

Declaration of the Taiwan Status

March 29, 2006

In testimony at a hearing on Taiwan in the International Relations Committee of the House of Representatives on April 21, 2004, the Assistant Secretary of State for East Asian and Pacific Affairs reiterated the core principles of US policy toward Taiwan. Among the most important of these was the recognition that:

- * The United States remains committed to a One China policy based on the three Joint Communiqués and the Taiwan Relations Act;
- * The US does not support independence for Taiwan or unilateral moves that would change the status quo as the US defines it;
- * For Beijing, this means no use of force or threat to use force against Taiwan. For Taipei, it means exercising prudence in managing all aspects of cross-Strait relations. For both sides, it means no statements or actions that would unilaterally alter Taiwan's status.

However, the question immediately arises: What is Taiwan's status? This is a riddle which has puzzled researchers for decades, and which the US State Department has failed to clarify at any time in the post WWII period.

Yet, at this juncture, we the undersigned say with certainty that the key to solving the riddle of Taiwan's status can be found in the writings of US Supreme Court Chief Justice Marshall, who offered this penetrating analysis in the famous *American Insurance Company* case (1828):

“The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”

And more explicitly, in *United States v. Huckabee* (1872), the Court speaking through Mr. Justice Clifford, said:

“Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined ”

Indeed, the *American Insurance Company* (1828) case is cited in Joseph Story's Commentaries on the Constitution (1833), in his explanation of the scope of application of the "territorial clause" (Article 4, Section 3, Clause 2):

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

and has been repeatedly cited in later US Supreme Court cases such as *Fleming v. Page* (1850), *Downes v. Bidwell* (1901), *Dorr v. US* (1904), and others.

Looking at the historical record, after the Japanese attack on Pearl Harbor, the United States declared war on the Empire of Japan on December 8, 1941. During the war, all military attacks on (Japanese) Taiwan were conducted by United States military forces, so it is clear that the United States has acquired Taiwan under the principle of conquest.

The United States is the "conqueror," and according to the customary laws of warfare in the post-Napoleonic period, the United States will be the (principal) occupying power.

As defined by US Supreme Court justices in *Ex parte Milligan* (1866), "military jurisdiction" under the US Constitution is of three kinds. In particular, so-called "military government" is

"to be exercised in time of foreign war without the boundaries of the United States".

Or, in more modern terminology, "military government" is the form of administration by which an occupying power exercises government authority over occupied territory.

In General Order No. 1 of September 2, 1945, the United States delegated the military occupation of Taiwan to Chiang Kai-shek (aka Chinese nationalists or Republic of China). The surrender ceremonies for Japanese troops in Taiwan were held on October 25, 1945, thus marking the beginning of United States Military Government (USMG) in Taiwan. Importantly, the authority for this occupation was handled separately from that of the four main Japanese islands.

Under international law, and indeed under United States law, it is impossible to

understand why the flag of the Republic of China has been prominently displayed everywhere in Taiwan beginning in late October 1945, and why the flag of the “conqueror” and “principal occupying power” (the United States) is not flying on any flagpole.

As the Chinese Civil War continued to rage in those turbulent years, the People’s Republic of China (PRC) was founded on October 1, 1949, and the remnants of the Republic of China regime fled to Taiwan, an area over which their military troops were exercising military occupation under the delegated authority of the United States Military Government.

Then in the post war San Francisco Peace Treaty, Japan renounced the territorial sovereignty of Taiwan, but no recipient country was named. Hence, Taiwan has remained under the jurisdiction of USMG as an interim status condition.

In consideration that Article 6 of the US Constitution specifies that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land

we must unequivocally state that the specifications of the San Francisco Peace Treaty are binding on all US government branches, including the Executive, Legislative, and Judicial.

And, when in the course of human events it becomes necessary for one people to dissolve the dishonest and illegal political bands which have connected them with another and to assume among the powers of the earth, the true and proper station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should make clear the causes which impel them to the declaration of connectedness with their sovereign. To this end, after a thorough review of the US Constitution, the SFPT, the Hague Conventions, the Geneva Conventions, the One China Policy, the three Joint Communiqués, and the Taiwan Relations Act, we the undersigned hold that the following facts are abundantly clear, and hereby submit these facts to a candid world:

(1) In the SFPT, the territorial sovereignty of Taiwan was not awarded to the Republic of China. After April 1952, there is no basis under international law, or under United

States law, for the Republic of China flag to be flying over “Formosa and the Pescadores” (herein referred to as Taiwan).

(2) In Taiwan, the flag of the United States should be flying. This is because the SFPT confirms that the United States is the “principal occupying power.” Upon cession by Japan, Taiwan has by default become an overseas territory of the United States under military government. More specifically, under the US Constitution’s territorial clause, Taiwan is “unincorporated territory under USMG,” which is correctly classified as an insular area of the United States. A similar status was enjoyed by Puerto Rico, Guam, the Philippines, and Cuba after the Spanish American War, and prior to the beginning of “civil government” in those island groups.

