

Reflections on Taiwan History

– from the vantage point of Iwo Jima

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On October 25, 2004, US Secretary of State Colin Powell stated: "Taiwan is not independent. It does not enjoy sovereignty as a nation." Formerly, Secretary Powell had a distinguished career in the military, and of course is quite familiar with all aspects of the laws of war, military law, etc. After pondering Secretary Powell's remarks for some time, some people may have thought to themselves: "If this is the position of the US government, might it be possible for the Taiwanese people to request that the US stop all arms sales to Taiwan, and then have the US Department of Defense handle all of Taiwan's defensive matters directly?"

Let's step back for a moment and consider these issues from the vantage point of the battle for Iwo Jima in February - March, 1945.

The Raising of the US Flag over Iwo Jima

At the Iwo Jima Memorial in Washington, D.C., there is a large statue of soldiers struggling to raise the US flag over Iwo Jima. This statue commemorates the brave actions of all the US Marines who fought in the battle to gain control of the island during the most intense days of the fighting on February 19th to 23rd, including the many who lost their lives.

Iwo Jima is a volcanic island which lies approximately 650 miles (1046 km) south of Tokyo. In order to proceed in military attacks against the main Japanese islands, the United States considered Iwo Jima to be an important strategic objective, and spent over a month in attacking and conquering the island. When we gaze upon the Iwo Jima Memorial, we may pause to think: What is its true significance? What lesson can it teach us in regard to clarifying Taiwan's international legal position?

As everyone knows, Iwo Jima is not United States territory. So, why was the US flag raised over Iwo Jima? Most people would say: "This is because the soldiers who landed on the island were US Marines, so of course they raised the US flag!" If we examine this matter a bit further and ask our Taiwanese friends: "When a foreign military force invades a geographic area, what is the rule regarding what country's flag should be raised?" then most people will reply "We should just consider the

nationality of the soldiers in the invading force, and then that country's flag should be raised!" Most people consider this to be sound logic, but in fact it is not very precise. We may even say that this sort of reasoning contains a number of blind spots.

According to the authors' opinion, it is precisely this failure to clearly define the rule regarding "Raising the Flag" which is the primary cause of Taiwan's current problems in our current era here in the 21st century.

In world history, the regulations and practices concerning the conduct of war have been most carefully and systematically defined in the post-Napoleonic era. (Napoleon died in 1821.) In fact, the customary laws of warfare in this era clearly show us the necessary considerations for the determination of which flag to raise when territory is invaded.

Who is the Principal Occupying Power?

Territory is considered occupied when it is actually placed under the authority of the hostile army. Under such circumstances, we need to determine: Who is the principal occupying power? In the situation of Iwo Jima, it was invaded and liberated by US military forces. No other countries' military troops were delegated administrative authority for the military occupation, hence the military occupation was under the direct authority of the United States. The United States was the (principal) occupying power, so of course the US flag should be raised.

In the paragraphs below, the authors will examine two related scenarios for the invasion, liberation, and military occupation of Iwo Jima. In both scenarios we assume that Iwo Jima has a native population. This will enable us to consider the broader issues regarding civilian personnel in occupied territory.

Scenario #1 -- Allied forces comprised of one country and one tribe: Let us suppose that in the Battle for Iwo Jima, the United States had been allied with a group of famous fighting warriors from northern India called the "Baluch tribe." Military forces from the United States and the Baluch tribe were fighting together in the Pacific, and after several days of heavy aerial and naval bombardments, the Japanese commanders on Iwo Jima agreed to surrender. At this point we can imagine that the United States military forces still had additional military operations to take care of in nearby geographic areas. Hence, the US Marine Corps (USMC) general would direct that senior Japanese commanders and all ground, sea, air and auxiliary forces within Iwo Jima surrender to the Baluch military forces, and that the Baluch should take

charge of the administration of the island. Our question is: What flag should be raised at the surrender ceremonies?

Upon analysis it is found that despite their long history of warriorhood, the Baluch are only a tribe, and in fact they don't have their own flag. Under such circumstances, of course the US flag is raised. It is clear from this arrangement that the United States is the principal occupying power. The Baluch military forces are just serving as "agents" for the US military forces in the administration of the island and its people after the surrender of Japanese troops.

Scenario #2 - Allied forces comprised of two countries: Let us suppose that in Battle for Iwo Jima, the United States had been allied with the Soviet Union. Military forces from the United States and the Soviet Union were fighting together in the Pacific, and after several days of heavy aerial and naval bombardments, the Japanese commanders on Iwo Jima agreed to surrender. At this point we can imagine that the United States military forces still had additional military operations to take care of in nearby geographic areas. Hence, the USMC general would direct that senior Japanese commanders and all ground, sea, air and auxiliary forces within Iwo Jima surrender to the Soviet Union's military forces, and that the Soviet Union should take charge of the administration of the island. Our question is: What flag should be raised at the surrender ceremonies?

