Study L-750 January 25, 2013

Memorandum 2013-8

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Definition of "State"

In connection with its study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), the Commission considered Memorandum 2012-51, which discusses the constitutional constraints applicable to conservatorship proceedings and similar arrangements.

As noted in that memorandum, UAGPPJA defines the term "state" to include "Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States." See UAGPPJA § 102(14). The staff expressed some uncertainty regarding the extent to which constitutional due process requirements apply to those non-state entities, and asked whether the matter should be researched further. Memorandum 2012-51, pp. 14-15.

The Commission directed the staff to "further investigate the potential consequences of UAGPPJA's definition of 'State … .'" Minutes (Dec. 2012), p. 4.

This memorandum presents the results of that inquiry. The first part of the memorandum provides a general description of the different non-state entities encompassed by the UAGPPJA definition of "state." The second part of the memorandum discusses the extent to which constitutional due process requirements apply to those entities.

DEFINITION OF "STATE"

Section 102(14) of UAGPPJA provides:

> "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

Initially, this memorandum discusses each of the non-state entities identified in that definition and provides a high level overview of their political status and governance. However, the memorandum addresses the entities in a different order than the UAGPPJA definition, as the broad category of "territory or insular

possession" is complex and encompasses two of the named entities, Puerto Rico and the United States Virgin Islands. The distinct entities (the District of Columbia and federally recognized Indian tribes) are addressed first, followed by a discussion of territories and insular possessions.

District of Columbia

The District of Columbia is the capital of the United States. The U.S. census estimates the District's population as 619,020 in 2011. U.S. Census Website State & County Quick Facts, quickfacts.census.gov/qfd/states/11000.html.

Article I, Section 8 of the U.S. Constitution provides that the District of Columbia is under the exclusive jurisdiction of Congress. In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act. Pub. L. No. 93-198, 87 Stat. 774 (1973) (hereafter, "Home Rule Act"). The Home Rule Act delegates certain legislative powers to the government of the District of Columbia, but Congress retains ultimate legislative authority. With the Home Rule Act, the Council of the District of Columbia acts as the legislative branch for the city. Congress reviews legislation of the Council before it can become law and retains authority over the city's budget; the President appoints the District's judges. Council of the District of Columbia – Home Rule Act, www.dccouncil.washington.dc.us/pages/dc-home-rule.

Federally Recognized Indian Tribe

According to the U.S. Bureau of Indian Affairs ("BIA"), there are 566 federally recognized tribes. BIA Website – What We Do, www.bia.gov/WhatWeDo/. The federally recognized tribes include approximately 1.9 million individual members. *Id.* Based on a 2005 BIA Report, enrollment in individual tribes ranges from 2 to 257,824 tribal members. BIA Office of Indian Services, 2005 American Indian Population and Labor Force Report, *available at* www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf. Certain states (including California) also have state-recognized tribes, but, without federal recognition, these tribes would not fall within the scope of the UAGPPJA definition. *See* National Conference of State Legislatures – List of Federal and State Recognized Tribes, www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized-tribes.aspx ("State-recognized Indian tribes are not federally recognized; however, federally recognized tribes may also be state-recognized.").

The BIA has an administrative process, managed by its Office of Federal Acknowledgement, for an Indian group seeking formal recognition as a federally

recognized tribe. *See* 25 C.F.R. Part 83. As of July 2012, the Office was actively considering nine petitions with five complete petitions awaiting active consideration. BIA Office of Federal Acknowledgement, Brief Overview (Jul. 2012), *available at* www.bia.gov/cs/groups/xofa/documents/document/idc-020607.pdf. The Office had also received another 265 letters of intent or partially documented petitions. *Id.*

The legal history between the United States government and the tribes is long and complex. For the Commission's purposes, this memorandum focuses on characterizing the current legal relationship between the federal government and the tribes and provides very brief historical context to highlight the controversies and challenges inherent in this relationship.

