

**Committee on Natural Resources**  
**Subcommittee on Indian and Insular Affairs**  
**Legislative Hearing**  
**1324 Longworth House Office Building**  
**January 18, 2024**  
**2:00 PM**

- **H.R. 6062 (Rep. Radewagen)**, To restore the ability of the people of American Samoa to approve amendments to the territorial constitution based on majority rule in a democratic act of self-determination, as authorized pursuant to an Act of Congress delegating administration of Federal territorial law in the territory to the President, and to the Secretary of the Interior under Executive Order 10264, dated June 29, 1951, under which the Constitution of American Samoa was approved and may be amended without requirement for further congressional action, subject to the authority of Congress under the Territorial Clause in article IV, section 3, clause 2 of the United States Constitution; and
- **H.R. 6273 (Rep. Moylan)**, “*Guam Host Community Compensation Act*”.

**Questions Submitted to be Answered for the Record:**

**Rep. Westerman:** Lt. Governor Ale, Deputy Assistant Secretary Keone Nakoa testified at the hearing that Department of the Interior review for the five constitutional amendments approved during the November 2022 American Samoa Constitutional Convention has been placed on hold at the request of Governor Lemanu P.S. Mauga.

Can you confirm if this request was made by Governor Mauga? If the Governor did request this from the Department of the Interior, why did he make this request?

**Lt. Governor Ale:** After submitting the five constitutional amendments to the Secretary of the Interior on December 14, 2022, Governor Lemanu Mauga subsequently asked the Secretary to hold off her review to allow time for repeal of Section 12 of Public Law 98-213, 48 U.S.C. Section 1662a (hereinafter “Section 1662a”).

The leaders of American Samoa, including Governor Lemanu Mauga, the Senate President, House Speaker, and Congresswoman Radewagen share the strong conviction that Section 1662a poses an unacceptable risk and unfair burden to American Samoa and her unique relationship with the United States. This concern was raised during the constitutional convention and led to Congresswoman Radewagen’s decision in November 2022 and again in October 2023 to introduce legislation to repeal Section 1662a. In fact, the American Samoa House of Representatives, on February 2, 2023, passed a Resolution asking Congresswoman Radewagen to take all necessary steps to repeal Section 1662a.

Section 1662a poses two primary concerns for the people of American Samoa. First, application of Section 1662a will delay and possibly prevent the people of American Samoa from amending their local constitution. As explained in my oral and written statements, the ability to

pass legislation in Congress, even seemingly noncontroversial legislation, is generally difficult and unpredictable. For American Samoa, the burden is even greater. Not only are we a small, remote territory in the middle of the Pacific Ocean, we have only one non-voting Delegate in the House of Representatives and no representation whatsoever in the Senate chamber.

Further, under Section 1662a, Congress has no obligation to act within a reasonable time once we submit our constitutional amendments for approval. In fact, Congress has no obligation under Section 1662a to act at all, or even respond to us. Based on our review, no other U.S. territory is required to endure such a burden in order to amend their local constitution. Given these facts, our local leaders made the only practical and logical decision for American Samoa in seeking repeal of Section 1662a. Repeal of Section 1662a protects our right as a people to self-determination and ensures fair treatment of all U.S. territories. Of course, repeal of Section 1662a does not remove Congress' ultimate authority over American Samoa under the Territorial Clause of the U.S. Constitution and under 48 U.S.C. Section 1661(c)<sup>1</sup>.

Second, application of Section 1662a to our constitutional amendments, exposes our local constitution and our special relationship with the United States to unnecessary risks.<sup>2</sup> American Samoa's relationship with the U.S. was forged on the promise made by the U.S. to our forefathers that our ability to preserve our Samoan culture would always be respected and protected. This promise, codified in the Deeds of Cession and in 48 U.S.C. Section 1661(a), has allowed American Samoa for over 120 years under the watchful eye of the President, the Secretary of the Navy, and now the Secretary of the Interior, to establish certain institutions and laws as incorporated into the local constitution, to protect and preserve the Samoan culture. While some of these protective measures may not be viewed or understood as conventionally conforming practice under the U.S. Constitution, they have been allowed to exist because of our special relationship with the U.S. and because our constitution is generally viewed as a matter of local law with limited applicability. Congressional review of our constitutional amendments under Section 1662a could convert our entire constitution into federal law subject to full application of the U.S. Constitution and application of federal laws now applicable to other territories. Worse, such congressional action could result in the establishment of a "de facto" organic act that could be conformed in the case of American Samoa to organic laws of other territories without any input from our people.

