A NATIVE’S CALL FOR JUSTICE: 
THE CALL FOR THE ESTABLISHMENT OF A 
FEDERAL DISTRICT COURT IN AMERICAN 
SAMOA

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I. INTRODUCTION

"E lele le toloaaema’au i le vai."¹ These are my mother’s words before I left home for the military and to further my education in the U.S. This phrase literally means that wherever the toloa bird flies, it always lands in the water. The message conveys that one should never forget where one comes from. A Samoan child is taught to never forget the well being of the families, villages, and people of Samoa. A Samoan leaves his family in search of a better future with the intent to give back to the community.

Samoa² is my home. It is the “historic location of the Garden of Paradise.”³ Our culture and identity bind us to the land that we have inhabited since the beginning of time. Every morning you wake up to the saumalū o le taeao⁴ seeing the sun shining on village fale’os.⁵ The sunrise brings energy to the land and revitalizes the spirits and vigor of the

¹ Toloa is a Samoan bird also known as the gray duck. It is pronounced Eh leh-leh leh toh-loh-ah ah-eh mah-ah-ooh ih leh vah-i.
² Samoa is an independent country distinct from American Samoa; however, I use the term Samoa to include both Samoa and American Samoa.
⁴ Translated as morning breeze. It is pronounced as sah-ooh-mah-lu-o-lay-tah-ay-ah-oh.
⁵ Translated as traditional Samoan house. It is pronounced as fah-lay-oh-oh.
Samoan people. The sunset transforms the clouds into a colorful conflagration covering the horizon. As one scholar describes:

The Samoan archipelago itself is a luxuriant tropical rain forest in the center of the Polynesian chain. Lush volcanic mountains and cliffs carpeted with dense jungle rise inspiringly out of beautiful aquamarine waves. Blue tide pools, lava beaches and cliffs, and geyser-like blowholes add color and charm to a magnificent coastline.6

Wherever I go, the words of my mother echo in my mind. It is a call to Samoans abroad to remember their families back home. It is our responsibility to make sure that no act of injustice has been done to our people back home. It is that interest of ensuring justice that drives me to write this paper. My people are taken from their homes and families and tried in foreign and unsympathetic courts. People not familiar with Samoan culture, morals, values, and traditions, determine our fate. Of course, if you expect to reap the benefits of the American system, you should also expect the burdens that come with those benefits. Fundamental to the American system is the right to trial by a jury of one’s peers. As Chief Justice Burger elaborated,

[One] great right is that of trial by jury. This provides that neither life, liberty nor property can be taken from the possessor until twelve of his unexceptional countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open court before as many of the people as choose to attend, shall pass their sentence upon oath against him.7

Due to the lack of a federal judicial process in American Samoa to try residents charged with federal crimes, Samoans are not afforded the full extent of their Sixth Amendment rights to a trial by jury of their peers.8

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6 See Teichert, Paradise, supra note 3, at 362.
7 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568 (1980) (holding that the right of the press and the public to attend a trial was implicit in the guarantees of the First Amendment of the U.S. Constitution).

The lack of cohesive federal judicial presence creates problems for both the federal government and residents of American Samoa. The limited federal jurisdiction requires the removal of American Samoa residents to other jurisdictions to be tried for violations of federal law. Due to these renditions, American Samoa residents are not afforded the
A Governmental Accountability Office report ("GAO") acknowledges residents’ thoughts, both positive and negative, in approaching this situation:

Reasons offered for changing the existing system focus primarily on the difficulties of adjudicating matters of federal law arising in American Samoa, principally based on American Samoa’s remote location, and the desire to provide American Samoans more direct access to justice. Reasons offered against any changes focus primarily on concerns about effects of an increased federal presence on Samoan culture and traditions and concerns about juries’ impartiality given close family ties.9

As the GAO report notes, although cost is an issue, “considerations of equity, justice, and cultural preservation should be the principal focus.”10 These considerations recognize the arbitrariness of dragging Samoans charged with federal crimes 2,000 miles away from their families to defend themselves in other unfamiliar jurisdictions. This practice is “inherently unfair.”11

Families of the accused undergo a great burden in these situations, particularly in trying to attend the trial. A family member of a Samoan resident12 charged with federal crimes recalled her dramatic experience:

I felt inferior to be standing in that courtroom. My uncle is the matai13 of our family. I was fortunate to attend his trial because I was up here for school. However, my whole family wanted to be there but they could not afford to travel opportunity to be tried by a jury of their peers. Id. (emphasis added).


10 Id. at 1 (emphasis added). “Potential cost elements includes agency rental costs, personnel costs, and operational costs, most of which would be funded by congressional appropriations.” Id.

11 Statement of the Honorable Togiola T.A. Tufafofo, Governor of American Samoa, Before the U.S. House Committee on Natural Resources (Sept. 18, 2008) (on file with author).


13 Samoan word for chief. It is pronounced as mah-tah-eee.
all the way to Hawaii. The moment he was taken from home was the last moment my whole family saw him until he was released from jail.\(^\text{14}\)

Juries in jurisdictions around the U.S. are unaware of Samoan local customs and beliefs. But understanding the Samoan system of beliefs is relevant in providing a fair trial. As one commentator stated, this is a natural result of “exporting a western style democracy to non-western cultures.”\(^\text{15}\) As late Governor Peter Tali Coleman\(^\text{16}\) explained:

The problem of white-collar crime is not unique to Samoa, nor is it unique to the American territories. Stories of political corruption abound on virtually a daily basis from French Polynesia in the East to Papua New Guinea in the West. Why? Because we’re all trying to cope with [a] western governmental system implanted by now departed administering authorities, systems which were build on western experiences and assumptions of human behavior and instincts which do not necessarily always translate well or full into island societies.\(^\text{17}\)

In a recent controversy involving Lt. Governor Sunia and Territorial Senator Lam Yuen,\(^\text{18}\) an integral part of their defense against public corruption charges was the consideration of “Samoan family relationships” and the “give-and-take of reciprocal exchange” in the Samoan culture.\(^\text{19}\) Though some have opposed this as “demoralizing the Samoan culture,”\(^\text{20}\) it is unduly unfair being tried in front of juries who are unknowledgeable and likely unsympathetic to your culture and beliefs.

\(^{14}\) Interview with Grace Tapuni Lafitaga, in Honolulu, Haw. (Feb. 1, 2009).

\(^{15}\) See Teichert, Paradise, supra note 3, at 3.

\(^{16}\) American Samoa Government, available at http://americansamoa.gov/governors/coleman.htm (last visited Apr. 25, 2009). “Governor Peter Tali Coleman was the first Samoan to be appointed governor of American Samoa, a U.S. territory, and later the first elected governor there.” Id.


serious concern arises when “the Sixth Amendment right (of a trial by one’s peers) may be compromised by a trial before jurors who may have no understanding of my people, or who may have a bias against Samoans.”

Many Americans are unaware that there exists a U.S. territory called American Samoa and it is impossible for Americans to understand a culture they don’t even know exists.

Furthermore, there is a concern about human trafficking and increasing federal-grant related corruption in American Samoa. The current judicial system in the territory is not appropriate for adjudicating these matters.

The most viable and appropriate solution is the establishment of a federal court in American Samoa. In Part II of this paper, I will discuss the creation of federal district courts in the U.S. I will also discuss the creation of territorial federal district courts, including an analysis of how federal courts were established in each territory. In Part III, I will examine the relationship between American Samoa and the United States. Here, I will also discuss the application of the American Constitution to the territories, and why it is significantly important to protect the Samoan communal land and matai system. I will analyze the judicial system in American Samoa and explain why it is not an appropriate venue for federal crimes. Furthermore, I will also discuss the recent federal cases from American Samoa, which give rise to the need for a federal court. In Part IV, I will discuss cases involving the application of the Sixth Amendment right to a jury trial to the U.S. territories, and how jury trials were held to be applicable to American Samoa. In Part V, I will examine the proposals given by the GAO and elaborate on why some of the GAO proposals create more problems than they solve. In particular I will discuss why the proposal to expand the jurisdiction of the High Court of American Samoa to include federal matters is an inappropriate

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22 When I was in Army Basic Training in Fort Knox, KY, I told one of my camaraderie that I was from Samoa. His response was, “Where is that?” Surprisingly, half of my platoon did not know where Samoa is located nor did they know anything about the Samoan culture and system of beliefs.

23 See Jenkins, GAO, supra note 9, at 17:

In 2003, Lee (U.S. v. Lee 159 F. Supp. 2d 1241 (D. Haw. 2001)) was convicted in the U.S. District Court of Hawaii of involuntary servitude, conspiring to violate civil rights, extortion, and money laundering. Another federal case in 2006 (U.S. v. Kelemete (D. Haw. filed Mar. 1, 2006)) resulted in guilty pleas from the prison warden and his associate for conspiring to deprive an inmate of rights, by assaulting him and causing bodily injury. Id.

24 See infra Part III(C).
solution. Finally, in Part VI, I will demonstrate that instead of expanding the federal jurisdiction of the High Court, the most appropriate and effective solution is the establishment of a federal district court in American Samoa as in other insular territories. Furthermore, I will discuss why the Ninth Circuit is a more promising venue for federal appeals originating from American Samoa. Also, by analyzing Wabol v Villacrusis, I will illustrate why the people of American Samoa need not worry about Equal Protection challenges against the communal land and matai system due to the establishment of a federal district court in the territory.

II. CONGRESS CREATED FEDERAL DISTRICT COURTS PURSUANT TO ARTICLE III OF THE U.S. CONSTITUTION

The U.S. federal court system consists of one Supreme Court, thirteen circuit courts of appeals, ninety-four district courts, and approximately 663 district court judgeships including the territorial district courts. Article III, section 1 of the U.S. Constitution vests judicial power in the United States Supreme Court, but also permits Congress to create inferior courts to exercise federal judicial power. Article III section 1 states:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their Services, a compensation, which shall not be diminished during their continuance in office.

Originally, through the Judiciary Act of 1789, Congress established three different types of courts: the Supreme Court, the circuit courts, and the district courts. The Act established thirteen district courts, authorized the appointment of clerks and prescribed procedural rules. The Act limited federal district and circuit courts’ jurisdiction to admiralty, diversity, U.S.

25 See Weaver, Territory, supra note 8, at 329.
26 U.S. CONST. art. III, § 1.
27 Id. (emphasis added). Federal district courts created under Article III are usually called Article III courts.
28 Judiciary Act of 1789, 1 Cong. Ch. 20, 1 Stat. 73 (1789). The Judiciary Act of 1789 was signed by President George Washington on September 24, 1789.
29 Weaver, Territory, supra note 8, at 328.
plaintiff cases and federal criminal cases.\textsuperscript{31} Federal diversity of citizenship jurisdiction was also implemented.\textsuperscript{32} Later on, the jurisdictional minimum of $500 was added.\textsuperscript{33}

Due to America’s westward expansion and the admission of new states, there was a need for reorganization of the judicial system.\textsuperscript{34} Congress reorganized the system into the judicial structure present today with the passage of the Circuit Court of Appeals Act of 1891.\textsuperscript{35} Newly created circuit courts of appeal shifted the majority of the appellate caseload from the U.S. Supreme Court to these newly formed courts.\textsuperscript{36} Today, district courts have jurisdiction primarily over questions arising under federal law and those cases involving diversity of citizenship.\textsuperscript{37} As discuss below, Congress over time created federal district courts in the territories similar in some circumstances to those of the Article III federal district courts.

