



U.S. DEFENSE OF TAIWAN RESPONSIBILITY REPORT

RE-EXAMINING THE FUNDAMENTAL PARAMETERS OF THE
BILATERAL RELATIONSHIP

VOLUME 1



U.S. DEFENSE OF TAIWAN RESPONSIBILITY REPORT

RE-EXAMINING THE FUNDAMENTAL PARAMETERS OF
THE BILATERAL RELATIONSHIP

Sponsoring Organization:
for the research, compiling, writing,
and editing of this book

Taiwan Autonomy Foundation
Los Angeles, California, USA

The content of this book is published under the
Creative Commons Attribution-NoDerivatives 4.0 International license.

See <https://www.twdefense.info/creative.htm>

Interested parties may print, sell, and distribute this book on their own initiative.

Please see the above webpage for details.

Author

Radford W. Hetterswift

Publishing date: Dec. 10, 2019

Version 1.1

ISBN: 978-0-578-62209-5

Contents

Chapter	Title	Page No
1	The Conundrum of Providing for Sufficient Defense Capability for Taiwan	1
2	The Fall of Singapore	7
3	The European Castle Story	19
4	A Mansion in South America	37
5	Introduction: U.S. Defense of Taiwan Responsibility Report	47
6	Mexican Military Forces Abandon the Port City of Tampico	54
7	The Mexican American War Extends into the Administration of President Lincoln (A Thought Experiment)	74
8	Disputes over the Continuation of Military Government in California Territory	94
9	Aftermath of the Explosion of the USS Maine in Havana Harbor	120
	Appendix A: Application of the U.S. Constitution's Bill of Rights in U.S. Overseas Territories	161
10	The Battle of Okinawa, the Peace Treaty, and the Eight Explanations	172
11	Disputes about the Aftermath of the Pacific War	193
	Appendix A: Analysis relevant to a Determination of the Defensive Responsibility for Taiwan	209
12	Prelude To War in Europe: the U.S. Occupation of Iceland	215
13	Military Occupation: Joint v. Zone, and the Law Of Agency	221
	Appendix A: Occupied Germany and the Allied Control Council	248
14	Polish Airliner Hijacking into Occupied Berlin	251
	Appendix A: Military Occupation of Japan and her Overseas Territories	261
	Appendix B: Organization Law for the United States Court of Taiwan	263
15	The 1979 Communique and the \$250 Million Lawsuit	272
	Notes and References	309

“It is all related,” the moderator said, ”and the customary way of handling these surrender and post-surrender situations in one war is most likely going to have a very direct bearing on how they are handled in some other war.”

CHAPTER 1

THE CONUNDRUM OF PROVIDING FOR SUFFICIENT DEFENSE CAPABILITY FOR TAIWAN

[DATELINE TAIPEI, TAIWAN]
PRESENT DAY

On August 15, 2019, speaking at the opening of the Taipei Aerospace and Defense Technology Exhibition, Republic of China President Tsai Ing-wen clarified her intention to buy more advanced military hardware from the United States.

As announced on the websites of the sponsors: The Bureau of Foreign Trade and Taiwan External Trade Development Council, (both organized under the authority of the Ministry of Economic Affairs, ROC), the venue for the Exhibition was

Taipei World Trade Center Exhibition Hall 1, Area A, C&D
No. 5 Hsin-Yi Road, Sec. 5, Taipei, Taiwan, ROC

Visiting the Taipei World Trade Center for the opening ceremonies of the three-day event, President Tsai gave a speech and was later escorted on a tour of the defense pavilion. The major focus of her remarks was the desire for Washington to approve the sale of upgraded F-16C/D Block 70 jet aircraft to Taiwan. Media reports place the number of jets to be purchased at 66, with a total contract price of US\$ 8 billion.

Brent Christensen, the Taipei-based Director of the American Institute in Taiwan (AIT), also made a number of important remarks at the Exhibition's opening.

**Remarks by AIT Director W. Brent Christensen
at Taipei Aerospace and Defense Trade Exhibition
August 15, 2019**

. As everyone may know, this year AIT has been commemorating our 40th anniversary with a year-long campaign of events across Taiwan, with each month recognizing a different aspect of the multifaceted nature of U.S.-Taiwan relations. August is Security Cooperation Month, and in fact just yesterday in Taoyuan I delivered a major policy speech on “promoting security cooperation.” When I assumed my position as Director of the American Institute in Taiwan about one year ago, I named “promoting security cooperation” as the first of my “four promotes” – the priorities I hope to focus on during my tenure as AIT Director. Security cooperation is one of the many facets of our deep U.S.-Taiwan relationship that we are proud of, so I’d like to take the opportunity to reiterate some of the themes I covered yesterday to this distinguished audience here today.

Any discussion of today’s robust U.S.-Taiwan security cooperation relationship would be incomplete without mention of the Taiwan Relations Act of 1979, the landmark piece of legislation that solidified the roots of today’s relationship and that consequently also established the American Institute in Taiwan. The Taiwan Relations Act was passed with broad U.S. Congressional bipartisan support – something that Taiwan still enjoys today – and it cemented a policy of continued support for Taiwan’s self-defense. Among our other commitments, the act stipulated that the United States would provide “such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”

This foundational statement has enabled the United States to sustain a policy of regular arms sales to Taiwan through seven administrations. Arms sales remain an important component of our security cooperation relationship with Taiwan, and our day-to-day work with the Taiwan authorities has focused on making sure Taiwan seeks the right capabilities to resist coercion. Since 2008, U.S. administrations have notified Congress of more than \$24 billion in foreign military sales to Taiwan, including just in the past two months the sale of M1A2 tanks and Stinger missiles, valued at \$2.2 billion dollars. To date, this administration alone has notified Congress of \$4.4 billion in arms sales to Taiwan.

Over the past 40 years, we have not only observed Taiwan's enthusiasm to pursue necessary platforms to ensure its self-defense, but also its evolving tenacity to develop its own indigenous defense industry. Today's exhibition is a clear example of that.

