

*American Samoa or Eastern Samoa?
The Potential for American Samoa to
Become Freely Associated with the
United States*

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American Samoa, a group of Polynesian islands in the South Pacific, is virtually the only land south of the equator under the US flag.¹ Its 40,000 residents (Ritova 1991) include many citizens of the neighboring independent nation of Western Samoa. American Samoa retains two key cultural elements: the *matai* 'chief' political system, and collective family ownership of land. American Samoans show little disposition to dispense entirely with either, despite an increasingly rapid pace of modernization and encroaching US federal judicial decisions. They want to preserve their culture without giving up the benefits of a close relationship with the United States.

American Samoans have reassessed their status as an unincorporated and unorganized territory a number of times since the islands came under US control in 1900. They have considered becoming an organized territory; joining Hawai'i as one of its counties; and becoming a US commonwealth, as did Puerto Rico and, more recently, the Northern Mariana Islands. Two American Samoan commissions concluded in the 1970s, however, that the risks to Samoan cultural identity outweighed the benefits of becoming more closely integrated (American Samoa 1970, 14-28a; 1979, 29-39).

These commissions also considered three ways of loosening American Samoan ties with the United States: independence; returning to the ways of "ancient Samoa"; and rejoining Western Samoa. American Samoans have firmly rejected all three, mainly out of fear that US financial support

would diminish sharply. They are also reluctant to become the junior partners in a unified state,² an outcome they recognize as inevitable because they have fewer people and less land than the Western Samoans (American Samoa 1970, 6–14; 1979, 22–28, 40). The greater material wealth of American Samoa probably has excited envy among some Western Samoans, resulting in a degree of disdain for their American cousins' falling away from the *fa'a Samoa* 'Samoan way'. American Samoans are aware also that Western Samoans consider their chiefly titles inferior in status to those in Western Samoa—yet another reason to avoid joining together in one polity.

The high costs of either increased political integration with or dissociation from the United States have led American Samoans to accept the status quo—with increasing local self-government and responsibility—as the best possible arrangement. American Samoan leaders, however, are beginning to resent limits on local autonomy and have expressed concern that territorial status may not continue to permit restrictions on alienation of American Samoan land (Ritova 1991; Lutali 1987, 43). The veteran American Samoan Governor Peter Coleman already has urged the formation of what would be the third future political status commission in as many decades (Ritova 1991). This dissatisfaction probably is confined currently to the American Samoan elite, but it has the potential to spread if federal intrusion threatens local interests.

Grounds for American Samoan concern do exist. The secretary of Interior, acting on the basis of a congressional delegation of "all civil, judicial and military powers" to such person as the president may direct (8 USC §1661 [1988]), has taken a very broad view of his authority to intervene in American Samoan executive, legislative, and even judicial matters. This authority is limited only by Title 8, section 1662a (USC 1988a), which forbids the secretary to alter the territorial constitution except through act of Congress (see Leibowitz 1989, 418–423). The US courts have sustained a broad interpretation of secretarial authority. In *King vs Morton* (1975), the US District Court for the District of Columbia also found that American Samoan courts could be required to provide jury trials (Leibowitz 1989, 456–459). Leibowitz concludes "the Federal courts are likely to hold that the 'fundamental rights' required to be applied to Samoa are greater than before."

American Samoans are increasingly likely to focus upon the potential of a new political status—free association—to bring about American

Samoa's emergence as an international actor while protecting their relations with the United States. This option was not explored by either of the previous study commissions because it had not yet assumed concrete form. Two freely associated states emerged from the former US-administered Trust Territory of the Pacific Islands in late 1986: the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI). They have been recognized already as sovereign by most independent Pacific Island nations, as well as the People's Republic of China, Israel, Japan, Australia, New Zealand, the Philippines, and, of course, the United States. They also have joined a number of international institutions, such as the South Pacific Forum, the Asian Development Bank, and the International Civil Aviation Organization. The FSM and RMI negotiated a bilateral agreement with the United States—the Compact of Free Association—that guarantees substantial US economic assistance over a fifteen-year period as well as relatively free access for labor and residence.³

American Samoa's unique status, and the historical basis of US sovereignty in American Samoa, are the key elements determining whether free association is accepted by American Samoans and the US government as a legitimate political status option. US federal views that initially ignored or dismissed Samoan sovereignty are in a state of flux which promises greater receptivity to American Samoan initiatives regarding their political status. The following analysis first discusses the current American Samoan status and then traces the American Samoan, US executive, and US legislative branch interpretations of the origin of US sovereignty in American Samoa. It concludes that the foundation for a freely associated Eastern Samoa is already in place.

THE UNIQUE STATUS OF AMERICAN SAMOA

American Samoa is the only US territory that is both unincorporated and unorganized. It is unincorporated because the US Constitution applies only in part, that is, only insofar as determined by the US Congress and courts. Unincorporated territories are unlikely to achieve statehood without first becoming incorporated, as part of a progression toward greater integration into the American political system. The territories of Guam and the Virgin Islands also are unincorporated, but, in contrast to American Samoa, are considered "organized." Their organization was effected

through the passage of "Organic Acts" by the US Congress establishing local constitutions written into federal law (see Leibowitz 1989 and Van Dyke 1990 on these distinctions).