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<sup>1</sup> See 48 U.S.C. Sec. 1661(c) ("***Until Congress shall provide for the government of such islands***, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. (Emphasis added). This language reflects Congress' clear intent to retain ultimate authority over governance of American Samoa.

<sup>2</sup> Although enacted in 1983, Section 1662a has never been put to test before. Congress has never had the opportunity to review amendments to the American Samoa constitution under Section 1662a. Unless repealed, this would be the first occasion where the provisions of Section 1662a would be applied.

Governor Lemanu Mauga consulted with the Secretary of the Interior regarding his concerns about Section 1662a and received useful advice from the DOI on how to proceed. The Secretary graciously agreed to delay her review of the amendments to allow time for repeal of Section 1662a.

**Rep. Westerman**: Lt. Governor Ale, in your testimony, you stated that the Congressional approval requirement under Section 12 of Public Law 98-213 has made it “infinitely more difficult for the people of American Samoa to amend their constitution when they see fit.” However, the Department of the Interior testified at the hearing that the reason why Congress has yet to review and approve the 2022 amendments is because American Samoa officials requested from the Department of the Interior to not finalize its review of the amendments, thus not submitting them to Congress for review.

Can you explain why you believe that it is the Congressional approval authority making it difficult for the people of American Samoa to amend their constitution when it has not been Congress holding up the amendments, but rather the Department of the Interior, at the request of American Samoan officials?

**Lt. Governor Ale**: Congress never delayed or held back approval of the five constitutional amendments we submitted to the Secretary of the Interior. If my testimony suggested otherwise, I sincerely apologize. In fact, the amendments have not been officially submitted to Congress by American Samoa or the Department of the Interior in furtherance of the purposes of Section 1662a because the Secretary has not completed her review or taken action to approve or disapprove any amendment. My statement, both orally and written, refers prospectively and reflects an honest assessment of American Samoa’s unique disadvantage, as compared to other jurisdictions, when it comes to our ability to push legislation through Congress. This disadvantage is made even worse when one considers the language of Section 1662a, which requires Congressional approval of our amendments but contains no requirement for Congress to even act upon receiving our amendments.

**Rep. Westerman**: When Section 12 of Public Law 98-213 became law in 1983, it was enacted because of the fear that the then-Secretary of the Interior would act unilaterally in American Samoa. As such, American Samoa requested Congress for constitutional amendments to require congressional approval.

Are you concerned about the potential for unilateral decisions by the Secretary of the Interior if amendments are no longer required to have congressional approval? If not, why?

**Lt. Governor Ale**: No. Even without Section 1662a, American Samoa has other available federal remedies to address any improper unilateral actions by the Secretary of the Interior. American Samoa retains a direct line to seek intervention by Congress under the Territorial Clause of the

U.S. Constitution and pursuant to 48 U.S.C. Section 1661(c). American Samoa also has the option of seeking intervention by the President pursuant to 48 U.S.C. Section 1661(c) and Executive Order 10264. Finally, American Samoa may seek judicial intervention if deemed necessary to address any improper unilateral action by the Secretary.

**Rep. Westerman:** In the event that the Secretary of the Interior does act unilaterally, would American Samoa request to reinstate the Congressional approval requirement? If not, what mechanism do you believe would serve to mediate and resolve the issue?

**Lt. Governor Ale:** No. Given the remedies available to American Samoa and the concerns raised above about Section 1662a, American Samoa would have no reason to seek reinstatement of Section 1662a if the Secretary acts improperly or unilaterally in the future.

