



Self-Determination in the U.S. Virgin Islands, American Samoa, and Guam

Panel Discussion of February 23, 2016

Presentation of Maria Lurie, Attorney-
Advisor, U.S. Department of the Interior,
Washington, D.C.

Disclaimer

- The views I will state are my own.
- I am not speaking on behalf of the Office of the Solicitor, the U.S. Department of the Interior, or the U.S. Government, nor am I speaking on behalf of any particular client.

Exploring Future Status Options

- What options are available under U.S. Federal law to the U.S. Virgin Islands, American Samoa, and Guam with respect to their future status and relationship with the Government of the United States?

Sources of U.S. Federal Law

- The term “U.S. Federal Law” may be understood to refer to the U.S. Constitution, Federal statutes, Federal regulations, or Federal case law.
- Federal case law embraces decisions issued by the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court.

Sovereignty and Plenary Power

- Two concepts will be central to our discussion: (1) sovereignty and (2) plenary power.
- “Sovereignty” means “[s]upreme dominion, authority, or rule.” BLACK’S LAW DICTIONARY 1402 (7th ed. 1999).
- “Plenary” means “[f]ull; complete; entire.” BLACK’S LAW DICTIONARY 1175 (7th ed. 1999).

Land Under the Sovereignty of the United States

- Under Federal law, all land under the sovereignty of the United States falls into one of two groups: states and the areas that are not states.
- The U.S. Virgin Islands, American Samoa, and Guam fall into the latter category. They are not states.

Plenary Power of Congress

- Under Federal law, the U.S. Congress has plenary power over the U.S. territories, including those of the U.S. Virgin Islands, American Samoa, and Guam.
- As recognized by the U.S. Supreme Court, “The Constitution has ... conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States whether they have been incorporated or not, to give to the inhabitants ... local governments [of] such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at [the] discretion [of the U.S. Congress].” Downes v. Bidwell, 182 U.S. 244, 289-90 (1901).

Duration of the Plenary Power of Congress

- The U.S. Congress's plenary power over a U.S. territory persists as long as the area remains in that territorial condition and terminates only when the area becomes a state or ceases to be under United States sovereignty.

Territorial Clause of the U.S. Constitution, art. IV, § 3, cl. 2

- The U.S. Congress's power over U.S. territories is rooted in the Territorial Clause of the U.S. Constitution. This provision, found at Article IV, § 3, cl. 2, reads:

↳ Territory or property of United States.

The 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

Three Available Options

- Understanding that under Federal law the U.S. territories are subject Congress's plenary power until such time as the area either becomes a state or ceases to be under U.S. sovereignty, we can see there are three distinct options available to the U.S. Virgin Islands, American Samoa, and Guam with respect to their future status and relationship with the Government of the United States:
 - Continued Territorial Status – Meaning that Congress would continue to have plenary power over the territory. There might, however, be a change in territorial form, e.g., American Samoa becoming an organized, unincorporated territory, or Guam becoming a commonwealth like Puerto Rico.
 - Statehood - Meaning admission into the Union as a new state.
 - Independence – Meaning independence from the authority of the United States, e.g., the Philippines Model or the Freely Associated States Model.

Continuity of Territorial Status

- Because the U.S. Virgin Islands, American Samoa, and Guam are all presently U.S. territories, continuity of territorial status would not change their relationship with the Government of the United States. They could, however, change the form of their territorial government, e.g., to a commonwealth.
- If these territories were to remain in territorial status, then the U.S. Congress would continue to have plenary power.
 - As previously noted, the plenary power of Congress over a U.S. territory persists as long as the area remains in that territorial condition and terminates only when the area becomes a state or ceases to be under U.S. sovereignty.

Statehood

- As for statehood, this option exists because “[n]ew states may be admitted by the Congress into this Union” U.S. Const. art. IV, § 3, cl. 1.
- If admitted as a state, a territory would stand on equal footing with the existing states in all respects.
- Statehood would, of course, confer upon the territory’s citizens certain political rights they do not currently possess, e.g., voting for President and electing two U.S. Senators and full voting members into the U.S. House of Representatives.
- Statehood would come with obligations, too, such as the payment of Federal taxes.

Independence

- As for independence, this option exists because “ [t]he 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” U.S. Constitution, Art. IV, § 3, cl. 2 (emphasis supplied).
- Independence would have significant legal consequences.

Independence

- As an independent nation, a former U.S. territory would not be subject to the authority of the United States and would be free to direct its own relations with foreign nations.
- By the same token, the former territory would not automatically be entitled to receive monetary support or military protection from the United States.

Independence

- The past showcases two distinct models with respect to independence: the Philippines Model and the Freely Associated States Model.
- With respect to the former, under the Philippines Independence Act of 1934, the Philippine government had authority to draft a constitution for an interim commonwealth, which, upon approval by the people of the Philippines and the U.S. President, initiated an interim commonwealth.
- The Act provided that after a transition period of 10 years, the President, by proclamation, would withdraw and surrender U.S. jurisdiction and sovereignty and recognize the independence of the Philippines as a separate and self-governing nation. In 1946, President Truman proclaimed the Philippines's independence, and the two nations entered into a Treaty of General Relations.

Self-Determination Panel Discussion

Independence

- Under the Freely Associated States Model, three former Trust Territories of the Pacific Islands—the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau—became independent after the U.S. Congress approved negotiated Compacts of Free Association with the respective territories.

Independence

- The Freely Associated States retain close ties to the United States, however, and the United States continues to provide security, defense, and various other types of financial assistances and services.
- Citizens of the Freely Associated States may generally enter the United States as non-immigrants and may establish residence and work here.

Expressing a Preferred Pathway Forward

- As for how the territories of the U.S. Virgin Islands, American Samoa, and Guam could express their preferred pathway forward, Congress could provide for a Federally sanctioned plebiscite in which the people of each respective territory would be asked to state whether they wish to maintain the current territorial status or to pursue a constitutionally viable path toward a permanent non-territorial status.
- Then, if the people elect to pursue a permanent non-territorial status, Congress could provide for an additional plebiscite to allow the people to choose statehood or independence. Once the people selected an option, Congress could then begin a process of transition consistent with that option.