These investments by Taiwan are commendable, as is Taiwan's ongoing commitment to increase the defense budget annually to ensure that Taiwan's spending is sufficient to provide for its own self-defense needs. And we anticipate that these figures will continue to grow commensurate with the threats Taiwan faces.

While most people think about arms sales when we talk about U.S.-Taiwan security cooperation, I would like to highlight that our relationship is actually much much more: we consider Taiwan a partner in realizing our free and open Indo-Pacific vision, our military services engage frequently and substantively in professional exchanges, and our authorities collaborate to enhance humanitarian assistance and disaster relief capabilities to respond to manmade and natural disasters. On that last point – perhaps reinforced by last week's earthquake and Typhoon Lekima response – we recognize Taiwan's world-class disaster response capabilities and have accordingly leveraged that expertise to enable Taiwan to train third country practitioners from across the Indo-Pacific region on best practices via our Global Cooperation and Training Framework.

As part of this Security Cooperation Month, AIT also welcomes the thoughts and ideas of Taiwan's general public to inform us as we carry on our security cooperation relationship. In collaboration with the Taiwan authorities, we have launched our third Digital Dialogue, which asks the people of Taiwan to respond to the question: How should the United States and Taiwan deepen their security cooperation relationship against the backdrop of cross-Strait tensions, U.S-China friction, new and emerging threats, and an increasingly complex Indo-Pacific regional security environment? We welcome your participation and value your frank and candid thoughts. To participate, simply go to the AIT website and search for "Digital Dialogues."

In closing, I would like to underscore what I said yesterday: that the U.S.-Taiwan security cooperation relationship – and our relationship writ large – is grounded in our fundamental shared values of human rights, freedom, and democracy. We are and will remain a true friend of Taiwan, and our commitment to the obligations enshrined in the Taiwan Relations Act is rock solid.

Thank you.

(excerpted from the website of the American Institute in Taiwan)

Earlier in 2019, during a reported interview with the international news channel CNN, President Tsai estimated that in the event of an attack by military forces of the People's Republic of China (PRC), the ROC military in Taiwan would certainly be able to hold out for at least one day or two days. She expressed the hope that after that time, the international community would join together to come to Taiwan's defense.

Local military officials scoffed at such estimates and said that in the face of a PRC attack, the ROC military forces could certainly hold out for a much longer period. How much longer? To this question they were unable to offer precise estimates.

International defense experts often make their own approximations; however they rarely take into account the fact that internet forums used by local Taiwan people are filled with anonymous postings telling an entirely different story. According to the accounts of many males who have completed their Taiwan military service, much of the military equipment which the ROC actually owns is not properly maintained, with the result that it is largely unserviceable.

COMPARISONS WITH THE DEFENSE OF KUWAIT

When asked about the Iraqi invasion of Kuwait in 1990, and how long the international community took to respond, the most common answers offered by attendees at the Taipei Aerospace and Defense Technology Exhibition ranged from 48 hours, to one week, to two weeks. The correct answer 168 days. The Allied coalition which came to Kuwait's defense was, according to some accounts, formed of approx. 35 countries.

Additionally, however, it must be remembered that Kuwait had been a full member of the United Nations since 1963, and was recognized internationally as an independent sovereign nation.

Since late 1949, the Republic of China has been ensconced on Taiwan, an island with a land area approximately twice the size of Kuwait. However, the ROC was expelled from the United Nations in late October 1971, and in the current day, UN officials typically refer to the island as "Taiwan, Province of China." Moreover, generally speaking, Taiwan/ROC is not recognized internationally as an independent sovereign nation.

Hence, President Tsai's anticipation that in the event of a PRC attack, the international community would join together to come to Taiwan's defense may merely be an exercise in extremely wishful thinking.

LARGE INCREASES IN TAIWAN'S DEFENSE BUDGET MAY BE THE ANSWER

Clearly aware of President Tsai's conundrum in this regard, AIT Director Christensen's remarks at the Taipei Aerospace and Defense Technology Exhibition stressed that "the US considers Taiwan a partner in realizing its vision of a free and open Indo-Pacific," while at the same time noting that the militaries of the ROC and the USA "engage frequently and substantively in professional exchanges, and their authorities collaborate to enhance humanitarian assistance and disaster relief capabilities."

The AIT Director further emphasized that "These investments by Taiwan are commendable, as is Taiwan's ongoing commitment to increase the defense budget annually to ensure that Taiwan's spending is sufficient to provide for its own self-defense needs. And we anticipate that these figures will continue to grow commensurate with the threats Taiwan faces."

But what is the true level of those threats? For starters, we can estimate the ROC/Taiwan's current annual defense budget at US\$ 11.3 billion. However, the adversary on the other side of the Taiwan Strait maintains an annual military budget which is nearly 20 times larger. International estimates of the true size of China's defense budget put the annual figure between US\$ 215 to 245 billion.

Can Taiwan increase its military expenditures by 20 times, or more, and sustain that level of spending for the foreseeable future? The answer is clearly No. Unquestionably some creative thinking is needed to formulate a different solution to Taiwan's defensive needs.

THE CASE FOR OUTSOURCING TAIWAN'S DEFENSE

What if the burden of providing for its own military forces (equipment, personnel, administration, management, etc.) was lifted from the shoulders of the Taiwan people? Would that provide a solution? When this subject is mentioned in public, most people immediately wonder if Taiwan's defense needs might be outsourced to the USA.

In order to examine this possibility in more detail, it would be very helpful if we could definitely determine the legal status of the Republic of China in Taiwan. However, this is a subject that has baffled a multitude of researchers for many decades. Moreover, when trying to make such a determination, many people have very rigid viewpoints on what they perceive to be the correct interpretation of relevant legal doctrines or historical events.

Therefore, any attempt at rational deliberations on the “Taiwan question” quickly leads to heated debate.

In this “Report,” rather than offering a direct challenge to many “outdated” or “old-fashioned” perceptions, perspectives, observations, or attitudes, the author adopts an entirely different approach. This approach involves the telling of stories. The content of the stories may seem unusual, but all of them will serve to give the readers much valuable insight into various background issues and underlying parameters that are intimately related to the “Taiwan question.”

