992) (Guam); *Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (Puerto Rico).

<sup>280</sup> See *supra* Part II.B.1.

<sup>281</sup> *Wabol v. Villacrusis*, 908 F.2d 411 (9th Cir. 1990).

<sup>282</sup> *Id.* at 413-14.

<sup>283</sup> *Id.* The court dealt with the legality of Article XII of the Northern Mariana Islands Constitution that incorporated section 805 of The Covenant to Establish a Commonwealth in Political Union with the United States of America, which restricts the alienation of local land to people of Northern Mariana Island decent. N. MAR. I. CONST. art. XII, § 1; see The Covenant to Establish a Commonwealth in Political Union with the United States of America, § 805, available at <http://cnmilaw.org/covenant.htm>.

<sup>284</sup> *Wabol*, 908 F.2d at 421. The Covenant explicitly states which provisions of the United States Constitution apply to the Commonwealth unless they are applicable by their own force. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, art. VI, § 501(a), available at <http://cnmilaw.org/covenant.htm>.

<sup>285</sup> *Wabol*, 908 F.2d at 421.

conception of fundamental rights differs from the Fourteenth Amendment's concept of "fundamental," which is based on Anglo-American concepts of ordered liberty.<sup>286</sup>

Applying the Insular Cases and the *King* rule, the Ninth Circuit decided that the application of the Equal Protection Clause of the Fourteenth Amendment to the commonwealth would be both impractical and anomalous.<sup>287</sup> The court found that a major basis for the political union between the United States and Northern Mariana Islands was the alienation restriction.<sup>288</sup> The application of the Equal Protection Clause would fundamentally alter this political union, and it would be "anomalous" to require the United States to renounce the Covenant.<sup>289</sup>

A clear analogy can be made in regards to American Samoa. The Northern Mariana Islands and American Samoa do not have the same political affiliation with the United States; nevertheless, the foundational documents establishing the political relationship are similar. The Northern Mariana Island's Covenant with the United States guaranteed protection of the indigenous population from the loss of the island's land. The American Samoan Deeds of Cession provide similar protection regarding land alienation.<sup>290</sup> While not as explicitly as the Northern Mariana Island's Covenant, the United States guaranteed the continuation of the *fa'a Samoa*, including the communal land system and the *matai* title system. This guarantee is further acknowledged by prohibition of land acquisition by non-Samoans enacted in the early days of the naval administration.<sup>291</sup>

Applying *Wabot* to American Samoa, it would be both impractical and anomalous to apply the Equal Protection Clause to American Samoa in land and *matai* title cases. The Deeds of Cession was a mutual agreement

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 423. The court stated:

It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.

*Id.*; see *supra* note 48-56 and accompanying text (discussing the Insular Cases).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Cession of Tutuila and Aunu'u, Apr. 17, 1900 available at <http://www.asbar.org> (follow "Legal Resources" hyperlink, then follow "Territorial Organic Documents" hyperlink); Cession of Manu'a Islands, July 14, 1904 available at <http://www.asbar.org> (follow "Legal Resources" hyperlink, then follow "Territorial Organic Documents" hyperlink). The Tutuila Cession Treaty provided for the United States to "respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property" for the "preservation of the rights and property of the inhabitants" of the island, while the Manu'a Cession Treaty explicitly stated that "the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized."

<sup>291</sup> See *supra* note 174 and accompanying text.

between the United States and the sovereign chiefs of American Samoa.<sup>292</sup> The chiefs allowed the United States to establish a naval and coaling station and to assert administrative control over the islands while the United States agreed to support the continuation and preservation of Samoan culture.<sup>293</sup> Although the relationship between the United States and American Samoa has changed significantly since the Deeds of Cession, the possible destruction of the communal land system through the enforcement of the Equal Protection Clause would undercut the foundational basis of this relationship. For the same reasons cited by the *Wabot* court, the Equal Protection Clause would be impractical and anomalous to apply in American Samoa.