A. Congress Has Plenary Power over the Territories under Article IV of the U.S. Constitution and Can Create Territorial Courts under Such Authority

In addition to creating inferior federal courts, Congress has the authority to create territorial courts to adjudicate matters outside of Article III courts. This authority was upheld by the Supreme Court of the United States in \textit{American Insurance Company v. Canter}.\textsuperscript{38} In \textit{Canter}, the Court proclaimed that Congress has the authority to create territorial courts, not under Article III, but from the Territorial Clause found in Article IV of the U.S. Constitution.\textsuperscript{39} Accordingly, restrictions\textsuperscript{40} contained in Article III do not apply to territorial courts.\textsuperscript{41} The Territorial Clause\textsuperscript{42} states:

\begin{quote}
\textit{The Territory Clause} states:
\end{quote}
Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.\footnote{Id. at 984-85.}

Non-Article III courts are sometimes called “legislative courts” because they are created by Congress pursuant to its powers outside Article III.\footnote{Id. at 986-987 (citing American Insurance Co. v. Canter, 26 U.S. 511, 546 (1828)). These courts then are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables the territory belonging to the United States. The jurisdiction with which they are invested not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Id.}

Non-Article III courts include the U.S. Court of Military Appeals, the U.S. Court of Veterans Appeals, and the U.S. Tax Court, which were created pursuant to Congress’ power in Article I.\footnote{See Stanley K. Laughlin, *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 383 (1991) [hereinafter Laughlin, Constitution].} They are commonly referred to as “Article I courts.”\footnote{Id. at 383; see also U.S. CONST. art. 1, § 8 (“The Congress shall have the power . . . to constitute tribunals inferior to the Supreme Court.”).} Similarly, territorial courts are referred to as “Article IV courts” because they are created pursuant to Article IV of the U.S. Constitution.\footnote{U.S. Courts, About U.S. Federal Courts, available at http://www.uscourts.gov/about.html (last visited Apr. 25, 2009). “Article I courts include the U.S. Court of Military Appeals, the U.S. Court of Veterans Appeals, and the U.S. Tax Court.” Id.}

\footnote{See Laughlin, *Constitution, supra* note 44, at 383-84.
In creating a federal judicial system for most American territories, Congress first created a single non-Article III federal court with regular and general jurisdiction similar to the one created for the territory of Alaska in 1884.\textsuperscript{48} In areas with an already functioning judiciary like Hawaii, Congress adopted the existing judicial system and gave the President authority to appoint judges, subject to Senate approval, and to remove justices of the Hawaiian Supreme Court.\textsuperscript{49} Also, Congress established a federal district court modeled after a typical Article III court and having the same jurisdiction and powers of a U.S. district and circuit court, except that the President appointed the judge for a six-year term.\textsuperscript{50}

Currently, territorial courts exist in the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands (“CNMI”), and American Samoa.

B. Territorial Federal District Courts Exist in Every Territory Except American Samoa

All of the American territories, except American Samoa, have a federal district court established pursuant to an Organic Act.\textsuperscript{51} Although an Organic Act seems relevant, it is not necessary for the establishment of a federal district court.\textsuperscript{52}

1. Puerto Rico

Puerto Rico became an unincorporated American territory when it was ceded to the United States by Spain in an 1898 treaty.\textsuperscript{53} The U.S. military controlled the islands until Congress passed the Foraker Act,\textsuperscript{54} which provided for the establishment of a local government.\textsuperscript{55} The Act

\textsuperscript{48} See Nicolas, No Mann, supra note 39, at 987.

\textsuperscript{49} Id. “Hawaii was different from other western territories including Alaska because prior to annexation, Hawaii was an independent nation with a three-tiered judicial system consisting of district courts for minor cases, courts of general jurisdiction known as circuit courts, and a supreme court.” Id

\textsuperscript{50} Id.

\textsuperscript{51} See generally Weaver, Territory, supra note 8; see also infra Part II(B)(1-4).

\textsuperscript{52} See e.g., To Establish a Federal District Court of American Samoa, H.R. 4711, available at http://www.house.gov/list/press/as00_faleomavaega/federalcourthr4711.pdf (last visited Jan. 17, 2010) [hereinafter HR 4711].

\textsuperscript{53} Treaty of Peace, art. II, 30 Stat. 1754, 1755 (Dec. 10, 1898) (ceding to Puerto Rico as well as other West Indies islands then under Spanish rule, to the U.S.).

\textsuperscript{54} Foraker Act, 56 Cong. Ch. 191, 31 Stat. 77 (1900) (codified at 48 U.S.C.A § 731 (West 2009)).

provided for a governor, an executive council, justices of the Supreme Court of Puerto Rico, and a judge of the newly created U.S. District Court, all appointed by the U.S. President. The Act also retained existing local tribunals and allowed the U.S. Supreme Court to hear appeals from the district court and the Supreme Court of Puerto Rico. The district court exercised no more jurisdiction than a typical Article III district court. Diversity jurisdiction, however, was broader in one significant respect in that the district court was vested with jurisdiction to hear cases involving parties of U.S. or foreign citizenship, and where the amount in controversy exceeded $1000.

Change occurred when Congress passed the Jones Act. The Act conferred citizenship on Puerto Ricans and extended Puerto Rico’s Bill of Rights to include the rights of Due Process and Equal Protection. The district court’s jurisdiction was extended to disputes involving citizens of a foreign state not residing in Puerto Rico and the amount in controversy exceeded $1000.

56 Cong. Ch. 191, at 81. The governor’s term was four years. The executive council consisted of a secretary, attorney general, treasurer, auditor, commissioner of the interior and commissioner of education, and five others of good repute; there was also a requirement that five members be native inhabitants of Puerto Rico.

Id. at 84. “The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, and interpreter, and such commissioners . . . .” Id.


59 56 Cong. Ch. 191, at 84-85.

60 See Nicolas, No Mann, supra note 39, at 989.

61 Id.


63 Id. at 953:

Sec. 2: That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny any person therein the equal protection of the laws . . . . Sec 5: That all citizens of Porto Rico . . . are hereby declared, and shall be deemed and held to be, citizens of the United States. Id.
was also increased to $3,000. The Act also incorporated the Puerto Rican district court into the U.S. Court of Appeals for the First Circuit.

Later, Puerto Rico went through various changes with passage of the Puerto Rico Elective Governor Act of 1947. A constitution was approved by the residents, and Commonwealth status was achieved when Congress approved the Puerto Rican constitution on July 25, 1952.

Establishment of the Commonwealth did not change the jurisdiction of the federal district court. Nevertheless, as one commentator notes, a number of changes to the district court of Puerto Rico have made it “indistinguishable from a typical Article III district court.” For example, judges for the district court have life tenure and fixed salaries, and the court’s jurisdiction is identical to that of an Article III district court.

2. U.S. Virgin Islands

The U.S. Virgin Islands consists of St. Croix, St. John, St. Thomas, and Water Island. In the early 1900s, the U.S bought these islands from Denmark for 25 million dollars under the fear that Germany might occupy them. With no voice from the U.S. Virgin residents, a Danish plebiscite approved the sale and control over the islands was transferred to the U.S. Navy Department for use in its operation against the Germans.
The first Organic Act\textsuperscript{74} for the U.S. Virgin Islands passed on March 3, 1917. It created a temporary government including a judicial system, a bicameral legislature and a governor appointed by the President.\textsuperscript{75} In 1931, the administration of the islands was transferred to the Secretary of Interior.\textsuperscript{76} Although another Organic Act\textsuperscript{77} was enacted in 1936 to provide for greater self-governance, it failed to address the election of a governor who was still appointed by the President. Even the new Revised Organic Act of 1954\textsuperscript{78} did not address this issue.\textsuperscript{79} After a constitutional convention in 1964\textsuperscript{80} and the passage of the Elective Governor Act,\textsuperscript{81} the U.S. President’s veto power on local legislation was eliminated and the islands were no longer under the control of the Secretary of the Interior.\textsuperscript{82}

In 1963, a federal district court was established, and it was comprised of one judicial district divided into two judicial divisions: one division contained the island of St. Thomas and St. John and the other contained the island of St. Croix.\textsuperscript{83} The district court has jurisdiction over bankruptcy matters and U.S. income tax laws applicable to the Virgin Islands.\textsuperscript{84} The President of the United States appoints the judges for a term of ten years.\textsuperscript{85} Except where limited by statute, the district courts have general jurisdiction over matters not conferred upon the inferior courts of the Islands.\textsuperscript{86} The Third Circuit Court of Appeals reviews decisions from the federal district court and the Supreme Court of the Virgin Islands.\textsuperscript{87}

\textsuperscript{74} Virgin Islands Acquisition Act, 64 Cong. Ch. 171, 39 Stat. 1132 (Mar. 3, 1917).


\textsuperscript{76} Weaver, \textit{Territory, supra} note 8, at 336 (citing Exec. Order 5566).


\textsuperscript{79} Van Dyke, \textit{Flag-Islands, supra} note 55, at 497.

\textsuperscript{80} Id. “Goals were proposed for the Convention and in the end a Constitution was adopted.” Id. at 497-98.

\textsuperscript{81} Id. at 498.

\textsuperscript{82} Id.

\textsuperscript{83} Weaver, \textit{Territory, supra} note 8, at 336-337.

\textsuperscript{84} Id. at 337. “Virgin Islands federal district courts jurisdiction parallels the jurisdiction of the other U.S. federal district courts.” Id. at 336.

\textsuperscript{85} 48 U.S.C.A § 1614(a) (West 2009).

\textsuperscript{86} Weaver, \textit{Territory, supra} note 8, at 337.

\textsuperscript{87} 48 U.S.C.A § 1613 (West 2000).
3. Guam

In 1898, Guam was ceded, along with Puerto Rico, by Spain to the U.S in the Treaty of Paris. Because of the increased military presence in the World Wars, Guam, under the U.S. Navy, went through a “rapid transformation” from an “agriculturally-based society to an Americanized society.”

The Guam Organic Act of 1950 granted U.S. citizenship, a bill of rights, and a legislative body for the residents of the territory but did not give much local autonomy. The Organic Act was later amended in 1968 to give greater autonomy to Guam by allowing its residents to elect their own governor.

The Act also created the District Court of Guam and a judicial branch constituting a “unified judicial system” with jurisdiction over local matters. The district court’s jurisdiction parallels that of other district courts of the United States and includes bankruptcy matters and original jurisdiction over matters not vested in another court by the Guam legislature. The Ninth Circuit Court of Appeals reviews appeals from the district court, and the President, with consent of the Senate, appoints the judges for a term of ten years.

