Territorial Cession after War and the End of Military Government

RULE: Military government continues until legally supplanted.

See Military Government and Martial Law, by William E. Birkhimer, 3rd edition, 1914, page 26.

EXPLANATION: For territorial cessions after war, the military government of the (principal) occupying power does not end with the coming into force of the peace treaty.

RELEVANT US SUPREME COURT CASES AND CITATIONS

=== Reference: DOOLEY v. U S, 182 U.S. 222 (1901) ===

http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/182/222.html

… We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress. Reference: Cross v. Harrison, 16 How. 182, 14 L. ed. 896. At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance.

=== Reference: DE LIMA v. BIDWELL, 182 U.S. 1 (1901) ===

http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/182/1.html

… The next case is that of Cross v. Harrison, 16 How. 164, 14 L. ed. 889. This was an action of assumpsit to recover back moneys paid to Harrison while acting as collector at the port of San Francisco, for tonnage and duties upon merchandise imported from foreign countries into California between February 2, 1848,-- the date of the treaty of peace between the United States and Mexico,-- and November 13, 1849, when the collector appointed by the President (according to an act of Congress passed March 3, 1849) entered upon his duties. Plaintiffs insisted that, until such collector had been appointed, California was and continued to be after the date of the treaty a foreign

territory, and hence that no duties were payable as upon an importation into the United States. The plaintiffs proceeded upon the theory, stated in the dictum in Fleming v. Page, that duties had never been held to accrue to the United States in her newly acquired territories until provision was made by act of Congress for their collection, and that the revenue laws had always been held to speak only as to the United States and its territories existing at the time when the several acts were passed. The collector had [182 U.S. 1, 185] been appointed by the military governor of California, and duties were assessed, after the treaty, according to the United States tariff act of 1846. In holding that these duties were properly assessed, Mr. Justice Wayne cited with apparent approval a dispatch written by Mr. Buchanan, then Secretary of State, and a circular letter issued by the Secretary of the Treasury, Mr. Robert J. Walker, holding that from the necessities of the case the military government established in California did not cease to exist with the treaty of peace, but continued as a government de facto until Congress should provide a territorial government. 'The great law of necessity,' says Mr. Buchanan, 'justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.' …

=== Reference: CROSS v. HARRISON (1853) ===

In order further to illustrate the view which was taken by the Executive branch of the government, of the existing condition of things in California, it is proper to insert an extract from a dispatch written by Mr. Buchanan, Secretary of State, to Mr. Voorhees, on the 7th of October, 1848. It is as follows:

> 'The President, in his annual message, at the commencement of the next session, will recommend all these great measures to Congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment.
>
> 'In the mean time, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the Treaty of Peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty, and property under the protection of no existing authorities? This would be a singular phenomenon in

the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, a government de facto, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

'This government de facto will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. …

=== Reference: CROSS v. HARRISON (1853) ===

… The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, …with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government.

=== Reference: SANTAIGO v. NOGUERAS, 214 U.S. 260 (1909) ===
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/214/260.html

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the Crown of Spain, and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation, and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander in Chief. In the case of Cross v. Harrison, 16 How. 164, 14 L. ed. 889, a situation of this kind was referred to in the opinion of the court, where it said; 'It [the military authority] was the government when the territory was ceded as a conquest, and it did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. [214 U.S. 260, 266] No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government.' Pp. 193, 194. And see Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891, and opinion of Mr. Justice Gray in Downes v. Bidwell, 182 U.S. 244, 345 , 45 S. L. ed. 1088, 1128, 21 Sup. Ct. Rep. 770.

The authority of a military government during the period between the cession and the action of Congress, like the authority of the same government before the cession, is of large, though it may not be of unlimited, extent. In fact, certain limits, not material here, were put upon it in Dooley v. United States, 182 U.S. 222 , 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, and Lincoln v. United States, 197 U.S. 419 , 49 L. ed. 816, 25 Sup. Ct. Rep. 455, though it was said in the Dooley Case, page 234: 'We have no doubt, however, that, from the necessities of the case, the right to administer the government

of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress,' -- citing Cross v. Harrison, supra.

=== Reference: Military Government and Martial Law, by William E. Birkhimer, 3rd edition, 1914, Kansas City, Missouri, Franklin Hudson Publishing Co., page 1. ===
http://famguardian.org/Publications/MilitaryGovAndMartLaw/MilitaryGovernmentAndMartialLaws.pdf

Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.

US Constitution: Territorial Clause and the right to govern territory

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; …*

=== Reference: AMERICAN INS. CO. v. 356 BALES OF COTTON, (1828) ===
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/26/511.html

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.

The usage of the world is, if a nation be not entirely subjugated to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them, and the government which has acquired their territory. The same Act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political,

is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

On the 2d of February 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, contains the following provision -- 'The inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the mean time, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.'

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self- government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United [26 U.S. 511, 543] States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source, whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed 'an Act for the establishment of a territorial government in Florida;' and, on the 3d of March 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration.

Hartzell's Notes: "entirely subjugated" is used here to refer to *debellatio* – which is the (pre-Napoleonic era legal premise of) complete subjugation of a belligerent nation with a resulting annexation and loss of sovereignty. Hence, the term *debellatio* refers to a conquered people who dissolved, leaving no one to assert their rights as a people. Contrasingly, *occupatio bellica* refers to a conquered people who persist, leaving the defeated nation as a legal subject.

