Unincorporated territory under the United States Military Government (USMG)

Part 1: USMG OCCUPATION WITHOUT PEACE TREATY CESSION

> [in reference to Fleming v. Page, 9 How. 603, 13 L. ed. 276] . . . . . which was an action against the collector at Philadelphia, to recover back duties upon merchandise imported from Tampico, in Mexico, during a temporary military occupation of that place by the United States. It was held that, although Tampico was within the military occupation of the United States, it had not ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. In delivering the opinion of the court Mr. Chief Justice Taney observed: 'The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war.
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> But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. . . . While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist.'
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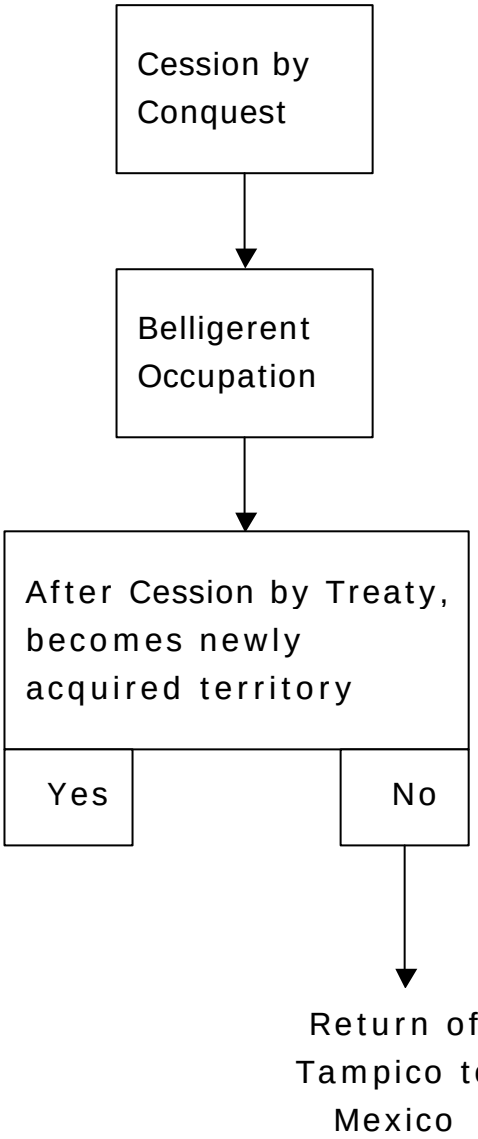
> Source: DeLIMA v. BIDWELL, 182 U.S. 1 (1901)

Commentary: Tampico, Mexico, was occupied by the USMG in late October of 1846, however there was no peace treaty cession. Please refer to the following chart.

DISPOSITION OF TAMPICO, MEXICO, AFTER THE MEXICAN AMERICAN WAR



Notes:

1. Cession by Conquest must be finalized by a peace treaty.

2. Military occupation does not transfer sovereignty.

3. In regard to the situation of Tampico, it was returned to Mexico according to the terms of the Treaty of Guadalupe Hidalgo, signed February 2, 1848, (entered into force July 4, 1848).

PART 2: USMG OCCUPATION FOLLOWED BY PEACE TREATY CESSION

> [in reference to Cross v. Harrison, 16 How. 164, 14 L. ed. 889] . . . . . 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.' These letters will be alluded to hereafter in treating of the action of the executive departments.
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> The court further held in this case that, 'after the ratification of the treaty, California became a part of the United States, or a ceded, conquered, territory;'. . . . . .