4. Commonwealth of the Northern Mariana Islands

The Northern Mariana Islands were part of the post-World War II United Nations Trust Territories of the Pacific Islands; the Islands later entered separate negotiations with the U.S. regarding their political

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88 Van Dyke, Flag-Islands, supra note 55, at 488.
89 Weaver, Territory, supra note 8, at 337-38.
91 81 Cong. Ch. 512, at 384.
92 Id. at 385-86.
93 Id. at 387-89.
94 Weaver, Territory, supra note 8, at 338 n.112. “Guamanians and other American citizens needed military permission to enter or exit Guam. These restrictions were later lifted in 1962.” Id.
95 Id. at 338.
96 48 U.S.C.A § 1424 (West 2009). A unified judicial system . . . include an appellate court designated as the ‘Supreme Court of Guam’, a trial court designated as the ‘Superior Court of Guam’, and such other lower courts. Id. at § 1424(a)(1).
97 Id. at § 1424-1.
98 Id. at §1424(b-c).
99 Id. at §§ 1424-3, 1424b(a).
Part of the U.S. interest in negotiating with the Northern Mariana Islands separately from the other islands was “due to its strategic location in the Northern Pacific.” In 1976, the Covenant to Establish a Commonwealth of the Northern Mariana Islands (Covenant) was passed granting Commonwealth status and the right to self-autonomy and self-government. A constitution for the Commonwealth was adopted in 1977 and went into effect in January 1978.

The Covenant granted citizenship to residents, exempted the islands from federal immigration and minimum wage laws, and protected land ownership from alienation to foreigners. To protect the interest of land to the descendants of CNMI’s people, the Covenant provided:

Except as otherwise provided in this Article . . . the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency . . . may thereafter, regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interest to persons of Northern Mariana islands descent; and may regulate the extent to which a person may own or hold land . . .

The District Court for the Northern Mariana Islands has jurisdiction similar to that of a U.S. district court, which also includes bankruptcy

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100 Weaver, Territory, supra note 8, at 339.
103 Van Dyke, Flag-Islands, supra note 55, at 481; see also Gretchen, Commonwealth, supra note 101, at 243 n.38 (“Unlike other territories governed by organic acts, the United States has a limited ability to alter the Covenant unilaterally.”).
104 Weaver, Territory, supra note 8, at 339-40.
105 Covenant, supra note 102, at art. III, § 301.
106 Id. at art. V, § 503(a).
107 Id. at art. VIII, § 805(a).
108 Id. (emphasis added).
matters and original jurisdiction over matters not reserved to local courts.\textsuperscript{110} The President, with the consent of the Senate, appoints a judge for the district court with a term of ten years, and the Ninth Circuit Court of Appeals has jurisdiction to review appeals from the district court.\textsuperscript{111}

III. THE U.S. HAS A TRUST RELATIONSHIP WITH AMERICAN SAMOA AND THROUGH THIS RELATIONSHIP CONGRESS SHOULD ACT TO ENSURE THAT RIGHTS OF SAMOAN RESIDENTS ARE PROTECTED

American Samoa is the only U.S. insular area in the southern hemisphere and is located approximately 2,600 miles southwest of Hawaii with a population estimate of 65,500.\textsuperscript{112} Residents of American Samoa are “nationals”\textsuperscript{113} of the United States but many become naturalized U.S. citizens.\textsuperscript{114} They have many rights as citizens of the United States, but do not have the right to vote in U.S. elections, and American Samoa’s Congressional Representative does not have a voting right in final approval of legislation in Congress.\textsuperscript{115}

The relationship between the U.S. and American Samoa started during the final years of the nineteenth century.\textsuperscript{116} Due to great interest in the Samoan islands shown by Germany, Great Britain, and the U.S., these three countries were drawn into disputes when they met in Apia\textsuperscript{117} Bay on March 5, 1889.\textsuperscript{118} When the three countries met on that day,\textsuperscript{119} a
horrendous hurricane wrecked all of the ships killing 142 Germans and a U.S. sailor.\textsuperscript{120} To resolve the tensions, the three countries met in Berlin and settled on the General Act of 1889.\textsuperscript{121} Under this Act, Western Samoa would be an independent and neutral nation, but the established government for American Samoa would be controlled by Great Britain, Germany, and the U.S., along with Western Samoa.\textsuperscript{122}

Even after this Act, tension between the three countries grew. They finally decided to resolve their differences and arbitrate their competing claims by entering into a convention to divide Samoa into two nations.\textsuperscript{123} The resulting Treaty of 1899\textsuperscript{124} annulled the original General Act.

Later, the Samoan chiefs of Tutuila\textsuperscript{125} accepted the inevitable and agreed to sign a Deed of Cession with the United States on April 17, 1900 whereby the Samoan chiefs ceded to the United States the islands, rocks, reefs, foreshores and waters of Tutuila, and to erect the island of Tutuila “into a separate District to be annexed to the United States, to be known as the District of Tutuila.”\textsuperscript{126} The Deed of Cession also referred to the Treaty of 1899 whereby the three outside powers recognized the “sovereignty of the government and people of Samoa and the Samoan group of islands as an independent State.”\textsuperscript{127}

There was also a separate Deed ceding the Manu’a Islands.\textsuperscript{128} These deeds (Tutuila and Manu’a) were not ratified by the U.S. government until 1929.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{119} Id. “Drawn into the disputes, one British, three German, and three U.S. warships were in Apia Bay on March 5, 1889.” Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 493 (referred to as the General Act of 1889).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{125} See General Act of 1889, available at http://www.asbar.org (last visited Apr. 25, 2009) (follow “Legal Resources” hyperlink; then follow “Territorial Organic Documents” hyperlink).
\item \textsuperscript{126} Another name for the island of American Samoa. It is pronounced as Two-t-two-ee-laah.
\item \textsuperscript{127} See Deed of Cession, available at http://www.asbar.org (last visited Apr. 25, 2009) (follow “Legal Resources” hyperlink; then follow “Territorial Organic Documents” hyperlink) [hereinafter DEED].
\item \textsuperscript{128} Id.
\item \textsuperscript{129} See Cession of Manu’a Islands, available at http://asbar.org (last visited Apr.
Of particular importance is the Deed of Cession for the island of Tutuila. The Deed of Cession establishes a “trust responsibility” on the part of the United States. It establishes a “contractual-agreement” between the people of Samoa and the United States that restrains what Congress can do in way of passing legislation for American Samoa. One commentator has compared the Deed of Cession to the 1840 Treaty of Waitangi between the Maori chiefs and Great Britain. In the Deed, the Chiefs were mindful to protect their rights to land and culture by specifically stating:

The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District . . . . The Chiefs of the towns will be entitled to retain their individual control of the separate towns . . . . But the enactment of legislation and the general control shall remain firm with the United States of America.

Though this language preserves a significant right for Samoans in controlling their land system, it is silent on contemplating any venue for residents of American Samoa charged with federal crimes to have a fair trial by jury of their peers. As discussed more fully below, the only other venue, the judicial system of American Samoa, provides little relief.

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8 U.S.C.A § 1661 (West 2009).

See DEED, supra note 127.

Van Dyke, Flag-Islands, supra note 55, at 494.

Id. “The treaty of Waitangi is the document in which the Maori chiefs acknowledged the British presence, but in this document they protected their rights to their lands and to self-governance.” Id.


See DEED, supra note 127.

See infra Part III(C).
A. The Application of the U.S. Constitution to the Territories Is Perplexing and Unclear

U.S. territories are classified by the concepts of “incorporated” or “unincorporated” and “organized” or “unorganized.” An organized territory is one where the civil government has been established under an organic act passed by Congress. Congressional approval is required for any changes to an organic act or territorial constitution.

The concepts of “unincorporated” and “incorporated” were introduced in a line of cases collectively known as the Insular Cases. A territory with an unincorporated status implies that not all provisions of the U.S. Constitution apply to that territory, while one with an incorporated status is one in which the full force of the Constitution applies. All four U.S. territories, except American Samoa, are considered “unincorporated” and “organized” territories, with CNMI and Puerto Rico having Commonwealth status.

American Samoa’s status is that of an unorganized and unincorporated territory. It is unorganized because the American Samoan government is not operating under an organic act enacted by the United States Congress. It is unincorporated because no Congressional action has been taken to incorporate American Samoa into the United States, and not all provisions of the U.S. Constitution are applicable to the

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138 Van Dyke, Flag-Islands, supra note 55, at 449.
139 Id. at 450. An Organic Act essentially establishes a territorial constitution. Id.
140 Id. at 459:

Congress retains, however, the power to amend or abrogate the laws of the territorial legislature. Such power has been described as ‘an incident of sovereignty,’ which “continues until granted away,” so that Congress’ failure to reserve expressly in an organic act the power to amend or abrogate territorial legislation does not prevent it from exercising such power. Id.

141 Id. at 449; see e.g., Delima v. Bidwell, 182 U.S. 1 (1901); Dooley v. U.S., 182 U.S. 222 (1901); Armstrong v. U.S., 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901) (stating: “The full effect of the Insular Cases was thus to declare that (1) Congress has general and plenary power over the territories (which it can delegate to executive agencies), but that (2) these powers are limited by certain fundamental rights of the territorial inhabitants.” Id.

142 Id. “A territory usually becomes ‘incorporated’ only if it is destined to become a state.” Id. at 459.

143 See generally Van Dyke, Flag-Islands, supra note 55, 449-53 (discussing the relationships between the U.S. and its territories).
144 Id. at 450.
145 Id.
In the past and recently, commissions were organized by the American Samoa government to examine the territory’s political status. The most recent one did not seek any changes to American Samoa’s political status but recommended that American Samoa continue to be a part of the United States with freedom to preserve the Samoan culture. But it still remains questionable whether the current political status of American Samoa is sufficient to protect the native rights and customs of Samoans in the long run.

When applying the U.S. Constitution to an unincorporated territory, the 1901 case of Downes v. Bidwell set the “fundamental rights” standard. In that case, Justice White stated that all Constitutional provisions apply to “incorporated territories” but not all apply to “unincorporated territories.” White also invited judges to invoke a “natural rights philosophy.” Consequently, the result is a categorical analysis - if a right is non-fundamental to one unincorporated territory, it will be deemed non-fundamental with respect to all other unincorporated territories. In 1922, the Court more clearly adopted this test in Balzac v. Porto Rico.

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147 Id. at 10:
Recent Future Political Status Commission consisted of five legislators, two attorneys, a district governor (prior elected lieutenant governor of American Samoa), one associate judge, two businessmen, four veterans, one college educator (PhD in Samoan Studies), and a Registered Nurse. Id.

148 Id. at 8.


150 182 U.S. 1 (1901).


152 Id.

153 Id. at 782. Arguing that White employed natural law methodology to identify which provisions are “fundamental.” Id.

154 Id. at 782 n.19. “It is . . . clearly settled that [the Constitution’s provisions for jury trial] do not apply to [a] territory . . . which has not been incorporated into the Union.” Id.

155 Balzac v. Porto Rico, 258 U.S. 298 (1922) (holding that Sixth Amendment right to a jury trial is not applicable to unincorporated territory of Puerto Rico); see also U.S. v. Vergudo-Urquidez, 494 U.S. 259, 268-69 (1990) (holding that protection against unreasonable searches and seizures did not extend to aliens outside the U.S).

In Dorr v. United States, 195 U.S. 138 (1904)], we declared the general
The Court deemed certain rights as “not fundamental in their nature.” These “non-fundamental rights” include the right to trial by jury, the right to presentment by grand jury, and the right to confront witnesses. Rights viewed as “fundamental” are mostly personal rights and privileges guaranteed by the U.S. Constitution such as due process and the prohibitions against ex post facto laws and bills of attainder. Nonetheless, in Reid v. Covert, the Court once more attempted to clarify which rights are “fundamental” to the territories. Most important in that case was Justice Harlan’s concurring opinion, where he applied a “due-process like balancing test” in determining which constitutional provisions apply to the territories. His standard established that in order to deny the extension of a constitutional provision to a territory, the government must demonstrate that it is “impractical and anomalous” in a particular setting. Under this standard, factors such as the “particular local setting, the practical necessities, and the possible alternatives” are considered. Harlan’s “impractical and anomalous” standard is criticized as “ambiguous” and “recasting the Insular Cases doctrine.”

rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated. 195 U.S. at 149. Only “fundamental” constitutional rights are guaranteed to inhabitants of those territories. Id. at 148; Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); see also Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976). Id.

