

Analysis of Proposed Amendments to the American Samoa Constitution

By Jon M. Van Dyke
jonmvandyke@gmail.com

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This memorandum responds to the request made by Dan Aga on Wednesday, June 16, requesting a review of “the proposed Constitutional amendments, and the Constitution as a whole, for issues of: (a) good governance; (b) consistency with U.S. state and territorial practice; and (c) consistency with the U.S. Constitution.” Special attention is given in this memorandum to the amendments that relate to the relationship between American Samoa and the United States and to the role of the U.S. Secretary of Interior.

Introduction

American Samoa adopted its first Constitution in 1960, which was revised in 1966 and approved by the voters of American Samoa in 1966 and by the Secretary of Interior in 1967. A second Constitutional Convention was held in 1973, and in 1976, Congress and the Department of Interior authorized the people of American Samoa to elect their Governor and Lieutenant Governor directly, and the first elected Governor and Lieutenant Governor were inaugurated in 1977. The third Constitutional Convention was held in 1984, but its proposed changes were withdrawn because of objections raised by the U.S. Justice Department, and then further changes proposed in 1986 were “rejected by the Samoan electorate, primarily due to proposed changes in the selection of the Samoan Senate.”¹

¹ ARNOLD H. LEIBOWITZ, DEFINING STATUS 465 (1989).

The current constitutional review is being undertaken at a time of controversies and discussions between American Samoa and the U.S. government regarding minimum wages, restrictions on grants and aid, threats to federalize immigration and customs, and other possible restrictions. The American Samoa Constitutional Review Office was established to prepare for the Constitutional Convention, under the leadership of its Executive Director Afoa Moega Lutu.

The amendments proposed to the Constitutional Convention delegates were prepared by a 29-member Constitutional Review Committee, appointed by Governor Togiola Tulafono on April 12, 2010, which included members from all sectors of the territory, including four members of the Senate, four members of the House, five members of the Cabinet, six representatives of the public, and ten representatives of youth and women. They met from May 10 to June 14, 2010 and evaluated possible amendments proposed by the 2007 Future Political Status Study Commission and suggestions made by the public, compiled by the American Samoa Constitutional Review Office.

The Constitutional Convention is scheduled to last from June 21 to July 2, 2010, and consists of 145 delegates selected by county councils (which are made up of matai from each family in the county) – 55 from Taulauta County, 29 from Maoputasi County, 11 from Itua County, 9 each from Fofu and Sua Counties, 7 from Tualatai County, 6 from Vaifanua County, 5 from Alataua County, 4 each from Leasina and Saole Counties, 1 each from each of the five Manu'a counties, and 1 from Swains Island.

The Role of the U.S. Secretary of Interior²

The proposed amendments would make significant changes in the relationship between American Samoa and the United States and the role of the U.S. Secretary of Interior. In Article II, Section 9, the Secretary of Interior's ability to overturn a Governor's veto of a legislation would be eliminated. Under the proposed amendment, the American Samoan Legislature could override a Governor's veto by a two-thirds vote, and after such an override, the "bill so repassed shall become law immediately, without the Governor's signature." Article II, Section 19 makes a technical change linked to the elimination of the Secretary of Interior's role regarding vetoed legislation. These proposals are based on a recommendation of the Future Political Status Study Commission (*Final Report*, Jan. 2, 2007, at 62), which pointed out that the American Samoan political system "has certainly come of age and is sufficiently experienced and matured to handle all local legislation, not in conflict with federal laws."

The proposed amendment to Article III, Section 3 would transfer the power to appoint the Chief Justice and Associate Justices of the High Court from the U.S. Secretary of Interior to the Governor, "subject to confirmation by the Senate." The language in the new Article III, Section 4 would make it clear that the U.S. Secretary of Interior would have no authority to "review, overturn or intervene in the appeal of a decisions of the High Court of American Samoa," thereby confirming the independence of the judiciary. This proposal is also based on a recommendation of the Future Political Status Study Commission (*Final Report* at 61), which pointed out that "[i]t is unheard of for a judicial decision to be subject to or overturned by administrative review." The

² Additional analysis of the role of the Secretary of Interior is found in the companion memorandum by Jon M. Van Dyke, entitled *Legal Authority Supporting DOI and Congressional Approval or Disapproval of Amendments to the Constitution of American Samoa* (June 21, 2010).

proposed change in Article IV, Section 3 is a technical change, removing the requirement that the Secretary/Lieutenant Governor transmit copies of all laws and executive orders to the Secretary of Interior.

