

## **MEMO: Political and Legal History of 48 U.S.C. 1662a**

### **CONCLUSIONS AND RECOMMENDATIONS:**

- 1. 48 U.S.C. 1662a does not in any respect or by any degree define, implement or enhance the Territorial Clause power of Congress to approve or disapprove, modify, or declare null and void any amendment to the local constitution approved by the Secretary of the Interior pursuant to Executive Order 10264, as authorized by Congress under 48 U.S.C. 1661. Accordingly, Congressional power would not be diminished, restrained or relinquished by repeal of 48 U.S.C. 1662a.**
- 2. The sole effect of 48 U.S.C. 1662a is to make approval by an act of Congress a condition precedent for any amendment approved by the Secretary under Executive Order 10264 to enter into force, including amendments ratified by a majority vote in a referendum conducted by the American Samoan Government in accordance with local laws.**
- 3. The historical role of the Congress, President, Secretary of the Interior and American Samoan Government in lawful governance of American Samoa, including adoption of the local constitution and amendments thereto pursuant to local law sustains self-government in a manner compatible with the 1900 and 1904 Deeds of Cession, 48 U.S.C. 1661, Executive Order 10264, the 1967 Revised Constitution of American Samoa and local law promulgated thereunder, subject to and consistent with federal law made applicable to American Samoa by Congress.**
- 4. Because Congress has the absolute power to act any time it chooses before, during or after amendment of the local constitution, and determine disposition of any proposed or approved amendment, there is no compelling juridical justification or prudential reason to make amendments contingent on action by Congress before amendments are promulgated and take effect as otherwise authorized by federal and local law.**
- 5. Accordingly, in the interests of local democratic self-determination and preservation of the American Samoa way of life consistent with 48 U.S.C. 1661, the extraneous mandate of 48 U.S.C. 1662a should be repealed.**

### **Part One: Framework for self-determination to preserve or change current status**

The framework for local self-government that preserves American Samoa's cultural, political and legal order, but allows for change through local self-determination, begins with the 1900 and 1904 Deeds of Cession. The 1929 Ratification Act (48 U.S.C. 1661) confirmed the Deeds of Cession, including U.S. obligation to respect local self-determination in local cultural affairs. That 1929 act of Congress delegated to the

President of the United States responsibility for conducting federal affairs in the territory consistent with U.S. obligations under the Deeds of Cession.

Pursuant to 48 U.S.C. 1661, in 1951 the President signed Executive Order 10264, which delegated to the Secretary of the Interior responsibility to conduct federal affairs in American Samoa on behalf of the President consistent with the Deeds of Cession. Finally, acting under Executive Order 10264, the Secretary approved the 1967 Revised Constitution of American Samoa, after its approval by the voters of the territory in 1966.

Those instruments provide the framework for self-determination in all local affairs not otherwise governed by applicable federal law. The local constitution provides for local self-government under the current status, and it can be amended by local initiative under the constitution, or otherwise proposed and approved under local law, with approval of the Secretary under Executive order 10264.

That framework remains unchanged since adoption of the local constitution in 1967, except that in 1983 a statute that has never been implemented or applied would require Congress to approve amendments after approval by the voters and the Secretary.

Now for the first time since 1983 amendments have been approved by the voters, and the Secretary as well as Congress are considering whether seeking approval of Congress under the 1983 statute is consistent with purposes of the framework for self-determination already previously established by Congress.

As explained in detail below, in 1983 the Member of Congress from American Samoa proposed and Congress adopted a one sentence statutory provision requiring Congress to approve any amendment to the local constitution adopted under E.O. 10264 (See, U.S. Public Law 98-213, Sec. 12; 48 U.S.C. 1662a).

That provision applies to any amendment approved by the Secretary, including amendments proposed through the amendment process prescribed in the 1967 local constitution at Article V, Section 3 and Section 4, or otherwise lawfully conducted under local authorities within the framework of self-government in all matters not otherwise governed by applicable federal law.

48 U.S.C. 1662a lay dormant from 1983 to 2022, simply because no amendment to the local constitution was ratified by voters in a local referendum or otherwise approved by the Secretary of the Interior during that period. There were multiple constitutional conventions called by past Governors under the local constitution and/or local law, and referendums were conducted on proposed amendments, but none were approved until five of 11 amendments were approved by voters in 2022.