American Samoa does not lack a constitution, but the locally drafted one it has was given effect in 1967 by the US Department of the Interior, the Cabinet agency responsible for territorial affairs, rather than by Congress. American Samoa was the last of the three US territories to gain the right to elect its own governor, due in part to the electorate's desire to protect existing institutions.⁴ The latter, for example, led American Samoans to reject a proposed new territorial constitution in 1986.

One of the most important features of American Samoa is that persons born there become noncitizen US nationals, instead of US citizens (8 USC 1408), unless one or both parents are US citizens. The term "national of the United States" includes any person who owes allegiance to the United States, whether a citizen or not (8 USC §1101[a][22] [1988]). The American Samoans are the only remaining noncitizen US nationals, a category that at various times also has included Filipinos, Guamanians, Puerto Ricans, the native tribes of Alaska, Cubans, Virgin Islanders, and certain residents of Panama.⁵ Any person born in any other part of the United States becomes a US citizen at birth, with a few exceptions.⁶

This distinction is not minor. First of all, American Samoan noncitizen nationals cannot vote in US elections, except, of course, for elections held in American Samoa itself. The individual US states each establish voting qualifications, generally in their constitutions, among which is included a restriction of the franchise to US citizens. For example, in Hawai'i the restriction appears in Article II, section 1, of the state constitution ("Every citizen of the United States . . . shall be qualified to vote in any state or local election"). US law does provide, however, for American Samoans to become US citizens. They first must take up residence in a US state and then qualify for naturalization (8 USC §1436 [1988]). A second disadvantage is that noncitizen nationals can be denied employment or government security clearances merely because of their lack of citizenship. And finally, a noncitizen national American Samoan can never aspire to become president of the United States because the Constitution specifies only a "natural born citizen" is eligible for that office.⁷

American Samoans nonetheless do not appear unhappy with noncitizen national status. In contrast to Guam, their legislature has never petitioned Congress for citizenship,⁸ or supported any organic act that would confer

citizenship. American Samoans have yet to be persuaded that accepting an organic act and US citizenship would be to their benefit. For example, the congressional Bingham Study Mission held hearings in Honolulu and American Samoa in 1930 and first proposed an organic act and citizenship for American Samoans (Gray 1960, 230). However, "a number of proposed Organic Acts introduced between 1930 and 1936 for Samoa died in the Congress" (Leibowitz 1989, 426).

Leibowitz notes also that in February 1948 about ninety chiefs asked that all bills before Congress dealing with American Samoa, including an Organic Act and citizenship legislation, be tabled for ten years. The American Samoan legislature took additional steps to ward off an organic act in 1950 and 1951 (Gray 1960, 260). Both the 1970 and 1979 future political status commission reports opposed passage of an organic act. The American Samoa Constitutional Convention requested the US Congress in 1984 not "to pursue or consider an organic act or an organized status for American Samoa without the express consent and approval of the people of American Samoa." (US Senate 1984, 28–29).

American Samoans who feel strongly about becoming US citizens can move to other parts of the United States and become naturalized without much difficulty while retaining their ties to American Samoa. Noncitizen US nationals have the same right to live and work anywhere in the rest of the United States as do citizens. This right, however, is not reciprocal.

American Samoan control over immigration into the territory further distinguishes it from its sister territories of Guam and the Virgin Islands (although not from the US Commonwealth of the Northern Mariana Islands, which also handles its own immigration affairs). American Samoa is not included in the definition of the United States for US immigration law purposes (8 USC §1101[a][38][1988]). The US Immigration and Naturalization Service, an agency of the Department of Justice, therefore does not control immigration into American Samoa. Under American Samoan law, persons of non-Samoan descent, including US citizens, can be restricted from entering, residing in, or working in the territory (Leibowitz 1989, 447–451).

American Samoa is also the only part of the United States that is not formally integrated into the US federal court system (US Senate 1978, 2). Dissatisfied litigants have appealed local judicial decisions successfully, however, by filing suit against the secretary of Interior in the US District Court for the District of Columbia (US Senate 1978, 4–5). The secretary

himself has asserted his right to perform judicial functions, in accordance with the authority invested in him by Congress (Leibowitz 1989, 418–423).

American Samoan restrictions on the sale or alienation of land also set off the jurisdiction from virtually all other parts of the United States, again with the exception of the Northern Marianas and, perhaps, certain Native American lands. At least 92 percent of American Samoan land is owned collectively by families, rather than individually (Leibowitz 1989, 430), although this figure may be declining due to alienation to individual American Samoans. The proscription against selling land to non-American Samoans (Leibowitz 1989, 431), originally introduced by the American naval administration soon after its establishment,⁹ prevents the loss of land to outsiders. It has played a major role in preserving American Samoan identity.

Finally, American Samoa is the only place in the United States where legislators can serve without having been popularly elected, aside from interim appointments to fill vacancies. Family leaders (*matai*) are decided upon by consensus and then selected by county councils “according to Samoan custom” to represent their counties in the upper house of the legislature (*Fono*) (Leibowitz 1989, 451–454).