However, even if the Equal Protection Clause applied to American Samoa, the land and *matai* title system would still survive a challenge under the clause. The focus of a challenge to the Equal Protection Clause is to determine whether the government's classification of a certain group is justified by a sufficiently related purpose.<sup>294</sup> Whether a justification is sufficient depends on the type of discrimination used by the government.<sup>295</sup> The Supreme Court has established three levels of scrutiny depending on the group affected by the discrimination.<sup>296</sup> Discrimination based on race or national origin, like those found in the American Samoan land alienation prohibition, is subject to strict scrutiny.<sup>297</sup> Strict scrutiny requires the government to show a compelling purpose for the discrimination and that it is unable to achieve its objective through any less discriminatory alternative.<sup>298</sup> Simply put, the compelling interest in maintaining the alienation restrictions would be the preservation of Samoan culture.

Beyond theory, in one appellate division decision, the High Court of American Samoa held that the Fourteenth Amendment to the U.S. Constitution does apply to the territory.<sup>299</sup> The high court determined the Amendment to be fundamental and applicable in American Samoa.<sup>300</sup> The

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<sup>292</sup> GRAY, *supra* note 139, at 110-17.

<sup>293</sup> *See id.*

<sup>294</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 527 (Aspen Law and Business 2001).

<sup>295</sup> *Id.* at 528.

<sup>296</sup> *Id.* at 529.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Craddick v. Territorial Registrar of Am. Samoa*, 1 Am. Samoa 2d 11, 12 (App. Div. 1980). In *Craddick*, a non-Samoan challenged the alienation statute that prevented him from obtaining land in Samoa. However, even with the ruling in *Craddick*, it is not a settled question that the Fourteenth Amendment fully applies to the territory. *Cf. Macomber v. Am. Samoa Gov't*, 12 Am. Samoa 29, 30 (App. Div. 1989) ("The extent to which the equal protection clause of the Fourteenth Amendment applies [is] unclear. . . .").

<sup>300</sup> *Craddick*, 1 Am. Samoa at 12.

land alienation restrictions were reviewed under a strict scrutiny standard.<sup>301</sup> The high court determined that the compelling state interest was to preserve the *fa'a Samoa*.<sup>302</sup>

The court acknowledged that land is a significant asset, both economically and culturally—it is life itself to a Samoan.<sup>303</sup> American Samoa is only seventy-six square miles and not all of that land is habitable. Land helps to define the family and maintains the family structure through its communal nature. The family must share the land for the greater good of the family instead of an internal focus on specific individual development. Perhaps a bit paternalistic, the land restrictions are designed to prevent Samoans from selling their cultural heritage to the highest bidder.

In a similar vein, the *matai* title system would survive an equal protection challenge.<sup>304</sup> A potential *matai* titleholder must possess at least fifty-percent Samoan blood.<sup>305</sup> This restriction is based on race/national origin and would be assessed under the strict scrutiny standard. As the *Wabot* Court stated, the Equal Protection Clause was not designed to “operate as a genocide pact for diverse native cultures” but to protect minority rights.<sup>306</sup> As pledged in the Deeds of Cession, the government must support the *fa'a Samoa*,<sup>307</sup> and therefore this pledge provides a compelling interest to support the *matai* system.

The *matai* system maintains a dispute resolution system within each family, provides a social structure for society, and aids in the management of the communal land system.<sup>308</sup> As the communal land and *matai* systems are

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 13-14. Interestingly, the two acting associate justices, Edward J. Schwartz, chief judge of the United States District Court for the Southern District of California and Paul D. Shriver, judge of the United States District Court for the Territory of Guam, wrote the majority decision. The permanent associate justice, Thomas Murphy dissented in the opinion.

<sup>303</sup> *Id.* at 13.

