Is Taiwan a Sovereign and Independent Nation under the terms of the Taiwan Relations Act?

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Part 1: Supposed Recognition of Nationhood Under the Terms of the TRA

Many advocacy groups in the United States claim that under the following clauses of the Taiwan Relations Act, Taiwan is already fully recognized by the United States as a sovereign and independent nation.

Taiwan Relations Act
22 USC 3303

(a) Application of United States laws generally

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) Application of United States laws in specific and enumerated areas

The application of subsection (a) of this section shall include, but shall not be limited to, the following:

(1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

(2) Whenever authorized by or pursuant to the laws of the United States to conduct or carry out programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 3305 of this title, such programs, transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.

Is it correct to assert that these clauses actually recognize Taiwan as an independent and sovereign nation? In order to examine the validity of such a claim, it is

necessary to overview the division of responsibilities between the different branches of the US federal government.

De-recognition of the ROC on Taiwan

In December 1979, President Carter announced his decision to break diplomatic relations with the Republic of China on Taiwan, and to cancel the ROC-USA Mutual Defense Treaty (MDT). This caused much controversy in the US Congress, with many members saying that the President could not cancel such a treaty without Congressional approval. Senator Goldwater from Arizona filed a suit in the US Supreme Court about the President Carter's cancellation of the MDT.

After careful deliberation, the US Supreme Court denied any authority to judge such matters. In the decision of *Goldwater v. Carter* (December 13, 1979), Justice Powell filed an opinion which summarized the situation as follows:

> *This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.*

Justice Brennan filed an opinion which summarized the situation in another way:

> *The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. That mandate being clear, our judicial inquiry into the treaty rupture can go no further.*

Although *Goldwater v. Carter* shows a debate on the termination of the MDT, there was no review of the commander-in-chief actions for the legal status of Taiwan. Nevertheless, the Supreme Court did confirm that the President has full authority over foreign policy.

The Constitution and the Powers of the President

While the Constitution is silent with respect to treaty withdrawal, the preponderance of writings and opinions on this subject strongly suggests that the Framers intended for the authority to be vested in the President. Article II, Section 1 of the Constitution declares that the “executive power shall be vested in the President." Additionally, Article II, Section 2 makes clear that the President “shall be Commander-in-Chief," that he shall appoint, with the advice and consent of the Senate, and receive ambassadors, and that he “shall have power, by and with the advice and consent of the Senate, to make treaties."

The treaty clause's location in Article II clearly implies that treaty power is an executive one. The Senate's role on treaties is merely a check on the President's otherwise **plenary power** -- hence the absence of any mention of treaty-making power among the many powers given to Congress in Article I, Section 8. Hence, treaty withdrawal remains an unenumerated power -- one that must logically fall within the President's general executive power.

A careful reading of the writings of the Framers strongly also confirms that they viewed treaties differently than domestic law, and that, while they desired to put more authority over domestic affairs in the hands of the elected legislative representatives, they believed that the conduct of foreign affairs lay primarily with the President. As Secretary of State Thomas Jefferson observed during the first Washington Administration, “The Constitution has divided the powers of government into three branches [and] has declared that ‘the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the Senate." Due to this structure, Jefferson continued, “The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."

Supreme Court Rulings on Presidential Powers

In the same vein is the history of Supreme Court rulings on the subject of presidential powers. The Court has concluded that the President has the leading constitutional role in managing the nation's foreign relations. As one commentator, David Scheffer, noted in the Harvard International Law Journal, “Constitutional history confirms time and again that in testing [the limits of presidential **plenary powers**], the courts have deferred to the President's foreign relations powers when the constitution fails to enumerate specific powers to Congress."

In *Harlow v. Fitzgerald* (1982), the Supreme Court observed that responsibility for the conduct of foreign affairs and for protecting the national security are “ ’central' Presidential domains." Similarly, in the *Department of Navy v. Egan* (1988), the Supreme Court “ … recognized the generally accepted view that foreign policy [is] the province and responsibility of the Executive.”

The case most frequently cited as confirming the President as the supreme authority in the Nation's conduct of foreign affairs is the Supreme Court's 1936 decision in the *United States v. Curtiss-Wright Corp*. In that case, the Court reversed the decision of the district court, and affirmed the constitutionality of President Franklin Roosevelt's declaration of an arms embargo against both sides in the conflict between Peru and Bolivia over the Chaco region. As stated in the opinion issued by Justice Sutherland, the power to conduct foreign affairs is “the very delicate, **plenary** and exclusive **power** of the President as the sole organ of the federal government in the field of international relations -- a power which does not require for its exercise an act of Congress."

Summary and Conclusion of Part 1

After overviewing the relevant US Supreme Court rulings on the subject, it is clear that under the Constitution the President alone has the power to recognize, and withdraw recognition from, foreign regimes.

Therefore, the above mentioned clauses of the Taiwan Relations Act cannot be interpreted to say that the United States government recognizes Taiwan as a sovereign and independent nation. In fact, the official policy of the United States is that it does not support “Taiwan independence”, “One China, One Taiwan,” or “Two Chinas.”

Part 2: Analysis of Taiwan's International Legal Position

China ceded Taiwan to Japan in the 1895 Treaty of Shimonoseki. After 1895, Taiwan was legally a part of the Japanese Empire. However, Taiwan's current international legal position has become complicated as a result of WWII in the Pacific, the change of Chinese governments in 1949, and the post-WWII peace treaty.

After the surprise Japanese attack on Pearl Harbor, Hawaii, on December 7, 1941, the US Congress declared war against the Empire of Japan on December 8. Many researchers overlook the fact that all military attacks on (Japanese) "Formosa and the Pescadores" during the December 8, 1941 to August 15, 1945 period were conducted by United States military forces. In other words, in terms of Taiwan, the United States is the "conqueror."

