

## Legal Memorandum

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This Memorandum is written in response to a request from Chief Legal Counsel Fainu`ulelei Ala`ilima-Utu to address three questions listed below.

**1. Even if the 1967 Constitution says the Governor shall appoint a Constitutional Committee "5 years after the effective date of the Constitution" which is technically 1972, can Governor still appoint a Constitutional Committee in 2010, since the Governors in 1984, 1986 and 1994 also appointed Constitutional Committees during the same years?**

Yes. The language in Article V, Section 4 instructs the Governor to appoint a Constitutional Committee five years after the effective date of the original Constitution, but it does not in any way restrict his ability to do so in subsequent years. Indeed, the purpose of Article V, Section 4 is clearly to encourage regular reexamination of the American Samoan Constitution, and Governor Tulafono acted consistently with that purpose in initiating the present constitutional review process.

**2. Will Congressional approval of the amendments removing the Secretary of the Interior from review of legislative and judicial decisions and other proposed amendments mean that American Samoa will be an organized territory and will our political status be like a commonwealth status or organic act status?**

Probably not. It is usually thought that a territorial community becomes an "organized" territory only after the U.S. Congress has passed an organic act establishing a civil government for that community. Guam, for instance, became an "organized" territory after Congress enacted the Guam Organic Act of 1950, 64 Stat. 384, codified at 48 U.S.C. §§ 1421-28e (1988). Most commentators would conclude, therefore, that American Samoa would become "organized" only after Congress had formally enacted an organic act detailing the governance of American Samoa.

Professor Stanley Laughlin, Jr. (of the Ohio State Law School) has, however, suggested that Congress's enactment of Section 12 of Public Law 98-213 in 1983, which requires any changes to the Constitution of American Samoa to be approved by an "Act of Congress," had the effect of converting the American Samoan Constitution (as it existed in 1983) into an "organic act," because Congress had given its approval to this Constitution as an appropriate document for the governance of American Samoa.

STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 87-88 (1995). This approach might appear to other commentators as a bit unusual, but there is no "one-size-fits-all" approach for dealing with territories, and Congress is free to address each territorial situation as it deems appropriate.

Once Congress approves the packet of amendments adopted by the delegates to the Fourth Constitutional Convention and approved by the voters of American Samoa through the Act of Congress required by Public Law 98-213, this statute will be yet another act of Congress approving the form of governance found in the revised Constitution of American Samoa. From Professor Laughlin's perspective, American Samoa will then have moved even more in the direction of being an "organized territory."

The answer to the question is not, therefore, entirely clear. Although most commentators would argue that a formal "organic act" must come from Congress before a territory becomes "organized," others might find incremental Congressional actions approving a territory's own constitution to be sufficient to create an "organized territory." Under this latter approach, a Congressional enactment approving further revisions to the Constitution of American Samoa might well be sufficient, particularly if those revisions include important changes that reduce the role of the Secretary of Interior.

The inquiry also asks whether American Samoa would thereby have a "commonwealth status." The term "commonwealth" is used in a variety of ways and has no fixed meaning. The "Commonwealth of Nations" refers to countries that used to be part of the British Commonwealth. The "Commonwealth of Independent States" refers to the countries that previously were part of the Union of Soviet Socialist Republics. Virginia, Kentucky, Pennsylvania and Massachusetts typically refer to themselves as "commonwealths: rather than as "states." Puerto Rico and the Northern Mariana Islands are called "commonwealths," apparently because they have a negotiated and codified contractual relationship with the United States, but their relationships with the United States differ in significant ways. The American Samoa Future Political Status Study Commission called for a process that would lead to a new act of Congress establishing "a permanent political status" for American Samoa" within "the American family of states and territories." *Final Report*, Jan. 2, 2007, at 42-43. An act of Congress approving the amendments emerging from the Fourth Constitutional Convention would be a step in that direction, but further changes will probably also be required before "a permanent political status" can be achieved.

### **3. Did Congress or people of territories initiate or formulate the Organic Acts of Guam and USVI?**

The Guam Organic Act of 1950, 64 Stat. 384, codified at 48 U.S.C. §1421-28e, was an act of Congress, passed pursuant to Congress's usual methods, but it did follow "a long determined campaign on the part of the Guam citizenry" (against opposition from the U.S. Defense Department) to change their status, and, in particular, to obtain U.S. citizenship. ARNOLD LEIBOWITZ, *DEFINING STATUS* 329 (1989). Professor Laughlin has

explained that "Guam's struggle for an organic act was not easy" and involved decades of hearings, study commissions, and efforts by Guamanians to get the attention of Washington. LAUGHLIN, *supra*, at 403.

An organic act was enacted by Congress for the U.S. Virgin Islands in 1936, 49 Stat. 1807, which was revised in 1954, 68 Stat. 497. Those living in the Virgin Islands participated in hearings and conventions that developed ideas for these statutes.

These acts were drafted in Washington, but certainly those living in Guam and the Virgin Islands had input into the provisions that were included in these statutes.