<sup>304</sup> A challenge to the *matai* title system might be brought under the Nobility Clause of the Constitution, which prohibits the granting of any titles of nobility by the United States. U.S. CONST. art. I, § 9, cl. 8. This clause of the Constitution states:

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

*Id.* When families are unable to select a new *matai* titleholder, the high court is the arbitrator and awards the title. This appears to be granting a title of nobility by the United States. However, the *matai* titles are family-based titles and more of a cultural institution than a government system of nobility and would most likely fall outside the Nobility Clause.

<sup>305</sup> AM. SAMOA CODE ANN. § 1.0403(a) (March 2007), <http://www.asbar.org> (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

<sup>306</sup> *Wabot v. Villacrusis*, 908 F.2d 411, 423 (9th Cir. 1990).

<sup>307</sup> See GRAY, *supra* note 139, at 110-17.

<sup>308</sup> *Supra* Part III.A.

fully incorporated in society and are designed to maintain the Samoan culture, it is clear that a less discriminatory alternative does not exist.

The Fourteenth Amendment, therefore, should not prevent the establishment of a greater federal presence in the territory. In fact, other constitutional provisions seem to require a larger federal presence.

*B. The Creation of a Federal District Court in American Samoa Would Resolve Some Current Problems but Would Create Other Problems*

On February 8, 2006, American Samoa's Delegate to Congress, Eni F.H. Faleomavaega, introduced House Bill 4711, or the "Federal District Court of American Samoa Act of 2006."<sup>309</sup> As the name implies, it aims to establish a federal district court in American Samoa.<sup>310</sup> The supporters of the Act hoped that the creation of a federal district court in the territory would settle some of the constitutional and jurisdictional questions surrounding American Samoa.<sup>311</sup>

The jurisdiction of the proposed court would be the same as the jurisdiction of a U.S. district court, but only to the extent that the Constitution and laws of the United States apply to American Samoa.<sup>312</sup> It would also possess the jurisdiction of a U.S. bankruptcy court.<sup>313</sup> The bill specifically prohibits the district court from having jurisdiction over any matters dealing with communal lands or *matai* titles in American Samoa.<sup>314</sup> The district court and the High Court of American Samoa would have concurrent jurisdiction over questions that concerned the interpretation of the Revised Constitution of American Samoa or the Deeds of Cession.<sup>315</sup> All appeals from the district court would be directed to the Ninth Circuit Court of Appeals.<sup>316</sup>

Modeled along the lines of the territorial courts in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, the President would

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<sup>309</sup> Federal District Court of American Samoa Act of 2006, H.R. 4711, 109th Cong. (2006) [hereinafter H.R. 4711]. The bill was referred to the House Judiciary Committee. *Id.* Eni F.H. Faleomavaega has been the territory's delegate to the House of Representatives since 1989. Biography of Eni F.H. Faleomavaega, <http://www.house.gov/faleomavaega/bio.shtml> (last visited Nov. 9, 2007). Before being elected to Congress, Delegate Faleomavaega served as Lieutenant Governor from 1985 to 1988. *Id.*

<sup>310</sup> H.R. 4711 at § 2(a).

<sup>311</sup> Press Release, Delegate Eni F.H. Faleomavaega, Faleomavaega Requests Hearing on Federal District Court for American Samoa (Feb. 10, 2006), [http://www.house.gov/list/press/as00\\_faleomavaega/hearingonhr4711.html](http://www.house.gov/list/press/as00_faleomavaega/hearingonhr4711.html).

<sup>312</sup> H.R. 4711 at § 2(b).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at § 2(b)(1).

<sup>315</sup> *Id.* at § 2(b)(2)(A)-(B).

<sup>316</sup> *Id.* at § 5(a).

appoint, with the advice and consent of the Senate, a judge for a term of ten years to preside over the district court.<sup>317</sup> The Act would also authorize the appointment of a U.S. attorney and marshal for the territory.<sup>318</sup>

Initially, Delegate Faleomavaega moved quickly for hearings on the bill.<sup>319</sup> He cited the support of the majority of American Samoans as a stimulus for introducing the bill.<sup>320</sup> However, the *Fono* passed resolutions opposing the creation of a federal district court, and Delegate Faleomavaega backed off on holding hearings.<sup>321</sup> The bill quickly died in committee after its sponsors withdrew their support.