In these stories, the author gradually introduces a large number of key legal and historical factors that are typically overlooked by persons researching Taiwan. These will all be found to have a direct bearing on any attempts to determine what country (or what political entity) should be in charge of Taiwan’s defensive needs.

Over the past ten years, many people have written essays discussing the new world order in the 21st century. Taiwan needs to determine its place in this new world order in a definitive fashion, and then strive to make a correct identification of what role it will play in the future. Hopefully, this can be done via rational discussions by all interested parties.

However, such discussions need to be based on certain fundamental tenets. The author hopes that this volume can serve as an aid in clarifying what those fundamental tenets should be.

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 2

THE FALL OF SINGAPORE

[DATELINE LOS ANGELES, CALIFORNIA]
PRESENT DAY

During a series of lectures on one particularly hot topic in the field of international affairs, a college professor was reviewing some interesting aspects of world history with his students. “I have a short printout from the internet here which I believe gives an accurate description of events in Singapore in February 1942. As some of you may know, this is a very serious and sensitive topic. You should not interpret my presentation of this information as looking down upon or criticizing British people, government, or the culture in general. It is simply a matter of historical fact.”

Hearing these remarks, several students in the classroom sat up in their chairs, and several more nodded in assent.

“Additionally, it can serve as a very good reference for exploring the many facets of the overall theme of our lecture series. In other words, it is much more relevant to us than the Fall of Constantinople in 1453 or the Fall of the Republic of Venice in 1797.”

“I have studied British history for several decades, and it is very interesting,” he continued. “Can anyone tell me the date of the start of Medieval English history and the events leading up to that?”

A hand went up. "It was the Norman conquest of England that brought William the Conqueror to the English throne in 1066."

The Professor smiled. "That is correct. I want to overview the significance of this date in English history, along with some WWII issues related to the United States before I turn to the situation in Singapore in 1942. I have prepared some slides which explain this in more detail."

A slide appeared on a screen at the front of the classroom.

The English Monarchy

* As a result of the Norman Conquest of England, all the land of England was claimed as the personal possession of William the Conqueror under an allodial title. The monarch thus became the sole "owner" of all the land in the kingdom, a position which has continued up to the present day.

* As a result of the Norman Conquest of England, the Kingdom of England was subjugated to Norman control. William the Conqueror acceded to the English throne in 1066.

Another slide appeared.

Allodial

[DEFINITION]

1. Free; not subject to the rights of any lord or superior; owned without obligation of vassalage or fealty.
2. The opposite of feudal.
3. "Allodial" is a description given to the outright ownership of land that did not impose upon its owner the performance of feudal duties.

"Now let me ask an important question related to WWII," the Professor went on. "Can anyone give me any details regarding the Japanese occupation of U.S. territory in WWII?"

Several of the students seemed very surprised at this question. One hand went up. "I know there were Japanese internment camps in several western states, but I don't think that there was any Japanese military occupation of U.S. territory during the WWII period."

“Yes,” the Professor nodded, “there were Japanese internment camps, and those are certainly a blemish on the human rights record of the United States. However, the idea that there was no Japanese military occupation of U.S. territory during the WWII period is a common misconception.”

“Here are the details in my next slide.”

U.S Areas under Military Occupation by Japan	Dates	Location
Philippines	May 8, 1942 – July 5, 1945	Western Pacific
Guam	Jan. 6, 1942 – Oct. 24, 1945	Western Pacific
Wake Island	Dec. 27, 1941 – Sept. 4, 1945	Central Pacific
Attu and Kiska Islands	June 6, 1942 – Sept. 27, 1943	Aleutian Islands

The students seemed to digest this information slowly.

“Now we can turn to Singapore,” the Professor said, somewhat proudly. “I will read the information on this slide aloud.”

The Battle of Singapore, also known as the Fall of Singapore, was fought in the South-East Asian theatre of World War II when the Empire of Japan invaded the British stronghold of Singapore—nicknamed the "Gibraltar of the East." Singapore was the major British military base in South-East Asia and was the key to British imperial interwar defense planning for South-East Asia and the South-West Pacific. Following two months of a Japanese military advance down the Malayan Peninsula, the fighting in Singapore lasted from February 8 to February 15, 1942.

The campaign, including the final battle, was a decisive Japanese victory, resulting in the Japanese capture of Singapore and the largest British surrender in history. About 80,000 British, Indian, and Australian troops in Singapore became prisoners of war (POWs). They joined 50,000 POWs taken by the Japanese in the earlier Malayan Campaign. In his memoirs, the British prime minister, Winston Churchill, called the fall of Singapore the "worst disaster" in British military history.

“So, now we want to look at some related questions,” the Professor said, placing his internet printout back in his notebook. “First, what was the legal status of Singapore after surrendering to the Japanese?”

No hands went up.

“Alright, the Professor smiled, “Some of you are probably worried that this is a trick question. OK, fine. So, I won’t ask for a specific answer. Let’s look at possibilities.”

He paused briefly, “What are the possibilities for the ‘legal status’ of Singapore after surrendering to the Japanese on February 15, 1942? In addition to giving your idea, I would appreciate it if you could give some of your rationale.”

Several hands went up.

“Sovereign territory of Japan. This follows directly from the information on English history which you presented this morning. As a result of the Japanese conquest of Singapore, all the land of Singapore would be claimed as the personal possession of the Japanese Emperor.”

Some students found this reasoning quite amusing.

The Professor raised his hand, “that is a perfectly valid suggestion for a ‘possibility,’ so it is nothing to laugh about,” he said. “Of course, 1942 is not 1066, and international law may have developed significantly in the intervening 850 or so years, but we can discuss that later.”

“Overseas British territory waiting for liberation,” was the second suggestion.

“What’s your legal rationale?” the Professor queried.

“Well, I assume that the British would want to take Singapore back. So, they would probably have the goal of liberating it from Japanese oppression.”