In early case law, Chief Justice John Marshall characterized federally recognized tribes as "domestic dependent nations" and analogized the relationship between the tribes and the United States to a ward-guardian relationship. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). These descriptions are still frequently quoted in current jurisprudence and legal scholarship. *See*, *e.g.*, Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 Utah L. Rev. 443 (2005). The ward-guardian analogy hints at the tension in the tribal-federal relationship; the ward-guardian relationship implies a tribal lack of capacity. Similarly, the language of *United States v. Sandoval* further describes a federal duty of care stemming from tribal dependency, noting that

> long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

231 U.S. 28, 46 (1913).

Over time, the federal government's approach towards the tribes (or, at the very least, the characterization of that approach) has evolved. The federal-tribal relationship is now often characterized as a trust relationship and a government-to-government relationship. *See*, *e.g.*, James Van Ness, Office of Gen. Counsel, Dep't of Def., The Federal Trust Doctrine – Realizing Chief Justice Marshall's Vision, Presentation at Beginning the Dialogue: Government-to-Government

Consultation Workshop (Aug. 17, 2004), *available at* www.doi.gov/pmb/cadr/programs/native/gtgworkshop/The-Federal-Trust-Doctrine.cfm; Memorandum from President Clinton to Executive Dep'ts and Agencies, Government-to-Government Relations With Native American Tribal Governments (Aug. 1994), *available at* www.justice.gov/archive/otj/Presidential_Statements/presdoc1.htm.

Today's discussions of the federal-tribal relationship focus more on the federal government's responsibilities to the tribes, including managing tribal lands and trust accounts. The federal government, through the BIA, helps tribes "improve their tribal government infrastructure, community infrastructure, education, job training, and employment opportunities along with other components of long term sustainable development that work to improve the quality of life for their members." BIA Website – What We Do, www.bia.gov/WhatWeDo/.

The unique relationship between the federal government and the tribes has led to a situation where tribes exercise self-government (*See* 25 U.S.C. § 1302(a)), while also being subject to certain restrictions and oversight from the federal government. Thus, while the federal government recognizes tribes as having sovereignty, the federal government still exercises some authority over the tribes and tribal actions. Generally, tribes possess "all powers of self-government except those relinquished under treaty with the United States, those that Congress has expressly extinguished, and those that federal courts have ruled are subject to existing federal law or are inconsistent with overriding national policies." BIA Website – FAQs, www.bia.gov/FAQs/index.htm.

Although this memorandum will discuss tribal sovereignty and due process protections further below, it is important to note that, as sovereigns, tribes have sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). Thus, unless Congress has abrogated that sovereign immunity by law or an individual tribe has waived its sovereign immunity, the tribe is immune from suit.

Territory or Insular Possession Subject to the Jurisdiction of the United States

Rather than "territory" or "insular possession," the federal government often uses the generic term "insular area" to describe such an entity. The U.S. Secretary of the Interior has responsibility for coordinating federal policy for insular areas (with the exception of Puerto Rico); this responsibility is executed by the Office of Insular Affairs. Office of Insular Affairs ("OIA") Website – Responsibilities and

Authorities, www.doi.gov/oia/about/responsibilities.cfm. The Office of Insular Affairs defines an insular area as:

> A jurisdiction that is neither a part of one of the several States nor a Federal district. This is the current generic term to refer to any commonwealth, freely associated state, possession or territory or Territory and from July 18, 1947, until October 1, 1994, the Trust Territory of the Pacific Islands. Unmodified, it may refer not only to a jurisdiction which is under United States sovereignty but also to one which is not, i.e., a freely associated state or, 1947-94, the Trust Territory of the Pacific Islands or one of the districts of the Trust Territory of the Pacific Islands.

OIA Website – Definitions of Insular Political Areas, www.doi.gov/oia/islands/politicatypes.cfm. The UGAPPJA definition only covers territories and insular possessions "subject to the jurisdiction of the United States." UAGPPJA § 102(14). Thus, UGAPPJA does not cover freely associated states, as they are not under U.S. sovereignty.