> '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. . . . California became domestic territory [182 U.S. 1, 187] immediately upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California . . . . .
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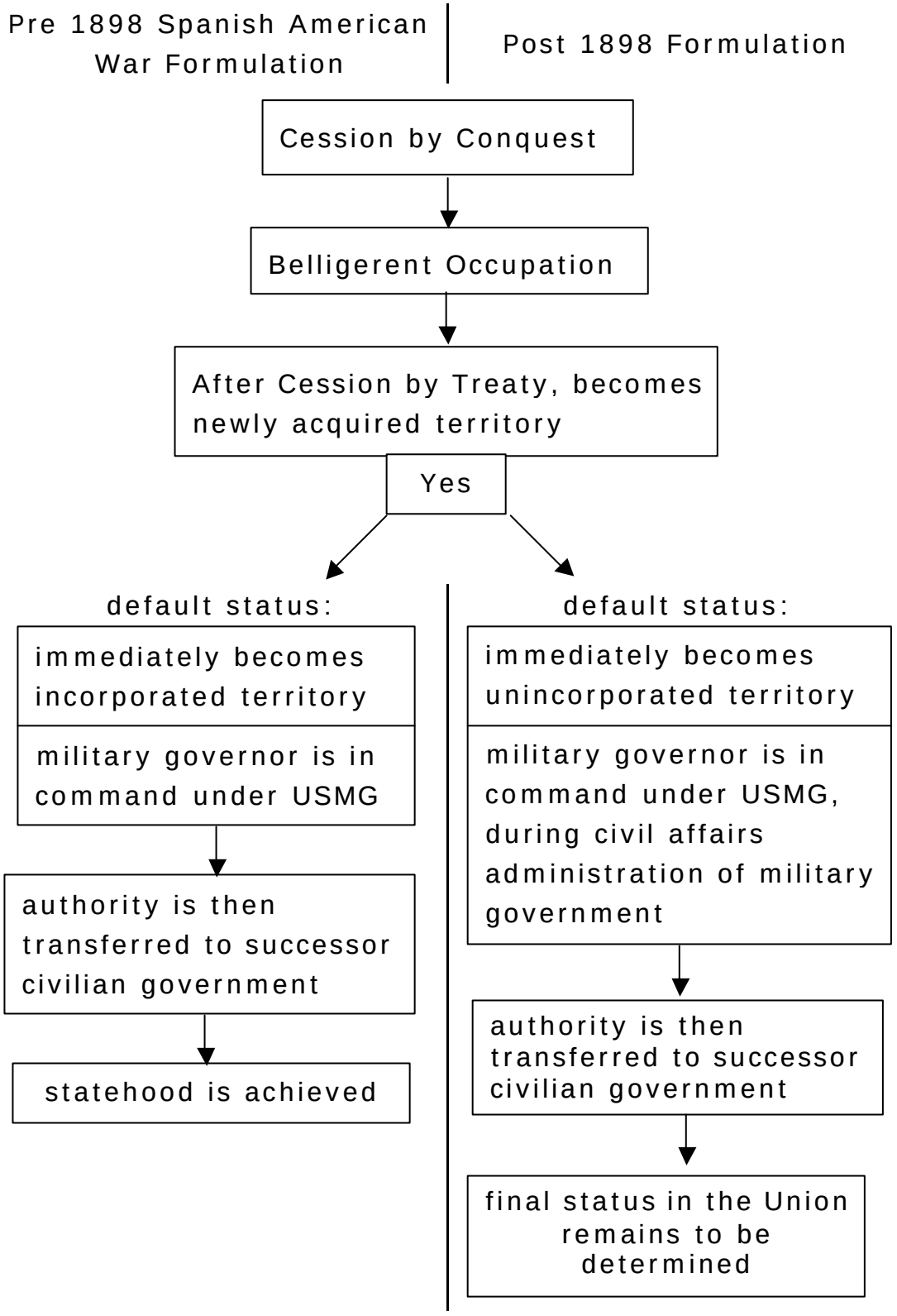
> Source: DeLIMA v. BIDWELL, 182 U.S. 1 (1901)

Commentary: Conquest is confusing to many civilian scholars because allows the displacement of the lawful sovereignty during military occupation. The occupation confers a domain of sovereignty but it does not formalize the displacement of that sovereignty into a permanent acquisition as hostilities are regarded as still continuing. Only the peace treaty does this for allowing permanent acquisition or “cession by treaty” of the original conquest.

The United States has a long history of acquiring territorial cessions. At the present time, the community of United States overseas includes Guam, Puerto Rico, American Samoa, the Northern Mariana Islands, and the U. S. Virgin Islands. Each of these territories has a unique relationship with the USA, largely due to their individual histories and the circumstances by which they came under USA administrative authority. However, they all share many important features, and are classified as unincorporated territories, a term that derives from Supreme Court Justice Edward Douglass White's concurring opinion in Downes v. Bidwell (1901). To be an unincorporated territory is to belong to but remain separate from the United States. Before this ruling, all newly acquired territories were incorporated by default. Please refer to the following chart.

