

Our inquiry to the US government -- What Are You Doing?

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The Beginning of WWII in the Pacific

"Yesterday, December 7, 1941 -- a date which will live in infamy -- the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan." President Roosevelt's speech of December 8, 1941, was immediately followed by a Congressional Declaration of War. On the following day, December 9th, the Chiang Kai-shek's Republic of China also declared war against Japan.

Formosa and the Pescadores had been ceded to Japan in the 1895 Treaty of Shimonoseki. Under international law, there is no doubt that Japan had possession of the sovereignty of these areas after 1895.

During the course of the Pacific war, the historical record shows that all military attacks against Japanese Formosa and the Pescadores, and indeed against the four main Japanese islands, were conducted by United States military forces. It is very significant that the Republic of China military forces did not participate. According to the precedent established in the Mexican American War, the Spanish American War, etc., after the end of hostilities, the United States will be the (principal) occupying power of these areas.

In early August 1945, the United States dropped two atomic bombs on Japan, and the Japanese surrendered on August 15th. US troops were in Formosa soon after, and on September 1st, US naval vessels arrived to arrange for the transport of 1,000 US prisoners of war to Manila. On September 2nd, General Douglas MacArthur directed the senior Japanese commanders and all ground, sea, air and auxiliary forces within Formosa to surrender to Chiang Kai-shek (CKS).

The relationship between the United States and the CKS' Republic of China in the military occupation of Formosa and the Pescadores (hereinafter called "Taiwan") is important. The United States is the principal occupying power. The Republic of China under CKS (hereinafter called "ROC") is the subordinate occupying power. General MacArthur gave orders to Chiang Kai-shek, and the Generalissimo accepted them. This is a principal - agent relationship. [Footnote 1]

The ROC military forces accepted the surrender of Japanese troops on October 25, 1945, in Taipei. The ROC officials immediately announced this occasion as "Taiwan Retrocession Day," however such an announcement is a violation of the laws of war. It is extremely regrettable that the United States government made no efforts to correct this error at the time. This was the first major mistake by the USA in the handling of Taiwanese affairs in the post-war period.

According to the Hague Conventions of 1907, the date of October 25, 1945 can only be interpreted as the beginning of the military occupation of Taiwan. Military occupation is conducted under "military government," and the United States has delegated the military occupation of Taiwan to the ROC. United States Military Government (USMG) in Taiwan has begun as of October 25, 1945.

In January of 1946, the ROC government announced mass naturalization of native persons in Taiwan as "ROC citizens." Additionally, some Taiwanese males were conscripted to fight in the Chinese civil war. (More formal military conscription laws over Taiwanese males were put into effect several years later.) Such unilateral announcements regarding naturalization and military conscription over persons in occupied territory are violations of the laws of war. It is extremely regrettable that the United States government made no efforts to correct these errors at the time. These were the second and third major mistakes by the USA in the handling of Taiwanese affairs in the post-war period.

In late 1949, with a civil war raging in Mainland China, additional military forces and government officials of the ROC fled to Taiwan. As of early 1950, the ROC government in Taiwan is "wearing two hats" - it is a subordinate occupying power (beginning October 25, 1945), exercising "effective territorial control" over Taiwan, and at the same time it is a government-in-exile (beginning December 1949). Decisions regarding the transfer of the sovereignty of Taiwan will be made in the post-war peace treaty, hence in early 1950 the ROC is clearly not in possession of the sovereignty of Taiwan.

On April 28, 1952, the San Francisco Peace Treaty (SFPT) came into force. Japan renounced the sovereignty of Taiwan in Article 2b, however, no receiving country was specified. This is a "limbo cession." The United States is confirmed as the principal occupying power in Article 23. Final disposition of Taiwan will be according to the directives of USMG, as per Article 4b:

Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to the directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

The ROC on Taiwan

As we know, the ROC is the legal government of "China" as spoken of in WWII. However, the ROC failed to maintain its legal position when it fled to Taiwan in late 1949. As of late April 1952, with the coming into force of the SFPT, the ROC is not the legally recognized government of Taiwan; it is merely a subordinate occupying power and government in exile.

With this recognition, an analysis of Taiwan's position under international law and US Constitutional law from late April 1952 up to the present day can proceed very straightforwardly. An examination of the situation of Puerto Rico and Cuba after the Spanish American War provides the necessary legal background.

Puerto Rico, Cuba, and Taiwan

Preliminary Comments: The Hague Conventions of 1907 specify that "territory is considered occupied when it is actually placed under the authority of the hostile army." The form of administration by which an occupying power exercises government authority over occupied territory is called "military government." The military government of the principal occupying power does not end with the coming into force of the peace treaty, but continues until legally supplanted.