Accordingly, the efficacy and operation of 48 U.S.C. 1662a was never put to the test until the 2022-2023 period American Samoa transmitted the approved amendments to the Department of the Interior, which has had the question of approval under advisement while consulting with the American Samoa Government and Congress

about the proposal by the Member of Congress from American Samoa and local leaders that 48 U.S.C. 1662a be repealed before a precedent for its application is created.

The role of the Secretary was approved by the voters in ratifying the local constitution in 1967, and derives in turn from the authorities and responsibilities of the Secretary Executive Order 10264. Accordingly, that role for the Secretary is not in itself a reason much less justification for 48. U.S.C. 1662a.

As noted, on November 8, 2022, the voters of American Samoa approved 5 of 11 amendments to the 1967 Revised Constitution of American Samoa. Three of the voter-approved amendments were technical changes conforming terms used in constitution to local language per custom, one enabled impeachment and removal of the Governor by the Legislature, and one gave the non-voting member of the Legislature from Swain's Island a vote in that body.

The amendments were proposed in 2022 by a convention called under the authority of the Governor, under local authorities and measures consistent with procedures for proposing and approving amendments pursuant to Article V, Section 4 of the 1967 Revised Constitution. The Department of the Interior provided a \$150,000 grant for the convention and referendum as called by the Governor.

Amendments proposed and ratified by voters, including under Article V, Section 3 or Section 4 of the constitution, must be approved by the Secretary of the Interior in the same manner as the constitution was adopted in 1967. Accordingly, the Secretary has the authority under Executive Order 10264 to approve amendments proposed by a convention called under authority of the Governor and approved by majority vote in a referendum conducted under local law.

After the 2022 vote in American Samoa, back in Washington It was determined by Interior Department legal and policy staff that the U.S. need not determine the local protocols for proposing and approving local amendments. Since the local process was determined lawful under both federal and local law, it was confirmed by the Department of the Interior that the Secretary had the authority and responsibility to either approve or disapprove any amendments proposed and approved locally.

In addition, it was determined by the American Samoa Government and the Department of the Interior that unless 48 U.S.C. 1662a were repealed, the amendments approved in 2022 could not take effect without the act of Congress in 1983.

In the past, multiple constitutional conventions have been called in the same manner as the 2022 convention, but voters have rejected all proposed amendments. In 2022, as noted, one of 6 amendments rejected by voters would have reduced the Secretary of the Interior's role in governance of the territory, including approval of constitutional amendments.

In all previous constitutional amendment votes the vast majority of Americans in American Samoa rejected all amendments that would change the role of the Secretary of the Interior under Executive Order 10264. In 2022, the amendment that would have reduced the DOI Secretary's role under the local constitution was also rejected.

The record of majority rule in past votes expressing trust in and reliance on the governing arrangements under 48 U.S.C. 1661 and Executive Order 10264 are understood in American Samoa as a record of self-determination in favor of the current status defined by the Deeds of Cession and the local constitution.

## **Part Two: Why repeal is best option**

The 1967 Revised Constitution of American Samoa adopted by majority rule in the 1966 ratification vote, including its amendment process, was approved by the Secretary and thereby entered into force in 1967. However, approval of the Secretary at least for now is no longer the last step in the constitutional amendment process.

That is because in 1983 staff acting on behalf of the Congress member from American Samoa, Fofu Sunia, requested House managers of a territorial spending bill to insert a one sentence amendment in that legislation that became 48 U.S.C. 1662a.

Whatever the purposes and intentions for that 1983 bill at the time, the long-term effect that became apparent was that a local democratic act of self-determination to amend the local constitution approved by the Secretary can no longer be given effect in the same manner by which the territorial constitution was itself approved by the Secretary and given effect in 1967.

Specifically, 48 U.S.C. 1662a makes Congressional action necessary, but does not require Congress to act. The result is Congress in effect can knowingly or unknowingly nullify the vote of the people and Secretarial approval of an amendment under Executive Order 10264 by simply doing nothing. By act or omission of either the Senate or the House the vote of the people can be ignored, nullified and vitiated.

Congress already has plenary power under the Territorial Clause of the U.S. Constitution to approve or disapprove of any amendment to the constitution before or after it is approved by the voters, the local government or the Secretary. The 1983 amendment is in that sense a hollow act by mere statute that does not and cannot give Congress power it has under the Constitution.