Default Status of Newly Acquired Territories under the US Constitution



PART 3: THE RIGHT TO ACQUIRE TERRITORY AND THE EFFECT OF TREATIES

By article 2, 2, of the Constitution, the President is given power, 'by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur;' and by article 6, 'this Constitution and the laws [182 U.S. 1, 195] of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.' It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in United States v. The Peggy, 1 Cranch, 103, 110, 2 L. ed. 49, 51: 'Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress.' And in Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435, he repeated this in substance: 'Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' So in Whitney v. Robertson, 124 U.S. 190 , 31 L. ed. 386, 8 Sup. Ct. Rep. 456: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over

the other. . . . . .

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 242, 255; 'The Constitution confers absolutely upon the government [182 U.S. 1, 196] 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.'

It follows from this that by the ratification of the treaty of Paris the island [of Porto Rico] became territory of the United States, although not an organized territory in the technical sense of the word.

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the Dred Scott Case.

In the more recent case of National Bank v. Yankton County, 101 U.S. 129 , 25 L. ed. 1046, it was said by Mr. Chief Justice Waite that Congress 'has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.' Indeed, it is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises,

> not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the [182 U.S. 1, 197] subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.
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> Source: DeLIMA v. BIDWELL, 182 U.S. 1 (1901)

Comments: Retrocession of Louisiana from Spain to France and the subsequent sale to the USA was the first American experience with the incorporation of new territories acquired by treaty cession. Up to the present day, there is much common confusion about the comparative status of Union territory and new territory acquired by peace treaty. Some background information is provided as follows:

The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern states to settle in the fertile valley [182 U.S. 244, 252] of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the treaty of October 27, 1795, by which the Mississippi river was opened to the commerce of the United States. 8 Stat. at L. 138, 140, art. 4. In October, 1800, by the secret treaty of San Ildefonso, Spain retroceded to France the territory of Louisiana. This treaty created such a ferment in

this country that James Monroe was sent as minister extraordinary with discretionary powers to co-operate with Livingston, then minister to France, in the purchase of New Orleans, for which Congress appropriated $2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at $15,000,000.

> Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the 3rd article of the treaty, which provided that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' [8 Stat. at L. 202.] This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress.
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> We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its

inhabitants, however foreign they may be to our habits, traditions, and modes [182 U.S. 244, 280] of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;'. . . . . and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants . . . shall be determined by Congress.' In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Source: DOWNES v. BIDWELL, 182 U.S. 244 (1901)

It is true that as between Spain and the United States -- indeed, as between the United States and all foreign nations -- Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

Source: NEELY v. HENKEL, 180 U.S. 109 (1901)
also quoted in DOWNES v. BIDWELL, 182 U.S. 244 (1901)

PART 4: CONSTITUTIONAL RIGHTS OF THE INHABITANTS OF ACQUIRED TERRITORY

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory

inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; 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 of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are in- [182 U.S. 244, 283] dispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,-- whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,-- it does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. Yick Wo v. Hopkins, 118 U.S. 356 , 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Fong Yue Ting v. United States,

149 U.S. 698 , 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing, 158 U.S. 538, 547 , 39 S. L. ed. 1082, 1085, 15 Sup. Ct. Rep. 962; Wong Wing v. United States, 163 U.S. 228 , 41 L. ed. 140, 16 Sup. Ct. Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Source: DOWNES v. BIDWELL, 182 U.S. 244 (1901)

PART 5: REFERENCE FOR THE TAIWAN STATUS ISSUE

Commentary: In Downes v. Bidwell (1901), a cession treated as foreign territory under US dominion has self-governing dominion issues of treaty-making powers which are handled separately by the foreign territory itself. For example, the WTO membership status for the foreign territory like Taiwan cession is a good start, and is in complete alignment with this principle.

This separate customs territory of SFPT cession is not a status of an independent country. The separate WTO trade status would be expected to be most commonly seen in regard to US possessions, trust territories, or any self-governing dominions. The foreign territory of the Taiwan cession is treated as separate customs territory, or a foreign state equivalent, but it is still a sub-sovereign by facts of cession.