=== Reference: TERRITORIAL GOVERNMENTS AND THE LIMITS OF FORMALISM ===

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[FN321] Thus, a formalist would probably conclude that the power to administer territories is twofold: during United States military occupation of territories, the President's war powers provide authorization for territorial governance under article II, while the regular administration of territories belongs to Congress under the territories clause of Article IV. [See Footnote 322]

[FN322]. The interplay between these powers raises fascinating questions when one considers the possibility of an interregnum. Suppose that the President is administering occupied territory during wartime. Then the war ends, the countries sign a treaty of peace, and the occupied territory is formally ceded to the United States. Under a formalist analysis, responsibility for governance now shifts to Congress under the territories clause. But what if Congress does not act? Does the executive branch-or perhaps the territorial population-have some residual or inherent governing authority? Or do we have a state (or territory) of anarchy? This precise question actually arose and was litigated to a final judgment in connection with California, in Cross v. Harrison, 57 U.S. (16 HOW.) 164 (1854) (civil government established by President continued to function until Congress legislated otherwise).

Hartzell's Notes: In many instances, when the terminology of "civil government" is used in speaking of a government established under military authority, this is in fact what in the present era we would term to be a "civil affairs administration of a military government."

In other words, the difference between a "civil government" established by, or recognized by, the US Congress, and a "civil affairs administration of a military government" must be carefully distinguished when researching US Supreme Court cases involving military occupation.

See FM 27-10 Law of Land Warfare, Chapter 6 OCCUPATION, paragraph 354:
http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch6.htm

354. Friendly Territory Subject to Civil Affairs Administration Distinguished

Civil affairs administration is that form of administration established in friendly territory whereby a foreign government pursuant to an agreement, expressed or implied, with the government of the area concerned, may exercise certain authority normally the function of the local government.

Such administration is often established in areas which are freed from enemy occupation. It is normally required when the government of the area concerned is unable or unwilling to assume full responsibility for its administration. Territory subject to civil affairs administration is not considered to be occupied.

If circumstances have precluded the conclusion of a civil affairs agreement with the lawful government of allied territory recovered from enemy occupation or of other territory liberated from the enemy, military government may be established in the area as a provisional and interim measure (see par. 12b and c). A civil affairs agreement should, however, be concluded with the lawful government at the earliest possible opportunity.

US Army regulations show a clear method how “sovereignty transfer” of territory under friendly occupation can be done. In order to fully explain this, it is necessary to use the legal concept of “plenum dominium et utile,” which indicates the true nature of **a duality of dominion**, which is (1) **"title"** and (2) **"control/usage"** of property. There is the incorporeal issue of the title of "dominium plenum," which designates the holding of the title by a superior power, and the corporeal issue of "utile dominium," which involves the custodial matters of those whose use their labor to till the soli of the superior power ("the king" or "the crown").

Hence, this paragraph 354 can be annotated for the Taiwan cession as follows:

Friendly Territory Subject to Civil Affairs Administration Distinguished

Civil affairs administration is that form of administration established in friendly territory ***(after peace treaty conversion from enemy territory because of plenum dominium et utile)*** whereby a foreign government ***(US Military Government tentatively disclaiming but not officially ceding any plenum dominium et utile)*** pursuant to a ***(Shanghai Communiqué as an executive)*** agreement, expressed or implied, with the ***(PRC)*** government of the ***(Taiwan)*** area concerned, may ***(allow the Chinese rebels or the ROC administrative authorities on Taiwan to)*** exercise certain ***(San Francisco Peace Treaty administrative)*** authority normally the function of the local government.

> Such administration is often [or "normally"] established in ***(Taiwan)*** areas which are freed from enemy occupation [or "enemy control"] ***(by SFPT cession from Japan)***. It is normally required when the ***(PRC)*** government of the ***(Taiwan)*** area concerned is unable or unwilling to assume full responsibility for its ***(SFPT)*** administration. ***(Taiwan)*** Territory subject to civil affairs administration ***(of US Military Government)*** is not considered to be ***(belligerently)*** occupied. ***(After treaty cession, it is friendly territory and not a legal situation of belligerent occupation of enemy territory).***
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> If circumstances have precluded the conclusion of a civil affairs agreement with the lawful government of allied territory recovered from enemy occupation or of other territory liberated from the ***(Japanese)*** enemy, ***(US/ROC)*** military government may be established in the ***(Taiwan)*** area as a provisional and interim measure. A ***(Shanghai Communiqué and a PRC-ROC bilateral)*** civil affairs agreement should, however, be concluded with the ***(PRC)*** lawful government at the earliest possible opportunity.

Thus in crafting this 1972 Communiqué, the following sentences were inserted to deal with the resolution of this Taiwan status problem:

> *"The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves."*

Importantly however, during this period of "interim status," the Taiwanese people are entitled to fundamental rights under the US Constitution, and these include the life, liberty, property, and due process of law under the Fifth Amendment, as well as the Article 1, Section 8 stipulation that "Congress will provide for the common defense."

Unfortunately, up to the present day, the US Commander in Chief and the State Department have engaged in reckless political expediency at the expense of the civil rights of the unincorporated territory of Taiwan. In order to effectively deal with this problem, the Taiwanese people should recognize their true international legal position, and then immediately demand their fundamental rights under the US Constitution and the Senate-ratified San Francisco Peace Treaty.

researched and written by Richard W. Hartzell