THE BASIS OF US SOVEREIGNTY ACCORDING TO AMERICAN SAMOANS

American Samoans trace the origin of US federal authority over their homeland to two acts of cession.¹⁰ These were executed by the chiefs of the islands of Tutuila and Aunu'u in 1900, and by the chiefs of the Manu'a island group to the east in 1904. Nineteen chiefs from Tutuila and one from Aunu'u signed the 17 April 1900 act. Immediately afterward Commander Benjamin F. Tilley of the USS *Abarenda* raised the US flag over the United States Naval Station, Tutuila (Gray 1960, 105–117, 125–149). This date, 17 April, is now celebrated as Flag Day in American Samoa, and 17 April 1900 appears on the territorial government seal (Sunia 1983, 118). American Samoan law defines a person of American Samoan ancestry as a lineal descendant of the inhabitants of the islands on 17 April 1900 (Leibowitz 1989, 451).

American Samoa's Delegate to the US Congress Eni (Hunkin) Faleoma-vaega spoke for many American Samoans in propounding this view of relations with the United States:

Unlike other insular territories, American Samoa was never annexed by the United States as a result of war or conquest. In the years 1900 and 1904 the traditional chiefs of the islands of Tutuila, Aunu'u, and Manu'a, by means of executing two separate treaties of cession, freely ceded their islands to the U.S. with the understanding that native lands and Samoan customs and traditions be honored and protected. . . .

In my judgement, the two treaties of cession still stand as the foundation or basis upon which American Samoa can claim a political relationship with the United States. (Faleomavaega 1990, 121).¹¹

Another American Samoan leader, High Chief Salanoa S. P. Aumoeualogo, testified before a US Senate subcommittee in May 1984:

As your household in the South Pacific, the Territory of American Samoa enjoys a unique and meaningful partnership with the United States. We began this beautiful relationship when our forefathers ceded Tutuila and Manu'a to this great country in 1900 and 1904 as reflected in the Treaties of Cession implementing the agreements and desires of our people with the United States to become members of this great Family. (US Senate 1984, 15)

Faleomavaega and Aumoeualogo called the acts of cession "treaties." However, E. W. Gurr, the official translator and witness, referred to each act instead as an "Instrument of Cession" in his certificates of interpretation (US House 1978, 46, 48, 52, 57). Nowhere in the English version of either document does the word "treaty" appear. There is evidence, nonetheless, supporting the American Samoan view.

In the Samoan version of the Manu'an act of cession the word *feagaiga* appears three times. A contemporaneous English-Samoan dictionary translates *feagaiga* as either "an established relationship between different parties," or "an agreement, a covenant" (Pratt 1893, 153). In the English version, *feagaiga* appears as "presents" in such phrases as "TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:—"; ". . . by THESE PRESENTS DO CEDE, . . ."; and "It is intended and claimed by THESE PRESENTS . . ." Webster's dictionary defines *presents* as "the present words or statements: the present legal instrument . . . or other writing" (Gove 1976, 1793). The American drafters of the Manu'an act of cession may have found it difficult to express "legal instrument" in Samoan and therefore fell back upon "*feagaiga*," designating an agreement or covenant. Read expansively, this supports American Samoan contentions that the

acts should be construed as obligations; read narrowly, it does so only for Manu'a.¹²

There are additional discrepancies. Commander Tilley presided over the Tutuila cession, and E. W. Gurr represented the naval commandant at the Manu'a cession. Neither man, however, signed the acts. The US Congress "accepted, ratified and confirmed" the acts of cession in a joint resolution adopted 20 February 1929 (US Statutes at Large 45, 1253). The resolution, however, contrasts markedly with the way international treaties were ratified at the turn of the century. And finally, the US Department of State omits the acts of cession from its comprehensive annual listing of *Treaties in Force* (USDS 1990). These discrepancies signal major differences between American Samoan and US federal interpretations of the acts.

US SOVEREIGNTY ACCORDING TO THE US EXECUTIVE BRANCH

The US executive branch has maintained a relatively consistent position, only recently modified, since the acquisition of American Samoa: US sovereignty stems from the Washington Convention of 1899 signed by the United Kingdom, Germany, and the United States, effective 16 February 1900, rather than from the Samoan acts of cession. All three powers had been deeply involved in Samoan disputes prior to the convention (see Ryden 1928). The US Navy was already using Pago Pago, Tutuila Island, one of the finest anchorages in the South Pacific, as a coaling station, and had commenced constructing a base.

Germany was willing to acquiesce in US control of both Tutuila and the Manu'a group, 60 miles to the east, if the United States and United Kingdom allowed it to acquire the Samoan islands, most notably Upolu and Savai'i, to the west of the 171st meridian west of Greenwich. The three powers agreed to partition Samoa between the United States and Germany on that basis in the Washington Convention, signed 2 December 1899. By separate agreement the United Kingdom received simultaneous German concessions in Africa and the Pacific (Ryden 1928, 571-572). The Washington Convention repealed the 1889 Treaty of Berlin, signed by the same powers, that institutionalized their earlier intervention in Samoa. The Berlin treaty had failed to bring about internal stability or prevent conflict among American, British, and German citizens in Samoa.