The Taiwan cession is held under the benign dominion of the US Military Government in SFPT. As a condition of having its sovereignty held in trust, it is a TRA status equivalency of a trust territory in Article 3 of SFPT. The notion of Taiwan being annexed or politically part of the PRC was flat out rejected by Senator Helms' legislation on the WTO ascension of Taiwan.

(2) the United States should be prepared to aggressively counter any effort by any WTO member, upon the approval of the General Council of the WTO of the terms and conditions of the accession of the People's Republic of China to the WTO, to block the accession of Taiwan to the WTO.

Source: Accession of Taiwan to the World Trade Organization, Public Law 106-286, Enacted 10 October 2000

http://www.taiwandocuments.org/pl106-286.htm

The Taiwan Relations Act is a US domestic law. A relevant clause was inserted by Senator Helms in his official capacity and in light of the TRA oversight powers of SFPT administrative authority controlled by the TRA treaty clauses and international organization clauses. It is critical to grasp the juncture of the three USA-PRC bilateral communiques with the TRA clauses here:

(d) Membership in international financial institutions and other international organizations

Nothing in this chapter may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.

Source: Taiwan Relations Act, United States Code Title 22 Chapter 48 Sections 3301 – 3316, Enacted 10 April 1979

http://www.ait.org.tw/en/about_ait/tra/

Despite the continuation of the ROC in some organizations, the USA does not even presently support the Taiwan cession in any international organization requiring (of those joining or acceding to membership) to have dejure sovereign status.

US law requires no support of Taiwan as a sovereign entity but treats it as *sub-sovereign* with separate membership in international organizations.

Creation of a separate customs territory applies to all cession categories of unincorporated territory as set out by the Downes v. Bidwell (1901) ruling. The US Constitution has no conflicts with this SFPT issue of Taiwan cession as a self-governing dominion of military government under the Insular Cases. The fiscal authority is also separated from the US Treasury.

The WTO status of the Taiwan cession as *a separate customs territory held under dominion by the administrative authority of US Military Government* can be directly derived from the judicial precedent in Downes v. Bidwell (1901). That insular case issue was fully satisfied by the military powers and derivative legal instruments and policies for holding such a dejure self-governing dominion under military government, therefore it directly follows that the Taiwan cession is qualified as unincorporated territory and that the Taiwanese people have the unalienable basic (or "undefined") civil rights protections thereof.

Attempting to evade these Constitutional issues, the three USA-PRC bilateral communiqués have seen the USA establish a One China Policy which peacefully seeks to "return" this SPFT Article 2b cession to the PRC, (not the ROC), as the recognized lawful government of the area. In fact, the PRC is not presently even exercising any effective form of SFPT powers nor legally does it have the current supreme authority of the USA.

Reference is made to the Congressional Record from 1952, during the SFPT ratification hearings.

> It was decided that when the treaty was ratified, Japan, of her own free will and acting under her own sovereignty, would determine which of the governments of China she would recognize, and the make her own separate treaty with that government. She is now making a separate treaty with Nationalist China, and is determining with

Nationalist China the question of the amount of reparations, if any, she will concede. Japan has stated very definitely, as the Senator from Alabama has just pointed out, that she is not going to deal with Communist China. Communist China is in no way, shape, or manner to get anything under this treaty. She has nothing to do with it. A new treaty would have to be negotiated before Communist China could have anything to do with this matter.

Source: Congressional Record – Senate, March 20, 1952, Volume 98 – part 2, page 2573, 82nd Congress, Second Session, Statement by Senator Smith, from New Jersey

PART 6: THE TERMINATION OF MILITARY GOVERNMENT

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the contrary, would only render them more dangerous. This must be the result, since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civil power.

And to me it further seems apparent that another and more

disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished 'all claim of sovereignty [182 U.S. 244, 343] over and title to Cuba.' It was further provided in the treaty as follows:

'And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property.'

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this court unanimously held in Neely v. Henkel, 180 U.S. 109, ante, 302, 21 Sup. Ct. Rep. 302, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the

exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not [182 U.S. 244, 344] intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed -- which, of course, I do not think to be conceivable -- that the judiciary would be authorized to draw to itself by an act of usurpation purely political functions, upon the theory that if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that under the rule clearly settled in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available.

> Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action, --a course which would be incompatible with the dignity and honor of the government.
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> Source: DOWNES v. BIDWELL, 182 U.S. 244 (1901)

Commentary: The taking of firm possession of the Taiwan area is pertinent as was done on October 25, 1945 establishing a starting date of belligerent occupation. Here in 2005, the Taiwan Question has been the centerpiece of the US-China policy for over 30 years since the Shanghai Communique and it has remained unresolved since the 1952 SFPT cession. Even the 1950 Truman Statement has reflected this continuing intention to **not** relinquish the administrative authority of the Taiwan area until a final resolution is reached. It is the "West Berlin" of the Far East in many respects. It is differentiated from West Berlin by the legal fact of a territorial cession in SFPT. This cession legally extends the occupation, and the military government established for Taiwan by the USA remains in force until legally supplanted.

1950 Truman Statement

> "The occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to the United States forces performing their lawful and necessary functions in that area. Accordingly, I have ordered the Seventh Fleet to prevent any attack on Formosa. 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."
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> -- US President Harry S. Truman, June 27, 1950

Over the past 50 years, most people have failed to grasp the significance of what President Truman said in these remarks, especially when viewed in light of subsequent events. By adding the missing word in the third sentence it will become clear –

> The determination of the future **final** status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.

In other words, after “cession by treaty,” i.e. the coming into force of the San Francisco Peace Treaty on April 28, 1952, the **interim** status of Taiwan was already completely defined, and Taiwan should have been flying the USA flag.

Belligerent occupation does not transfer sovereignty, but a peace treaty cession does. Following such a final end of belligerent occupation by treaty, the laws of occupation will still legally continue for any **limbo cession** cases like Taiwan (as specified in the SFPT) or Cuba (as specified in the Treaty of Paris).

These limbo cessions were "foreign in a domestic sense" because these self-governing dominions are not treated as dependent areas or US possessions, and the military government established during their interim period is only a provisional government imposed by force. If a territory is destined to join the Union of States, then it is incorporated by Congress and will join the 50 other states at the appropriate time the federal territory is settled and the population is sufficient for that step. Otherwise, the federal government is supreme in the area until it is legally supplanted.

The supreme authority of the USA displaced the Japanese sovereignty upon cession, but the US disclaimed any intention of possession of the Taiwan cession and unwisely allowed the ROC to continue indefinitely during the limbo cession period. The striking similarity between Taiwan’s situation and the world in 1898 under the administration of President William McKinley cannot help but be noticed. The Teller and Platt Amendments are noteworthy in this respect.

Teller and Platt Amendments

In April 1898 Senator Henry M. Teller (Colorado) proposed an amendment to the U.S. declaration of war against Spain which proclaimed that the United States would not establish permanent control over Cuba. It stated that the United States "hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said island except for pacification thereof, and asserts its determination, when that is accomplished,

to leave the government and control of the island to its people." The Senate passed the amendment on April 19. True to the letter of the Teller Amendment, after Spanish troops left the island in 1898, the United States occupied Cuba until May 20, 1902.

The Teller Amendment was succeeded by the Platt Amendment introduced by Senator Orville Platt (R-Connecticut) in February 1901. It allowed the United States "the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty..." The Platt Amendment was finally abrogated on May 29, 1934.

There is no relinquishment of sovereignty if incorporation does not occur within any particular time frame, nor is the treaty-making clause mysteriously rendered ineffective. Self-governing dominions have their autonomy for such treaty-making powers like their British counterparts of an earlier era. However, it is a treaty status question of the benign dominion that these delegated treaty-making powers can be ultimately exercised or become a source of juridical impedance when seeking any American support in joining international organizations. This insular status can occur within the military power or the civil powers of administrative authority.