What the 1983 statutory requirement of Congressional approval does is empower either chamber of Congress to suspend operation of the local constitution and democratic self-determination on a local self-government and home rule issue by taking no action. It allows nullification of democratic process by Congress acting passively, without exercising its constitutional power over territories authoritatively and affirmatively.

Subsequently, after 48 U.S.C. 1662a became law, Congress was advised in 1984 testimony by the Department of Justice that the 1983 amendment might have unintended consequences relating to the territory's status and federal relations as described below. See, U.S. Senate Energy and Natural Resources Committee, Hearing Report, "Revised Constitution of American Samoa," May 8, 1984.

Thereafter, recognition increased that the 1983 amendment was not warranted or needed. Accordingly, Congressman Sunia's successor, Eni Faleomavaega, proposed legislation in 2005 to repeal 48 U.S.C. 1662a.

However, there was confusion in Congress about whether repeal of the act would relinquish powers of Congress, which is not the case given the plenary powers of Congress over all matters of territorial governance, including amendments to the local constitution.

Now, decades later, it might seem like a logical solution to this anomaly going forward to amend the 1983 statute by requiring Congress to act on a proposed amendment within a specified period time. That, of course, would not be binding or enforceable, unless perhaps the statute provided the amendment would take effect if Congress does not act by a specified date.

That option of Congressional approval by default if Congress does not act by a date certain is consistent with the automaticity of an effective date for locally ratified constitutions submitted to Congress by Guam or the U.S. Virgin Islands territory under a 1978 federal statute (P.L. 94-584). But that 60 rule does not apply to amendments (and no constitution has ever been adopted by those two territories).

Another option might be to limit the application of 48 U.S.C. 1662a to amendments proposed and initiated by the Secretary under Executive Order 10264 but not jointly with the Government of American Samoa, and/or proposed and ratified according to local law. That would change and limit the role of the Secretary in a way rejected by voters in every referendum since 1967, including the 2022 vote.

That latter option also would not fully democratize the process (if that were the goal), as long as the Secretary can control what amendments would ever reach Congress after approval by the voters, through the power to approve or disapprove. So, unless the role of the Secretary is either radically altered or ended, the current law will remain.

### **Part Three: Political risk of clouding American Samoa's status**

In the 1984 hearing before the Senate Committee on Energy and Natural Resources cited above, a Deputy Assistant Attorney General from the Office of Legal Counsel in the U.S. Department of Justice suggested implementation of 48 U.S.C. 1662a could raise questions and concerns about whether that might alter political status, rights or equities of American Samoa in the federal-territorial relationship.

While the ultimate effect or impact of those questions and concerns may be more speculative than determinative, the fact that DOJ would give such testimony is extraordinary and cannot be dismissed by countervailing legal or political speculation. Indeed, even if only seen as an expression in 1984 of DOJ disapproval of the adoption of 48 U.S.C. 1662a without regular order and DOJ review, the 1984 DOJ testimony demands attention and consideration.

Alone the DOJ position in 1983 about the 1983 one sentence add-on to P.L. 98-213 may not be legally dispositive, but it augments and provides a political risk context for the preceding discussion of the legal anomalies emanating from 48 U.S.C. 1662a.

Specifically, DOJ indicated “federalization” of the local constitution under 48 U.S.C. 1662a could open not only the constitution but even the Deeds of Cession to amendment or revision the same as a generic territorial organic act, rather than an historical legacy of stable relations under 48 U.S.C. 1661.

The result predicted by DOJ was risk that American Samoa’s unique status could be modified. If so, the territory as well as its people who are U.S. nationals could be reclassified for the first time since 1900, as a territory and population indistinguishable from other four unincorporated by statutorily organized territories.

Once articulated by DOJ in 1984, even if temporized with the passage of time this concern cannot simply or lightly be explained away or ignored. DOJ cannot “take it back” or give reassurances that mitigate the effects of the questions DOJ raised.

Those concerns are now part of the political culture of American Samoa, and contribute to the steadfastness of its people to preserve a unique tradition of patriotism and allegiance combined with autonomy and customary way of life, which the U.S. promised to help preserve in the 1900 and 1904 Deeds of Cession. That is what self-determination means to American Samoa.