The U.S. General Accounting Office ("GAO") has prepared several reports on "insular areas." However, the GAO uses the term "insular areas" to refer to a smaller set of lands – "all territories over which the United States exercises sovereignty." U.S. GAO, Pub. No. GAO/OGC-98-5, U.S. Insular Areas – Application of the U.S. Constitution, n. 1 (1997), *available at* www.gao.gov/archive/1998/og98005.pdf (hereafter, "1997 GAO Rep."). Going forward, this memorandum will use the GAO definition of "insular area" to refer only to those areas over which the United States exercises sovereignty.

The GAO's report identifies fourteen insular areas, nine of which are small islands without permanent inhabitants (temporary inhabitants may include U.S. military or scientific researchers). *Id.* at 1-6, app. 2. The five inhabited insular areas include Puerto Rico, the U.S. Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands ("CNMI"), and Guam. *Id.* at app. 1. Thus, although Puerto Rico and the U.S. Virgin Islands are called out separately in the UAGPPJA definition, they also fall within the umbrella category for territories and insular possessions. According to the Census, the combined estimated population of these five areas in 2010 is 4,384,000. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 1313, *available at* www.census.gov/compendia/statab/2012/tables/12s1313.pdf.

All five inhabited insular areas are unincorporated, meaning that they are not subject to the full U.S. Constitution. U.S. GAO, Pub. No. GAO/HRD-91-18, The

U.S. Constitution and Insular Areas, 4 (1991), *available at* archive.gao.gov/d20t9/144197.pdf (hereafter, "1991 GAO Rep."). For unincorporated insular areas, only selected provisions of the Constitution apply and the mechanism by which those provisions are made applicable to an individual insular area differs. Each of these five has a "unique historical and legal relationship with the United States" and the applicability of specific constitutional provisions must be analyzed separately for each area. *See id.* at 3. The second section of this memorandum discusses the due process protections provided in each of the five inhabited insular areas, as well as the due process protections provided by the District of Columbia and the federally recognized Indian tribes.

APPLICATION OF DUE PROCESS PROTECTIONS

District of Columbia

As stated above, Congress retains exclusive jurisdiction over the District of Columbia. Congress is fully subject to the U.S. Constitution as an arm of the federal government, therefore, in exercising its authority over the District of Columbia, Congress is required to provide the protections of the U.S. Constitution described in Memorandum 2012-51. *See Wight v. Davidson*, 181 U.S. 371, 384 (1901) ("No doubt, in the exercise of such legislative powers [over the District of Columbia], Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty or property without due process of law … ."); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 104 (1953) (The Organic Act establishing the District of Columbia "constituted it 'a body corporate for municipal purposes' with all of the powers of a municipal corporation 'not inconsistent with the Constitution and laws of the United States and the provisions of this act,' and gave it jurisdiction over all the territory within the limits of the District.").

Therefore, it appears that the District of Columbia must offer the same constitutional due process protections as the U.S. states (described in Memorandum 2012-51) in its conservatorship proceedings.

Federally Recognized Indian Tribe

The applicability of federal due process protections to tribes is a complex question. The following is a brief history describing the law regarding the federal-tribal relationship and due process protections offered by the tribes.

In short, tribes are not directly subject to the restrictions of the U.S. Constitution, since they existed as sovereigns prior to the enactment of the Constitution. Congress sought to extend due process protections legislatively. In the legislation, however, the due process protections applicable to tribes were not intended to be the same as those applicable to the federal and state governments. Regardless, tribal sovereign immunity precludes suits in federal court to enforce those protections (except in limited circumstances inapplicable in the conservatorship context). Thus, while tribes are required to offer due process protections, those protections must be sought within the individual tribal processes and may represent a different conception of due process than that in the federal case law under the Fifth and Fourteenth Amendments. These matters are discussed in more detail below.

Application of U.S. Constitution Limited by Tribal Sovereignty

Tribal sovereignty predates the establishment of the U.S. Constitution and, thus, is not directly subject to the restrictions in the U.S. Constitution. *See*, *e.g.*, *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government."); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880-81 (1996) ("Because tribal powers of self-government are 'retained' and predate the federal Constitution, those constitutional limitations that are by their terms or by implication framed as limitations on *federal* and *state* authority do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction.").