The United States acted quickly to ensure that the Washington Conven-

tion would be implemented. Four days after its signature, Commander Tilley informed High Chief Mauga of Tutuila of the partition, although Tilley probably was acting on dispatches advising him of the imminent ceremony rather than an actual report of the convention's signature. Tilley reportedly also assured Mauga that the United States would punish all disorder and uphold the authority of the chiefs (USDN 1927, 45).

On 19 February 1900, three days after the Washington Convention entered into effect, President McKinley issued an executive order delegating control over the islands to the US Navy for the purpose of establishing a naval station. McKinley specifically charged the secretary of the Navy to take "such steps as are necessary to establish the authority of the United States and to give to the islands the necessary protection."¹³ The secretary, in turn, issued a general order the same day establishing a naval station under the direction of a commandant. Tilley was assigned as the first commandant of the "United States Naval Station, Tutuila," as the Navy collectively termed the US-acquired islands (Gray 1960, 107-108).

Tilley and the *Abarenda* returned to Samoa on 12 February 1900 from a trip to New Zealand to obtain building materials for the naval station. Almost immediately he had to steam around the island to deal with two defiant chiefs (Gray 1960, 107). The incident illustrated the potential difficulty of establishing US military and political authority in a notoriously unstable area. Tilley advised the secretary of the navy on 23 February 1900 that "If the United States intends to take control of the islands east of the one hundred and seventy-first meridian, it is desirable that this should be done at once. The present uncertain and unsettled condition is dangerous and invites disorder" (USDN 1927, 45-46). Tilley probably concluded that obtaining the formal concurrence of the Samoan chiefs to US rule before asserting sovereignty was imperative.

Tilley quickly won over the chiefs of Tutuila and Aunu'u, an islet associated with Tutuila, but the *Tui* 'paramount chief' of the Manu'a group proved less tractable. Tilley steamed to Ta'u island in Manu'a and on 11 March 1900 sent ashore a letter informing the Tui Manu'a of the treaty and inviting him to sign a joint cession. Tilley and US Consul General L. W. Osborn of Apia, accompanied by a number of chiefs brought from Tutuila, met with the Tui Manu'a twice the following day. At the conclusion of their second meeting, the Tui Manu'a handed Tilley a letter accepting the sovereignty and protection of the United States of America. The Tui Manu'a also agreed to send observers to the ceremony but

refused to participate himself. This prompted Tilley to remark "whether you come or not, the authority of the United States is already proclaimed over this island" (USDN 1927, 46-47; Gray 1960, 108-110).

Tilley's lack of diplomacy in making such a claim laid bare the US assumption that it already possessed all the authority required to assert its sovereignty over the eastern Samoan islands. This attitude could not be expressed openly or acted upon in Tutuila, however, because of the overriding strategic US interest in establishing the naval station without stirring up Samoan opposition. Tilley therefore waited until the 17 April act of cession before hoisting the US flag there. He also delayed until 24 April, a week later, issuing the first naval regulation, entitled "Regulation for the Promulgation of Laws for Tutuila and Manu'a" (American Samoa 1900a).

Regulation no. 1 was followed on 1 May by Regulation no. 5, "A Declaration concerning the Form of Government for the United States Naval Station, Tutuila" (American Samoa 1900b). It declared "The laws of the United States of America shall be considered to be in force in the Islands of Tutuila and Manu'a." The inclusion of Manu'a in both regulations, despite the refusal of the Tui Manu'a to cede his islands, evinced US determination to assert sovereignty over all the islands assigned to the United States by the convention.

The Tutuilan act of cession itself confirms this interpretation. Its preamble notes it was undertaken in part "to ratify and confirm the grant of the rule of said Islands heretofore granted on the 2nd day of April 1900" (US House 1978, 50). This refers to an earlier "Letter of Address from the Chiefs of Tutuila to Commander B. F. Tilley, U.S.N.," that seemed to provide the formal concurrence Tilley needed. The letter of 2 April culminated in the declaration "We now, rightly appointed according to the customs of Samoa to be the representatives of all the different districts in Tutuila we do confirm all the things done by the Great Powers for Tutuila, we do also cede and transfer to the Government of the United States of America the Island of Tutuila and all things there to rule and to protect it" (US House 1978, 44). A chief from Aunu'u also signed the letter, so its omission was not important.

The failure to mention Manu'a in this key segment, however, despite preambulatory language acknowledging that the United States claimed both Tutuila and Manu'a, evidently rendered the letter unacceptable to Tilley. He therefore persuaded the same twenty chiefs on 17 April to cede:

ALL THOSE the ISLANDS of TUTUILA AND AUNUU and all other Islands, rocks, reefs, foreshores, and waters lying between the thirteenth degree and the fifteenth degree of south latitude and between the one hundred and seventy first degree and the one hundred sixty seventh degree of west longitude from the Meridian of Greenwich together with all sovereign rights thereunto belonging and possessed by us TO HOLD the said ceded territory unto the Government of the United States of America TO ERECT the same into a separate District to be annexed to the said Government to be known and designated as the District of "Tutuila." (US House 1978, 50)

Not coincidentally, the area thereby ceded is significantly larger than that conveyed by the Letter of Address. The cession of 17 April included not only Tutuila, Aunu'u, and the Manu'a group, but also uninhabited Rose Atoll, at 168° 8' west longitude the most easterly of the Samoan Islands (New Zealand 1978, pl 15). The chiefs of Tutuila and Aunu'u, of course, had no authority over Manu'a or Rose (USDN 1927, 48), but they probably calculated that the Tui Manu'a would be too busy dealing with the Americans to take them to task.