Rather than pushing for the bill, Delegate Faleomavaega directed the General Accounting Office (“GAO”) to conduct a review of the judicial system of American Samoa.<sup>322</sup> Delegate Faleomavaega directed the GAO to answer specific questions regarding the American Samoan judiciary.<sup>323</sup> The

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<sup>317</sup> *Id.* at § 3(a).

<sup>318</sup> *Id.* at § 3(c).

<sup>319</sup> Press Release, Delegate Eni F.H. Faleomavaega, Faleomavaega Requests Hearing on Federal District Court for American Samoa (Feb. 10, 2006), [http://www.house.gov/list/press/as00\\_faleomavaega/hearingonhr4711.html](http://www.house.gov/list/press/as00_faleomavaega/hearingonhr4711.html).

<sup>320</sup> Press Release, Delegate Eni F.H. Faleomavaega, *supra* note 3. Delegate Faleomavaega asserted in a survey of 2000 American Samoans that seventy-six percent supported the idea of a federal district court in the territory. *Id.* The supporters included leaders of the *Fono* as well as traditional leaders of the island. *Id.*

<sup>321</sup> Press Release, Delegate Eni F.H. Faleomavaega, Faleomavaega Informs ASG of Status of Federal District Court Bill (March 16, 2006), [http://www.house.gov/list/press/as00\\_faleomavaega/fedcourtonhold.html](http://www.house.gov/list/press/as00_faleomavaega/fedcourtonhold.html).

<sup>322</sup> *Id.*

<sup>323</sup> Press Release, Delegate Eni F.H. Faleomavaega, Chairman and Ranking Member of Resources Committee Join Faleomavaega in Requesting GAO Study of American Samoa’s Judicial System (July 20, 2006), [http://www.house.gov/list/press/as00\\_faleomavaega/chairandrakingjoineni.html](http://www.house.gov/list/press/as00_faleomavaega/chairandrakingjoineni.html). The list of questions included:

1. Under what authority does the Secretary of the Interior appoint justices? Given that, under the current system, the Secretary of the Interior is responsible for oversight of the Territory, and he/she also appoints the justices of the High Court of American Samoa, what is the basis for determining how many justices should be appointed to the High Court? Could this problem be resolved by Congress appointing High Court Justices in the same fashion as Article I district court judges are appointed?
2. How does the High Court’s authority compare to that of an Article III or statutorily created territorial court?
3. What status does a High Court justice have? Is he or she a federal judge or an agency employee?
4. Within the appellate court system in American Samoa, what are the people’s rights of appeal to the federal court system? Of what significance is the fact that federal judges are included in the appellate court in American Samoa? Also, appeals of High Court opinions currently are challenged by suing the Secretary of the Interior in Washington, DC. Would a statute be appropriate to restrict the venue for such lawsuits to the District of Hawaii?
5. Does this court structure ensure that a resident of American Samoa receives equal protection under the law, given that all other states and territories have a right to appeal to either an Article III court or a court created by an act of Congress in which the tenure and

scope of the GAO report ventures beyond how to create a federal district court in American Samoa. The GAO was instructed to explore the foundations of U.S. authority over the territory stretching back to the Deeds of Cession and identify variations of federal jurisdiction that could manifest themselves in the territory.<sup>324</sup>

C. *Instead of a Federal District Court, a Better Solution Would Be the Creation of a Federal Division of the High Court of American Samoa*

While greater federal jurisdiction in American Samoa would resolve many issues raised in this article, it is not clear that American Samoa requires a separate federal district court. A better solution, due to the unique structure and development of American Samoa's judiciary, would be to create a "Federal Division" of the High Court of American Samoa.

independence of the court is assured by statute? Also, does the equal protection clause apply in American Samoa in the same way as other States and Territories, given that no federal law or Organic Act specifically governs this issue in American Samoa?