Statutory Extension of Constitutional Protections to Tribes: Indian Civil Rights Act

In 1968, Congress acted to extend certain constitutional protections to tribes legislatively, adopting the Indian Civil Rights Act. 25 U.S.C. §§ 1301-03 (hereafter, "ICRA"). Section 1302(a)(8) of the ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall … deny to any person within

its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" However, the protections offered by the ICRA are not coterminous with the protections in the U.S. Constitution.

> Despite the similarities in language between the ICRA and the Federal Bill of Rights, the legislative history of the Act indicates that Congress did not intend to subject tribal governments to the same restrictions as the federal and state governments. The legislative history and the text of the Act indicate unambiguously that Congress intended to balance the application of individual civil rights on reservations with continued tribal self-determination over internal affairs.

Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 Ind. L. J. 831, 838 (1997) (citations omitted). Given the history between the tribes and the United States government, federal statutes placing restrictions on tribal self-governance can be controversial within the tribal communities, even where, as discussed below, the tribes view such protections as central to their own heritage. After the passage of the ICRA, a commentator noted that "[t]he Indians view Congress' action as a further weakening of Indian self-government in the name of protecting Indians from their own people." Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 Colum. Surv. Hum. Rts. L. 49, 50 (1970-1971).

Federal Case Law under the Indian Civil Rights Act: The Early Years

Many federal courts, finding an implied civil cause of action, decided ICRA cases using "a balancing test whereby the interest of the tribes in continuing their traditional governments was balanced against the plaintiff's right to be free from the prohibited governmental activity." Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 Idaho L. Rev. 307, 312 (1991-92).

Tribal Sovereign Immunity as a Bar to Suit under Indian Civil Rights Act: Santa Clara Pueblo v. Martinez

In 1978, the U.S. Supreme Court found that tribes could not be sued under ICRA for injunctive or declaratory relief because ICRA did not waive tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). In the *Santa Clara Pueblo* case, respondents, a female member of the tribe and her daughter, sued for relief against enforcement of a tribal ordinance that denied membership to children of female tribal members who marry non-members, while granting membership to children of male members who marry non-

members. *Id.* at 51. The Court recognized that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers" (*id.* at 58) and went on to find that "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." *Id.* at 59. The Court noted that the only remedy provided by the ICRA was habeas corpus "to test the legality of [a person's] detention by order of an Indian tribe." *Id.* at 58. The Court determined that finding an implied right of action that could be adjudicated in federal courts would "interfere[] with tribal autonomy and self-government … ." *Id.* at 59. "[R]esolution in a foreign forum of intratribal disputes of a more 'public' character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority." *Id.* at 60.

The *Santa Clara Pueblo* case significantly limited the role of federal courts enforcing ICRA, eliminating the implied civil cause of action relied upon by many federal courts prior to *Santa Clara Pueblo*.

Certain commentators have identified *Santa Clara Pueblo* as a difficult case, pointing to a fundamental policy question that underlies the case ("women's rights" vs. "federal government imperialism"). 28 Idaho L. Rev. at 316. One commentator notes that the *Santa Clara Pueblo* case "has become symbolic of the federal courts' deference to tribal sovereignty – even when tribal court decisions are seemingly inapposite to Western liberal ideals … ." Riley, *Tribal Sovereignty in a Post-9/11 World*, 82 N.D. L. Rev. 953, 954-55 (2006).

Tribal Case Law under the Indian Civil Rights Act post-Santa Clara Pueblo

After *Santa Clara Pueblo*, "[t]ribal governments are mandated to act in accordance with the policies expressed in the ICRA, but enforcement must come in tribal court … . [T]here is no appeal from tribal court into the federal system, and no collateral attack other than in habeas corpus … ." 28 Idaho L. Rev. at 314. Thus, to understand the due process protections provided by federally recognized tribes, one must look to an individual tribe to understand what requirements its tribal courts have imposed to provide due process. For this reason, this memorandum cannot provide a definitive answer on what process is due for federally recognized tribes generally. However, the following discussion offers some sense of tribal due process protections and their relationship to federal due process.