Upon analysis, many people will no doubt say that the flag of the Soviet Union should be raised. However, this method of dealing with the administration of Iwo Jima after the surrender ceremonies may have a number of "unpleasant side effects."

The Distinction between "Occupation" and "Annexation"

According to international precedent in the post-Napoleonic era, the invasion, conquest, and control of a nation or territory by foreign armed forces is considered "military occupation" and not "annexation." However, what if upon accepting the surrender of Japanese troops in Iwo Jima, the Soviet Union's military commanders immediately announce that the island has become an indivisible part of Soviet national territory? Would there be any remedy at that juncture?

Moreover, what if five or six years later there is a coup d'etat in the Soviet Union, and a number of high ranking government officials and military personnel all flee to Iwo Jima? At this point it might be expected that this Soviet Union government which has established itself in Iwo Jima still has full diplomatic relations with thirty or more

countries. An important question is: Can we consider the "Soviet Union in Iwo Jima" to be an independent and sovereign nation?

With reference to Article 1 of the Montevideo Convention (which entered into force on December 26, 1934), the "Soviet Union in Iwo Jima" does indeed meet the four criteria of having (a) a permanent population, (b) a defined territory, (c) a government and (d) the capacity to enter into relations with the other states.

In fact however, the "Soviet Union in Iwo Jima" is only a subordinate occupying power and a government in exile! It has effective territorial control over Iwo Jima, but does not have sovereignty! Hence, it cannot be considered a sovereign state in the international community.

Having proceeded this far in our hypothetical scenarios regarding the military occupation of Iwo Jima we must pause to consider: Do the above scenarios give us any clues as to what really happened to Taiwan in 1945?

The authors must stress that regardless of the situation of a territorial cession in peacetime or as the result of war, there is always the need for a clear "transfer of title." It is only with a clear "transfer of title" that the new owners can claim sovereignty over the territory.

What is the significance of the date of October 25, 1945? According to international law, this can only be viewed as the beginning of the military occupation of Taiwan. Moreover, according to the principle that "military occupation does not transfer sovereignty," it is impossible to hold that there was any transfer of sovereignty on that date. Hence, the sovereignty of Taiwan was still held by Japan until the coming into force of the post war San Francisco Peace Treaty (SFPT) on April 28, 1952. In that treaty, Japan renounced the sovereignty of Taiwan in Article 2b. Was this sovereignty transferred to the Republic of China? The answer is no.

Significantly, military occupation is a transitional period, or a period of "interim status." Since the SFPT did not specify a "receiving country" for the transfer of the sovereignty of Taiwan, we must consider: Who will make the decision regarding the final disposition of Taiwan in the post-war period? The answer is: the principal occupying power will make the decision.

Japan renounced the sovereignty of Taiwan in the SFPT, but no receiving country was

specified. In such a situation, who is in charge? According to Article 23, the United States is the principal occupying power, and Article 4b confirms that the United States has disposition rights over Taiwan. In 1972, when the US President announced the "One China Policy," he was actually making arrangements for the future disposition of Taiwan. Importantly, this was done in accordance with the specifications of the SFPT.

In summary of the above, a correct statement of Taiwan's current international legal position is that it is "foreign territory under the dominion of the United States". Indeed, as we know, the Taiwan Relations Act is a domestic law of the USA. Up to the present day, Taiwan has not been unified with the PRC. Hence, during this period of "interim status," can the Taiwanese demand recognition of their "fundamental rights" under the US Constitution? The answer is yes.

The earlier that the Taiwanese demand their US constitutional rights, the better.

References

According to the precedent in US Supreme Court, *Dorr v. United States*, 195 U.S. 138, 147 (May 31, 1904), under the US Constitution there is the concept of "fundamental rights," and these may be described as "inherent although unexpressed principles which are the basis of all free government"

(A) In an authoritative 1997 report compiled by the United States General Accounting Office, it was stated that "These fundamental rights appear to correspond roughly to the 'natural rights' earlier described by Justice White in a concurring opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901). Justice White included among 'natural rights' the right to one's own religious opinion as well as 'the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice; to due process and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments'"

(B) The guarantees in the Fifth Amendment that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" are clearly fundamental rights. Indeed, the ruling in *Downes v. Bidwell*, 182 U.S. 244 (1901) also held that ". . . even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."