These proposed amendments, if approved by the delegates to the Fourth Constitutional Convention and the voters of Samoa, would (along with all other amendments adopted by the delegates and approved by the voters) have to be submitted to Congress for approval in and “Act of Congress” under Section 12 of Public Law 98-213 (Dec. 12, 1983).³

If these proposed changes are approved, the Constitution of American Samoa would still recognize, in Preamble, Paragraph 3, the authority of the Secretary of Interior to “take such action as many be necessary and appropriate and in harmony with applicable law, for the administration of civil government in American Samoa” pursuant to Presidential Executive Order No. 10264, and, in Preamble, Paragraph 8, “the administrative responsibility and...guidance of the Department of the Interior in coordinating federal policies in the Territory of American Samoa.” The full extent of the Secretary of Interior’s power has been put into question by Congress’s enactment of Public Law 98-213 in 1983, which was explicitly designed to restrain the Secretary’s power, if the Secretary’s power would be further curtailed by the amendments now being considered by the Constitutional Convention. It may be appropriate, therefore, to eliminate the language in Paragraphs 3 and 8 of the Preamble, and the elimination of this language would also emphasize the inherent right to self-determination of the American Samoan people.

³ Act of Dec. 8, 1983, Public Law 98-213, sec. 12, 97 Stat. 1462 (1983), 48 U.S.C. § 1662a (1993).

In Article V, Sections 3 and 4, constitutional amendments developed through the Legislature or a Constitutional Convention and subsequently approved by the voters would be “forwarded to the Secretary of the Interior and President of the United States for their review and submission of the amendment to Congress for approval.” (Proposed Article V, Section 10 and Preamble, Paragraph 10 also say that the Secretary of Interior will have reviewed the amendments added to the new Constitution.) Because Section 12 of Public Law 98-213 (1983) asserts Congress’s responsibility to approve constitutional amendments, it may be that the Secretary of Interior’s review and approval of these amendments has been superceded by Congress’s primary role, and therefore that the references to the Secretary of Interior in Article V, Sections 3.4, and 10 and Preamble, Paragraph 10 should be removed.

Other Proposed Amendments

Preamble, Paragraph 4 – The proposal that the motto be changed from “Samoa, Muamua Le Atua” to “Amerika Samoa Muamua Le Atua” (“American Samoa, God Be First”) does not raise any significant constitutional issues. Although the motto contains a reference to “God,” this general reference to the diety is usually viewed as being consistent with the Establishment Clause in the First Amendment, because it is not unduly coercive, and is similar to the motto of the United States (“In God We Trust”) and with the inclusion of “under God” in the national Pledge of Allegiance. The Constitution of the State of Washington contains similar language (“We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution”), but these words have never been viewed as creating constitutional difficulties.

Preamble, Paragraph 5 – The new proposed language raises no significant constitutional issues, but one might wonder why the final phrase refers to “the right to local self-government” rather than “the right to self-government,” which includes more broadly the inherent right to self-determination of all peoples, including American Samoans.

Preamble, Paragraph 7 – This proposed language provides clarification and accuracy, but one might question the reference to the Secretary of Interior in this paragraph, because the Secretary’s role is inconsistent with the inherent expression of self-determination by the American Samoan people.

Preamble, Paragraphs 8 and 9 – The proposed language in these paragraphs may be unnecessary and inappropriate in a document designed to be an expression of the self-determination and self-governance of the people of American Samoa.

Preamble, Paragraph 10 – This revision updates the earlier language, but, again, it may be inappropriate to refer to the approval of the Secretary of Interior and Congress in a document designed to reflect the inherent right of self-determination of the American Samoan people.