Although, as noted above, Congress intended to strike a balance between individual civil rights and tribal self-determination in the ICRA, some viewed the ICRA as a significant imposition on tribal sovereignty. In tribal case law, the tension is apparent. In several cases, tribes discussing due process protections emphasize that such protections originate with tribal custom and, when referencing U.S. case law, tribes are careful to note that they are using U.S. case law as a reference, but not as binding authority. *See*, *e.g.*, *108 Employees of the Crow Tribe of Indians v. Crow Tribe of Indians*, 2001 Crow 10, ¶ 20 (2001) ("Particularly in the context of a civil case, such as the present one, the federal courts have recognized that the interpretation of the ICRA 'will frequently depend on questions of tribal tradition and custom[.]' Although this court is not required to apply the ICRA in precisely the same manner as the corresponding provisions of the U.S. Constitution, we have nevertheless looked to the decisions of the U.S. Supreme Court on federal constitutional rights as the starting point for interpreting specific provisions of the ICRA." (citations omitted)); *Johnson v. Mashantucket Pequot Gaming Enterprise*, No. 2 Mash. 273 (1998) ("The purpose of the ICRA was not to apply, in a wholesale fashion, federal constitutional provisions to American Indian Tribes; but rather, to allow the implementation of unique political, cultural and economic needs of the various tribal governments. Federal and tribal courts have acknowledged that Congress did not intend that due process principles of the Constitution would disrupt 'settled tribal custom and traditions.'" (citations omitted)); for more examples, *see generally* McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465 (1998); 72 Ind. L. J. 831.

With 566 individual sovereign tribes, it is challenging to make a definite assertion about the due process protections provided by federally recognized Indian tribes without extensive research reviewing the law that has developed in each of the tribes. One commentator has found that "despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts." 34 Idaho L. Rev. at 489. A student law review note analyzing tribal cases from a few tribes found that "[w]hen tribal courts do apply due process differently than Anglo-American courts, they generally do so in the context of decreasing formality and increasing discretion for tribal judges to arrive at the broad maxim of 'justice.' Greater degrees of informality and greater power to apply principles of equity, and thus depart from rigid legal precepts, was [sic] acknowledged by several of the courts examined." 72 Ind. L. J. at 864.

Territory or Insular Possession Subject to the Jurisdiction of the United States

As noted above, the five inhabited insular areas are all unincorporated, meaning that the full U.S. Constitution does not directly apply. However, it appears that four of the insular areas – Puerto Rico, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and Guam – are all subject to the amendments of the Constitution that provide due process protection, although the mechanisms for applying those protections differ and are discussed further below.

While there is no federal legal precedent confirming the applicability of the federal due process protections to American Samoa, these provisions could apply if U.S. courts deem due process a "fundamental" protection in accordance with the Insular Cases discussed below. Beyond that, the American Samoa constitution contains a due process clause and American Samoa case law has cited to federal case law in applying due process protections. These matters are discussed more fully below.

Applicability of Constitutional Protections to Territories and Insular Possessions Generally

While there are different legal mechanisms for applying constitutional protections to residents of the different insular areas, a series of Supreme Court cases from the early 1990s, the "Insular Cases," found that certain "fundamental" constitutional rights do apply to the insular areas. 1997 GAO Rep. at app. 1, p. 23. Specifically, certain judicial commentary indicates that the "Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment right to just compensation, the Eighth Amendment right against civil and unusual punishment[,] the right to the writ of habeas corpus, and the Eleventh Amendment are all so fundamental as to be applicable to unincorporated territories." *See* A.H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 27 (1989). However, the case law has not definitively determined whether the due process protections of the Fifth and Fourteenth Amendments are fundamental rights applicable to insular areas. *See id.* at 27, n. 99.

More recently, opinions of justices have called into question the continuing applicability of the Insular Cases, suggesting that the Court may be more apt to extend constitutional protections to insular areas without requiring a

determination of whether such protections are "fundamental." In *Torres v. Puerto Rico*, Justice Brennan wrote in a concurring opinion:

> Whatever the validity of the [Insular Cases], in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico in the 1970's. As Mr. Justice Black declared in *Reid v. Covert* (plurality opinion): "[N]either the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine, and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government."