Katz, Jurisprudence, supra note 151, at 783.

Balzac, 258 U.S. at 298.

Dorr v. U.S., 195 U.S. 138, 144-45 (1904) (holding that application of the Sixth Amendment’s jury trial requirement is inappropriate for the undeveloped condition of the Philippine political system).


Katz, Jurisprudence, supra note 151, at 783.

Reid v. Covert, 354 U.S. 1 (1957) (holding that U.S. military family members are not fairly in the “military service” so they are entitled to a civilian trial).

Id. See also Katz, Jurisprudence, supra note 151, at 783 (“In the territorial context, the balancing requires courts to weigh government’s plenary power to rule territories against an individual’s right to specific constitutional safeguards of personal liberty.”) Id.

See Reid, 354 U.S. at 64 (Harlan concurring).

Id. at 75 (Harlan concurring).

Id.

Katz, Jurisprudence, supra note 151, at 784:
The D.C. Circuit has applied Justice Harlan’s “impractical and anomalous” test, while the Ninth Circuit has applied the “fundamental rights” test and even touched on Harlan’s standard in a more relaxed manner. One commentator has viewed this as a “doctrinal dispute” between the two circuits which has enabled the lower federal courts to “maximize the legitimacy of the U.S. authority in the territories.”

Due to the unclear standard set by the U.S. Supreme Court, district courts differ on which Constitutional provisions are applicable to U.S. territories, particularly the application of the Sixth Amendment right to a trial by jury.

B. Preservation of the Samoan Land System Is an Important Aspect of the U.S. – American Samoa Relationship

Samoa has a unique culture often called the fa’aSamoa or the Samoan way. It has been described as the “essence of being Samoan,” and includes a “unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their

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168 See infra Part IV (discussing King v. Morton 520 F.2d 1140 (D.C. 1975)).

169 See infra Part VI(B) (discussing Wabol v. Villacrusis 908 F.2d 411 (9th Cir. 1990)).

170 See Katz, Jurisprudence, supra note 151.

171 See infra Part IV.

172 It is pronounced as Fah-ah-sah-mo-ah.
experience as a distinct race.”

There are two pillars of the fa’a Samoa: the matai title system and the communal land system.

Samoan life is centered on the aiga, or extended family, which contains a hierarchy of ruling chiefs, known as matai. A matai is given a title, which is a name other than a birth name and matais are categorized and ranked by the importance of their respective titles.

One must meet certain qualifications in order to be eligible for a matai title. To maintain family harmony one has to obtain approval and consensus from the family. In the event no consensus is reached, the matter is referred to the High Court of American Samoa. A matai title

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173 Treichert, Paradise, supra note 3, at 3.
174 Weaver, Territory, supra note 8, at 343.
175 It is pronounced as ah-ee-ngah.
176 Weaver, Territory, supra note 8, at 431.

A person not possessing all of the following qualifications is ineligible to succeed to a matai title:

(a) He must be of at least one-half Samoan blood.

(b) He must have been born on American soil: provided that a person born of parents who were inhabitants of American Samoa, but temporarily residing outside of American Samoa or engaged in foreign travel, at the date of birth of such child, may, for the purpose of this subsection be considered as having been born on American soil if:

(1) while actually residing in American Samoa and at any time within one year after he attains the age of 18 years, he files with the Territorial Registrar a renunciation, under oath of allegiance to the country of his birth; or

(2) he has resided in American Samoa for a continuous period of less than 10 years prior to the time of filing his application to be registered as the holder of a matai title.

(c) He must be chosen by his family for the title.

(d) He must live with Samoans as a Samoan.

(e) For purposes of this section, the Territory’s Delegate to the United States House of Representatives while occupying the post of Delegate, and his dependents, or a member of his staff recruited from this Territory while employed by the Delegate’s office, and his dependants, are considered to be continuously residing in American Samoa although physically residing outside of American Samoa. Id.

178 § 1.0409.
must be registered but no one can register more than one title at one time.\textsuperscript{179}

The most senior \textit{matai} of the family is the \textit{sa’o}\textsuperscript{180} and this \textit{matai} oversees all the family disputes and the usage of the family’s communal land.\textsuperscript{181} The \textit{sa’o} has the ultimate authority in the administration of communal land among the family members.\textsuperscript{182} Members of the \textit{aiga} are also expected to provide \textit{tautua},\textsuperscript{183} or service, to their \textit{sa’o} including labor on land and donation of various gifts.\textsuperscript{184}

The other pillar of the \textit{fa’a Samoa}, communal land,\textsuperscript{185} exists concomitantly with the \textit{matai} system, and one cannot exist without the other. It is the law and policy of American Samoa to prohibit the alienation of land. Am. Samoa. Code Ann. § 37.0204(a-b) provides:

\begin{enumerate}
\item[(a)] \textit{It is prohibited for any matai of a Samoan family who is, as such, in control of the communal family lands or any part thereof, to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa.}
\item[(b)] \textit{It is prohibited to alienate any lands except freeholds land to any person who has less than one-half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than 5 years and has officially declared his intention of making American Samoa his home.}
\end{enumerate}

\textsuperscript{179} § 1.0402.  
\textsuperscript{180} It is pronounced as Sah-ooh.  
\textsuperscript{181} Weaver, \textit{Territory, supra} note 8, at 343, n154. Matai functions include: 1) the allocation of communal land among the clans of the aiga; 2) the assessment of labor, goods, and money for family sponsored events; 3) control over aiga assets, such as family bank accounts; 4) mediation of interfamily disputes; 5) representing the aiga to the village councils or other populations. \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} It is pronounced as tah-ooh-two-aah.  
\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.} at 343, n155.  

Three other types of land exists in American Samoa: 1) freehold land, which is land given to individuals before the United States took control over the islands; 2) the judicially created concept of individually owned land, which is controlled by individual Samoans; and 3) government land normally obtained in the early stages of navy administration. \textit{Id.}
Land is very important to Samoans. To destroy the fa’a Samoa would annihilate the Samoan values system, sense of responsibility, and social morality. The challenge facing Samoa is how to accommodate the rights imposed upon its people by the United States, while at the same time preserving the fa’a Samoa principles essential to native life. This is probably the most important issue facing natives in the U.S. territories and worldwide. As one scholar notes:

The Enlightenment defined the West and set it apart from all of the other great cultures in the world. But in culture as in economics, there is no such thing as a free lunch. If you liberate a person from ancient tyrannies, you may also liberate him from familial controls. If you enhance his freedom to create, you will enhance his freedom to destroy. If you cast out the dead hand of useless custom, you may also cast out the living hand of essential tradition. If you give him freedom of expression, he may write The Marriage of Figaro or he may sing gangster rap. If you enlarge the number of rights he has, you may shrink the number of responsibilities he feels.

The United States must understand that the founding principle of the U.S. relationship with American Samoa is preservation of the fa’a Samoa and its communal land and matai system. It was for that specific reason that the Samoan chiefs signed the Deed of Cession. As stated in the Deed of Cession, the U.S. must “respect the rights of the people to their property.” To respect the rights of Samoans to their property is to preserve both the communal land system and the matai chief system, because both of these aspects intertwine in the fa’a Samoa culture.

C. The Unique Judicial System of American Samoa Is the Only Appropriate Venue to Hear Local Issues Regarding Matai Title and Communal Land

The United States Navy, under the command of B. F. Tilley, originally founded the High Court of American Samoa when Tilley opened a coaling station at Pago Pago in 1900. He appointed E. W. Gurr of


187 Treichert, Paradise, supra note 3, (citing James Q. Wilson, the Moral Life, Address at Brigham Young University Commencement 5-6 (Apr. 21, 1994)) (emphasis added).

188 See DEED, supra note 127.

189 Laughlin, Constitution, supra note 44, at 385.
New Zealand as his civil assistant or secretary of native affairs, where he served as judge of the local court with Commander Tilley acting as chief justice of the High Court of the territory. The initial judicial structure included a high court, district courts, and village magistrates with jurisdiction over local affairs. In 1951, President Harry S. Truman in Executive Order 10246 charged the secretary of the interior with the administration of American Samoa. Although still under the administration of the secretary of interior, the people of Samoa held a constitutional convention adopting a constitution that maintained the High Court.

Presently, the judicial structure of American Samoa consists of a High Court, a district court and village courts. Family, drug and alcohol courts, established by the chief justice of the High Court, hear juvenile, domestic relations, domestic violence, and criminal alcohol and substance abuse cases. The district court has jurisdiction over small claims civil cases, misdemeanors, traffic cases, initial examinations and preliminary proceedings in criminal cases, adoptions, and actions arising under specific statutes. Each village court consists of an associate judge assigned by the chief justice, and has jurisdiction over matters arising under the regulations of each village.

190 CAPTAIN J.A.C. GRAY, AMERIKA SAMOA: A HISTORY OF AMERICAN SAMOA AND ITS UNITED STATES NAVAL ADMINISTRATION 126-27 (1960) [hereinafter GRAY].

191 Id. at 126.

192 Laughlin, Constitution, supra note 44, at 385 (citing Exec. Order No. 10246, 16 C.F.R. 6419 (June 29, 1951)).

193 Id.


195 § 3.0501.

The Chief Justice may establish by rule or order o[r] both, a Family, Drug, and Alcohol Court Division within the High Court . . . . The purpose of this . . . is to develop a comprehensive, one judge-one family court that can address all matters affecting families, from juvenile offenses to domestic violence and adoptions to divorce and child support. The Court shall also address in its sentences relating to cases involving violence or alcohol or drug use, appropriate rehabilitation programs, close monitoring, and graduated sanctions to minimize levels of repeat offenders. Id.

196 § 3.0502.

197 § 3.0302.

198 §§ 3.0401, 3.0402.
The High Court consists of the chief justice, an associate justice and associate judges. The chief justice and associate justice are appointed by the secretary of interior, have no local or U.S. Senate confirmation, and may be removed for cause by the secretary of interior. There are at least five associate judges appointed by the governor upon the recommendation of the chief justice, and local senate confirmation is required. Justices and associate judges are prohibited from hearing cases in which they have a “substantial interest;” in the appellate division, they are prohibited from hearing a case they decided as a trial judge. The three divisions in the High Court are: land and titles division, trial division, and the appellate division.

The land and titles division hears all controversies relating to land and matai titles and requires at least the presence of a justice and one associate judge. In a land controversy, when there is a difference of opinion between the justice and associate judges assigned to the case, the opinion of the justice prevails. In a difference of opinion involving a matai title controversy, the justice withholds his opinion and the majority opinion of the four associate judges opinion prevails; however, the justice will cast the deciding vote if there is a tie among the four associate judges.

The trial division of the High Court consists of justices and judges, with the required quorum of one justice and one judge. The trial division is a court of general jurisdiction. An opinion of the justice

199 § 3.1001; see also Weaver, Territory, supra note 8, at 349. “In theory, the secretary of the interior can remove the justices without cause, but in practice the secretaries have not employed this power.” Id.