Puerto Rico: United States Military Government in Puerto Rico began on August 12, 1898, with the surrender of Spanish troops. The United States was the (principal) occupying power. The Treaty of Paris came into force on April 11, 1899, and Puerto Rico was ceded to the United States in Article 2. In *Downes v. Bidwell* (1901), the US Supreme Court ruled that upon cession by Spain, under US law Puerto Rico became "unincorporated territory." However, the Foraker Act, which was passed by the US Congress to provide a civil government for Puerto Rico (and supplant USMG), only came into effect on May 1, 1900. Hence, from April 11, 1899 to May 1, 1900, Puerto Rico is clearly "unincorporated territory under USMG."

Cuba: United States Military Government in Cuba began on July 17, 1898, with the surrender of Spanish troops. The United States was the (principal) occupying power. The Treaty of Paris came into force on April 11, 1899, and Cuba was a limbo cession in Article 1. However, the Republic of Cuba government, established to provide a civil government for Cuba (and supplant USMG), only began operations on May 20, 1902. Based on the rulings in *Downes v. Bidwell* (1901) and *Neely v. Henkel* (1901) it is clear that upon the coming into force of the peace treaty, Cuba became unincorporated territory under USMG. Indeed, the United States flag flew over Cuba from July 17, 1898, until the formal end of USMG in Cuba was proclaimed by the US President on May 20, 1902.

Taiwan: United States Military Government in Taiwan began on October 25, 1945, with the surrender of Japanese troops. The United States is the principal occupying power. The San Francisco Peace Treaty came into force on April 28, 1952, and Taiwan was a limbo cession in Article 2b. [Footnote 2] Based on the rulings in *Downes v. Bidwell* (1901) and *Neely v. Henkel* (1901) it is clear that upon the coming into force of the peace treaty, Taiwan has become "unincorporated territory under USMG." As of late April 1952 (if not earlier), the United States flag should be flying over Taiwan. [Footnote 3] **To date, there has been no announcement by the US President of the formal end of USMG in Taiwan, nor the supplanting of USMG by any other United States approved civil government operations.**

Fundamental Constitutional Rights

In the Insular Cases (beginning 1901) the US Supreme Court held that even without any actions by the US Congress, "fundamental rights" under the US Constitution apply in all unincorporated territories. **However, with no action by the US Commander in Chief, what we have seen in Taiwan from late April 1952 to the present is something completely different.**

Specifically, the Taiwanese people have been forced to accept ROC citizenship without any internationally recognized legal basis, and males are subject to military conscription in violation of the Geneva Conventions. The Taiwanese people are living under the ROC Constitution, and in their daily lives they are singing the ROC national anthem, raising the ROC flag, and recognizing an ROC national father. The ROC on Taiwan is a non-state, but the ROC constitutional structure in force specifies that insurrection or rebellion against the ROC is punishable by death or lengthy imprisonment!!

Hence, as of late Spring, 1952, in order to conform to the provisions of the Senate-ratified SFPT, and to support and defend the Constitution of the United States against all enemies, foreign and domestic, the US Commander in Chief must issue an Executive Order for the Republic of China government on Taiwan to disband. The US government must help the Taiwanese people organize a temporary government (with a new President, Vice-President, and other top officials), and begin preparations for the calling of a Constitutional Convention.

The myriad mistakes by the USA in the handling of Taiwanese affairs in the post-war period are extremely regrettable.

The One China Policy

With the coming into force of the SFPT in 1952, a clear basis for the future development of Japan was established. However, the situation of Taiwan was a total mess.

We do not dispute the One China Policy, but at the same time it must be recognized that Taiwan is Taiwan and China is China.

In the Shanghai Communique of February 28, 1972, the following wording is particularly important:

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. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all US forces and military installations from Taiwan.

Some have argued that this is a very convoluted way of saying that **"Although Taiwan is not a part of China, we want everyone to think that it is."** This is certainly worthy of further examination.

That the Commander in Chief has the right to make "dispositions of the property of Japan," in accordance with SFPT Article 4b, we do not challenge. However, we do maintain having done no prior consultation with the Taiwanese people, making a decision to put Taiwan on a "flight-path" for eventual unification with the PRC does violate the rights of the Taiwanese people to life, liberty, property, and due process of law under the Fifth Amendment. These Fifth Amendment protections are "fundamental rights" under the US Constitution, and apply in overseas territories even without any actions by the US Congress.

Misleading the US Congress?

The State Department informed the Senate in 1970 that **"As Taiwan and the Pescadores are not covered by any existing international disposition, sovereignty over the area is an unsettled question subject to future international resolution."**

This statement was repeated in a **"Subject: Legal Status of Taiwan" Memorandum from the Department of State Legal Advisor on July 13, 1971,** [Footnote 4] and has been often repeated since. Is this willful ignorance of the truth... or some type of politically motivated cover-up? Might it indicate collusion with the China lobby, funded by Generalissimo and Madame Chiang Kai-shek? Or is it simple negligence?