Tilley must have considered the act of cession a crucial element in his efforts to ensure the security of the new naval station. He nonetheless realized that the document forwarded to his superiors would have to convey title to all the islands assigned to the United States by the Washington Convention. Tilley may have gone out on a limb in negotiating the Tutuila act of cession in the first place. There is no evidence that the US government considered such an act necessary to establish its sovereignty over eastern Samoa. Tilley ensured that he could not be accused of failing to fulfill President McKinley's order to establish US authority by convincing the chiefs of Tutuila and Aunu'u to cede the whole of eastern Samoa—not just their respective islands—in the act of 17 April.

The 17 April cession and flag raising took place at Pago Pago, Tutuila. Tilley returned the observers of Tui Manu'a to Manu'a on 25 April. He probably also had another go at persuading the Tui Manu'a to cede his lands, perhaps in a separate document. Although unsuccessful, he did manage to arrange a 5 June flag-raising ceremony for Manu'a. Tilley later also raised the flag at Leone, on the western end of Tutuila, on 21 June; and on Rose Atoll on 10 July. Tilley brought the Tui Manu'a and other leading chiefs of Manu'a with him to Rose Atoll and "declared the island to be a part of the territory of the United States, in accordance with the

three-power treaty and the proclamation of the President of the United States" (USDN 1927, 48).

Tilley soon found more concrete means of impressing the Samoans. One of his first acts after the Tutuila cession was to ask the Navy to authorize raising a force of fifty men to serve as an organized guard "fit for use in the bush." Even before he received approval, Tilley "gathered together on Tutuila and Manu'a a force of 36 Samoans to form a guard" (Darden 1952, 1). Insofar as it operated in Manu'a, the Tui Manu'a probably viewed the guard, known as the Fita Fita, as his own instrument. Tilley's initiative in organizing it nonetheless signaled the US intention to become involved in areas previously reserved to the chiefs.

The naval administration struck a much more important blow at the authority of the Tui Manu'a, again prior to his act of cession. A dispute erupted in mid-1901 over the use of the High Chief's 'ava title, *le ipu o le Tui Manu'a* 'the cup of the Tui Manu'a'. By then American Samoa had been divided into three districts, with one high chief from each appointed as governor. One of the two Tutuilan governors arrived unexpectedly in Ofu, part of the Manu'a district, and demanded that the 'ava title of the Tui Manu'a be used during the welcoming ceremony, thus equating him in rank to the Tui Manu'a. In the absence of the island's high chief, the confused Ofuans sought to avoid offending their high-ranking visitor by calling the vessel in which the 'ava drink was served to him *ipu o le Kovana* 'Governor's cup'.

The Tui Manu'a took umbrage at his subjects' diplomacy. He considered *ipu* should refer solely to his personal cup. He had the three offenders arrested, ordered their property destroyed, their families evicted, and themselves set afloat in canoes on the ocean. Only the fortuitous arrival of E. W. Gurr, who had come to hold court in Ta'u—in itself an encroachment on the authority of the Tui Manu'a prior to cession—kept the Tui Manu'a from carrying out his sentence.

Gurr ordered the Tui Manu'a to desist and informed him he would have to pursue his grievance by bringing the offenders to trial. The Tui Manu'a complied and a tribunal headed by Gurr took up the case in Ta'u on 20 September 1901. Gurr and one of the other two judges found the defendants not guilty. The remaining Samoan judge found one defendant guilty. The Tui Manu'a appealed Gurr's decision. Captain U. Sebree, Commander Tilley's successor, upheld Gurr's ruling against the Tui Manu'a in 1902.

Tulifua, the dissenting judge, tried to present a protest petition to a US Naval official, but the latter refused to accept it. When Captain Sebree obtained a copy of the document by other means, he had the signers arrested and brought to Pago Pago to stand trial for contempt of court. Four defendants were found guilty, including Tulifua, who was fined and effectively confined to Tutuila. The *ipu* affair demonstrated that the US administration had no qualms about subjecting the Manu'ans to its rule in Manu'a, despite the lack of cession (Gray 1960, 140–149).

The 1904 cession of the Tui Manu'a was an anticlimax. The Tui Manu'a desired a school for his community. This gave Commander E. B. Underwood, the fourth commandant or acting commandant, an opening to obtain the cession, handed down as unfinished business. During an October 1903 visit to Manu'a, Underwood promised to endorse the request for a school and to provide an annual subvention if Manu'a were ceded to the United States. Underwood also pledged that the signers of the cession would receive the same recognition provided by President Theodore Roosevelt to the signers of the 17 April cession. Underwood further advised he would return the chastened Tulifua to Manu'a. The Tui Manu'a yielded. Secretary for Native Affairs E. W. Gurr witnessed the 14 July 1904 cession (Gray 1960, 156–157). True to his word Underwood gained an acknowledgment of the Manu'a cession by President Roosevelt, who sent a silver watch and chain, a silver medal, and a proclamation diploma to each signer (USDN 1927, 49).