200 § 3.1004.

201 § 3.1007(a):

No judge shall sit in any case in which he, or a family of which he is a member, has a substantial interest, or in which he has been counsel, is or has been a material witness, or is a member of the same family with any party to the case.

(b) Neither the Chief Justice, nor the Associate Justice, nor any associate judge of the High Court shall sit in the appellate division of that court in the hearing and determination of any appeal from the decision of a case or question decided by him, or the decision of which he joined in the trial court. Id.


203 §§ 3.0208(b), 3.0240.

204 § 3.02400241(a).

205 § 3.0241(b).

206 § 3.0230.

207 § 3.0208.
always prevails if there is a difference of opinion between the justice and judges.\textsuperscript{208} The trial court’s Rules of Civil and Criminal Procedure and Rules of Evidence are modeled after the U.S. Federal Rules.\textsuperscript{209}

The appellate division consists of the chief justice, associate justice, acting associate justices appointed by the secretary of the interior, and associate judges, with the presence of two justices and one associate judge necessary for a quorum.\textsuperscript{210} This division reviews on appeal all final decisions of the trial and land and titles divisions of the high court.\textsuperscript{211} The acting associate justices are typically Ninth Circuit judges who travel from the U.S. to American Samoa once a year to hear appeals in the appellate divisions.\textsuperscript{212} Although it has never occurred, the Secretary of the Interior may overrule any decision by the appellate division.\textsuperscript{213} Under American Samoa law, the secretary’s right to review may cease if the American Samoan legislature creates an appellate review system, but that option has

(a) The trial division of the High Court shall be a court of general jurisdiction with the power to hear any matter not otherwise provided for by statute. Notwithstanding the foregoing, the trial division of the High Court shall have original jurisdiction of the following classes of cases and controversies:

(1) civil cases in which the amount in controversy exceeds $5,000, except land and titles matters as provided in subsection (b);
(2) criminal cases in which a felony is charged;
(3) admiralty and maritime matters, of which the trial division shall both in rem and in personam jurisdiction;
(4) juvenile cases;
(5) the probate of wills and administration of estates;
(6) domestic relations, except adoptions and actions arising under the Uniform Reciprocal Enforcement of Support Act;
(7) all writs; and
(8) all matters of which the trial division has jurisdiction by statute. \textit{Id.}

\textsuperscript{208} § 3.0231.

\textsuperscript{209} Weaver, \textit{Territory, supra} note 8, at 350.

\textsuperscript{210} AM. SAMOA CODE ANN. § 3.0220 (2009), \textit{available at} http://www.asbar.org (last visited Apr. 25, 2009) (follow “Legal Resources” hyperlink; then follow “American Samoa Code” hyperlink).

\textsuperscript{211} § 3.0208(c).

\textsuperscript{212} Weaver, \textit{Territory, supra} note 8, at 351.

\textsuperscript{213} See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 378-79 (D.C. Cir. 1987); \textit{see also} Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1412 (D.D.C. 1986).
yet to be exercised by the legislature.\textsuperscript{214} Direct appeals to other courts, including the Supreme Court of the United States, are not available\textsuperscript{215} and American Samoa is not included in any federal circuit court of appeals.\textsuperscript{216} The appellate division of the High Court is the court of last resort in American Samoa.

A problem arises when Samoan residents are charged with federal crimes. The High Court of American Samoa has jurisdiction over certain federal matters,\textsuperscript{217} but does not have jurisdiction over crimes listed in Title 18 of the United States Code and bankruptcy.\textsuperscript{218}

Even in instances of limited federal jurisdiction, the High Court of American Samoa operates differently from federal district courts. The High Court’s “piecemeal nature” does not give it authority to “enjoin federal court proceedings or to transfer a case to a federal court,” thus sometimes leading to “parallel litigation in the High Court and a federal court.”\textsuperscript{219} A recent example of parallel litigation occurred in a 2003 maritime case, when a plaintiff brought suit on the same incident in the High Court of American Samoa and the federal district court of the Southern District of California.\textsuperscript{220} Another difference is that direct appeals to circuit courts are available from other federal courts, including district courts in other U.S. territories, but such an appeal is not available for the High Court of American Samoa. One may access a federal district court.


Unless and until the Legislature of American Samoa provides for an appeal to a court created by an act of the Legislature, the decisions of the Appellate Division of the High Court shall be final. When and if the Legislature of American Samoa provides for an appeal from any decision of the courts of American Samoa to a court created by an act of the Legislature, any right of appeal granted from such decisions to the appellate division of the High Court and right or review by the Secretary of the Interior shall cease. \textit{Id.}

\textsuperscript{215} \textit{Hodel}, 830 F.2d at 385-86.

\textsuperscript{216} 28 U.S.C.A § 41 (West 2009).

\textsuperscript{217} \textit{See e.g.,} 46 U.S.C.A. § 3101(2)(E) (West 2008) (granting the High Court jurisdiction over admiralty cases); 29 U.S.C.A. § 653 (West 2008) (granting the High Court jurisdiction over Occupational Safety and Health Administration violations); 7 U.S.C.A § 136(i) (West 2008) (granting the High Court jurisdiction over environmental pesticide control statute); 7 U.S.C.A. § 2146(c) (West 2008) (granting the High Court jurisdiction over the transportation, sale, and handling of certain animals); 49 U.S.C.A. § 3102(a)(11) (West 2008) (jurisdiction over motor vehicle safety).

\textsuperscript{218} Jenkins, \textit{GAO}, supra note 9, at 13.

\textsuperscript{219} \textit{Id.} at 14.

\textsuperscript{220} \textit{Id.} at 14 n.41.
court and circuit court of appeals, however, by suing the secretary of the interior in his role as administrator of the territory.\textsuperscript{221}

Until recently, federal prosecutors and other courts have asserted jurisdiction over Samoan residents charged with federal crimes. A federal law, also known as the “first brought statute,” provides a venue for the federal government.\textsuperscript{222} Under this statute, proper venue for a crime committed outside a judicial circuit is:

(1) the district in which the defendant is arrested or first brought; or (2) if the defendant is not yet arrested or first brought to a district, in the judicial district of the defendant’s last known residence; or (3) if no such residence is known, in the U.S. District Court for the District of Columbia.\textsuperscript{223}

The Ninth Circuit and D.C. Circuit have upheld this statute in two federal cases involving federal crimes in Samoa.\textsuperscript{224} Other than the “first brought statute,” U.S. district courts have jurisdiction and venue if part of the offense was committed in their state or jurisdictional area.\textsuperscript{225} Consequently, previous federal cases involving Samoan residents were heard all over the U.S.\textsuperscript{226} As a result, Samoan residents are deprived of their right to a trial by jury of their peers. In the following cases, the defendants unsuccessfully challenged the jurisdiction and venue of the courts in which they were charged and convicted.

\textsuperscript{221} See Hodel, 637 F. Supp. at 1405:

Here, the sole defendant is the Secretary of the Interior, and the issue is whether he has administered the government of American Samoa in accordance with the requirements of the United States Constitution. Clearly, the Secretary is within the geographical jurisdiction of the United States District Court for the District of Columbia, and that court is competent to judge the Secretary’s administration of the government of American Samoa by constitutional standards, and if necessary, to order the Secretary to take appropriate measures to correct any constitutional deficiencies. \textit{Id.}

\textsuperscript{222} 18 U.S.C.A. § 3238 (West 2009).

\textsuperscript{223} Jenkins, \textit{GAO, supra} note 9, at 12 (citing 18 U.S.C.A. § 3238 (West 2009)).

\textsuperscript{224} U.S. v. Gurr, 471 F.3d 144 (D.C. Cir. 2006); U.S. v. Lee, 472 F.3d 638 (9th Cir. 2006).

\textsuperscript{225} Jenkins, \textit{GAO, supra} note 9, at 12 n.35 (citing U.S. v. Ofoia (M.D. Ga. filed Feb. 28, 2003) (eight residents of American Samoa charged in the U.S. District Court for the Middle District of Georgia with defrauding AFLAC, headquartered in Georgia).

\textsuperscript{226} Id. at 13 n.36 (citing cases: U.S. v. Kuo (D. Haw. filed May 10, 2007) (the Criminal Section of DOJ’s Civil Right’s Division prosecuted several individuals involved in a sex trafficking operation in American Samoa); U.S. v. Sunia (D.D.C. filed Sept. 6, 2007) (the Public Integrity Section of the DOJ’s Criminal Division initiated proceedings against two government officials in American Samoa, charging, among other things, fraud and bribery)).
1. U.S. v. Lee

KilSoo Lee recruited individuals from Vietnam, China, and American Samoa to work in his garment factory in American Samoa. Federal authorities arrested Lee and transported him 2,300 miles to be tried in the Hawaii federal district court. Lee moved for lack of jurisdiction and improper venue but the district court denied his motion and agreed with the government that jurisdiction is proper because American Samoa is not a “district.” A federal grand jury convicted Lee on fourteen counts—conspiracy to violate civil rights, involuntary servitude, extortion, and money laundering, which resulted in a 40-year prison sentence.

Lee appealed his case asserting lack of jurisdiction and improper venue. He asserted that the High Court of American Samoa, through various statutory provisions, had jurisdiction to enforce American Samoa laws. He also argued that due to executive delegations, the High Court’s jurisdiction trumped the federal district court’s jurisdiction.

The Ninth Circuit reasoned that § 1.0201 of the American Samoa code does not discuss incorporation of Title 18 crimes and the High Court has never tried an individual under Title 18. Even if the Legislature of

227 Lee, 472 F.3d at 639-640.

228 Id. at 640. Lee’s actions included incidents of deportation threats . . . preventing workers from leaving the compound, and feeding workers so sparingly that they were forced to sneak out of the compound in search of food.

229 Id.

230 Id. at 640-41; see generally 18 U.S.C.A. § 3238 n.9 (West 2009).

231 Lee, 472 F.3d at 641.

232 Id. at 642.

233 Id.; see also 48 U.S.C.A. § 1661(c) (West 2009).

234 Id. Lee cited AM. SAMOA CODE ANN. § 1.0201 as incorporating Title 18 federal crimes in American Samoa.


The following are declared to be in full force and to have the effect of law in American Samoa:


(2) The parts of the Constitution of the United States of America and the laws of the United States of America as, by their own force, are in effect in American Samoa;

(3) This Code, as amended from time to time and rules issued pursuant thereto;

(4) So much of the common law of England as is suitable to conditions
American Samoa had incorporated Title 18 into Samoan law, a federal district court would still have concurrent jurisdiction to try an individual for Title 18 crimes, even if the High Court of American Samoa had already done so.\(^{236}\) Most important to the court was the fact that Congress did not create a federal district court in American Samoa to adjudicate federal law.\(^{237}\) The court reasoned that Congress could have created a federal district court in American Samoa or directed an existing American Samoa court to assert jurisdiction over a particular criminal matter.\(^{238}\) In denying Lee’s motion for improper venue, the court asserted that venue was proper under the “first brought statute.”\(^{239}\)

2. U.S. v. Gurr

In 1999, Bernard Gurr, a manager of the American Samoa Government Employees Federal Credit Union, was on his way from American Samoa to Hawaii, when he was arrested for conspiring to defraud the United States.\(^ {240}\) He was later charged with a superseding twenty count indictment, found guilty by a jury trial, and sentenced to 70 months in prison.\(^ {241}\)

Gurr argued that the district court lacked jurisdiction and that venue was improper because the crimes occurred in American Samoa.\(^ {242}\) The D.C. Circuit briefly noted that Title 18 applied to American Samoa regardless of whether the secretary of interior had explicitly extended Title 18 to American Samoa, but that the courts of American Samoa did not have jurisdiction to hear Title 18 violations.\(^ {243}\) With regard to venue, the court denied Gurr’s motion and reasoned that venue was proper under 18 in American Samoa and not inconsistent with this section.