“Immediately elevated to the status of United Nations Trusteeship,” was the third answer. “That would be based on the relevant trusteeship specifications in the UN Charter.”

“Did the United Nations exist in 1942?” the Professor asked. “Was there even a draft version of the UN Charter available for reference in 1942?”

A student in the front row commented: “I seem to recall that the United Nations was founded Oct. 24, 1945, in New York City.”

“Correct,” the Professor nodded. “So, do we have any other possibilities for the ‘legal status’ of Singapore after surrendering to the Japanese on February 15, 1942?”

One student in the center of the classroom stood up. “Chinese territory,” he announced. In response to this, there was a general sense of puzzlement throughout the room. Several students were slowly shaking their heads back and forth and frowning in confusion and bewilderment.

“Rationale?” the Professor asked.

“Well, I had a Chinese roommate in high school,” the student explained. “And he said that in elementary and junior high school in China, they were all taught that whenever the local troops surrender, the territorial sovereignty is immediately transferred to China.”

Several students now began laughing out loud.

“By the way, my name is Ames,” the student commented. “In reflection, I guess my roommate’s statements need to undergo some more thorough analysis.”

The Professor smiled. “I believe what your roommate was referring to is in situations where the Chinese military officers accepted the surrender of local military forces,” he stated. “And indeed we need to look at this more closely. One possibility advanced earlier was that Singapore has become the sovereign territory of Japan. Your suggestion here is that Singapore has become the sovereign territory of China. How can we sort this out? What is the key factor?”

“The surrender ceremonies?” a student in the back row asked, seeming somewhat unsure of himself. “I think there is some international rationale for saying that the country that conducts the surrender ceremonies is in a primary position.”

“A primary position to do what?” the Professor asked.

“To take charge of the territory,” the student replied. “But I am not sure of the details.”

“No, unfortunately, that is another common misconception,” the Professor clarified. “Neither the Hague Conventions of 1907 nor the Geneva Conventions of 1949 specify that any legal relationships arise based on a consideration of what military troops accept the surrender.”

A female student raised her hand. “Well, I don’t want to be impolite or anything, and I recognize that you may be discussing certain aspects with relevance to the situation in the present day, or whatever. But, you just mentioned the Geneva Conventions of 1949. If we are discussing the situation of Singapore in 1942, then that wouldn’t be mentioned yet, isn’t that true? I mean, I understand that the Geneva Conventions of 1949 are part of international humanitarian law in the present era, but if we are discussing from the perspective of 1942, wouldn’t those need to be set aside? Temporarily at least?”

“It is an excellent point,” the Professor agreed. “I was going to touch on this issue in one of my further lectures, but since you have brought it up, we might as well discuss it now. This entire subject involves”

A new slide came into view on the screen at the front of the room.

THE CUSTOMARY LAWS OF WARFARE

“Previously, in the research for my graduate degree, I formulated a number of RULES based on these so-called ‘Customary Laws of Warfare.’ Here are the first two,” the Professor stated.

RULE #1:

The surrender ceremonies mark the beginning of the military occupation.

Later codified into the Hague Regulations (1907), Article 42

From the second half of the eighteenth century onwards, international law came to distinguish between the military occupation of a country and territorial acquisition by invasion and annexation, the difference between the two being originally expounded upon by Emerich de Vattel in his opus *The Law of Nations* (1758).

The distinction then became clear and has been recognized among the principles of international law since the end of the Napoleonic Wars (circa 1820). Invasion followed by immediate annexation was no longer recognized as a valid method of territorial acquisition.

“It is important to recognize that the world community began to re-evaluate many of the tenets of international law after the age of Napoleon. Many fundamental changes were gradually agreed upon,” he explained.

The Napoleonic Wars

The Napoleonic Wars (1803–1815) were a series of major conflicts pitting the French Empire and its allies, led by Napoleon I, against a varying array of European powers formed into various coalitions, financed and usually led by the United Kingdom. The wars stemmed from the unresolved disputes associated with the French Revolution (1789 – 1799) and its resultant disputes and clashes. The wars are often categorized into five conflicts, each named after the coalition that fought Napoleon: the Third Coalition (1805), the Fourth (1806–07), the Fifth (1809), the Sixth (1813), and the Seventh (1815).

Napoleon I

aka Napoléon Bonaparte, a famous French general, born August 15, 1769, in Ajaccio, Corsica; died May 5, 1821, on St. Helena Island (British Overseas Territory).

“Military Occupation” and the United States

In the United States, the concept of military occupation has been understood since the founding of the Republic. For example, the U.S. Supreme Court case of *Shanks v. Dupont*, 28 U.S. 242 (1830) discusses the British military occupation of South Carolina in 1780, and *United States v. Rice* (1819) 4 Wheat. 246, discusses the British military occupation of Castine, Maine, during the War of 1812. Other examples are numerous. *Fleming v. Page*, 50 U.S. 603 (1850) discusses the U.S. military occupation of an east-coast Mexican port city during the Mexican American War.

“You will recall that we just discussed several examples of the Japanese occupation of United States territory during WWII.”

RULE #2:

Military occupation does not result in the transfer of territorial sovereignty.

Later codified into FM 27-10 (1940), para. 273

Military occupation in a foreign war, being based upon the possession of enemy territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional, or a period of “interim status.” The political status of occupied territory may be said to be undetermined.

In both the Mexican American War and the Spanish American War, the U.S. Supreme Court held that although Mexican territory and Spanish territory came under the jurisdiction of U.S. military forces during the war, these territories did not (in the strictest sense), become *part of* the United States. Such an interpretation is reinforced by noting that in occupied territory it is forbidden for the occupier to (a) institute a “mass naturalization” of the local populace, (b) force the local populace to enlist in the occupier's armed forces, (c) carry out mass transfers of the civilian population of the occupying power into the occupied territory, etc.

“What is FM 27-10?” one student asked.

“That is basically a compilation of the customary laws of warfare recognized by the United States. It was assembled by the War Dept., which was the predecessor to the Dept. of Defense. The first edition was published on Oct. 1, 1940.”