442 U.S. 465, 475-76 (1979) (citation omitted); *see also Boumediene v. Bush*, 553 U.S. 723, 758 (2008) ("It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.").

Regardless, without a general rule about the direct applicability of the due process protections of the U.S. Constitution to insular areas, the areas must be examined individually to determine whether Congress, the courts, or the government of the insular area has acted to extend due process protections to the area. *See* 1997 GAO Rep. at 23 ("Whether rights under the Constitution apply to a territory and, if so, to what extent depends essentially on either of two factors, according to a series of Supreme Court decisions called the Insular Cases. The first is whether the right in question is considered to be "fundamental" or not; the second is whether the Congress has taken legislative action to extend the Constitution to the territory." (citations omitted)).

Under the Territorial Clause of the U.S. Constitution, Congress has

> 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.

U.S. Const. art. IV, § 3. To govern insular areas, Congress often adopts an Organic Act. An organic act is the "body of laws that the United [sic] Congress has enacted for the government of a United States insular area; it usually includes a bill of rights … ." OIA Website – Definitions of Insular Area Political Organizations, www.doi.gov/oia/islands/politicatypes.cfm. Insular areas for

which Congress has adopted an Organic Act are considered "organized." *Id.* In addition, some insular areas have adopted their own constitutions containing bill of rights protections. The applicable Organic Acts and constitutions are discussed below for the individual insular areas.

Puerto Rico

Puerto Rico is an organized territory of the United States with commonwealth status. Cent. Intelligence Agency, The World Factbook (hereafter, "CIA Factbook"), Puerto Rico: Government, https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html. Puerto Rico has its own federal district court and appeals from the court go to the First Circuit. *See* 48 U.S.C. § 864; 28 U.S.C. § 41.

Puerto Rico's Organic Act (as modified by the Puerto Rican Federal Relations Act), codified in Title 48, Chapter 4 of the U.S. Code, requires that the Puerto Rican constitution be approved by Congress, conform to the U.S. Constitution, and include a bill of rights. 48 U.S.C. §§ 731c, 731d. After discussing the applicability of the U.S. Constitution's due process clause under Puerto Rico's Organic Act, the First Circuit Appeals Court concludes that the requirement that the Puerto Rican constitution conform with the U.S. Constitution "must mean that the people of Puerto Rico, who remain United States citizens, are entitled to invoke against the Commonwealth of Puerto Rico the protection of the fundamental guaranty of due process of law, as provided in the federal Constitution." *Mora v. Mejias*, 206 F.2d 377, 382 (1953); *see also Fornaris v. Ridge Tool Co.*, 423 F.2d 563, 566-67 (1970), *rev'd on other grounds*, 400 U.S. 41 (1970). Thus, it appears that Puerto Rico is effectively subject to the due process protections provided by the U.S. Constitution.

Further, Puerto Rico's constitution includes a due process provision in its bill of rights, which provides in part "[t]he right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. … No person shall be deprived of his liberty or property without due process of law … ." P.R. Const., art. II, § 7, *available at* www.lexisnexis.com/hottopics/lawsofpuertorico/.

Although it's unclear why Puerto Rico is called out separately in the UGAPPJA definition, uncertainty about Puerto Rico's future status may be one reason. In a recent non-binding vote, a majority of voters do not support the island's commonwealth status and when asked to select an alternative, the majority of votes cast on that question were for statehood. *See* Alexandrino &

Shoichet, *White House weighs in on Puerto Rican statehood vote*, CNN Politics (Dec. 5, 2012), *available at* www.cnn.com/2012/12/05/politics/puerto-rico-statehood/index.html. With the political status of Puerto Rico possibly changing in coming years and the final outcome unknown, the continued applicability of federal due process protections is uncertain. However, under the preferred statehood option, Puerto Rico should be subject to the U.S. Constitution in the same manner as the states (discussed in Memorandum 2012-51).