Article I, Section 3 – The proposed amendment would add a new sentence stating that “The Legislature shall enact laws to prohibit further individualization of communal lands.” This proposal is based on a recommendation in the 2007 report of the Future Political Status Study Commission (*Final Report* at 47), which said that “individualization of lands must cease. Whatever action is needed to achieve that goal must be made with haste.” The proposal builds on the existing language of this provision, which states the policy that the government should protect Samoans from alienation of

their lands and the destruction of the Samoan way of life and language. The enactment and implementation of this proposal should not present any significant constitutional issues, because U.S. appellate courts have upheld unique land systems in the Northern Marianas and in American Samoa in *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), *cert denied sub nom Philippine Goods, Inc. v. Wabol*, 506 U.S. 1027 (1992), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374 (1987).

Article I, Section 5. The proposed amendment would maintain the prohibition on unreasonable searches and seizures, but would eliminate the last sentence, which now reads: “Evidence obtained in violation of this section shall not be admitted in any court.” The elimination of this sentence seems designed to eliminate the Exclusionary Rule, or perhaps at least to make the application of the Exclusionary Rule less automatic. The requirement that illegally-obtained evidence be excluded from trial in state as well as federal courts was announced by the U.S. Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), in order to give teeth to the prohibition on unreasonable searches. The Court explained that without such a rule, law enforcement officials had little incentive to avoid unreasonable searches, and thus that the constitutional rights of citizens were much more likely to be violated, adding that “[n]othing can destroy a government more quickly than its failure to observe its own laws.” Since *Mapp*, the U.S. Supreme Court has permitted illegally-seized evidence to be introduced in certain limited situations, but the essence of the Exclusionary Rule has remained in place. If the proposed amendment is adopted, and the final sentence of Article I, Section 5 is eliminated, then the Exclusionary Rule would probably still apply in American Samoa pursuant to U.S. constitutional law, because the

protection against unreasonable searches is likely to be viewed as a fundamental right applicable in American Samoa.

Article I, Section 6. The proposed amendment adds the right to “an impartial jury” to the language of this provision. This addition is warranted because of the decision in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), which concluded that the constitutional right to a jury trial applied in American Samoa.

Article I, Section 14. The proposed amendment states that: “The laws shall recognize the rights and special needs of persons with developmental disabilities.” This directive appears to be addressed to the Fono, but it might be argued that the adoption of this provision would require American Samoan courts to scrutinize laws affecting persons with developmental disabilities with heightened scrutiny. It is also unclear exactly how “developmental disabilities” should be defined.

The U.S. Supreme Court ruled in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), that courts should not apply heightened scrutiny to statutes classifying persons based on mental retardation or other physical or mental disabilities, because “[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.” The difficulties raised by this proposed amendment could be cleared up by explanations provided in the committee reports of the Constitutional Convention which provide guidance regarding the proper interpretation of this provision.

Article I, Section 15(a). The proposed amendment clarifies that the Government’s responsibility to provide “a system of free and non-sectarian public

education” extends to “the pre-elementary, elementary and secondary levels,” but not to higher education. This proposal does not raise any constitutional issues.

Article I, Section 15(b). This proposed amendment gives constitutional status to two boards – a “Board of Regents for the Department of Education” for “the pre-elementary, elementary and secondary levels,” and a “Board of Higher Education” for the American Samoa Community College. Both of these Boards would be empowered to develop or formulate policies, but it is not clear whether they would have any other powers related to governance. This proposal is based on recommendations of the Future Political Status Commission (*Final Report* at 50), which recommended that members be appointed from diverse sectors of the community and that the Board and the Director of Education submit an annual report on the state of education in the territory. The Board of Regents for the Department of Education would be a revival of the Board of Education, which has functioned previously. The Board of Higher Education (BHE) functions at present as the governing body of the American Samoa Community College (ASCC). It consists of eight members and has the responsibility to select the ASCC President, to set policies, to approve budgets, to approve or discontinue programs, and to award degrees and certificates. It may be advisable to expand the language in this proposed amendment to clarify the powers of the two Boards.

