

# Quick Summary of the San Francisco Peace Treaty's Disposition of "Formosa and the Pescadores"

*by Richard W. Hartzell & Dr. Roger C.S. Lin*

## **REFERENCES to SFPT:**

Article 2(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

Article 4(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

Article 21 Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

Article 23 ..... including the United States of America as the principal occupying Power, .....

## **REFERENCES to ROC CONSTITUTION and ROC NATIONALITY LAW:**

ROC Constitution, Article 3

Those with the citizenship of the ROC are the nationals of the ROC.

ROC Nationality Law, Article 2

Those with one of the following circumstances, belong to the citizenship of the ROC:

1. at the time of their birth, father or mother was a national of the ROC

Notes:

- (1) From the above, it appears that the ROC Nationality Law is contrary to the ROC Constitution which places citizenship first, and from citizenship flows national status.

(2) But the ROC Nationality Law says that citizenship is only found in those with nationality. Hence, it is thus impossible for anyone to have constitutionally valid nationality under the ROC Nationality Law.

(3) In any event, even putting aside this “ROC Constitution vs. ROC Nationality Law” technical analysis, in his October 4, 2005, Taipei Times newspaper article, Mr. Richard W. Hartzell has succinctly pointed out the key facts of the matter. For the Taiwanese people to be bona fide ROC citizens, two conditions would need to be met. First, the post-war treaty would have to award sovereignty of Taiwan to the ROC and second, there would have to be a law passed regarding these mass-naturalization procedures, after the peace treaty came into effect on April 28, 1952. In fact, neither of these two conditions was met.

(4) The ROC Nationality Law was originally promulgated in Feb. 1929, when Taiwan was a part of Japan. It was revised in Feb. 2000, however there were no Articles addressing the mass naturalization of Taiwanese persons as ROC citizens.

(5) The most commonly quoted reference for the “legal basis” of native Taiwanese persons as having ROC nationality is a January 20, 1946, order issued by the ROC military authorities. However, that order was never ratified by the Legislative Yuan, nor made into a law. Importantly, as “belligerent occupation” of Taiwan began on October 25, 1945, with the surrender of Japanese troops, and only ended with the coming into force of the San Francisco Peace Treaty on April 28, 1952, such an order is prohibited. More specifically, the imposition of mass-naturalization procedures over the civilian population in occupied Taiwan territory is illegal under the laws of war.

### *Preliminary Conclusions*

Japanese Courts have held that the native persons of “Formosa and the Pescadores” were of Japanese nationality until early April 1952. Japan renounced the sovereignty of “Formosa and the Pescadores” in the SFPT, but the Republic of China (ROC) was not the recipient of this sovereignty.

The ROC Constitution does not clearly define its own “territory.” By contrast, the Constitution of the United States specifies the inclusion of the original thirteen states, as well as additional states which have entered the Union via acts of Congress. In regard to territories ceded to the United States, or held by the United States, there are

treaties which give the full specifications.

With no clear legal basis to include *Taiwan* in its definition of “national territory,” and no international treaty references which can be found, the ROC is definitely not the competent authority to issue ID documentation of any kind to native persons in Taiwan.

Hence under the US Supreme Court’s Insular Cases, the US Constitution, the laws of war, the San Francisco Peace Treaty, and the SFPT-authorized Sino-Japanese Peace Treaty (Treaty of Taipei), the native inhabitants of Taiwan remain either as (1) Japanese nationals, thus owing their allegiance to Japan, or (2) nationals of the principal occupying power, and thus owing their allegiance to the principal occupying power. This analysis would flow directly from the concept of “temporary allegiance” under the law of occupation, which is discussed in many US Supreme Court cases.

### *To Whom do the Taiwanese Owe Allegiance?*

Japanese courts have not recognized the native persons of Taiwan as Japanese nationals since the Spring of 1952. In other words, under Japanese law, and indeed under international law, native persons of Taiwan currently owe no allegiance to the government of Japan.

This leaves us with only one other possibility. The native inhabitants of Taiwan must be correctly classified as US (non-citizen) nationals, and their identification documents and travel documents must be issued under the authority of the United States. In the San Francisco Peace Treaty, the United States is specified as the principal occupying power.

Taiwan is self-governing dominion under Taiwan Relations Act (TRA), but there is no passport issuing authority. Hence, it can be maintained that under US law the Taiwan governing authorities are counterfeiting “Republic of China passports.”

In other words, the ROC Ministry of Foreign Affairs is not recognized under either the San Francisco Peace Treaty or the TRA to issue passports for native Taiwanese persons, in the areas of “Formosa and the Pescadores.” As defined in INA 101(a)(30), the ROC 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

The consideration of whether the ROC Ministry of Foreign Affairs is the competent authority for issuing passports to native persons in the Kinmen (Jinmen) and Matsu (Mazu) island groups is an entirely separate matter however.

### *References*

The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations." -- US President Harry S. Truman, June 27, 1950

#### 7 FAM 1121.2-2 Court Decisions (TL:CON-66; 10-10-96)

a. In the first decade of the 20th century, in a series of court cases often called the "Insular Cases", the Supreme Court developed the rationale that, absent specific Congressional legislation or treaty provisions— (1) The Constitution has only limited applicability to U.S. territories; and (2) Inhabitants of territories acquired by the United States acquire U.S. nationality -- but not U.S. citizenship.

#### 7 FAM 1121.4-3 Status of Inhabitants of Territories Not Mentioned in the Immigration and Nationality Act(INA) (TL:CON-66; 10-10-96)

The United States exercises sovereignty over a few territories besides those mentioned above. Under international law and Supreme Court dicta, inhabitants of those territories, (Midway, Wake, Johnston, and other islands) would be considered non-citizen, U.S. nationals; However, because the INA defines "outlying possessions of the United States" as only American Samoa and Swains Island, there is no current law relating to the nationality of the inhabitants of those territories or persons born there who have not acquired U.S. nationality by other means.

#### 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.

\* In *Gonzales v. Williams*, 192 U.S. 1 (1904), the Supreme Court referred to its earlier

finding that: ---

The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided.” (Boyd v. Nebraska ex rel Thayer, 143 U.S. 135 (1892))

\* Under the basic Immigration Act of February 5, 1917, the definition of the United States included any waters, territory, or other place subject to its jurisdiction, except the Isthmian Canal Zone. “Island citizens” or (“citizens of the islands”) under the jurisdiction of the United States were expressly excepted from the definition of "alien", to whom the act alone applied.

\* 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 for the House Committee on Resources, 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.”

(C.) “In sum, it can fairly be said that the Insular Cases stand for essentially two propositions: (1) for territories incorporated into the United States, the Constitution applies *ex proprio vigore*, and (2) for unincorporated territories, only ‘fundamental’ constitutional rights apply.” See *King v. Morton*, US Court of Appeals, D.C. Circuit, (1975).