“Has it been updated?” one student inquired.

“Yes, there have been several updates up to the present day.” He explained. “And let’s look at how all of this applies to the application of the 1949 Geneva Conventions to the situation of Singapore in 1942.”

The Professor picked up his notebook. “You have to consider that since the end of the Napoleonic era, there have been many people compiling lists of what they viewed as the ‘acceptable conduct in war’ for the modern era. This is a very humanitarian thing to do. So, many people compiled lists of various concepts, and then they would have meetings and try to standardize all of this information. In the United States, one of the earliest and most famous lists is called the Lieber Code.

“Hence, you have lists of all these concepts. Then you have something called the Lieber Code, promulgated in 1863. So, what is this? It is a compilation of previously collected information. Hence, if you have someone pointing to a situation which occurred in 1857, and claiming that this was a violation of a particular Article of the Lieber Code, that wouldn’t necessarily be incorrect. It is quite possible that the concept embodied in this particular Article of the Lieber Code has been embodied in the ‘Customary Laws of Warfare’ for decades or longer.”

Several of the students began to nod their heads.

“So, we can use the same type of thinking process to look at the Hague Regulations of 1907 or the Geneva Conventions of 1949. For the most part, these are compilations of previously recognized concepts. So, we can overview the Geneva Conventions of 1949, for example, and then consider some situation from 1942. So, of course, in order not to confuse the layman, maybe we don’t want to say directly that this is in violation of the 1949 Geneva Conventions. But if it is a fairly broad concept, we could probably just say that this situation in 1942 violated the ‘customary laws of warfare’.

“Here are some additional slides,” he continued.

The Mexican American War

The recognition of California territory as part of the United States only occurred as a result of the re-demarcation of the territorial boundary between the United States and Mexico, effective as of the date of the coming into force of the Mexican American Peace Treaty in 1848. Also, remember that the United States paid the Mexican government US\$ 18.5 million in war reparations. This amount includes the assumption of US\$ 3.5 million Mexican debt owed to U.S. citizens.

The Spanish American War

The recognition of Guam, Puerto Rico, Cuba, and the Philippines as U.S. territories only occurred as a result of the territorial cession specifications, effective as of the date of the coming into force of the Spanish American Peace Treaty in 1899.

“Excuse me,” one student in the third row stood up. “Isn’t it usually the case that the losing party in the war pays war reparations to the winning party? So did you just mean to say that Mexico paid US\$ 18.5 million in war reparations to the United States?”

“Very good point,” the Professor nodded. “But in 1848 it was the United States that paid that amount to Mexico. At the time, U.S. President James Polk said felt that such a payment was fair. I believe that he wanted to avoid the accusation that we were taking Mexican land without compensation.

“OK, moving along” the Professor picked up a stack of papers. “In the broadest sense, we can view the transfer of the territorial sovereignty of (Upper) California territory to the United States to be a ‘cession of territory.’ So, I put the five territories of California,

Guam, Puerto Rico, Cuba, and the Philippines together for the purposes of our discussion today.”

He waved the stack of papers back and forth somewhat unceremoniously. “It seems almost ridiculous to point out that the effective date for the cession of territory in a treaty is when the treaty comes into force. However, I have collected a large number of scholarly papers where the authors were quite confused about this aspect.”

He put down the papers. “The next slide is directly applicable to talking about the legal status of Singapore in 1942.”

[DEFINITIONS]

- **Military occupation** is a condition in which territory is under the effective control of foreign armed forces.
- **Military government** is the form of administration by which an occupying power exercises governmental authority over occupied territory. In the U.S., the 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. (Birkhimer, p. 21)

It is also important to note that the surrender ceremonies mark ‘the end of hostilities,’ not the end of the war. So, after the surrender ceremonies, the correct analysis is to say that Singapore is occupied territory of Japan.”

“What is Birkhimer?” a student near the back of the room asked.

“He was a U.S. Army Brigadier General and lawyer, and he wrote a famous book about all types of military matters,” the Professor clarified. “That will be discussed more thoroughly in future sessions. I have a copy of his book here.”

The Professor took a large book out of his briefcase, raising it up to show to the class.

“One of our students mentioned earlier that after the British in Singapore surrendered, the British would want to take Singapore back. We have a related picture. This is the headquarters of the Ministry of Defence in London. It is located in Whitehall and is known as MOD Main Building,” the Professor said. “This structure is of the neoclassical style and was originally built between 1938 and 1959.”

A picture of the MOD Main Building came on the screen.

“Nevertheless, with the fall of Singapore on Feb. 15, 1942, many aspects of the administration of this territory will have changed. So, at this point, we can consider the issue of the responsibility for Singapore’s defensive needs.

“The customary laws of warfare do not contain any blanket authorization for the wholesale dismissal of local government personnel during a period of military occupation. However, it would certainly be expected that the activities of any local military forces would certainly be suspended.”

“So, Japan would be responsible for the defense of Singapore during this period,” One female student of Asian ancestry commented.

“Rationale?” The Professor asked.

“The local Singapore military troops have been deactivated, as a result of the surrender ceremonies,” she added.

“Well, I want to re-emphasize my point, which is other than to say that the surrender ceremonies mark the end of hostilities in that particular location, it is best for us not to base any of our reasoning on the fact of the surrender ceremonies. Remember, nowhere in the customary laws of warfare do we find any rationale that any special legal relationships arise based on a consideration of what military troops accept the surrender.”

“I agree that it is Japan.” Ames spoke up, “Japan must take responsibility for the defense of Singapore at this time.”

“Rationale?” The Professor asked.

“The divine right of kings,” Ames stated clearly. “Or, the divine right of Emperors.”

“That is an interesting conceptualization,” the Professor said, “and I would categorize it as being part of the school of thought advanced by the French jurist and political philosopher Jean Bodin (1530–1596). However, I don’t think such arguments will have survived the French Revolution!”

“I guess I will have to concede that,” Ames replied, seeming somewhat dejected.

The classroom was silent as the students contemplated alternative arguments. The Professor awaited the students' further comments.