In this regard, it must be recalled and understood emphatically that American Samoa is not an “organized” territory, that is, not subject to an organic act of Congress establishing local self-government and defining federal-territorial relations under federal law on the basis of conquest or purchase of the islands by the U.S. federal government.

Rather, American Samoa was not taken as a prize of war or purchased by the highest bidder. Instead, the high chiefs ceded their sovereignty and islands to the U.S. by deeds in 1900 and 1904. In accepting and enacting the terms of those deeds Congress affirmed that American Samoa was recognizing the U.S. as sovereign and that the people now owed allegiance to the United States.

At the same time, as noted, the U.S. accepted the obligation to protect and preserve the customs and traditions of American Samoa and its way of life, including the traditional

land ownership system. As a result, the federal footprint in American Samoa is very small compared to other territories.

Given this degree of both legal and de facto autonomy, far fewer federal statutes apply, and American Samoa proudly and patriotically has statutory U.S. nationality but not statutory citizenship unless individually acquired. There is no federal court in American Samoa and its High Court has been appointed by the Secretary of the Interior.

If the status of American Samoa and its U.S. national population is to change, its leaders reportedly believe that best would be initiated in the people before being proposed to Congress or imposed by a court. That is the position local government leaders successfully argued in the federal courts during *Fitisemanu* case, seeking to federalize constitutionally imposed birthright citizenship in the territory by court ruling without democratic consent of the governed.

And that is why the Governor, both Houses of the local Legislature and senior local and federal officials directly responsible for leadership on this matter have proposed that the 1983 amendment taking away home rule under the people's constitution be repealed. That is because in its historical context the 1983 amendment requiring Congress to approve any amendments to the constitution is not consistent with self-determination.

As noted above, in the 2022 vote, the amendment conferring voting rights on the representative from Swain's Island is the only amendment passed that ushers in a change in local political affairs. That and the other approved amendments need to undergo Interior Department legal review. Frustration over delay in federal approval of the 2022 vote on several amendments to the local constitution is understandable.

However, there is now valid concern and hesitation about action by the Secretary of the interior that could trigger Congressional inaction, on one hand, and Congressional hearings in which approval or disapproval of an amendment such as the Swain's Island vote decided by the voters back home could become the focus of a debate over election law in Congress.

Thus, the decision in Washington not to act without further deliberation is prudent given flaws in the hastily adopted 1983 federal law creating a local constitutional political conundrum under 48 U.S.C. 1662a that now only Congress can correct.

To understand the legislation introduced to repeal that errant 1983 statute requiring Congressional ratification-action on amendments, and to define the real options for resolution of this dilemma, it is important understand American Samoa's political ethos.

#### **Part Five: America's Most Self-Governing Overseas Territorial Possession:**

American Samoa is the only U.S. territory that is not seeking changes to its political status and relations with the federal government. The traditional and elected leaders of

American Samoa and the voters consistently demonstrate a preference to remain America's outpost in the South Pacific under current law.

Although grateful for the federal programs, services and benefits of U.S. territorial status, the American Samoa body politic consistently has affirmed through local self-government that any change in political status or federal-territorial relations preferably should be initiated locally not in distant Washington.

American Samoa is home to deeply patriotic Americans whose allegiance and loyalty to America is confirmed by the highest per capita rate of U.S. military service of any state or territory. Yet, when a territorial policy advocate from Guam filed a lawsuit asking a federal court in Washington DC to end the current statutory "national but not citizen" status of Americans born in the territory, and replace it not by statutory citizenship applicable on the other territories, – but by federal judicial order with the same citizenship status conferred in states, the local government opposed that lawsuit.

American Samoa's Congresswoman, Governor and Legislature intervened as parties in the case and opposed any change to the historical American nationality and autonomous political status that has served the people of the territory and our nation so well for over 120 years. The U.S. Supreme Court rejected petition to review federal appellate court ruling in favor of the current status of American Samoa and persons born there.

That local initiative to preserve the autonomous status of the territory confirmed that U.S. nationality in American Samoa confers rights to Americans equal to that of nationals residing in the four other unincorporated territories who are classified as "citizens" by federal territorial statutes.