**Rep. Radewagen:** In my statement I noted we stay in close consultation with both the Secretary and Congress based on trust and commitment to what best for both the people of American Samoa and the American people as a whole. Do you agree that it is respectful but also honest to recognize that the Secretary, a territorial government or Congress may exercise powers in a way that causes questions or concerns, and that H.R. 6062 is an example of American Samoa asking Congress to reconsider its exercise of powers in the 1983 act, knowing in the end that Congress has the power but wanting to work together toward successful federal and local law and policy for our territory and our nation?

**Lt. Governor Ale:** The 1900/1904 Deeds of Cession create a relationship between American Samoa and the U.S. that is fundamentally different than nationhood, statehood or organized territory status. American Samoa is an unincorporated territory with local government not organized under federal statute like the other four unincorporated territories. Congress never approved an organic act or local constitution because Congress delegated its power to organize local government to the President in 1929. The President established local government under the Department of the Interior in the 1951-1960 period, and the Secretary approved the current constitution effective in 1967.

In contrast, under federal statute organic acts Congress organized local government and authorized each of the other four unincorporated territories to adopt local constitutions subject to approval by Congress. Even though the constitutions of the other territories are authorized and approved by federal statute, those federal laws do not require amendments to local constitutions to be approved by Congress. Of course, all local constitutions and laws promulgated thereunder must be compatible with applicable federal law.

Within the framework of federal territorial law and policy applicable to American Samoa, there will be times when the local government, Department of the Interior and Congress will act separately or in some combination and create concerns or questions that each will address. It is

normative for corrections to be made based on joint efforts to make federal territorial law and policy more perfect, just as we never cease trying to make the U.S. more perfect.

The current effort being made by ASG, DOI and Congress to determine if the 1983 amendment to 48 U.S.C. 1661 and the American Samoa's local constitution by 48 U.S.C.1662a should be corrected is based on trust and respect for the authorities, initiatives and actions of ASG, Interior and Congress.

**Rep. Radewagen:** Is it accurate to say that the 1983 act codified at 48 U.S.C. 1662a was in effect an amendment to the American Samoa local constitution that was enacted without a hearing at which American Samoa was afforded an opportunity to be heard, and without any formal consultative process of any kind that we know of as we look back at what happened?

**Lt. Governor Ale:** Consistent with 48 U.S.C. 1661 (1929) and Executive Order 10264 (1951), the 1967 Revised Constitution of American Samoa and laws adopted thereunder authorize the local government to propose amendments to the local constitution. While it is within the authority of Congress to do so, by adding an additional statutory Congressional approval process for amendments, in addition to the approval requirements under 48 U.S.C. 1661, Executive Order 10264, and the 1967 Revised Constitution, the effect of 48 U.S.C. 1662a is to directly change the amendment process under existing federal and local law. It appears this was done in Congress without regular order or the creation of a public record before Congress to transparently inform Congress and the public then or now as to the purposes and perspectives of all stakeholders in the 1983 decision to approve Section 12 of P.L. 98-213.

**Additional Background Provided by the American Samoa Government for the Record in Response to the Preceding Questions and Answers:**

1. Importance of Congressional action on H.R. 6062: Governor Lemanu Palepoi Sialega Mauga, the American Samoa Government and our fellow Americans in American Samoa welcome and are grateful for Congressional oversight on local constitutional matters, as provided in the hearing by the Subcommittee on Indian and Insular Affairs on January 18, 2024. We deeply appreciate the care, time and attention allocated to consideration of H.R. 6062, and the opportunity to address here the important questions addressed to the ASG witness by full House Natural Resources Committee Chairman Westerman.

The responsiveness by HNRC/SIIA to the efforts of ASG to work with the Department of the Interior, in order to ensure the results of the 2022 referendum on local constitutional amendments are duly honored, demonstrates the efficacy of confidence and trust we placed in Congress to fully and fairly consider H.R. 6062. Without presuming, we hope Congress can expedite its consideration of H.R. 6062 and signal its intentions with regard thereto before the Secretary must act on this matter subject to the 1983 amendment codified at 48 U.S.C. 1662a.