Notwithstanding the submission implicit in the cession, the Manu'ans demonstrated a last-minute stubbornness that Gurr ultimately accommodated. The cession, prepared in typescript by the naval administration, concluded “the provisions contained in the Act of Cession by the chiefs and rulers of Tutuila for the respect and protection of the rights of all people, and for their government, shall be extended toward the people dwelling in the Islands of Manua.” The Manu'ans prevailed upon Gurr to line out those words and write in “the rights of the chiefs in each village and of all people concerning their property according to their custom shall be recognized” (US House 1978, 60). This change not only dissociated Manu'a from Tutuila, but, more importantly, introduced the concept that the people of Manu'a were entitled to the protection of their property according to Samoan custom.

The dramas played out in Tutuila and Manu'a in the first few years of the 1900s soon subsided. The executive branch claim to have acquired

American Samoa through the Washington Convention, however, still prevails in its regulations concerning acquisition of noncitizen US national status. Claims to US citizenship and noncitizen nationality are handled within the United States by the Immigration and Naturalization Service (INS) of the Department of Justice. The Department of State handles them on foreign soil. Both agencies consider 16 February 1900—the effective date of the convention—to be the date American Samoans acquired noncitizen US nationality.

The State Department reached its first known decision on the effective date of nationality for American Samoans in 1927, when it concluded “The indigenous inhabitants of the territory described in the treaty above referred to who were residing in that territory on February 16, 1900, and their children or other descendants . . . who were residing in such territory on that date and their children are nationals of the United States” (USDJ 1952, 594).

The INS cited the State Department decision in a 1949 ruling declaring “inhabitants of Samoa . . . are United States nationals if they fall within the following classifications: . . . (b) Those who were native inhabitants of American Samoa on February 16, 1900, or Swain’s Island on March 4, 1925 (the time of annexation from Germany and Great Britain), became American nationals.” The INS ruling, and a companion one on American Samoan nationality, ignore the acts of cessions (USDJ 1952, 589, 729).

The State Department issued instructions to its Passport Office in 1955 reaffirming 16 February 1900 as the date of acquisition of US nationality by American Samoans (USPO 1956, 1–3). The Foreign Affairs Manual (FAM), the State Department’s manual for diplomatic and consular functions, referred to the same date in succeeding nationality regulations on American Samoa (USDS 1967; USDS 1984).¹⁴ In none of its regulations has the State Department acknowledged the acts of cession.

Other executive branch agencies have occasionally acknowledged the acts of cession and even accorded them recognition as the source of US sovereignty. For example, a Justice Department official testified before Congress in 1984 that the United States acquired the western part of American Samoa through the “Treaty of 1900”—referring to the 17 April cession—and the eastern part through the “treaty with the King and chiefs of Manu’a of 1904” (US Senate 1984, 53–54). Interior Secretary Hodel is reported to have written on 7 June 1985, just before he visited American Samoa, that “When it accepted the . . . Cession and gained sovereignty

over the islands of American Samoa, the United States agreed . . . to preserve the rights and property of the people" (US House 1986, 32). The executive branch now appears willing to accord the acts of cession greater importance in relations between the United States and American Samoa than it has in the past.

~~US SOVEREIGNTY ACCORDING TO THE US LEGISLATIVE BRANCH~~

Had the history of the Samoan acts of cession ended with Roosevelt's watches, medals, and diplomas American Samoans today might find difficulty reconciling their view of the cessions with that of the US government. The US Congress, however, joined the executive branch in recognizing the acts of cession in 1929 by passing a joint resolution declaring

The cessions by certain chiefs of the islands of Tutuila and Manua and certain other islands of the Samoan group lying between the thirteenth and fifteenth degrees of latitude south of the Equator and between the one hundred and sixty-seventh and one hundred and seventy-first degrees of longitude west of Greenwich, herein referred to as the islands of eastern Samoa, are accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904, respectively.¹⁵

Congress may have recognized the cessions to undercut support for an indigenous political group known as the Mau. In joint hearings before US House of Representatives and Senate committees in January 1928, one naval officer testified that there was a dissatisfied group, encouraged by part-Samoans and non-Samoans who hoped to gain enhanced access to land and political office through changes to the status quo. Another officer read into the record a November 1927 report from the governor of American Samoa admitting that "a comparatively small organization known as the Mau" had been active since 1921. The governor reported a month later that twenty *matai* claiming to represent the Mau stated they would not pay taxes until a decision was reached regarding the Mau's demand for a civil government (US Congress 1928, 55, 61, 82). New Zealand's contemporaneous problems with the much stronger Mau movement in neighboring Western Samoa would have been well known to the lawmakers.