Finally, the front row student stated: "It must be conquest. Japan assumes responsibility for the local defensive needs based on its conquest of Singapore."

"Correct," the Professor nodded slowly. "The fact that the conqueror has jurisdiction over conquered territory is one of the fundamental tenets of the laws of war." He paused briefly. "The conqueror will be regarded as the legal occupier, or (principal) occupying power."

The class ended. As the students were filing out of the classroom, several approached the Professor with class scheduling sheets in their hands. Before they had a chance to speak, Mark, the host of a popular "campus chat show" on the internet appeared at the classroom doorway. "Hello, Professor Northbridge," he said enthusiastically. "What was the content of your lecture today? Anything I should mention on our daily broadcast?"

The Professor looked at some of the scheduling sheets which the students handed to him. One of them spoke up. "Well, frankly speaking, we found your lecture very interesting, so we stayed and listened to the end. But I think we came to the wrong classroom."

The Professor handed the sheets back to them, while smiling and nodding briefly. "No, you were in the right classroom," he said.

"What is the subject of this lecture series?" Mark asked.

The Professor walked a few steps down the hallway, and then turned and said: "Our lecture series is on the subject of Taiwan history."

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 3

THE EUROPEAN CASTLE STORY

[DATELINE PRAGUE, CZECH REPUBLIC]

PRESENT DAY

“I hope you have all had the opportunity to view Dr. Northbridge’s lecture, which he gave last month in Los Angeles. The students who signed up for this lecture will have received an email notice giving you the instructions for finding that video on our Department’s website.”

“My name is Joseph Axelhimmer,” the professor said. “The university museum is three buildings down, and I recommend that you visit it since they are now having a display of paintings by various artists showing the differences in the conduct of warfare over the ages. They have the English engaging in various battles in the 11th century, and scenes from various wars in the following centuries, including the Crusades, Hundred Years' War, Siege of Constantinople, Catalan Civil War, Portuguese conquest of Goa, Siege of Kazan, Russo-Crimean Wars, War of the Spanish Succession, Austro-Turkish War, American Revolutionary War, Napoleonic Wars, French Invasion of Russia, War of 1812, Mexican American War, Taiping Rebellion, American Civil War, First Sino-Japanese War, Spanish American War, Boxer Rebellion, WWI, WWII, Korean War, Vietnam War, Afghanistan Wars, etc.

“As you get into the late 1800s and then into the 1900s, there are many photographs as

well. I saw several pictures of the American bombing raid on Taiwan during the 'Taipei Air Raid' of May 31, 1945, which I had not seen before.

"I will continue with the discussion today. Or perhaps someone has questions. You will see that everyone has access to a microphone, and the microphones are numbered. So, if you raise your hand and push the button, the numbers will display on the screen at the front of the room."

The professor looked around the room and then back at the screen. "No. 58."

"Yes," the student speaking from microphone 58 said. I am sorry that I have been busy with some family medical issues recently, and I was only able to see about ten minutes of Dr. Northbridge's lecture online. I will certainly watch all of it later. Thankfully, one of my friends was able to view it completely, and he wrote out an outline for me. However, his outline is somewhat confusing."

"Perhaps you can bring up some of the points you don't understand," the professor said.

"Well, he gave me a list of the topics covered," the student replied, "so I guess I will just read it out. It includes the February 1942 surrender of British troops in Singapore, and a discussion of the legal status of Singapore after the surrender, the Norman conquest of England in 1066, the Japanese occupation of U.S. territory in WWII, United Nations trusteeships, Hague Conventions of 1907, the Geneva Conventions of 1949, the customary laws of warfare, U.S. War Dept. Field Manual FM 27-10 published in 1940, the Lieber Code of 1863, the United States acquirement of California as a result of the Mexican American War, the United States acquirement of Guam, Puerto Rico, Cuba, and the Philippines as a result of the Spanish American War, the effective date for the cession of territory in a treaty, DEFINITION of military occupation, DEFINITION of military government, the end of hostilities v. the end of the war, the responsibility for Singapore's defensive needs after the surrender ceremonies, the tenet that the conqueror has jurisdiction over conquered territory, and the axiom that the conqueror is the legal occupier."

"That is fairly complete," the professor used his remote control to adjust the temperature of the air conditioning in the room.

"But I thought that this lecture series was on one particularly hot topic in the field of international affairs, namely 'New Research into Taiwan history'."

“Yes, that is correct.”

“But as I understand it, the Qing Dynasty of China ceded Taiwan to Japan in 1895. Then, according to some well-respected history websites that I consulted online, along with some history books I read in the library, the Republic of China took control over Taiwan in October 1945, after the Japanese surrender ceremonies. In that era, it was recognized as the sole legitimate Chinese government, exercising sovereignty over all Chinese territory.”

“Well, Dr. Northbridge discussed this last time,” the professor stated. “You will recall that he quoted from the customary laws of warfare of the post-Napoleonic period to show that (1) Territory is considered occupied when it is actually placed under the authority of the hostile army, and (2) Military occupation does not transfer sovereignty.”

“Well,” student 58 continued, “many of the sources I consulted said that the territorial sovereignty of Taiwan was transferred to the Republic of China on the date of the surrender ceremonies, Oct. 25, 1945.”

The professor raised his head up, and appeared to stand at attention. “I hear echoes of William the Conqueror winning the Battle of Hastings on October 14, 1066, and claiming all the land of England as his own. After some further military efforts, William was crowned king on Christmas Day 1066!”

The professor paused briefly. “In 1066, we could speak of annexation, but by the mid-20th century, we could only speak of military occupation. I believe that was the point of Dr. Northbridge’s remarks.”

As all of the students were slowly digesting this information, the light went on for microphone 26. The professor acknowledged the student.

“Could you explain more about what exactly you mean by the customary laws of warfare? I am not totally clear about what is included in that concept.”

“Certainly,” the professor said, “and I prepared some slides for exactly that purpose. First, let’s look at the sources of the laws of war.