We believe that after reading this entire essay, all members of the public will understand why the "ROC on Taiwan" is not an internationally recognized government, while at the same time the **Taiwan Relations Act** is a domestic law of the United States. Moreover they will understand why when tensions flared between the PRC and Taiwan 1996, the US Commander in Chief sent two aircraft carriers into the Taiwan Strait without any previous consultation with the Taiwan governing authorities. Significantly, the "ROC on Taiwan" has been unable to obtain admittance to the United Nations, and has been refused membership in such important international bodies as the World Health Organization. [Footnote 5] Why is this? On October 25, 2004, in a press conference in Beijing, former Secretary of State Powell stated: **"Taiwan is not independent. It does not enjoy sovereignty as a nation, and that remains our policy, our firm policy."** We agree with Mr. Powell's statement entirely.

The Situation in 2005

We strongly urge that the members of Congress and other responsible US government officials consider the following actions:

- Suspension of the operations of the ROC Ministry of National Defense. The US Constitution states that Congress will provide for the common defense. None of the pre-existing five major unincorporated territories (Guam, Northern Mariana Islands, American Samoa, Puerto Rico, and the US Virgin Islands) have their own Ministry of National Defense, or have they instituted military conscription laws over their local populace. All defense matters for the fifty states and territories under US administrative authority are handled by the Department of Defense in the Pentagon.
- Authorization for the US Department of Defense to assume full responsibility for the defense of Taiwan, and to increase the deployment of military equipment and personnel in the western Pacific in order to protect United States' interests.
- Suspension of the operations of the ROC Ministry of Foreign Affairs. All diplomatic and consular matters for the fifty states and territories under US administrative authority are handled by the Department of State.

- Establishment of the "United States Court of Taiwan." Under the US Constitution, this would be an Article II Court, and would serve to protect the rights of US citizens in Taiwan and deal with other important matters regarding US administrative authority over Taiwan. The issue of whether this Court or a separate tribunal would deal with the alleged war crimes perpetrated by ROC government officials could be decided at a later date.
- Authorization for the Taiwanese people to begin preparations for the calling of a Constitutional Convention, designing of a new flag, new seal, etc.
- Authorization for the establishment of a timetable for the retirement of the current ROC President, Vice President, the heads of the Five Yuan, the Supreme Court justices, the High Court justices, other top officials, etc. as well as US government assistance for the appointment of transitional Taiwanese government officers in these positions.
- Authorization for the Taiwanese people to obtain new "Taiwan" passports, issued under United States administrative authority. [Footnote 6]
- Authorization for the US Marines to raise the US flag over Taiwan.

We welcome your contributions to insure a free and democratic future for Taiwan.

Taiwan Defense Alliance

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Additional Background Information on Military Government, Military Occupation, and the Taiwan Status

US Army Field Manual FM 27-10 "The Law of Land Warfare" is a compendium of the Hague Conventions, Geneva Conventions, Uniform Code of Military Justice, and other recognized "laws of war" precedent, customs, and norms governing the conduct of military operations on land. The first edition was published October 1, 1940.

In Application of Yamashita (1946), the US Supreme Court held that: "FM 27-10 (1940), states the principal offenses under the laws of war recognized by the United States."

The contents of this Field Manual are important when discussing the Taiwan status, see <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/index.html> and in particular, an in-depth understanding of Chapter 6: OCCUPATION is imperative, see <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch6.htm>

The US Constitution has placed no limit upon the war powers of the government, but they are regulated and limited by the laws of war. One of these powers is the right to institute military governments. In *Ex Parte Milligan* (1866), the US Supreme Court held that military government is to be "exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents."

Territorial Cession and Military Government

For a territorial cession after war, the designation of a "receiving country" in the peace treaty merely indicates that that country is authorized by the international community to establish a civil government in the territory.

Significantly, at the point of the coming into force of the peace treaty, and normally for some time thereafter, the occupied territory is still under the administration of the (principal) occupying power. This is explained and illustrated in many US Supreme Court cases including *Cross v. Harrison* (1853), *Dooley v. U.S.* (1901), *DeLima v. Bidwell* (1901), etc.

It is important to note that Taiwan's status as "unincorporated territory under USMG" is not a final political status, but rather an "interim status" under the military government of the principal occupying power, i.e. the United States. [Footnote 7]

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For additional comments on the future democratic development of Taiwan, and full footnotes for this article, see <http://www.taiwanbasic.com/notes/>

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God bless America, Taiwan, and the whole world!