In the same resolution Congress tried to facilitate American Samoa's integration into the United States by authorizing a commission to recommend legislation concerning American Samoa's status. Senator Bingham

led the American Samoan Commission to Honolulu and American Samoa in 1930 for hearings, but its recommendations for an organic act and US citizenship were opposed by the potential beneficiaries. Numerous proposals for an organic act, citizenship, or both died in Congress during the 1930s, 1940s, and 1950s in the face of continued opposition. Congress's reluctance to impose either upon American Samoa is a strong indication that it respects the principles embodied in the acts of cession, whether or not it considers itself bound by them.

Numerous parties have viewed the congressional resolution as ending uncertainty over the legal basis of US sovereignty in American Samoa. For example, Leibowitz claims that President McKinley used his constitutional authority as commander-in-chief to issue the 19 February 1900 Executive Order establishing the naval station (Leibowitz 1989, 414). Leibowitz further asserts "Prior to cession, the war powers seemed to be the authority for the Executive Branch action although after the ratification of the Instruments of Cession probably the foreign affairs power was the source of governmental authority" (Leibowitz 1989, 438). He thereby implies that Congress conferred the status of treaties upon the acts of cession.

Neither the administration nor the Congress, however, intended to handle the cessions as treaties. Contrast, for example, the steps taken to implement the Washington Convention (which, unlike the acts of cession, is listed in *Treaties in Force*, USDS 1990, 332): signature; ratification advised by the US Senate; ratification by the president; ratifications exchanged; and proclamation by the president. The acts of cession were merely filed. Leibowitz's theory that the president issued the executive order establishing the naval station by virtue of his war powers elides President McKinley's obvious intent to implement the Washington Convention—an example par excellence of his foreign affairs power, but not a very helpful one to those who would term the cessions treaties. The congressional resolution did not turn the cessions into treaties, but it did bring the cessions, and the interpretation of their significance, for the first time within the legislative, in addition to the executive, ambit.

Since the 1929 resolution Congress has refrained from endorsing the executive branch position on the effective date of sovereignty in American Samoa. For example, the Nationality Act of 1940—the first major codification of US nationality law after the acquisition of American Samoa—states with regard to noncitizen nationals, comprising the inhabitants of

the Philippines, Guam, and American Samoa at that time, only that “the following shall be nationals, but not citizens, of the United States at birth: (a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States” (US Statutes at Large 54, 1139, §204). This section did not designate individual effective dates for acquisition of nationality in the “outlying possessions.” The provisions governing the acquisition of US citizenship by persons born in Puerto Rico, the Canal Zone, and Panama, in contrast, specified such dates.

The Immigration and Nationality Act of 1952 decreed “Unless otherwise provided . . . the following shall be nationals, but not citizens of the United States at birth: (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession” (US Statutes at Large 66, 238, §308[1]). By then, the only American soil defined as an outlying possession was American Samoa. Congress did not designate a date of acquisition for American Samoa, or a date of nationality acquisition for American Samoans, despite sections specifying citizenship acquisition dates for residents of Puerto Rico, the Canal Zone, Panama, Alaska, Hawai‘i, the Virgin Islands, and Guam. Congress still has not designated any such date regarding American Samoa despite nearly forty years of continuous amendments to the act.

Congress did legislate the definition of an American Samoan in 1988, in the course of establishing a national park in American Samoa. It openly diverged from the executive branch position for the first time by linking the definition to the Tutuila act of cession: “the term ‘native American Samoan’ means a person who is a citizen or national of the United States and who is a lineal descendant of an inhabitant of the Samoan Islands on April 18, 1900” (the day after the Tutuila Cession) (16 USC §410qq-3 [1988]).

CONCLUSIONS

The US government does not consider the acts of cession to be treaties, but their recognition by both the executive and legislative branches, and the latter’s “acceptance,” impose an implicit obligation upon it to demonstrate the maximum possible respect for the cessions. The acts guaranteed the United States the “peaceful enjoyment” of its new acquisition at a time of widespread civil conflict. American Samoan assumptions that the

United States in turn would respect the intent of the cessions appear reasonable.

Van Dyke declares "The Deed of Cession establishes a trust responsibility on the part of the United States." He argues that it (them?) should be viewed in the same way the Treaty of Waitangi is now coming to be viewed in New Zealand, that is, as constitutional documents protecting the rights of the indigenous people (Van Dyke 1990, 85). The US government is unlikely to turn American Samoa into a UN trusteeship or to accord the acts of cession the primacy in its relationship with American Samoa that the Treaty of Waitangi occupies in contemporary New Zealand. Both Congress and the executive branch, however, have left the door open for increased recognition of the importance of the acts in defining that relationship. It is up to American Samoans to decide how much importance they wish to assign to the acts of cession.

The American Samoan hunger for increased political autonomy is part of the broader process of decolonization that continues to operate within the Pacific nearly three decades after Western Samoa became the first independent state. The acts of cession empower American Samoans to assert their right to explore alternative political statuses—even those, such as free association, that might restore Samoan sovereignty. Will American Samoa remain American, or will it become Eastern Samoa? Bound together as we are, it will be difficult for either the federal government or American Samoans to contemplate substantial change in the underlying political relationship.