We believe that H.R. 6062 would restore the successful self-government model established as authorized by Congress under 48 U.S.C. 1661, by repealing the disruptive 1983 amendment thereto codified at 48 U.S.C. 1662a. In that context, the following reply is offered to the first of three specific questions directed to the ASG witness by Chairman Westerman:

The American Samoa Government's efforts to achieve timely action and approval of amendments ratified by a majority in the 2022 referendum has not been pursued by one or more "requests" to the Department of the Interior or Congress. Rather, in our endeavors with the Office of the Secretary, our Congresswoman who speaks with us for the people, and with the Congress, we are making offers of consultation, cooperation and collaboration to define and achieve as a shared goal a policy that honors the 2002 vote, albeit in a somewhat complex historical, legal and political context.

Accordingly, on December 14, 2022, the Governor transmitted the amendments approved by a majority of voters in the referendum on November 8, 2022 to the Secretary of the Interior. On behalf of the American Samoa Government and the people of the territory the Governor requested approval of these amendments by the Secretary, to enable the most-timely local implementation possible for each amendment so confirmed. This official and formal request, regarding amendments which have been public record before and after the 2022 vote, also was made a part of the record before Congress in the Governor's testimony of February 9, 2023, before the U.S. Senate Committee on Energy and Natural Resources.

During consultations by the Governor and senior ASG officials with the Secretary and senior DOI officials, including ASG and DOI legal counsel, it was recognized that potentially unproductive and possibly prolonged delay in approval and implementation of amendments could occur, due to the requirement of 48 U.S.C. 1662a that amendments approved by the people and the Secretary have no effect unless and until also enacted by a federal statute.

In addition, we have been cognizant of testimony by the U.S. Department of Justice addressing the legal implications of 48 U.S.C. 1662a soon after it was enacted. At that time, DOJ expressed concern and raised questions about whether Section 12 of P.L. 98-213 (48 U.S.C. 1662a) would alter the legal effect of 48 U.S.C. 1661 (1929), the federal statute that ratified the 1900 and 1904 Deeds of Cession. 48 U.S.C. 1661 confirmed features of local autonomy created by the Deeds of Cession and authorized the President to establish local self-government under Executive Order 10264 (1951).

Without questioning the good will with which Congress and the President would act in the event 48 U.S.C. 1662a were implemented to enact as federal law each of the 2022 amendments approved by the Secretary, that requirement creates a unique and unequal burden on American Samoa. That burden is not justified by or compatible with the unique structure and features of local self-determination established for American Samoa under Executive Order 10264, as authorized by Congress under 48 U.S.C. 1661.

Accordingly, after the Governor consulted with American Samoa's elected Member of Congress and the elected leadership of the Legislature of American Samoa, specifically the President of the Senate and Speaker of the House, there was a consultative understanding reached by the American Samoa Government with the Office of the Secretary that Congress should have the opportunity to consider H.R. 6062 while the Secretary has the amendments under advisement, before application of 48 U.S.C. 1662a is triggered and sets a precedent with possible unintended consequences noted above.

This cooperative forbearance is undertaken as an affirmative step to restore self-government instituted under Congressional authorization in 48 U.S.C. 1661. That 1929 local territorial government enabling act for American Samoa, as implemented under Executive Order 10264 (1951) and the current 1967 Revised Constitution of American Samoa, is a success story for Congressional oversight, in the only territory that does not currently seek a change in its political status.

Yet, that same success story could be exposed to undue and inappropriate political risk if 48 U.S.C. 1662a were to be applied and set a regrettable precedent in federal-territorial relations. That risk is not to be minimized, since 48 U.S.C. 1662a applies unequally and unfairly only to American Samoa, when it arguably better would serve U.S. interests nationally and locally if that 1983 provision applies to none of America's territories.

The consultative consensus reached by the American Samoa Government and the Office of the Secretary is a federal-territorial relations success that has included consultations with and oversight by Congress. It also has included creation of a record before Congress based on the public record on the 2022 referendum and amendments approved and transmitted to the Secretary. This has culminated in the hearing that HNRC's Subcommittee on Indian and Insular Affairs conducted on January 18, 2024.