Article I, Section 15(c). This proposed amendment would require the public schools to “provide and require a comprehensive, integrated and standards-based curriculum in Samoan language and culture and provide funding for research and teacher training in these subject areas.” This amendment is written in mandatory terms, but it is

not clear what level of funding is anticipated. Hawaii's Constitution contains language that is somewhat similar in Article X, Section 4 :

The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.

This provision has led to the establishment of Hawaiian-language immersion schools, but debates continue regarding how much funding should be provided for these schools.

Article I, Section 17. This amendment would make both Samoan and English official languages of American Samoa, and would require the Constitution, statutes and regulations to be published in both languages, but would leave to the Legislature the responsibility to determine "which other public acts and transactions shall be in the Samoan language." This proposal is similar to Article XV, Section 4 in Hawaii's Constitution, which says that "English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."

Article I, Section 18. This proposed amendment would require that "natural resources from land, air, waters and submerged lands...shall be managed, controlled, protected and preserved in accordance with local laws." This language would appear to eliminate any role for the federal government, and could be interpreted to say that U.S. environmental laws, for instance, would have no applicability in American Samoa. Although it is unclear what federal laws are applicable to American Samoa (and the four other U.S.-flag territories and commonwealths), most commentators conclude that at least some of the federal environmental laws are applicable to American Samoa. This

provision, if it remains in its present form, may therefore raise significant conflicts with efforts of the federal government to protect environmental resources in American Samoa.

Article I, Section 19. This proposed amendment would introduce an initiative process, where by voters could enact or repeal laws through a direct vote. For an initiative to appear on the ballot, 20% of those eligible to vote would have to sign a petition supporting the ballot measure. This is a high percentage, and because it is linked to those “eligible to vote” rather than those who are registered to vote or who have actually voted in a recent election, it makes the percentage even higher and more difficult to reach. By comparison, in California signatures equal to 5% of the total votes actually cast for governor in the previous gubernatorial election are required to place an initiative designed to enact a statute on the ballot. In Oregon, for a ballot initiative to amend the state constitution, signatures equal to 8% of the votes cast in the previous gubernatorial election are required to place a proposal on the ballot. Under the proposal, the American Samoan Legislature would be empowered to enact laws governing direct and indirect initiatives and to “specify certain laws that shall not be enacted or repealed by a people’s initiative.”

Article II, Section 2. This proposed amendment would increase the size of the Senate from 18 to 20 members, while maintaining the House of Representatives at the present size of 20. It designates and defines the three political districts of American Samoa, and it defines the counties in terms of the villages that are within the counties.

The proposed amendment states that the Senate and House should be reapportioned at least every ten years based on the most recent population census (and if the Legislature fails to undertake such a reapportionment, the Governor shall do so), with

the proviso that at each of the 15 counties shall have at least one Senator. This would change the existing situation, where representative districts are listed and defined in the Constitution, and would lead to an apportionment in the House based on the one-person/one-vote system required in the 50 states under *Reynolds v. Sims*, 377 U.S. 533 (1964). In the Senate, however, because of the requirement that each county be represented by at least one Senator, and because of the substantial differences in population among the counties (ranging, in the 2000 census, from a low of 135 to a high of 22,025), the allocation of seats in the Senate would deviate substantially from the one-person/one-vote standard. In fact, the departure from the one-person/one-vote approach would increase in comparison to the current situation, because the sparsely-populated five counties in the Manua Islands would increase their presence in the Senate from three seats (out of 18) to five seats (out of 20).