(5) The provisions of the prior codes of American Samoa and other laws that are inconsistent with the provisions of this Code, until such time as they are repealed or superseded. Id.

\(^ {236}\)Id. at 643 (citing King v. Morton, 520 F.2d 1140, 1141 (D.C. Cir. 1975) (“[T]hat Samoan courts are competent to adjudicate claims of Samoan litigants arising under the laws of the United States does not prevent district courts from hearing such claims when jurisdiction is otherwise proper.”)).

\(^ {237}\)Id. (citing 28 U.S.C.A §§ 81-131 (2009) (listing all judicial “districts,” but not including American Samoa)).

\(^ {238}\)Id.


\(^ {240}\)Gurr, 471 F.3d at 146-147.

\(^ {241}\)Id. at 147.

\(^ {242}\)Id. at 154.

\(^ {243}\)Id.
U.S.C. § 3238 since he was indicted in the District of Columbia before he was arrested and "first brought" into the United States.\textsuperscript{244}

These are just two cases among the many current and past controversies that articulate the need for a federal court in American Samoa.

IV. THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL IS APPLICABLE TO THE TERRITORY OF AMERICAN SAMOA

In 1968, the Supreme Court of the United States held in \textit{Duncan v. Louisiana} that the Sixth Amendment right to a jury trial is applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{245} Two years later, the Court affirmed \textit{Duncan}'s proposition in \textit{Baldwin v. New York}.\textsuperscript{246} Lower courts disagreed about the application of the Sixth Amendment right to a jury trial to the U.S. territories.\textsuperscript{247}

Two U.S. Supreme Court decisions, \textit{Hawaii v. Mankichi}\textsuperscript{248} and \textit{Dorr v. U.S.},\textsuperscript{249} stood for the proposition that the Sixth Amendment right to jury trials did not apply to unincorporated territories. The Court in \textit{Dorr} emphasized its position:

\begin{quote}
[T]he power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory
\end{quote}

\textsuperscript{244} \textit{Id.} at 155.

\textsuperscript{245} \textit{Duncan v. Louisiana}, 391 U.S. 145, 156 (1968); see also \textit{Baldwin v. New York}, 399 U.S. 66 (1970) (holding that although Sixth Amendment of the U.S. Constitution allows a “petty” offense to be tried without a jury, no offense punishable by more than six month’s imprisonment could be deemed “petty”); \textit{Dorr v. U.S.}, 195 U.S. 138 (1904) (holding that application of the Sixth Amendment’s jury trial requirement is inappropriate for the undeveloped condition of the Philippine political system); \textit{Hawaii v. Mankichi}, 190 U.S. 197 (1903) (holding that right a jury and the right to presentment by a grand jury are “not fundamental” but concern merely a method of procedure).

\textsuperscript{246} \textit{Baldwin}, 399 U.S. at 66.

\textsuperscript{247} \textit{Compare} \textit{King v. Andrus}, 452 F. Supp. 11 (D. D.C. 1977) (holding that Sixth Amendment right to a jury trial is applicable to the territory of American Samoa), and \textit{Northern Mariana Islands v. Atalig}, 723 F.2d 682 (9th Cir. 1984) (holding that Sixth Amendment right to jury trials is not applicable to CNMI).

\textsuperscript{248} \textit{Mankichi}, 190 U.S. at 197.

\textsuperscript{249} \textit{Dorr}, 195 U.S. at 138.
so situated.\textsuperscript{250} In 1922, the Court re-affirmed this position in \textit{Balzac v. Porto Rico}.\textsuperscript{251} In that case, the defendant, an editor of a daily newspaper in Puerto Rico, was charged with misdemeanor criminal libel.\textsuperscript{252} He demanded a jury trial and the local district court denied his demand, referencing the Penal Code of Puerto Rico that gave no right to jury trials for misdemeanor offenses.\textsuperscript{253} He contended that the Sixth Amendment of the U.S. Constitution requires that in “all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”\textsuperscript{254} The local district court ruled against this contention, which was later affirmed by the Supreme Court of Puerto Rico.\textsuperscript{255} The U.S. Supreme Court affirmed and held that the Sixth Amendment right to trial by jury did not apply to the unincorporated territory of Puerto Rico.\textsuperscript{256}

Half a century later, American Samoa dealt with the issue of jury trials in \textit{King v. Morton}.\textsuperscript{257} In that case, the issue before the D.C. Circuit was the constitutionality of American Samoa’s historic refusal to provide jury trials to persons prosecuted under territorial law.\textsuperscript{258}

Jake King, a non-Samoan U.S. citizen living in American Samoa, was charged with violating American Samoa’s tax code.\textsuperscript{259} After moving for a jury trial, his motion was denied by the trial division of American Samoa.\textsuperscript{260} The trial division reasoned that the “legislation and statutes” of American Samoa “do not provide for a jury trial” and a “constitutional right to a jury trial does not extend to territories which were not incorporated into the Union.”\textsuperscript{261} The defendant appealed his case to the appellate division of the High Court of American Samoa where the trial division’s ruling was affirmed, and the appellate division held that the “imposition of an Anglo-American jury system upon Samoa’s legal

\textsuperscript{250} Dorr, 195 U.S. at 149.
\textsuperscript{251} Balzac v. Porto Rico, 258 U.S. 298 (1922).
\textsuperscript{252} Id. at 300.
\textsuperscript{253} Id.
\textsuperscript{254} Id. at 304.
\textsuperscript{255} Id. at 302.
\textsuperscript{256} Id. at 314.
\textsuperscript{257} King v. Morton, 520 F.2d 1140 (D.C. 1975).
\textsuperscript{258} Id. at 1143.
\textsuperscript{259} Id. at 1142.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
structure ‘would be an arbitrary, illogical, and inappropriate foreign imposition.’”

King commenced an action against the secretary of the interior, as administrator of American Samoa, in declaring the right to a trial by jury unconstitutional.263 The district court for the District of Columbia dismissed the action for lack of jurisdiction.264 King appealed to the D.C. Circuit Court of Appeals and argued that even though the U.S. Supreme Court in Balzac held that the right to a “jury trial” is not a fundamental right in unincorporated territories; the Court had reversed its position in Duncan and Baldwin by applying the right to jury trial to the states through the Fourteenth Amendment.265 The D.C. circuit held that the Duncan and Baldwin decisions had not overruled Balzac.266 Implying a movement away from the Balzac decision, however, the circuit court stated that the case did not depend on whether the territory was “unincorporated” or whether a right was “fundamental.”267 Instead, the court indicated that the Constitutional right of a trial by jury rests on a “solid understanding of the present legal and cultural development of American Samoa” by considering factors such as the particular local setting, the practical necessities, and the possible alternatives.268 The main question, according to the court, should be whether the right to a trial by jury would be “impractical and anomalous” within the unique circumstances of American Samoa.269 The circuit court reversed the district court’s holding and remanded the case back to the district court, instructing it to determine whether the implementation of a jury system was “practicable” in light of “the Samoan mores and mātai culture with its strict societal distinctions.”270

On remand, the district court decided that the right to a jury trial was applicable to American Samoa.271 The court concluded that facets of Samoan culture not compatible with the institution of trial by juries have been “eroded in the face of western world encroachment.”272 Moreover,

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262 Id. at 1143 (citing Gov’t of American Samoa v. King, no. App. 63-73 (High Ct. Am. Samoa, App. Div., decided Apr. 1, 1974)).
263 Id. at 1144.
264 Id.
265 Id. at 1146-47.
266 Id. at 1147.
267 Id.
268 Id.
269 Id. (citing Reid v. Covert, 354 U.S. 75 (1957) (Harlan, concurring)).
270 Id.; See also Van Dyke, Flag-Islands, supra note 55, at 463.
272 Id. at 14.
the court determined that the American Samoa system could provide for a jury pool since the islands possess a sufficient pool of prospective jurors and legal personnel. Finally, in light of the “legal and cultural development . . . trial by jury in American Samoa . . . would not have been, and is not now, ‘impractical and anomalous.’” Therefore, the court held that any “rules and regulations . . . which deny the right of a trial by jury in criminal cases in American Samoa are unconstitutional on their face.”

Critically, Justice Harlan’s “impractical and anomalous” standard as applied in King may disregard a territory’s express wishes, and indicates a more extensive application of the U.S. Constitution overseas. Therefore, Samoans should be aware of possible long-term implications that this standard may have on their local customs and practices.

In Northern Mariana Islands v. Atalig, the Ninth Circuit ruled differently on the application of the Sixth Amendment right to a jury trial in CNMI. In Atalig, the Defendant was charged with possession of marijuana and requested a trial by jury, which the trial court denied. Like the defendant in King, Atalig argued that his right to a jury trial, guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution, was being denied. The Ninth Circuit, like the D.C. Circuit in King, rejected the position that Duncan and Baldwin overruled the

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273 Katz, Jurisprudence, supra note 151, at 787.

274 Andrus, 452 F. Supp. at 17.

275 Id.

276 Katz, Jurisprudence, supra note 151, at 801.

Unlike the Insular Cases Court [which presumed that rights deemed “non-fundamental” in one setting did not apply in other unincorporated areas] . . . Harlan’s test presumes that every constitutional right applies to every territory. To overcome this presumption, the government must show that introducing a specific right would be too burdensome in the given setting . . . . The “impractical and anomalous” standard . . . connotes a more extensive application of the Constitution overseas. Id. (emphasis added).

277 Robert A. Katz comments that this standard implies a more extensive application of the Constitution overseas. Therefore, there is an argument that the King standard may not be favorable to the people of American Samoa, particularly in any Equal Protection on their communal land and matai system.


279 Atalig, 723 F.2d at 684. Maximum penalty for possession of marijuana is one year imprisonment, a $1,000 fine, or both. 5 Trust Territory Code § 501(1) provides jury trials in criminal cases only for offenses punishable by more than five years imprisonment or a $2,000 fine. Id.

280 Id. at 684.
decision in *Balzac*. Suprisingly, this was the only time the court cited to the *King* case.

Though the CNMI Covenant specifically states that jury trials are not applicable to the CNMI, the court rejected the approach that “the Constitution applies in the [C]NMI only to the extent provided for and agreed to in the Covenant.” However, the court cited the *Balzac*, *Dorr*, and *Mankichi* cases for the proposition that the Fifth Amendment grand jury indictment and Sixth Amendment right to a trial by jury are non-fundamental rights that do not apply in unincorporated territories.