2. Understanding the 2022-2024 amendment approval process: The current joint effort of the American Samoa Government and the Office of the Secretary of the Interior is to ensure all necessary and appropriate steps to implement in the most-timely way amendments approved by majority vote of our fellow Americans in the 2022 referendum. The import of the Governor's transmittal letter, dated December 14, 2022, was that the people of American Samoa had spoken, and accordingly the American Samoa Government supported timely action by the Secretary to approve all five amendments.

On February 9, 2023, the Governor testified before the Senate Committee on Energy and Natural Resources and reiterated on behalf of the American Samoa Government the request for the Secretary of the Interior to take all steps "necessary and appropriate" in order to "bring into effect" the amendments approved by majority vote of the people. Thus, the position of the Governor and the American Samoa Government has been clear, and it is that timely action to approve and implement the amendments was

intended and desired by the people of American Samoa and their leaders acting on behalf of the people.

Similarly, on behalf of the Secretary of the Interior, Assistant Secretary Carmen Cantor and her staff consulted with the Governor and his staff on the steps required for the Secretary to act on the amendments in a timely manner, as authorized by federal and local law and policy. In that context, the 2022 referendum results presented the first occasion since it was enacted in 1983 that both the American Samoa Government and Office of the Secretary were faced by the practical administrative tasking and legal dilemma posed by the requirement 48 U.S.C. 1662a that Congress act before any amendments approved by majority vote of the people and by the Secretary became effective and could be implemented.

Repeal of 48 U.S.C. 1662a had been proposed more than once by American Samoa's representatives in Congress during the intervening decades since it was adopted in 1983. But in 2023 it was recognized the efforts of American Samoa Government to carry out the will of the people could be delayed indefinitely -- and the vote in effect nullified, not by the affirmative exercise of Congressional authority but by inability or inopportunity for Congress to act. That outcome could be unrelated to any substantive issue, but understandably due to demands and priorities in our nation's critical and urgent affairs, leading to unwarranted delay or inaction on local territorial internal affairs with no defined federal equities or imperatives at play.

But the flawed predicates of 48 U.S.C. 1662a are not primarily procedural, parliamentary or political, but rather implicate constitutional powers, statutory law and allocation of democratic rights for Americans in the territory. Thus, while it is appropriate for Congress to exercise oversight to ensure local law in a territory applies only to extent not otherwise governed by federal law, the burden on the territory is to ensure compatibility of all local law with applicable federal law.

In contrast, the effect of 48 U.S.C. 1662a is to require that amendments to local law embodied in the local constitution must be enacted as federal statutory law. Yet, 48 U.S.C. 1662a is not the source of and does not increase Congressional constitutional authority to enact a federal law approving or disapproving amendments to the local constitution. When the Territorial Clause gives Congress plenary and supreme powers to which the federal courts have deferred for 125 years, Congress does not need a statute to permit itself to exercise that power.

Accordingly, repeal of 48 U.S.C. 1662a would not diminish that constitutionally conferred power of Congress, and would simply remove an impediment and possible barrier to local self-government on local matters. That hurdle to local democratic self-determination is posed by 48 U.S.C. 1662a as a condition subsequent imposed by federal law on the promulgation of local law, with no effect other than the presumably unintended disruption of local self-government on amendments to the local constitution, which are invalid to the extent of any inconsistency with federal law.

As noted in testimony offered as Lieutenant Governor in the role of a witness, requiring Congress to act on every change to local law is not fair to our fellow Americans in the territory and it is not fair to Congress, because both have better uses of their respective authorities, time and effort.