(3) The Insular Cases of the US Supreme Court clarified that even without any action by Congress, “fundamental rights” under the US Constitution apply in all insular areas. Most importantly, these so-called “fundamental rights” include the Fifth Amendment stipulations that no person shall be “deprived of life, liberty, or property, without due process of law,” and the Article 1, Section 8 provision that Congress shall “provide for the common defense.” No overseas territories of the United States maintain their own “Ministry of National Defense,” nor have they instituted their own military conscription policies over the local populace.

(4) The “liberty” of the Fifth Amendment includes the right to travel, and the right to travel includes the right to obtain a passport. Based on the provisions of the SFPT and the decision in *DeLima v. Bidwell* (1901), “Taiwan is under the dominion of the United States.” The nationality of native persons in Taiwan is thus provided by *Boyd v. Nebraska ex rel Thayer* (1892) where the Supreme Court asserted that:

“The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass ”

This determination was confirmed again in *Gonzales v. Williams* (1904), and amplified by the decision of *US v. Wong Kim Ark* (1898), where the Court held that:

“To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, It is equally the doctrine of the English common law that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects de facto, their children, born under such a temporary dominion,

are not born under the ligeance of the conquered.”

(5) For native Taiwanese persons to be bona fide ROC citizens, two conditions would have to be fulfilled. First, the SFPT would have to award sovereignty of Taiwan to the ROC. Second, there would have to be a law passed in Taiwan regarding these mass-naturalization procedures, after the peace treaty came into effect on April 28, 1952. In fact, neither of these two conditions has been fulfilled.

(6) Notably, Article 4 of the ROC Constitution specifies that “The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly.” In regard to the alleged incorporation of Taiwan into Chinese territory, there is no resolution of the National Assembly on record.

(7) The Republic of China is not recognized under either the SFPT or the TRA with any power to issue passports for native Taiwanese persons, in the areas of “Formosa and the Pescadores.” As defined in INA 101(a)(30),

The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

the Republic of China’s Ministry of Foreign Affairs cannot be construed as the “competent authority” for issuing passports to these persons. The false claims of “citizenship of the Republic of China” for native Taiwanese persons holding ROC passports make those passports illegal under US law.

(8) For a territorial cession after war, the military government of the principal occupying power does not end with the coming into force of the peace treaty. Based on the specifications in 8 USC 1408, 7 FAM 1111.3, 7 FAM 1121.1, 7 FAM 1121.2-2, and 7 FAM 1121.4-3, native Taiwanese persons are “US national non-citizens.” Upon the coming into force of the SFPT, and up to the present day, the allegiance of native Taiwanese persons is to the United States of America. Under 8 USC 1101 (a)(30), it is the USA which is the “competent authority” for issuing ID documentation to native Taiwanese persons.

(9) Currently, Taiwan is in a transitional period, or period of “interim status,” being held by the military government of the principal occupying power under SFPT. It is

important to clarify that while this interim status condition under SFPT persists there is no “Taiwan Republic”, nor any “One China, One Taiwan”, nor “Two Chinas,” nor “a divided Chinese nation.” This is because Taiwan has not yet reached a “final (political) status.”

(10) The Republic of China in Taiwan is a “subordinate occupying power” beginning October 25, 1945, and a “government in exile” beginning December 1949. The Republic of China Constitution is *not* the “organic law” of the Taiwan cession. The Taiwanese people are entitled to draft their own Constitution under United States administrative authority, similar to the inhabitants of other US overseas territories.

(11) In 1972, the Commander in Chief concluded a “Shanghai Communiqué” with the PRC which contained certain specifications regarding Taiwan’s envisioned future status. We allege that the making of these specifications is a violation of the Taiwanese people’s Fifth Amendment rights to “due process of law.” A fundamental requirement of due process is “the opportunity to be heard,” see *Grannis v. Ordean* (1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner. Significantly, the Taiwanese people were not consulted before the drafting of the Shanghai Communiqué.

We, therefore, in regard to the above statements of fact, do, in the name, and by the authority of the good people of Taiwan, solemnly publish and declare, that the US Congress should assume jurisdiction over the civil rights and political status of the native inhabitants of Taiwan, according to the US Constitution’s territorial clause, and that the White House, State Dept., Defense Dept., and other departments, agencies, boards, commissions, committees, etc. of the Executive Branch should take immediate action to remedy their mishandling of the Taiwan question in the post-WWII period, in order to preserve, protect, and defend the Constitution of the United States against all enemies, foreign or domestic.

And in further support of this Declaration, we also give notice that the native inhabitants of Taiwan are ready to submit their DS-11 applications for US national non-citizen passports.

Signed,