Also, the court made no mention of Harlan’s “impractical and anomalous” test in *Reid v. Covert*. Furthermore, the court rejected the *Reid* case as inapplicable to the federal government’s relationship with U.S. territories; *Reid*, the court believed, applied to the government’s authority to extend military jurisdiction to civilian citizens, not Congress’ broader authority over insular authorities. The court held that to maintain Congress’ “flexibility” in its territorial powers, *Duncan’s* approach should not apply, but the appropriate standard was to “inquire whether the asserted right ‘was one of those fundamental limitations in favor of personal rights’ which are the ‘basis of all free government.’” This approach is appropriate when administering offshore territories to avoid imposition of provision on “peoples unaccustomed to common law traditions.” The court considered the relevance of the provisions established in the Covenant and concluded that not providing for jury

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281 Id. at 690, n.25 (citing King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975)).
282 Id. at 688.
283 Id.
284 Id. at 689, n.22 (“we think the district court exaggerated *Reid’s* effect on the *Insular Cases.*”); see also Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1139 n.11 (D. N. Mar. I. 1999) (rejecting the “impractical and anomalous” test because the “vitality of that test is in doubt”).
285 Id at 689. “Reid concerned the government’s power to extend military jurisdiction to civilian citizens; in contrast, the *Insular Cases* considered the power of Congress to govern insular territories.”
286 Id. at 690. “Were we to apply sweepingly Duncan’s definition of ‘fundamental rights’ to unincorporated territories, the effect would be immediately to extend almost the entire Bill of Rights to such territories. This would repudiate the *Insular Cases.*” Id.
287 Id. (emphasis added).
288 Id. at 685. “The drafters of the Covenant noted that without these provisions, ‘the accession of the Northern Mariana Islands to the United States would not have been possible. Marianas Political Status Commission, Report of the joint Drafting Committee 3 (1975).” Id. (emphasis added).
trials in CNMI under the Covenant did not violate either the Sixth or Fourteenth Amendment of the U.S. Constitution.\textsuperscript{289}

Although the \textit{King} and \textit{Atalig} cases conflicted, \textit{King} appeared to require that American Samoa allow for jury trials. American Samoa, however, still has not fully embraced the holding in \textit{King}. The American Samoa Constitution does not expressly guarantee the right to a jury trial; instead it grants such a right to the extent the chief justice provides for jury trial by rule.\textsuperscript{290}

\section*{V. The GAO and Its Recommended Proposals in Addressing the Federal Court Issue in American Samoa}

The idea of a federal court is not new to American Samoa. In the 1930’s, legislation was proposed to establish an avenue of appeal from the High Court of American Samoa to the U.S. District Court of Hawaii, but Congress took no action.\textsuperscript{291} Even in the mid 1990s, in response to concerns involving white-collar crime in American Samoa,\textsuperscript{292} there was a proposal for changing the judicial structure of American Samoa, including the establishment of a federal court; again, Congress did not take any action on the proposal.\textsuperscript{293} Recently in 2006, Congressman Eni Faleomavaega Hunkin of American Samoa introduced legislation into the U.S. Congress to establish a federal court in American Samoa.\textsuperscript{294} Due to a request from the local legislature of American Samoa, the Congressman suspended any further consideration of the legislation and requested the GAO to study the issue and submit a report.\textsuperscript{295}

Near the end of 2008, the GAO published a report identifying three potential scenarios for solving the federal court issue in American Samoa:

\begin{enumerate}
\item Establish a federal court in American Samoa under Article IV of the U.S. Constitution,
\item Establish a district court in American Samoa as a
\end{enumerate}

\textsuperscript{289} Id. at 690.
\textsuperscript{290} See AM. SAMOA CONST. art. I, § 2, available at http://www.asbar.org (last visited April 26, 2009) (follow “Legal Resources” hyperlink; then follow “American Samoa Constitution” hyperlink). The case notes section states that due process does not require jury trial unless provided by the Chief Justice by rule. Pelesasa v. Te’o (A.S. 1978) comes a year after the King decision.
\textsuperscript{291} See FPSCC, supra note 146, at 14.
\textsuperscript{292} See American Samoa, available at http://www.tpub.com/content/cg1998/og98005/og980050023.htm (last visited Apr. 25, 2009). “In a December 1994 report, the team concluded that the absence of a federal court in American Samoa contributed to difficulties in curbing white collar crimes.” Id.
\textsuperscript{293} See FPSCC, supra note 146, at 15.
\textsuperscript{294} See HR 4711, supra note 52.
\textsuperscript{295} See FPSCC, supra note 146, at 9.
division of the District of Hawaii, or

(3) Expand the federal jurisdiction of the High Court of American Samoa.\textsuperscript{296}

A closer analysis illustrates that the second and third scenarios raise more problems than they solve.

A. Establishing a District Court in American Samoa as a Division of the District of Hawaii Creates Bad Public Policy and Is Unworkable

In this scenario, a division of American Samoa would be created within the District of Hawaii. The jurisdiction of this district would be specified by statute and could be limited to criminal cases only, or possibly include bankruptcy, federal question, and diversity jurisdiction.\textsuperscript{297} The process of appealing decisions would be the same as the district of Hawaii—to the Ninth Circuit and then to the U.S. Supreme Court.\textsuperscript{298} Executive and judicial branch staff in the District of Hawaii could share support and provide minimal staff for the American Samoa division.\textsuperscript{299}

Since the new division of American Samoa would be a part of the District of Hawaii, an Article III judge would be required to preside over it.\textsuperscript{300} This would be wholly different from the Article IV federal courts in other U.S. territories. Unlike federal judges in other territories, the judge for the new American Samoa division would be appointed by the President, with the advice and consent of the Senate, and serve a life-term. This is problematic and would raise questions of equity between the federal courts in the U.S. territories.\textsuperscript{301} Of all the U.S. territories, only American Samoa will have federal judges with life-term, instead of the regular ten year term for other territorial district judges. Moreover, the GAO reported that the cost for “additional supervisory staffs” to travel between American Samoa and Hawaii would make this proposal more costly than establishing an Article IV district court.\textsuperscript{302}

\textsuperscript{296} See GAO, supra note 9, at 27.

\textsuperscript{297} Id. at 30.

\textsuperscript{298} Id.

\textsuperscript{299} Id.

\textsuperscript{300} Id. at 29-30. This would “differ from the Article IV courts in CNMI, Guam, and USVI . . . [Judge[s] would be appointed by the President, with the advice and consent of the Senate, and serve either a life term with good behavior (Article III) or a 10-year term (Article IV) as is true in Guam, CNMI, and USVI.” Id.

\textsuperscript{301} Id. at 30.

\textsuperscript{302} Id.
B. Expanding the Federal Jurisdiction of the High Court Is Not an Appropriate Solution Because It Creates More Problems Than It Solves

Another proposed scenario is to expand the federal jurisdiction of the High Court. Though it may seem inexpensive and suitable for Samoan residents, this scenario brings more issues to the table than it solves.

Expanding the jurisdiction of the High Court is a unique scenario when compared to federal courts in other insular territories.\textsuperscript{303} “While there is a history of federal courts in insular areas with jurisdiction over local offenses, there has never been the reverse -- a local court with jurisdiction over both local and federal offenses.”\textsuperscript{304} The judge for this scenario would be the chief justice of the High Court of American Samoa; an impractical solution since the chief justice would need to manage both a local and federal caseload.\textsuperscript{305} It is also uncertain whether executive and judicial branch staffs would be provided by the United States since they are normally only provided to a federal district court.\textsuperscript{306} The facilities of the High Court may also be an issue since they are “already used to capacity without the added caseload that federal jurisdiction could bring.”\textsuperscript{307} Though this may seem less costly, various issues with judges’ roles and appointment make this scenario impractical.\textsuperscript{308} As the GAO stated:

High Court Justices would have to be cognizant of their roles and responsibilities when shifting from the duties of a local High Court Justice to the duties of a federal judge . . . [Some judicial officials] expressed concerns about the differences in the way judges are appointed – while federal judges are generally appointed by the President, the justices in America Samoa are appointed by the Secretary of the Interior.\textsuperscript{309}

Finally, the appeals process would be complicated and uncertain due to numerous levels of appellate review for the limited federal cases the High

\textsuperscript{303} \textit{GAO}, supra note 9, at 31.
\textsuperscript{304} \textit{Id.}
\textsuperscript{305} \textit{Id.} at 31-32. “The Chief Justice of the High Court has stated that the High Court may need an additional judge to handle the increased caseload.”
\textsuperscript{306} \textit{Id.} at 32.
\textsuperscript{307} \textit{Id.}
\textsuperscript{308} \textit{Id.} at 33.
\textsuperscript{309} \textit{Id.}
Court of American Samoa currently handles.\textsuperscript{310} The following is the appellate review process for this proposal:

(1) to the Appellate Division of the High Court, (2) to the Secretary of the Interior, (3) to the U.S. District Court for the District of Columbia, (4) to the U.S. Court of Appeals for the District of Columbia Circuit, and (5) to the U.S. Supreme Court.\textsuperscript{311}

This perplexing and excessive appellate process will cause tremendous hardships to the parties due to delay from the multiple levels of appeal. The parties will also suffer costly attorney’s fees, not to mention the social stress the families go through in the whole process. Furthermore, in the event there is an appeal to the district court of the District of Columbia and the D.C. Circuit, the parties would potentially bear a heavier financial if they had travel all the way to D.C. for multiple appeals. Moreover, compared to all the federal courts in the States and U.S. territories, this scenario is different because one level of federal review is through the secretary of the interior, in his position as administrator of the American Samoa government.\textsuperscript{312}

More importantly, Samoans should know that the Ninth Circuit rather than the D.C. Circuit is a more favorable judicial environment for any case from American Samoa, due to the familiarity that most Ninth Circuit federal judges have with local customs and issues.\textsuperscript{313}

Some commentators, most notably Michael W. Weaver,\textsuperscript{314} have argued in favor of expanding the High Court’s jurisdiction.\textsuperscript{315} He contends that the distinctiveness of the Samoa judicial system from other territories should be preserved.\textsuperscript{316} In his article, Weaver suggests that the

\textsuperscript{310} Id. at 31.

\textsuperscript{311} Id.

\textsuperscript{312} See supra Part II(B).

\textsuperscript{313} See infra Part VI(B).

\textsuperscript{314} Michael Weaver is an associate at McDermott Will & Emery LLP. He is also a former law clerk to Chief Justice Michael Kruse and Associate Justice Lyle L. Richmond of the High Court of American Samoa.

\textsuperscript{315} See Weaver, Territory, supra note 8.

\textsuperscript{316} Id. at 365.

Congress established federal district courts in Puerto Rico, the U.S. Virgin Islands, and Guam when it organized the civil government. . . This did not occur in American Samoa. . . . Over time, the federal government has provided the high court with federal jurisdiction in such areas as admiralty and Occupational Safety and Health Administrations violations. Id.
High Court of American Samoa could be incorporated into the Ninth Circuit for federal appeals.\textsuperscript{317}

Although Weaver’s proposal addresses the issue of unfair trials, it will likely promote forum shopping. Under his proposal, one could appeal a federal decision by the High Court to the Ninth Circuit (as Weaver suggests), or to the district court of D.C and then to the D.C. Circuit Court of Appeals by challenging the secretary of the interior as the administrator of American Samoa.