6. Is it proper for people charged with federal crimes in American Samoa to be transported to Hawaii or Washington, DC, in light of the Sixth Amendment constitutional guarantee of a trial by jury "of the State and district wherein the crime shall have been committed?" Could this issue be resolved by extending the venue of the District of Hawaii to include federal crimes in American Samoa?

7. Is it constitutional to give Article III federal jurisdiction to a territorial court that is subject to the authority of an executive agency? Can a High Court justice be designated to assume the duties of an Article I judge?

8. If Congress is amenable to conferring federal jurisdiction on the High Court, what legislative changes, if any, would be required to allow the High Court to accept this responsibility?

9. Also, if this "hybrid" federal/local court is established, how would the costs of this court be apportioned and from what sources?

10. Would this increase in caseload necessitate new facilities and employees?

11. Given the United States government's commitment to preserving the traditional culture and values of American Samoa, what recommendations would GAO have for structuring a federal court in American Samoa that would not take jurisdiction over American Samoa's communal land tenure and chiefly "matai" title systems?

12. Under the provisions of 48 U.S.C. 1661(c), what does it mean, "Until Congress shall provide for a government of such islands..."? Does this mean since 1929, Congress has not yet organized or established a government for these islands? Should Congress be involved in the establishment of such a government? If so, what kind of government?

13. Under the Secretary's authority from the President via the Congress to administer "all civil, judicial and military powers" in the territory, what are the implications of this authority, since now the territory has elected its own governor and House members of the local legislature, and yet Congress has not expressly given approval of American Samoa's territorial constitution?

14. Are there conflicts in statutory intent of the Ratification Act of 1929 and the 1983 federal law that required Congressional approval of any proposed amendment(s) to the 1967 territorial constitution?

<sup>324</sup> *Id.*

In the other territories examined, the federal district court was created about the same time that a civil government was created for the territory.<sup>325</sup> Congress established federal district courts in Puerto Rico, the U.S. Virgin Islands, and Guam when it organized the civil government.<sup>326</sup> This created a structure very similar to the judicial structure found in the States. The territories each had local courts to handle local matters, while the district court had jurisdiction over both federal and local matters.<sup>327</sup> The jurisdiction of these Article IV Territorial District Courts was much broader than that of Article III District Courts with respect to local matters. The important point is that a dual structure existed within these territories from the early development of the judicial system.

This did not occur in American Samoa. American Samoa has a single territorial court without a federal court connected to it. This system has developed over a hundred years. Over time, the federal government has provided the high court with federal jurisdiction in such areas as admiralty and Occupational Safety and Health Administration violations.<sup>328</sup> The high court operates in a closed system, with the high court being the true court of last resort for the territory. A few individuals have “appealed” to the federal system by suing the secretary of the interior, but these have been rare occurrences. Importantly, the high court has gained the respect of the Samoan community.

A “Federal Division” would provide greater federal jurisdiction to the territory, without the upheaval of creating an entirely new system. The new division could be very easily incorporated into the existing high court. The current rules of the high court mirror the Federal Rules and, after American Samoan case law, the high court looks to federal cases for persuasive authority. A federal division would also avoid much of the fiscal baggage associated with the creation of an entirely new district court and its associated staff. For example, it would not be necessary to create a new

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<sup>325</sup> See *supra* Part II.B.2 (discussing the development of territorial governments).

<sup>326</sup> *Id.*

<sup>327</sup> See *supra* note Part.II.B.2 (discussing the development of territorial governments).

<sup>328</sup> See, e.g., 46 U.S.C. § 31301(2)(E) (2000) (granting the High Court the same jurisdiction as federal district courts over admiralty cases); § 29 U.S.C. 653 (2000 & Supp. V 2005) (granting the high court the same jurisdiction as federal district courts over Occupation Safety and Health Administration violations); 7 U.S.C. § 136(i) (2000) (granting the high court with jurisdiction over environmental pesticide control statute); 7 U.S.C. § 2146(c) (2000) (granting the high court with jurisdiction over cases involving the transportation, sale, and handling of certain animals); 49 U.S.C. § 30102(a)(11) (2000) (motor vehicle safety).