U.S. Virgin Islands

The U.S. Virgin Islands is an organized territory of the United States. CIA Factbook, Virgin Islands: Government, https://www.cia.gov/library/publications/the-world-factbook/geos/vq.html. The Virgin Islands has its own federal district court and appeals from the Virgin Islands district court are heard by the Third Circuit. *See* 48 U.S.C. §§ 1611-13a; 28 U.S.C. § 41.

The Organic Act of 1936 created the foundation for local self-government and explicitly applied the Bill of Rights protections in the U.S. Constitution to the Virgin Islands. Leibowitz at 257. Since its adoption, the Organic Act has been amended, most significantly in 1954 with the adoption of a Revised Organic Act. *See* 156 Cong. Rec. S5138 (daily ed. Jun. 17, 2010) (statement of Sen. Bingaman) (hereafter, "Bingaman Statement"). In the absence of a constitution, the Virgin Islands are governed by the Revised Organic Act of 1954, as amended. *Id.*

The Revised Organic Act of 1954 is codified in Title 48, Chapter 12 of the U.S. Code. These provisions include a subchapter entitled "Bill of Rights" that provides that (1) "[n]o law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws" and (2) "[t]he following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States … the first to ninth amendments inclusive … [and] the second sentence of section 1 of the fourteenth amendment … ." 48 U.S.C. § 1561.

Thus, under the Revised Organic Act, the Virgin Islands is effectively subject to the due process protections provided by the U.S. Constitution.

Public Law 94-584 provides some assurance that due process protections will continue to apply in the event that the Virgin Islands adopts its own constitution.

Pub. L. No. 94-584, 90 Stat. 2899 (1976). The law authorizes the peoples of the Virgin Islands and Guam to convene constitutional conventions and draft constitutions. *Id.* Public Law 94-584 requires the constitutions to

> (1) recognize, and be consistent with, the sovereignty of the United States over the Virgin Islands and Guam, respectively, and the supremacy of the provisions of the Constitution, treaties, and laws of the United States applicable to the Virgin Islands and Guam, respectively, including, but not limited to, those provisions of the Organic Act and Revised Organic Act of the Virgin Islands and the Organic Act of Guam which do not relate to local self - government.
>
> …
>
> (3) contain a bill of rights;
>
> …

Id. § 2(b). In 2010, Congress rejected the proposed constitution resulting from the Virgin Islands' fifth constitutional convention. Bingaman Statement at S5138. Before Congress acted, the Department of Justice reviewed the Constitution and found several infirmities, including "the absence of an express recognition of United States sovereignty and the supremacy of Federal law" and "imprecise language in certain provisions of the bill of rights of the proposed constitution[.]" S.J. Res. 33, 111th Cong. (2010). Thus, the federal government is seeking to ensure that the Virgin Islands conforms to the requirements of Public Law 94-584, which should secure the continued protections of the U.S. Constitution and statutes in the area.

Commonwealth of the Northern Mariana Islands

The CNMI is a commonwealth in political union with the United States. CIA Factbook, Northern Mariana Islands: Government, https://www.cia.gov/library/publications/the-world-factbook/geos/cq.html. The Marianas Political Status Commission and the United States negotiated the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (hereafter, "Covenant") detailing the process by which the Northern Mariana Islands would become a commonwealth. *See* CNMI Commonwealth Law Revision Commission Website – Covenant, www.cnmilaw.org/covenant.htm. In the mid-1970s, the Covenant was approved by both parties and signed into law in the United States. *Id.* In the Covenant, the United States agreed to establish the District Court for the Northern Mariana

Islands, which was deemed to belong to the same judicial circuit as Guam. Covenant § 401.

Regarding due process, section 501(a) of the Covenant provides that

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States … Amendments 1 through 9, inclusive … [and] Amendment 14, Section 1 … . Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

Thus, the CNMI is effectively subject to the due process protections provided by the U.S. Constitution.

Further, in accordance with the Covenant, the CNMI convened a constitutional convention in 1976. CNMI Commonwealth Law Revision Commission website – Constitution, www.cnmilaw.org/constitution.htm. The resulting constitution was ratified and went into effect in 1978. *Id.* The CNMI constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." CNMI Const., art. I, § 5, *available at* www.cnmilaw.org/constitution_article1.htm.