VI. The Best Solution is the Creation of an Article IV Federal District Court in American Samoa

The best solution for dealing with these complex issues is the establishment of a federal district court in American Samoa. Creating this federal district of American Samoa mirrors the draft legislation introduced by Congressman Eni Faleomavaega in 2006.\textsuperscript{318} A federal district court of American Samoa could have limited jurisdiction that would “exclude matters pertaining to matai title and land tenure issues.”\textsuperscript{319} The President, with the advice and consent of the Senate, would appoint Judges for a ten-year term. Associated executive and judicial branch staff could also be provided with their own stand-alone offices.\textsuperscript{320}

A new courtroom, detention facility, judge’s chambers and other relevant infrastructure would also be built.\textsuperscript{321} Appeals would be to the U.S. Court of Appeals of the Ninth Circuit, which as discussed previously, is a favorable judicial environment for American Samoa.\textsuperscript{322}

This model emulates those established in other territories.\textsuperscript{323} Although some may argue that the caseload will be relatively small, some studies show that new federal courts open up new businesses benefiting the territory and its people.\textsuperscript{324} Also, Samoan residents, as in other insular territories, will be provided with a fair trial by jury of their peers. If a defendant fears jury partiality, the case may be transferred to another

\textsuperscript{317} Id. at 366.

\textsuperscript{318} See HR 4711 supra note 52.

\textsuperscript{319} Jenkins, GAO, supra note 9, at 27 (emphasis added).

\textsuperscript{320} Id. at 28. “Probation and Pretrial services staff, U.S. Attorney and Staff, and U.S. Marshals staff would establish stand-alone offices, Defender services could be provided, at least initially, through the Federal Public Defender Organization personnel based in the District of Hawaii and/or Criminal Justice Act (CJA) panel attorneys.” Id.

\textsuperscript{321} Id. at 29.

\textsuperscript{322} See infra Part VI(A).

\textsuperscript{323} See supra Part II(B).

\textsuperscript{324} Jenkins, GAO, supra note 9, at 29, n.65.
district at the federal court’s discretion and with the defendant’s consent.\(^{325}\)

A. *The Ninth Circuit Is a Favorable Judicial Environment for the People of American Samoa*

Besides more cost-efficient airfare,\(^ {326}\) the Ninth Circuit is a favorable venue for appeals from the federal district court in American Samoa. Though legislation establishing a federal court in American Samoa would restrict the federal court from hearing any case involving communal land or the *matai* chief system, the possibility of an equal protection challenge to these pillars of the *fa’a Samoa* must be considered.

Firstly, in the event there is a challenge to the communal land and *matai* system, the Ninth Circuit judges are already well aware of local customs and practice, because from time to time Ninth Circuit judges have been designated by the secretary of the interior to sit on the High Court.\(^ {327}\) Secondly, there is precedent in the Ninth Circuit that would preserve the communal and *matai* system of American Samoa in the event of a challenge.

B. *Samoan Fear of Infringement upon American Samoa Communal Land and Matai System from the Creation of a Federal District Court Is Misguided*

The major fear Samoans have of increasing federal presence in the territory is the impact of the Fourteenth Amendment Equal Protection Clause. They fear that a federal court would infringe upon Samoan culture and traditions, particularly the communal land and *matai* system.\(^ {328}\) However, an increasing federal presence in American Samoa does not necessarily mean that the Fourteenth Amendment would apply automatically to the territory.\(^ {329}\) American Samoa, unlike Puerto Rico and Guam,\(^ {330}\) does not have statutory provisions providing that only parts of

\(^{325}\) See 28 U.S.C.A § 1404(a-b) (West 2009).

\(^{326}\) It is reasonably inexpensive to travel from American Samoa to California (Ninth Circuit), then to D.C. (D.C. Circuit).


\(^{328}\) See Jenkins, GAO, supra note 9, at 23-24.

\(^{329}\) Weaver, Territory, supra note 8, at 358-62.

\(^{330}\) See e.g., *Guam Soc. of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992); Examining Bd. of Eng’rs, Architects, and Surveyors v. Flores
the Fourteenth Amendment apply to the territory.\textsuperscript{331} Nevertheless, a significant case decided by the Ninth Circuit Court of Appeals in 1889, \textit{Wabol v. Villacrusis},\textsuperscript{332} supports the proposition that the \textit{matai} and communal land system would survive an equal protection challenge.

In \textit{Wabol}, the main issue before the Ninth Circuit was whether land restriction in the CNMI Constitution violated the Equal Protection Clause.\textsuperscript{333} Article XII, section 1 of the CNMI constitution provides that “[t]he acquisition of permanent and long-term interests in real property within the Commonwealth \textit{shall be restricted to persons of Northern Marianas descent}.\textsuperscript{334} As in \textit{Atalig}, the court stated that fundamental rights are those “limitations in favor of personal rights which are the basis of all free government,” as contrasted with defining fundamental rights as those “necessary to Anglo-American regime of ordered liberty.”\textsuperscript{335} The court also stressed that “the incorporation analysis thus must be undertaken with an eye toward preserving Congress’ ability to accommodate the unique social and cultural conditions and values of the particular territory.”\textsuperscript{336}

In addressing the \textit{King} standard, the Ninth Circuit noted that the “impractical or anomalous” test “sets forth a workable standard” to analyze a “delicate balance between local diversity and constitutional command, and one which is consistent with the principles stressed in \textit{Atalig}.”\textsuperscript{337} Significantly, the Ninth Circuit used the more relaxed “impractical or anomalous” instead of the “impractical and anomalous” standard used by the D.C. Circuit. The Ninth Circuit’s analysis focused on three concerns:

\begin{itemize}
  \item Whether introducing a contested right into a territory would thwart efforts to protect local culture and values and to preserve the native social system; whether the right’s application would impair the United States’ ability to form political unions and other advantageous arrangements with territories; and whether introducing the right would force
\end{itemize}

\begin{footnotes}
\textsuperscript{331} Weaver, \textit{Territory}, supra note 8, at 358.
\textsuperscript{332} \textit{Wabol v. Villacrusis}, 908 F.2d 411 (9th Cir. 1990).
\textsuperscript{333} \textit{Id.} at 419-20.
\textsuperscript{334} \textit{Id.} at 414 (emphasis added); \textit{see also} CNMI Const. Article XII, sec. 6 (2009) (provides in pertinent part that “any transaction made in violation of section 1 shall be void ab initio.”).
\textsuperscript{335} \textit{Id.} at 421 (citing \textit{Atalig}, 723 F.2d at 690).
\textsuperscript{336} \textit{Id.} at 422. (emphasis added).
\textsuperscript{337} \textit{Id.}
\end{footnotes}
the United States to break international commitments. The court found that the land alienation restrictions of Article XII of the CNMI constitution are not subject to equal protection analysis. The court also emphasized the political relationship between the United States and CNMI.

We think it clear that interposing this constitutional provision would be both impractical and anomalous in this setting. *Absent the alienation restriction, the political union would not be possible.* Thus, application of the constitutional right could ultimately *frustrate the mutual interest that led to the Covenant.* It would also hamper the United States’ ability to form political alliances and acquire necessary military outposts.

One can also apply a “clear analogy” to American Samoa by examining the United States’ relationships to American Samoa and CNMI. Even though two very different documents establish the relationships, both have the same founding principle -- to protect against the alienation of territorial land from the people of Northern Marians and Samoa. Both the CNMI and American Samoa constitutions protect land from alienation.

As evidenced by the specific provision in the 1900 Deed of Cession, protecting the Samoan communal land and *matai* system is at the heart of the relationship between the United States and American Samoa. Any attack on the communal land and *matai* system would destroy the relationship. The Navy also established a similar interest in the early days where a navy commander issued a Native Lands Ordinance prohibiting the alienation of land to non-Samoans.

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339 *Wabol*, 908 F.2d at 424.
340 *Id.* at 423 (emphasis added).
341 Weaver, *Territory*, *supra* note 8, at 359.
342 Compare AM. SAMOA CODE ANN. § 37.0204(a-b) (2009) (American Samoa’s land restriction statute), and *Covenant*, *supra* note 102, at art. VIII, § 805(a) (CNMI’s land restriction).
343 *Id.*
344 *See Hodel* 637 F. Supp. 1398, at 1405 n.8 (D.C. Cir. 1987):

Attorney General Lutu stated, “This is without a question the most important outside judicial action involving American Samoa in the history of our relationship with the United States. . . . [Protection of property] go[es] to the very heart of that relationship.” *Id.* (emphasis added).

345 Weaver, *Territory*, *supra* note 8, at 345.
It is both “impractical and anomalous” to apply the Equal Protection Clause to the communal land and matai system of American Samoa. Communal land and the matai system function correspondingly, and without one, the other fails to exist. The Samoan people entered into negotiations with the U.S with the intent that the U.S. would respect their lands. The Attorney General of American Samoa also reflected this principle in the following statement:

Every Western power that has entered the Samoan islands, not just the United States, in their official documents and treaties, has recognized what anyone who has ever visited Samoa or knows anything about Samoa knows, that the culture is integrally involved in communal ownership of land, and to upset or destroy that feature of Samoan society would ultimately destroy the society.

The Ninth Circuit has emphasized the importance of native land ownership. Land to natives is a “significant asset” and “the basis of family organization” passing from “generation to generation creating family identity and contributing to the economic well-being of family members.” Similarly, American Samoa’s lands are the cultural anchor for its people. As the Wabol court emphasized:

The land alienation restrictions are properly viewed as an attempt . . . to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors.

Samoa is a tightly knitted society that covers 76.8 square miles and not all of the land is inhabited. Allowing any Equal Protection Clause claims would destroy the foundation of Samoan society and the Samoan people as a whole. The Ninth Circuit has already proclaimed that the equal protection clause is not designed to “operate as a genocide pact for diverse native cultures,” but to protect the rights of native people. The matai and communal land system are concomitant aspects of the fa’a Samoa. As agreed upon in the Deed of Cession, the United States must respect the people of American Samoan and their fa’a Samoa culture.

346 See DEED, supra note 127.
347 Hodel, 637 F. Supp. at 1042, n.2 (emphasis added).
348 Wabol, 908 F.2d at 423 (emphasis added).
350 Wabol, 908 F.2d at 423.
VII. CONCLUSION

It is imperative that Congress address the unfair treatment faced by American Samoa residents charged with federal crimes. The appropriate solution is the establishment of a federal district court in American Samoa. This can be done by introducing legislation similar to HR 4711, as previously introduced by the American Samoa Congressman Eni Faleomavaega Hunkin. Issues that have been reported in the GAO report, together with views and testimonies from Samoan officials should be addressed in a new version of the bill. Paramount in this new bill should be the specification of the federal court’s jurisdiction as excluding any matters involving communal land and matai title system. These matters should be reserved to the High Court of American Samoa.

Samoans should also be aware that the fear of an equal protection challenge to the local customs from the establishment of a federal court should not outweigh the need for justice and fairness. Samoans charged with federal crimes are dragged out of their homes and sent overseas. As a result, they will always face an unfair disadvantage from being tried in foreign and unsympathetic jurisdictions with jurors who have no knowledge of the Samoan people and the fa’a Samoa.

This is not a problem with other U.S. territories since they have their own federal district courts to try their people in front of a jury of their peers. As seen through the years, federal criminal convictions in Samoa are rising. It is of the utmost importance that we address this issue, and the only appropriate and effective solution is to establish a federal district court in American Samoa.

\[351\] See e.g., Handbook for Jurors in the Federal District Court of Guam, available at http://www.uscourts.gov/jury/trialhandbook.pdf (a handbook given by the federal district court of Guam to juror members to prepare them for jury trials).