Based on this realization, what is the relationship of Taiwan to the United States? The answer to this question can be provided by reviewing relevant US Supreme Court cases. In particular, in *Downes v. Bidwell*, 182 U.S. 244 (1901) after the Spanish American War, the Supreme Court confirmed its earlier findings that ---

> "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." (*American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242, (1828))
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> "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 …. " (*United States v. Huckabee*, 16 Wall. 414, 21 L. ed. 457, (1872))
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> "'The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty." (*Church of Jesus Christ of L. D. S. v. United States*136 U.S. 1 , 34 L. ed. 478, 10 Sup. Ct. Rep. 792, (1889))

Hence, it can be maintained that upon the surrender of Japanese troops, the United States “acquired” Taiwan under the principle of conquest. However, the United States cannot annex Taiwan, it can only hold it under military occupation.

In other words, under customary laws of warfare of the post-Napoleonic era, legal relationships for conquered territory do not arise from a consideration of who surrendered to whom, who fought whom, etc., but rather from a determination of who is fulfilling the role of “the occupying state” or “the occupying power,” as spoken of in the Hague and Geneva Conventions.

General Order No. 1 (1945), San Francisco Peace Treaty (1952), and Treaty of Paris (1899)

An overview of General Douglas MacArthur’s General Order No. 1 of September 2, 1945, which arranged for the Japanese surrender ceremonies and military occupation of over twenty areas, strongly indicates that the United States is fulfilling the role of “the occupying power.” Moreover, such a determination is fully confirmed by Article 23 of the post-war San Francisco Peace Treaty, of April 28, 1952, where the United States is designated as the “principal occupying power.”

Looking more carefully at the Senate ratified San Francisco Peace Treaty, Japan renounced the sovereignty of Taiwan in Article 2b, but no country was named as recipient. Significantly, Article 21 the treaty clarifies that China is not the beneficiary of the territory of “Taiwan.” The United States is confirmed as the “principal occupying power” in Article 23, and the United States Military Government has final disposition rights over the territory of Taiwan as per Article 4b. As we know, the US Commander in Chief is the head of the military arm of the US government.

The form of administration by which an occupying power exercises government authority over occupied territory is called "military government." Looking back at the Treaty of Paris and the history of the Spanish-American War era, a certain structure for the military occupation becomes apparent. In particular, in the cessions of Puerto Rico, the Philippines, Guam, and Cuba, the period of military occupation was followed by a formal announcement by the US government of the end of “United States Military Government” (USMG) in these areas. The earliest date was May 1,

1900, when USMG in Puerto Rico ended, and civil government operations authorized by the US Congress began.

Comparative data for the end of USMG in the Philippines was July 4, 1901; the end of USMG in Cuba was May 20, 1902; and the end of USMG in Guam is usually stated as July 1, 1950.

United States Military Government in Taiwan

The situation of Taiwan is somewhat complicated by the fact that the United States (as "the principal occupying power") has delegated the administrative authority for the military occupation of Taiwan to the Chinese Nationalists. Under international law, this is merely "Grotian agency," which is the law of agency as applied to dealings between nations.

However, with no end of USMG in Taiwan having ever been announced by the United States government, it is clear that even today Taiwan remains under USMG administrative authority.

This means that Taiwan has been acquired by the United States in the same fashion as Puerto Rico, the Philippines, Guam, and Cuba were acquired during of the Spanish-American War, under the principle of conquest. As mentioned above, even before the coming into force of the April 11, 1899, Treaty of Paris, and indeed for over a year thereafter, ***all of these four areas*** were under United States Military Government!

US Insular Areas (Unincorporated Territories)

In *Downes v. Bidwell*, 182 U.S. 244 (1901) the US Supreme Court confirmed that upon relinquishment of Spanish sovereignty in the peace treaty, these four island groups became "unincorporated territories" under US law. Indeed, in the present era these are what we would refer to as "Type 1 Insular Areas."

In that case, the Supreme Court Justices also reasserted their earlier findings that ---

> "So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory

> domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in *Fleming v. Page*, 9 How. 603, 617, 13 L. ed. 276, 281 (1850)."

An examination of all relevant legal and historical documents strongly suggests that at the present time, under the terms of the Senate-ratified San Francisco Peace Treaty, Taiwan remains under USMG administrative authority, and has not yet reached a "final (political) status." Under such a framework, Taiwan qualifies as an insular area of the United States, and the Taiwanese people should be enjoying fundamental rights under the US Constitution. Such fundamental rights would certainly include life, liberty, property, and due process of law under the Fifth Amendment.

The "One China Policy" of the United States

The analysis presented above does not violate the "One China Policy" which is strongly espoused by the State Department and the White House. In fact, under the clarification of Taiwan's international legal position as presented herein, it is clear that the so-called "Republic of China on Taiwan" is merely a subordinate occupying power (beginning Oct. 25, 1945) and a government in exile (beginning December 1949).

Hence, in the world today there are not "Two Chinas."

However, under the terms of the Senate ratified San Francisco Peace Treaty, it is hard to understand why the Republic of China (ROC) government is still being allowed to "operate" in Taiwan. Clearly, the ROC is blocking the Taiwanese people's enjoyment of fundamental rights under the US Constitution.

Summary and Conclusion of Part 2

Taiwan's international legal position this is an issue of international law and US Constitutional law which urgently needs the attention of the Committee on Resources, House of Representatives. This Committee is in charge of the insular affairs of the United States.