Guam

Guam is an organized territory of the United States. CIA Factbook, Guam: Government, https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html. Guam has a federal district court, which is part of the Ninth Circuit. 48 U.S.C. §§ 1424(a), 1424-3(c).

Congress passed Organic Act legislation for Guam in 1950 and 1968. *See* Leibowitz at 329, 342. The provisions of Guam's Organic Act are codified in Title 48, Chapter 8A of the U.S. Code. The "Bill of Rights" included in the Organic Act provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." 48 U.S.C. § 1421b(e). In addition, Section 1421b(u) includes a list of provisions from the U.S. Constitution that apply to Guam, including "the first to ninth amendments inclusive … [and] the second sentence of section 1 of the fourteenth amendment … ." Thus, under its Organic Act, Guam is effectively subject to the due process protections provided by the U.S. Constitution.

As noted above, Public Law 94-584, which authorized the Virgin Islands to convene a constitutional convention, authorized Guam to do the same. Guam has not yet adopted a constitution, although they have held constitutional conventions in 1969 and 1977. Guam Code Ann., tit. 5, Ch. 42, Note (2013), *available at* www.guamcourts.org/compileroflaws/GCA/05gca/5gc042.PDF. However, regardless of whether Guam acts to adopt a constitution, the language of Public Law 94-584 should ensure that the protections of the U.S. Constitution continue in force.

American Samoa

American Samoa is an unorganized territory of the United States. CIA Factbook, American Samoa: Government, https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html. Thus, American Samoa lacks an Organic Act or foundational legal document that defines its relationship to the United States. "In theory, the Secretary [of the Interior] argues he has total power and may overturn any Samoan governmental decision. The doctrine is legally questionable and politically unacceptable to Samoa." Leibowitz at 402.

Although American Samoa does not have an Organic Act, it has adopted its own constitution. *Id.* at 402, n. 3; 420-23. Article I of the American Samoa constitution is a Bill of Rights and provides, in part, that "[n]o person shall be deprived of life, liberty, or property, without due process of law … ." Am. Samoa Const., art. I, § 2, *available at* www.house.gov/faleomavaega/samoan-constitution.shtml. After the adoption of American Samoa's constitution, Congress claimed full authority over the amendment or modification of the American Samoa constitution. *See* 48 U.S.C. § 1662a (adopted in 1983).

In applying due process protections, American Samoa due process case law discusses Supreme Court cases from the United States. *See Ferstle v. Am. Samoa Gov't*, 7 Am. Samoa 2d 26, 48-51 (Trial Div. 1988) (citing U.S. Supreme Court cases *Mathews v. Eldridge* and *Parratt v. Taylor*), *available at* www.asbar.org/archive/Cases/Second-Series/7ASR2d/7ASR2d26.htm. Thus, it appears that the due process protections offered by the American Samoa constitution are similar to federal due process protections.

Further, American Samoa case law identifies the Fifth Amendment due process protection as "fundamental" and notes that due process and equal protection "are so basic to our system of law that it is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing

the territories … ." *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (App. Div. 1980), *available at* www.asbar.org/archive/Cases/Second-Series/1ASR2d/1ASR2d10.htm. This case suggests that federal due process protections could extend to American Samoa under the Insular Cases "fundamental" protection principle, discussed above.

CONCLUSION

Based on the authorities discussed herein, it appears that the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands are all subject to the due process protections provided in the U.S. Constitution. American Samoa appears to offer analogous due process protections through their own constitution.

While federally recognized Indian tribes are not directly subject to the due process protections in the U.S. Constitution, Congress has acted to legislatively extend due process protections to the tribes. Generally, the conception of due process applicable to tribes differs from federal and state due process in that Congress sought to balance individual protections with continued tribal self-determination. It is important to note that due process rights cannot be asserted against tribes in federal court due to sovereign immunity, so remedies must be sought in individual tribal courts and those courts are not bound to follow federal case law on due process. Although there has not been an exhaustive review of tribal due process cases, a more limited review found that tribal courts are no less protective of individual rights than federal courts.

Respectfully submitted,

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