Sources of the laws of war

The laws of war are derived from two principal sources:

- a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.
- b. *Custom*. Although some of the law of war has not been incorporated in any treaty or convention to which most nations are a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

“When speaking of modern concepts of the laws of war, we are speaking of the post-Napoleonic period, so that is approx. post-1820. So, you will note that there is a category of unwritten or un-codified content. In other words, we need to look at the common practice of states. The descriptive words most commonly used to describe that are ‘custom’ or ‘precedent’.”

“And this whole discussion is directed toward nations, I mean this is talking about the proper behavior of nations during the conduct of war,” student 26 offered.

“Yes, the proper behavior of nations during the conduct of war,” the professor said, “or more specifically the proper behavior of their military forces.”

The light for student 58 flashed again. The professor nodded in his direction.

“But, I am still not understanding where all of this is going. Again, a year or two ago I did some serious research on Taiwan, and I found that the so-called Taiwan question arose as a result of the Chinese civil war of the late 1940s,” student 58 pointed out. “Then approx. two months after Mao Tse-tung proclaimed the founding of the People’s Republic of China on Oct. 1, 1949, the remnants of the old ROC regime fled to Taiwan, a territory which had formerly belonged to Japan, but had been given back to the ROC in October 1945.”

“I believe Dr. Northbridge discussed this last time as well,” the professor said, knotting his brow. “He specifically mentioned that when the specifications of territorial cession are made in a treaty, the effective date for the cession of territory is when the treaty comes into force. Japan’s renunciation of all its right, title, and claim to Taiwan was in the San Francisco Peace Treaty (SFPT) of April 28, 1952.”

The microphone for student 32 lit up. “I also did quite a bit of research into Taiwan history a few years back. I recall that the sources I quoted from in my final report said that the ROC government officials began the exercise of jurisdiction over Taiwan territory after the completion of the surrender ceremonies, and have continued that jurisdiction up to

the present day,” he clarified. “The ROC has full control of all domestic activities in Taiwan, so that proves its sovereignty.”

The professor looked at the floor briefly. “You may want to review Dr. Northbridge’s lecture again when you have time. I clearly recall that he clarified that -- The fact that the conqueror has jurisdiction over conquered territory is one of the fundamental tenets of the laws of war.” He paused briefly. “He also pointed out that -- Nowhere in the customary laws of warfare do we find any rationale that any special legal relationships arise based on a consideration of what military troops accept the surrender.”

“I don’t quite understand how we are supposed to put all of this together,” student 26 asked.

“Well, in my studied opinion, if you are saying that you have jurisdiction over the territory based merely on the fact of having conducted the surrender ceremonies, then the conqueror is someone else,” the professor stated calmly. “So this would seem to indicate that you are acting *on behalf of* the conqueror and there is legal terminology for that, but we will discuss that later.”

No further questions seemed forthcoming from the student body at this point. The professor waited for more than a minute, then the light for microphone 14 lit up.

“I searched through over twenty Taiwan history websites just last week. I spent a lot of time reading the information there. After I was done, I went out to dinner with my boyfriend. I allowed my mind to sort of aggregate all of that information, and as I finished my meal, one summary sentence popped into my head. That sentence was ‘Taiwan was returned to China after WWII.’ That was the summary conclusion I came up with after going over all of that information,” she pointed out. “So, I can’t see why that would be in error.”

The professor had been adjusting the blinds on one of the windows at the side of the room. He turned around quickly. “Returned to? Did you say ‘Returned to?’”

Student 14 nodded.

“Oh, well then,” the professor’s mood seemed to lighten up. “Then you need to hear the European Castle story. But I want to take a short restroom break first.

= = = = Restroom Break = = = =

After the professor and students had returned, they saw a picture of a large and beautiful castle on the screen at the front of the room. The name was simply denoted as “Teufwaffen Castle.” An additional overlay of lettering then slowly appeared on screen, explaining that from an architectural standpoint, rating the size and beauty of this castle, on a scale of one to ten, it would be a 5. By comparison, it was noted that Neuschwanstein Castle in Southern Bavaria in Germany would be an 8.

“Of course, on this scale, we cannot give a ranking for the Palace of Versailles, but after all that is a Palace, and not a Castle,” the professor added. “But most important is the fact that Teufwaffen Castle is surrounded by 188 acres (76 hectares) of grounds. There are open fields, forests, lakes, and gardens. These, together with the Castle itself, are part of the entire estate.”

The next image showed some historical details of the ownership of the Castle.

Teufwaffen Castle

Built: over a period of ten years, 1535 to 1545

Ownership:

[HUDESAK PERIOD]

1535 to 1809: by the wealthy and aristocratic family of Hudesak who had strong ties to the royal family.

1809 to 1898: after the gradual downfall of the Hudesak family fortunes, the Castle and grounds were sold to the Jelineksky family for an undisclosed sum

[JELINEKSKY PERIOD]

1898 to 1969: Due to the passage of new environmental laws in the 1960s, the upkeep of the Castle and its grounds needed to comply with strict environmental standards. The Jelinsky family members, being unable to burden the financial costs, placed the Castle up for sale.

[UNDETERMINED PERIOD]

1972: When no buyers for the Castle had been found after three years, the Jelineksky family hired a prominent law firm, and undertook a renunciation of all right, title, and claim to the Castle and grounds. At that point, different portions of the estate were held

in the name of over 25 individuals. In conjunction with these procedures, a formal meeting of the “Jelineksky clan” was called, with a public notary in attendance. Over 170 people attended. Additionally, a formal Resolution was drafted on the spot, and over 95% of the adults in attendance submitted signed notarized signatures. A group of six individuals, headed by a Mr. Colin Jelineksky III, a prominent local industrialist, agreed to assume full responsibility for any and all outstanding legal issues connected with this procedure. Along with other appropriate legal paperwork, this Resolution was filed with the authorities at the provincial and central government levels. After several months, the lawyers received notice from the local Land Office that the relevant ownership deeds of the Jelineksky family had been canceled.

The lawyers also took care to send formal notification to the Tax Office, saying that the Jelineksky clan would not be making any more tax payments on the property.