It is not clear whether the one-person/one-vote requirement would be applicable to American Samoa. The Commonwealth of the Northern Marianas (CNMI) has one chamber of its legislature that departs dramatically from the one-vote/one-person standard, and this system has been upheld by the U.S. Supreme Court, because it is spelled out specifically in the Covenant that established the CNMI. *Rayphand v. Sablan*, 1999 WL 1327223 (D.N.M.I. 1999), *aff'd sub nom. Torres v. Sablan*, 120 S.Ct. 928 (2000). Perhaps it could be argued that the language in the Deeds of Cession specifying that the United States shall respect the rights of the Samoans to their lands and property constitutes an agreement by the United States to allow American Samoans to apportion one chamber of their Legislature in a manner designed to ensure that the voices of the less-populated regions are heard.

The proposed amendment would give Swains Island a nonvoting delegate in the House of Representatives. This procedure would be similar to American Samoa's nonvoting delegate in the U.S. House of Representatives, and the system that has been used in the Maine Legislature whereby the Penobscot and Passamaquoddy Indians have been allowed to participate as nonvoting delegates.

Article II, Section 3. The proposed amendment would state that Senators must "a leading registered matai of a Samoan family" rather than "the registered matai of a Samoan family." This change is based on a recommendation of the Future Political Status Commission (*Final Report* at 55), and it would permit some flexibility and expand the pool of persons eligible to be in the Senate.

Article II, Section 4. The proposed amendment is a technical one, because the manner of allocating Senators to counties is addressed in the proposed amendment to Article II, Section 2.

Article II, Section 8. The proposed amendment would extend each of the two regular sessions of the Legislature from 45 to 60 days.

Article II, Section 26. This new section would establish a process for impeaching and removing from office the Governor, the Lieutenant Governor, the Chief Justice, Associate Justices, the President of the Senate, and the Speaker of the House of Representative. This provision is somewhat unusual in extending the impeachment process to the leaders of the legislative chambers, who can generally be removed by a simple majority of the members, without having to go through the elaborate process described in this proposed amendment. The proposal is also unusual in requiring the two-thirds vote in both the House, which initiates the impeachment process, as well as in

the Senate, which determines whether the office-holder should be removed. In the U.S. Constitution (Article I, Sections 2-3), by contrast, the U.S. House of Representatives initiates an impeachment by a simple majority, while the Senate can only remove an office-holder, after trial, by a two-thirds vote.

Article IV, Section 14. This proposed new section would require the Legislature to enact, and the Executive Branch to enforce immigration laws, “to restrict the entry of non-American Samoans and non-U.S. nationals into American Samoa.” This proposal is similar to one of the recommendations found in the American Samoa Future Political Status Study Commission Report (*Final Report* at 45), and it clearly reflects concerns that are broadly felt by American Samoans. The phrase “non-U.S. nationals” may, however, raise some ambiguity. It is frequently stated that American Samoans are the only remaining “U.S. nationals,” but it might be argued that U.S. citizens are also “U.S. nationals” in some sense, and that this term “nationals” includes citizens as well as those who are part of the U.S. political community but are not formally citizens. If this provision is designed to empower the American Samoan government to exclude U.S. citizens from entering into American Samoa, that could raise problems under the U.S. Constitution. Arnold Leibowitz has explained that:

The original cession agreement does not suggest this power to limit access [to American Samoa by U.S. citizens]. The better legal rule would be that the right of U.S. citizens to travel to American Samoa is unrestricted even if their capacity to own land like that of other outsiders, once there, is limited.⁴

Article IV, Section 15. This proposed new section would require the Legislature to establish a Public Utilities and Services Commission to regulate the rates and fees

⁴ ARNOLD LEIBOWITZ, *DEFINING STATUS* 451 (1989).

charged by public utilities “and perform related functions.” It might be useful to describe the powers of this new Commission in more detail.

Article V, Section 4. The proposed new language in this section would revise and clarify the process of calling for Constitutional Conventions to revise the American Samoan Constitution. The proposed changes would eliminate the requirement that the Governor appoint a Constitutional Committee at any specific time, and would give the Governor discretion to decide when to submit the question to the electorate whether a Constitutional Convention should be held. The proposed new language will require that forthcoming Constitutional Conventions will have about 110-115 delegates.

Article V, Section 10. This present language is removed, because this language has been relocated to Article II, Section 2. The proposed new language explains the amendments that have been added to the Constitution.