Just as military occupation does not transfer sovereignty and forbids oaths of allegiance to the hostile power, a ratified peace treaty coming into legal effect has the power of international law to change the previously temporary situation by the principle of conquest for the legal acquisition of the territorial sovereignty. In the case of West Berlin, the hostile or belligerent occupation of Germany was ended in 1950 by the Tripartite Powers (USA, UK, France). However, there were no treaty cessions of German territory until the 1955 Bonn Convention which ended the "friendly occupation" and established the West German nation. West Berlin, notably, was excluded from any cession by the Bonn Conventions and so "interim" acquisition of German

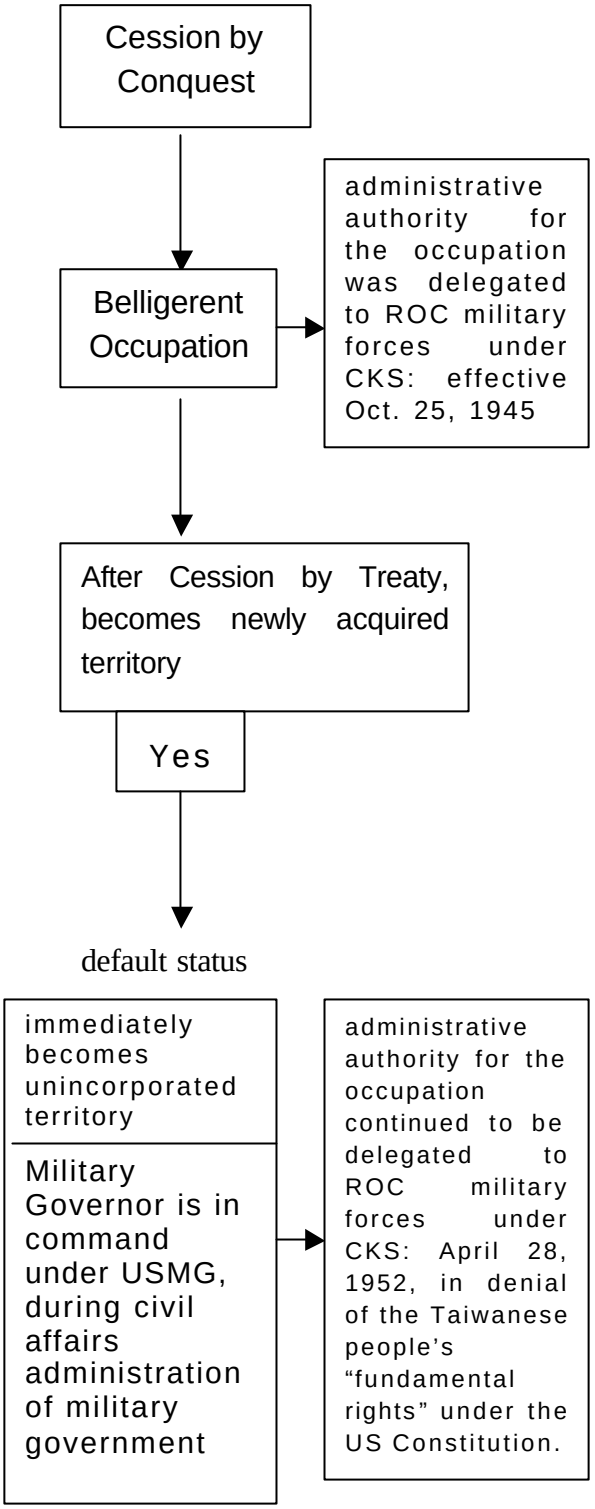
sovereignty was acquired by the principle of conquest for the supreme authority of the USA. In *US v. Tiede*, the legal basis for the establishment of the US Court of Berlin in 1979 originated with the temporary acquisition of German sovereignty under the principle of “cession by conquest.” This was just transitory displacement of German sovereignty under the Laws of War by the USA. Similar to the circumstances described in Neely v. Henkel (1901), the territorial sovereignty of Taiwan was acquired under the conquest principle with a cession by peace treaty into the supreme authority of the USMG. For the Laws of War, supreme authority is equated with the sovereignty or dominion of the paramount occupational authority coming above other Allied Powers whom are merely just "junior partners".

At the most basic level, military occupation is defined as a condition in which territory is under the effective control of a foreign armed force. Military occupation presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.

The Insular Cases don't apply to West Berlin because it was belligerent occupation which is only temporary acquisition of sovereignty under cession by conquest, with no concluding “cession by treaty.”