3. History of 48 U.S.C. 1661 (1929) and 48 U.S.C. 1662a (1983): We are grateful for the opportunity to explain the statement that 48 U.S.C. 1662a significantly complicates and makes it far more difficult to initiate, conduct and complete the local process for approving locally developed amendments to the local constitution. There are several ways to describe the problems that would arise from implementation of Sec. 48 U.S.C. 1662a:

- Congress authorized the President to organize local civilian government in American Samoa in 1929 under 48 U.S.C. 1661, on terms confirming a U.S. obligation to recognize local autonomy in local cultural and social affairs to preserve the Samoan way of life.
- The central aspect of the Samoan way of life implicated in the U.S. obligation to protect and preserve local cultural and social autonomy is perpetuation of the land ownership system that sustains social cohesion in Samoan society.
- As authorized by Congress in 48 U.S.C. 1661, in 1951 the President issued Executive Order 10264, delegating the authority to organize local civil government under 48 U.S.C. 1661 to the Secretary of the Interior.
- The Secretary of the Interior approved the local constitution of American Samoa in 1960, and also approved its amendment in the 1967 Revised Constitution of American Samoa.
- The exercise of the President's power under 48 U.S.C. 1661 and delegation of that authority to the Secretary in 1951, as well as all local actions and actions of the American Samoa Government under the local constitution, have been and remain fully subject to Congressional oversight and the Territorial Clause power to "otherwise provide" for government of American Samoa as stipulated in 48 U.S.C. 1661.
- It was under Congressional oversight that the American Samoa constitution was approved by the Secretary under Executive Order 10264 in 1960, and Congress also had oversight when the revised constitution was approved in 1967.
- The people of American Samoa and the American Samoan Government believe that the local constitution should be amended in the same way it was approved.
- That is due to desire in American Samoa to preserve continuity and stability in the unique historical structure of federal-territorial relations under the 1900/1904

Deeds of Cession, 48 U.S.C. 1661, Executive Order 10264 and the 1967 Revised Constitution of American Samoa.

- After 54 years of continuity and stability in federal territorial relations under 48 U.S.C. 1661, without effective consultation between Congress, President, Secretary or the American Samoa Government, in 1983 the Congress amended 48 U.S.C. 1661 by enacting 48 U.S.C. 1662a.
- 48 U.S.C. 1662a amended 48 U.S.C. 1661 by providing that amendments approved by the people and Secretary under 48 U.S.C. 1661 and Executive Order 10264 have no legal effect unless approved as a new federal statute by Congress.
- In 1984, a Deputy Assistant Attorney General of the United States testified in a hearing before the Senate Committee on Energy and Natural Resources on the Constitution of American Samoa, including the effect of 48 U.S.C. 1662a on federal-territorial relations.
- In written and oral testimony the Department of Justice witness advised Congress that the Office of Legal Counsel had questions and concerns about whether having Congress approve amendments to the American Samoa Constitution pursuant to 48 U.S.C. 1662a would in effect alter the one-of-a-kind system of local self-government and special autonomy established under the Deeds of Cession, 48 U.S.C. 1661 and Executive Order 10264.

The preceding litany of historical, legal and political considerations is the context in which the statement can be made that 48 U.S.C. 1662a makes the constitutional amendment process after 1983 more difficult than approval of the local constitution by the people and Secretary in 1960, or its amendment and revision in same manner in 1967.

When the U.S. Congress adopted 48 U.S.C. 1661 in 1929, it expressly “accepted,” “confirmed and “ratified” the 1900 and 1904 Deeds of Cession, which served as documents of mutual consent setting forth terms for local autonomy under U.S. sovereign rule over the islands.

While the 1929 ratification statute recognized the authority of the U.S. Congress to “otherwise provide” terms for conducting federal-territorial relations, Congress generally has recognized an obligation and commitment to local autonomy in local cultural and social affairs, as agreed and promised in the Deeds of Cession.

Accordingly, 48 U.S.C. 1661 mandates that “...all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct...”

48 U.S.C. 1661 also provided that, “The existing laws of the United States relative to public lands shall not apply to such lands in the said islands of Eastern Samoa; but the Congress of the United States shall enact special laws for their management and disposition.”

While the Department of the Interior has institutionalized the political status and federal-territorial relations under 48 U.S.C. 1661, neither the ASG nor DOI has institutionalized 48 U.S.C. 1662a. There is a high level of uncertainty about whether the 1984 DOJ testimony warning of possible unintended consequences following “federalization” of matters that have been managed as local and internal for 125 years.