Many of the elements of the sovereignty exercised by the two existing freely associated states already exist in American Samoa. The rights to control immigration, to limit the sale of land, and to retain the *matai* role in the legislature have been authorized, implicitly or explicitly, by all three branches of the US government. American Samoa's indeterminate status, epitomized by noncitizen nationality, would facilitate yielding US sovereignty if that were desired by the American Samoans. The United States has allowed noncitizen nationals to go their own way before, notably in the Philippines, Cuba, and the Canal Zone. Perhaps less change would be required than expected. Whether free association is the answer to American Samoan aspirations nonetheless could take many years to determine.

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Notes

1 Excluding US embassies located in the Southern Hemisphere; uninhabited Jarvis island in the South Pacific; and US bases located in Antarctica (over no portion of which, however, has the United States yet asserted a claim). The United States gave up its claims to thirteen Pacific islands south of the equator (and one north of the equator) in favor of the nation of Kiribati (USDS 1979a); to four such islands in favor of the nation of Tuvalu (USDS 1979b); to four islands in favor of the Cook Islands, a self-governing state in free association with New Zealand (USDS 1980a); and to three islands constituting the New Zealand territory of Tokelau, in a convention with New Zealand (USDS 1980b). All four treaties entered into effect in September 1983.

2 American Samoans have never formally considered the option of inviting Western Samoa to renounce its sovereignty and join them under the US flag. It is doubtful the Western Samoans would take them up on it.

3 The compact appears in US Statutes at Large 99, 1770, but United States 1987 includes the numerous subsidiary agreements also reached with the Federated States of Micronesia. There is a separate compilation for the Marshall Islands.

4 Beginning in 1972, American Samoan voters voted down proposals for the election of a governor and lieutenant governor three times before finally approving the concept in a 31 August 1976 plebiscite conducted by the Interior Department (US House 1978, 94–96). The voters may have been concerned that an elected governor would undermine the *matai* system (Leibowitz 1989, 455).

5 USDJ 1952, 593–594 with regard to noncitizen nationals in Cuba, the Canal Zone, and the Philippines; and p 735 with respect to native Alaskan tribes.

6 For example, children born in the United States to foreign diplomats do not gain US citizenship at birth because their parents are not subject to the jurisdiction of the US government.

7 US Constitution, art II, sec I, para 5.

8 The Guam legislature unanimously petitioned the US Congress for citizenship in 1936 (Van Cleve 1974, 84). The Organic Act of 1 August 1950 made Guamanians US citizens. A General Assembly of traditional leaders of Tutuila and Manu'a did petition Congress for US citizenship for American Samoans in 1960, but this exception apparently occurred due to unfounded anxiety that American Samoa might be united against its will with Western Samoa, subsequently granted independence by New Zealand in 1962 (Leibowitz 1989, 460–461).

9 See Reg 4, 30 April 1900. Regulation to prohibit the alienation of native land in Tutuila and Manu'a. Dept of the Navy (Leibowitz 1989, 425).

10 For the texts of the Tutuila and Manu'a acts of cession in English and Samoan, see US House 1978, 46–56 and 57–63, respectively.

11 Delegate Faleomavaega made this point publicly more than fifteen years ago in congressional hearings dealing with American Samoa (US House 1976, 18–19). He claims today that the two separate acts of cession did not unite Tutuila and Manu'a (Faleomavaega 1990, 121). Faleomavaega advocates that the two entities call a convention to discuss the acts of cession; officially declare a political union; determine whether and how to amend the acts of cession or seek a new treaty with the United States; and call a constitutional convention and organize a government based on the treaty (Faleomavaega 1990, 122). He is actively campaigning, when in American Samoa, for this strategy, although Tutuilans are unlikely to be enthusiastic about a policy enabling the Manu'ans to exact a price for acceding to formal political union. Faleomavaega's argument that internal political relations would have to be settled prior to any move by American Samoa to reclaim its sovereignty from the United States nonetheless is convincing.

12 I am indebted to Robert Kiste, director, Center for Pacific Islands Studies, University of Hawaii, for suggesting a comparison of the Samoan and English versions of the Letter of Address and the acts of cessions, and to Aso Maga, graduate student, University of Hawaii, for pointing out the differences discussed. It is worth noting parenthetically that the American-drafted Manu'an act of cession initially also referred to the 1900 Tutuila act of cession as a *feagaiga*, in the Samoan-language version, but the Manu'ans requested that the phrase in which it appears be deleted (see text below) and the Americans agreed (US House 1978, 62).

13 President McKinley's executive order appears in "Navy Department, February 19, 1900, Serial Order No. 540. General Records of the Department of the Navy, General Correspondence, 1897–1915, file no. 3931. National Archives, Record Group No. 80" (Tansill 1974, 67).

14 The Foreign Affairs Manual is not available at most libraries, but can be

found at the US Department of State, US Passport Agencies (ie, an office of the State Department) and US diplomatic and consular posts.

15 US Statutes at Large 45, 1253 (48 USC §1661 [formerly 1431] [1988]), enacted 20 February 1929. Congress erred by one week in making its acceptance of the Tutuila act of cession effective as of 10 April 1900.

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