The current political status of the Taiwan cession is not an internal affair of China, it is an insular affair of the SFPT and TRA. Arrangement for the final status has been made by the US Commander in Chief in the 1972 Shanghai Communique and is standard operating procedures in paragraphs 353 and 354 of (US Army Field Manual) FM 27-10 for finalization of such insular status within the military powers.

Disposition of Formosa and the Pescadores after WWII by the USA



Strategic Implications:

1. Japan lost the war and gave up her overseas possessions. However, "cession by conquest" must be finalized by a peace treaty.
2. According to this arrangement, there is the clear intent to give Formosa & the Pescadores to China. Assuming the status of the principal occupying power, on September 2, 1945, USMG directs that Japanese forces in Formosa & the Pescadores surrender to CKS. Military occupation does not transfer sovereignty, but the military forces of CKS assume the position of subordinate occupying power in Taiwan.
3. The USA still recognizes the ROC as the legitimate government of China in the early 1950's, so the President and Secretary of State are not in a hurry to deal with the Taiwan question. Moreover, in the international community, the debate over who truly represents the legal government of China continues to rage. From the US point of view, a final determination of this issue would be very useful in dealing with all related matters.
4. The SFPT stipulates that the United States is the principal occupying power, but does not make a formal transfer of the sovereignty of Formosa & the Pescadores to any other country. These areas remain under friendly occupation.
5. On February 28, 1972 the USA and PRC promulgate the Shanghai Communique, recognizing the PRC as the sole legitimate government of China, and placing Formosa & the Pescadores on a "flight path" for eventual unification with the PRC, based on the outcome of successful negotiations between representatives of both sides of the Taiwan Strait.
6. Accordingly it is seen that the sovereignty of Taiwan is currently held by the USMG, in a similar manner to Cuba after April 11, 1899, in the form of a fiduciary relationship.

PART 7: JUS FECIALE & JUS GENTIUM

> Those rules which regulated the declaration of war and the conduct of war are comprehended under the term Jus Feciale. Some modern writers give to the term a wider signification; and others limit it more closely. Osenbrueggen (De Jure Belli et Pacis Romanorum, p. 20 Lips. 1836) defines the Jus Feciale to be that which prescribed the formulae, solemnities and ceremonial observed in the declaring, carrying on, and terminating a war, and in the matter of treaties. The Romans often used the expression Jus Gentium in a sense which nearly corresponds to the modern phrase Law of Nations, or, as some call it, International Law (Livy, ii.14, vi.1, quod legatus in Gallos, ad quos missus erat, contra jus gentium pugnasset; xxxviii.48; Sallust. Jug. 22). The term Jus Belli (Cic. de Leg. ii.14) is used in the same sense.
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> Source: http://www.taiwanadvice.com/history/jus.htm

Commentary: There is far too much confusion not only of the concept of unincorporated territory but of the concept of jus feciale. It is within the above citation that the constitutional role of the High Commissioner is defined. For those military powers of SFPT, it is a matter of the civilian control over the (military) civil affairs administration of the Taiwan cession including issues of civil rights and treaty-making powers of self-governing dominions. It is not a usurpation of the foreign affairs powers of the State Department, but a constitutional firewall between the military and foreign affairs powers of the US Constitution for the SFPT cession of Taiwan. The State Department is never to be an executive agency of administrative authority under separation of powers of the constitutional customary practices. Past customary practice has demonstrated no one should have allowed Mr. Kissinger to reign supreme over the cessions in SFPT without the added consent of the High Commissioner of the Taiwan cession.

Because of SFPT differences in Article 2 versus Article 3

cessions, and without the appointment of a US nationality High Commissioner (which is the modern day terminology for "military governor"), the people of Taiwan have seen their basic US Constitutional rights trampled by officials of the State Department for the last 50 years in the name of political expediency. Thus the appointment of a High Commissioner of the Taiwan cession is an important line of defense for a constitutional right of TRA enhancement for this unincorporated territory.

> Nothing contained in this chapter shall contravene the interest of the United States in human rights, especially with respect to the human rights of all the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.
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> Source: Taiwan Relations Act

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Source: First Amendment, US Constitution

-- Richard W. Hartzell
revised: July 2005