Those DOJ concerns in 1984 could become self-fulfilling prophecy should Congress not now institutionalize in 2024 that 125-year legacy of special autonomy. The best way to do that is to repeal 48 U.S.C. 1662a.

Approval of local amendments by Congress will convert these local amendments to a local constitution established under authority of the Deeds of Cession, 48 U.S.C. 1661, Executive Order 10264 and the 1967 local constitution into a federal statute. DOJ expressed concern that Congressional approval of amendments could convert the entire local constitution into a federal statutory organic act and end the federal territorial relationship defined by the Deeds of Cession, 48 U.S.C. 1661, Executive Order 102764 and the 1967 Revised Constitution.

Please be assured, then, that no one representing the American Samoa Government would suggest that Congress, the Department of the Interior or ASG has been “holding up the amendments.” Rather, we appreciate the contributions that officials at DOI and both members and staff in Congress have made to seeking and finding an approach to action on and approval of the amendments approved by the voters that redeems the promise of the Deed of Cession without unintended consequences.

We hope the record created at the hearing on January 18 will clarify the questions and issues that have been raised so that we can work together find solutions that best serve Americans in the territory and across our nation.

4. Flawed statute does not define Congressional power or territorial policy

The limited formal record before Congress regarding the actual intent of Congress in allowing the 1983 amendment codified at 48 U.S.C. 1662a to be included in P.L. 98-213 makes it hard to confirm the motives and reasons for that provision. Indeed, without any record before Congress to confirm its purpose, 48 U.S.C. 1662a actually constitutes an amendment to the 1929 authorization by Congress codified at 48 U.S.C. 1661, under which local self-government measures for American Samoa have been established and progressively democratized.

In addition, the flawed 1983 statute lacks precision and utility. For example, it does not provide procedures for the Secretary to make transmittal of amendments approved under Executive Order 10264 to Congress, but rather mandates only that any such approved amendments have no effect unless again approved by Congress. Additionally, there are no limitations on the period within which ASG, DOI or Congress should act to implement the requirement of Congressional approval.

Those tertiary procedural omissions aside, more fundamental issues of considerable consequence arise from the anomalies in the 1983 amendment statute.

First, it is ironic that in the case of amendments approved by the people in an act of self-determination 48 U.S.C. 1662a does not protect the people of American Samoa from “unilateral” action by the Secretary. That is true of actions under Executive Order 10264 disapproving amendments approved by the voters, which might be deemed to be against the interests of the people in that territory.

Instead, all 48 U.S.C. 1662a does is require Congress to review amendments voted on favorably by a majority of the people that have been approved by the Secretary. 48 U.S.C. does not apply to “unilateral” actions of the Secretary disapproving amendments approved by a majority of the people in a referendum lawfully conducted under local law.

If Congress allows itself to be misled to believe its power to review actions of the Secretary on amendments derives from 48 U.S.C. 1662a, then that means Congress is precluded from reviewing unilateral actions of the Secretary when the people presumably need it most. That is, not when a democratically approved amendment is approved by the Secretary, but when the Secretary nullifies an amendment approved by a democratic majority.

Of course, this is a false narrative, because 48 U.S.C. 1662a is not the source of the power of Congress to “otherwise provide” for federal law and policy in American Samoa. Instead, the 48 U.S.C. 1661 framework as implemented under Executive Order 10264 motivates ASG and DOI to resolve differences and address issues the Samoan way, as much or more than the Washington way.

The pragmatic predicate of Secretarial Order 10264 is that dealing with the President’s surrogates in the Office of the Secretary and convincing one or two decision senior decision makers on an agreed action by consensus requires far less effort than convincing 535 members of Congress to act on matters of local self-government.

But it remains true that if the Secretary and American Samoa can’t resolve a problem, routine Congressional oversight has to be augmented and potentially legislation will be required to solve the problem.

That kind of special Congressional oversight is intended and expected under 48 U.S.C. 1661, and Executive Order 10264. Those instruments of delegated authority create no zone of executive power or privilege outside the reach of Congressional authority to “otherwise provide” for governance of the territory under 48 U.S.C. 1661 and, of course, the Territorial Clause.