Other Provisions of the Present Constitution that May Need Adjustment

Some other parts of the present American Samoa Constitution appear to be anachronistic and unrelated to the present and proposed scheme of governance, or inconsistent with U.S. constitutional principles, and thus should be considered for possible removal or revision. Among these provisions are:

Preamble, Paragraph 2: “and provided that until Congress shall provide for the Government of the islands of American Samoa, all civil, judicial, and military powers shall be vested in such person or persons and exercised in such manner as the President of the United States shall direct;” – This provision appears to have been overtaken by events, because executive and legislative branch members are now elected locally, and because

the judges under the proposed amendments would be appointed by the Governor rather than from Washington. It should, therefore, be considered for elimination.

Preamble, Paragraph 3: “Whereas by Executive Order No. 10264 the President of the United States directed that the Secretary of the Interior should take such action as may be necessary and appropriate and in harmony with applicable law, for the administration of civil government in American Samoa; and” -- As explained above, this provision also appears to have been overtaken by events, because the authority of the Secretary of Interior is increasingly limited, and it should be considered for elimination.

Article I, Section 7. The language in this provision allows the Governor to suspend the writ of habeas corpus. Several of the U.S. Supreme Court justices explained in their opinions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the writ of habeas corpus under the U.S. Constitution can be suspended only by the U.S. Congress, and not by the President acting alone. The writ of habeas corpus is such an essential right of citizens that it should not be suspendable by a single person, and so it may be appropriate to change this provision to make it clear that the writ of habeas corpus can be suspended only by an act of the American Samoan Legislature.

Article I, Section 12. This provision says that a person can be prohibited from holding “any public office of trust or profit under the Government of American Samoa” by mere membership in “any party, organization, or association which advocates the overthrow by force or violence of the Government of American Samoa or of the United States.” The U.S. Supreme Court has ruled, however, in *Yates v. United States*, 354 U.S. 298 (1957), and *Scales v. United States*, 367 U.S. 203 (1961), that a person cannot be punished for mere membership in such an organization, and can be punished only if the

person actively supports the goals of the organization, in addition to being a member of it. It may be appropriate, therefore, to modify this provision so that it is consistent with U.S. constitutional law.

Article IV, Section 1. Because the earlier provision has been superseded by subsequent Executive Orders of the Secretary of Interior, the language referring to these executive orders should be eliminated, and, perhaps, the language now found in paragraph 1 of Article IV, Section 2, could become the new Article IV, Section 1 (but without the now-unnecessary phrase “commencing with the first Tuesday following the first Monday of November 1977”).

Article IV, Section 2. The new language is designed to address the problem of succession. It has some awkwardness in its phrasing, because it seems to say that if a Governor-elect becomes disabled or dies, the Lieutenant-Governor shall become the Governor, even though the term of the previous Governor may not yet have expired. The final paragraph is also somewhat awkward, because it refers to the “Lieutenant Governor-elect,” and that reference should probably be eliminated. That paragraph also says that the confirmation process for a new Lieutenant Governor appointed by the Governor shall be “the Legislature,” meaning that both chambers would have to confirm the appointment. Other provisions referring to confirmation (*i.e.*, Article III, Section 3) give this power exclusively to the Senate. It may be appropriate to involve both chambers in the confirmation process for a Lieutenant Governor because of the particular importance of such an appointment.

Article IV, Section 3 is confusing, because it indicates that the “Secretary of American Samoa” and the “Lieutenant Governor of American Samoa” are one and the

same. This seems to be an anachronistic remnant from an earlier era, and it would be clearer to eliminate the reference to “Secretary,” to rename this section as “**Lieutenant Governor**” and rephrase it to eliminate all references to “Secretary.”

Article V, Section 1. This section contains unnecessary language, and everything could be eliminated after the word “appointed” in line five.

Conclusion

This analysis and these suggestions are designed to assist the delegates to the Fourth Constitutional Convention determine how to proceed in the coming two weeks. Please let me know if further explanations or analysis regarding any of these provisions would be helpful.