To understand this political culture, it is important to note that American Samoa was never disposed to European colonial or American imperial initiatives. Instead, the powerful Chiefs of the Eastern islands of Samoa requested and voluntarily agreed in 1900 and 1904 to Deeds of Cession conferring U.S. sovereignty over the islands of the territory, in exchange for the U.S. promise to preserve the local traditional land ownership system and way of life.

It is because the U.S. has kept its promises that American Samoa prefers its current political status to any other relationship with the U.S. federal government or model of self-government. The U.N. may classify American Samoa as non-self-governing territory for its own purposes, but most locals believe the current status is the result of and consistent with local self-determination.

It is recommended to support repeal of 48 U.S.C. 1662a. If that statute is not repealed, approval of the amendments ratified by the people in 2022 will trigger the perverse and anomalous 1983 law suspending the amendment process to which the people have consented, unless and until Congress acts. In turn, action by Congress under that 1983



statute could have consequences for self-determination for American Samoa to which its people have not consented.

In that context, it is important to note that the Secretary's role not only in the amendment process but more broadly under Executive Order 10264 derives from a consent based mutually beneficial federal-territorial relationship created by Congress in 1929 under 48 U.S.C. 1661. In that historic Act, Congress authorized the President to adopt measures to establish local government in the territory, and since 1951 that has included authorization of the Secretary of the Interior to execute and implement responsibilities for federal relations with the territory pursuant to Executive Order 10264.

The legal meaning, political implications and intergovernmental viability of Section 1662a is being fully revealed and understood for the first time since it was adopted. Obviously, that is due to approval of five constitutional amendments in the referendum of Nov. 8, 2022, now awaiting final review and action by the Secretary of the Interior under Executive Order 10264, pending Congressional review at this time of H.R. 6062.

In that context, while not seeking uniformity or "one size fits all" political status features for all territories, it has not been agreed American Samoa should be the only U.S. territory with a local constitution that has to come to Congress after the people have voted to amend the constitution. Like the local constitutions of all unincorporated territories, American Samoa's constitution applies only to local affairs to the extent consistent with federal law, so local amendment is limited to local matters in all territories.

That is why American Samoa has not agreed the historical role Secretary of the Interior in approval of amendments justifies singling American Samoa out for the requirement of Congressional action after an act of local self-determination and Secretarial approval. While each of the other four territories has been authorized by Congress to adopt a constitution, only American Samoa's constitution was authorized by the President and Secretary as enabled and authorized by Congress.

Thus, just as each territory's legal relationship with the U.S. is unique, American Samoa's right of self-determination should not be uniquely burdened because of the unique features of its organic law grounded in the Deeds of Cession. Section 1662a was an ad hoc and never reviewed revision of what was in 1983 a 54-year federal-territorial relations success story under 48 U.S.C. 1661

The mandate of Section 1662a is for what amounts to a secondary after-the-fact Congressional approval. The effect is to hold acts of local self-determination in abeyance indefinitely, until Congress acts, or even to nullify amendments by omission or silence.

Perhaps most fundamentally, Congress does not need 1662a to exercise its plenary and supreme power under the Territorial Clause to approve or disapprove any amendment approved by the Secretary under Executive Order 10264. Whether an amendment is proposed in a local convention and ratified in a referendum or any other lawful procedure

under local law, approval by the Secretary does not bind the Congress before or after the Secretary acts.

The U.S. DOJ position is that there is no vested right under local or federal law to a local constitution or any amendment to it, whether or not adopted under authorization by Congress in 48 U.S.C. 1661. Thus, there is no gain of Congressional authority by requiring a second authorization by Congress under 1662a, and no loss of Congressional power if the 1983 statute is repealed. Indeed, Congress can disapprove amendments approved by the Secretary, approve amendments that have been disapproved by the Secretary, or simply amend the local territorial constitution as Congress chooses.

Because the local constitution was adopted by the people and approved by the Secretary on behalf of the President as authorized by Congress, the real effect of Section 1662a is to prevent the local constitution from being amended in the same manner it was adopted. As such, Section 1662a is a condition precedent and/or condition subsequent that either way leaves an act of self-determination and/or Secretarial act promulgated under Congressional authorization in limbo unless and until Congress acts yet again.

In contrast, the power of Congress to approve or disapprove of any amendment or act of the Secretary in American Samoa or other territory is sovereign, supreme and of constitutional magnitude, not created by or dependent on a mere federal statute like 1662a.