U.S. Attorney's Office in American Samoa. The jurisdiction of the U.S. Attorney's Office in Hawaii could be extended to American Samoa.<sup>329</sup>

The Federal Division of the high court would possess very limited jurisdiction. It would be limited to civil, criminal, and regulatory statutes of the United States specifically applied to the territory and only where the United States acted as plaintiff. The federal statutes that have already been specifically applied to the high court by the federal government would be heard in the new division. This type of jurisdiction would allow the Federal Division to hear violations of Title 18 of the United States Code, which covers the bulk of federal crimes. Title 18 has been the statutory basis for the renditions of American Samoan residents to other parts of the United States for trial. The opportunity for the high court to try violations of federal law would remove the Sixth Amendment concern over American Samoan residents' lack of a trial by a jury of their peers.

The final aspect of jurisdiction would be bankruptcy matters. The establishment of bankruptcy jurisdiction would be an important addition to the jurisprudence of American Samoa. American Samoa currently lacks bankruptcy jurisdiction or procedures.<sup>330</sup> The establishment of bankruptcy jurisdiction would provide Samoans with the same rights as the other territories and promote the overall economic conditions of the territory.

The Federal Division should be incorporated into the Ninth Circuit for appeal purposes. However, the current appeal process of the land and titles division and the trial division should remain the same, with appeals being heard by the appellate division of the high court. This system would provide federal criminal defendants the full appeal protection of the federal system. At the same time, it would maintain a certain distance between the land and titles division decisions and the federal appellate system.

The creation of a Federal Division could run parallel to changes in the appointment of the justices of the high court. As discussed earlier, the secretary of the interior selects the justices of the high court and can remove them for any reason.<sup>331</sup> While the power of removal has not been invoked without justification, in order to avoid any potential conflicts in the appointment, an amendment to the Revised Constitution should return the power of appointment to the President of the United States with the advice

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<sup>329</sup> This is not a new concept, as a single United States Attorney serves the districts of Guam and the Northern Mariana Islands. United States Attorneys, United States Attorneys Mission Statement, <http://www.usdoj.gov/usao> (last visited Mar. 5, 2007).

<sup>330</sup> *Sw. Marine of Samoa, Inc. v. S&S Contracting, Inc.*, 5 Am. Samoa 2d 70, 82 (Trial Div. 1987).

<sup>331</sup> REV. CONST. AM. SAM., art. III, § 3. <http://www.asbar.org> (follow "Legal Resources" hyperlink; then follow "American Samoa Constitution" hyperlink).

and consent of the Senate. The justices should have a ten-year term, with reappointment available, and only be removable for cause. This would place the justices in line with the other territorial judges.<sup>332</sup>

Overall, the Federal Division would not dramatically increase the caseload of the high court, but would fill important gaps in the jurisdiction of American Samoa.

## VI. CONCLUSION

American Samoa is unique. From its inception, the United States' administration of the territory has guarded *fa'a Samoa*. The United States has attempted to preserve the communal land and *matai* title system through the limited development of federal laws in the territory, which is illustrated by the fact that American Samoa is outside a federal judicial district. While this exclusion has arguably protected *fa'a Samoa*, it has begun to harm the rights of American Samoan residents. The creation of a federal district court in the territory would resolve some of the jurisdictional problems. However, at the same time, it would create its own problems including the high cost of creating an entire district court system in the territory and, most importantly, forcing a relatively alien judicial structure on a 100-year-old judicial system. The better solution would be the expansion of the high court's jurisdiction. A greater federal presence, through the development of a Federal Division of the High Court of American Samoa, will not destroy the cultural underpinnings of *fa'a Samoa*, but will actually protect it by making it easier for American Samoan residents to enforce their rights.

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<sup>332</sup> See *supra* Part II.B.2.