“From here on I will generally just refer to the Castle and its grounds as the ‘Castle,’” the professor clarified. “Now the question I want to ask is – After 1972, who owns it? Or should we use the Latin phrase *terra nullius*, meaning *land that belongs to no one* to describe it?”

No students pressed the button on their microphone.

“OK,” the professor said. “Let’s look at possibilities. What ideas does anyone have? Since no one commented on my previous suggestion, I will consider *terra nullius* to be the first possibility.”

Several lights appeared on the screen. The professor acknowledged #21.

“I think that the Castle still belongs to the Jelinsky family. I would hold to the rationale that in order to do a legally valid renunciation of property rights, you have to designate a ‘receiving party’ very clearly.”

“It is an interesting idea,” the professor admitted. “However, I think that the reality of life in modern society is that we see many people renouncing their property rights in all sorts of situations. For example, in many Asian societies it is the custom that only male heirs may receive any family inheritance. Of course, in most countries, the civil law conforms to western standards and clearly specifies equal inheritance rights for both male and female heirs. To get around this, the family members often use various methods to threaten the daughters, and then force them to apply with the local court to formally renounce their

inheritance rights. In some situations where the other male children have already died, the mother has already passed away, no other living relatives can be located, etc. such a renunciation by the remaining daughter or daughters could leave the family in the situation of having no ‘receiving party’ for the father’s assets.”

The professor acknowledged #32.

“In this situation I believe that the state would have some sort of ‘escrow’ system in place, so that after his death the father’s assets would be held in escrow for some period of time, and announcements would be made in the appropriate government records offices, notifying any valid claimants to come forward before some specified expiry date, such as seven years or something,” student #32 opined. “After that period of time, the property would revert to the state.”

“It is an excellent piece of analysis,” the professor agreed, “however you have to remember that even in the 1960s and 1970s the financial systems of many countries did not have such advanced formulations in place. Speaking more broadly, I think you have touched upon the whole idea of ‘custody rights’. The ownership of the Castle has been renounced, and we want to ask – Who owns it now? Maybe no one owns it, so we have correctly labeled it as ‘undetermined’. But it seems likely that we should be able to make a legal determination of who has custody rights over it.”

The professor acknowledged #32 again.

“In consideration that the Jelinsky family renounced their ownership rights without the designation of a ‘receiving party,’ I think that the Castle would revert to its original owner,” #32 stated.

“Rationale?” the professor asked.

“Well, I am from Asia and our history textbooks always say that if our country has an island, a sandbank, or a peninsula, or whatever, and we have established historical ownership over that, and then there is a war and in the specifications of the peace treaty it is stolen from us by some other country, then in the future if that country renounces its ownership without naming a ‘receiving party,’ then the territory reverts to our sovereignty.”

“Rationale?” the professor asked.

“Yes, I have researched this and can give several rationale. In the first instance, the post-war treaty that required us to give up the ownership of the territory is an unequal treaty, so that would be invalid anyway, student #32 explained. In the second instance, where the territory is renounced, I mean the ownership is renounced, then it would revert back to the sovereignty of the original owners, based on the doctrine of historical ownership, or alternatively what you might call historical sovereignty.”

“It is an interesting theory,” the professor agreed, “but I find some significant holes in your logic. In the experience of the United States, for example, we have had much experience with territorial cession, both in peacetime and as the result of war. You used the term ‘unequal treaty,’ but in fact all dispositive treaties, in other words all treaties which are stipulating the disposition of territory are unequal. So, we can say that all such treaties are unequal by definition. To my knowledge, no international court has ever invalidated a treaty on the grounds that it is alleged by one or more parties to be ‘unequal’,” the professor elucidated. “Moreover, I believe that there have been some rulings of the international court in the Hague which have firmly denied the concept of ‘historical sovereignty,’ as advanced by some pseudo-knowledgeable Asian legal personages.”

The professor paused to let his renunciations sink in.

“I am also curious as to why you would describe the cession of territory in a treaty ratified by all parties to be ‘stealing’. If you don’t agree to the specifications in a peace treaty for example, you always have the choice of refusing to sign it. The question is, are your military troops willing and able to keep fighting? If not, then your refusal to agree to the terms of peace may mark the end of your dynasty, kingdom, republic, or whatever,” the professor tried to explain his reasoning. “In other words, if you don’t sign something, then what is the alternative? In looking at the situations of most of these peace conferences that I have overviewed in the post-Napoleonic era, I didn’t see that the delegates to the treaty signing ceremony were being physically coerced to sign, or stamp their seal, or impress their thumbprint or whatever. The overriding consideration was whether their own military troops had the ability to continue in the conflict or not. If not, then it was their own circumstances which were coercing them into agreeing to the terms of peace, not other outside forces.

“That is my studied view,” the professor added. “You can take it for what it is worth, I suppose.” His face gradually took on a relaxed expression.

“More significantly, and more in line with the main content of our lecture series, is the

simple fact that you will find no justification in the customary laws of warfare for such an interpretation of treaties. In other words, while some of the concepts just advanced by our esteemed fellow-student may have had some validity in a pre-Napoleonic world . . . and I won't comment on that, . . . but I must stress that in the so-called modern era, we need to look to what customary precedent has been established by the international community for dealing with such situations. And I must point out that as far as I know, there is no precedent from the 1820s to the present to say that treaties can be invalidated by the charge of being 'unequal,' or that territory reverts to some alleged 'original owner' after its renunciation, such as in the case of a limbo cession."

"Limbo cession?" student #32 queried.

"Well, that is just a handy phrase to describe the cession of territory in a treaty where no receiving country is specified. For example, in the 1898 Spanish American Peace Treaty, Cuba was a limbo cession with the United States of America as the (principal) occupying power," the professor clarified.

A light for student #39 went on.

"I almost forgot, something I wanted to point out from Dr. Northbridge's lecture. He stated (and I have the exact quotation here): 'The recognition of Guam, Puerto Rico, Cuba, and the Philippines as U.S. territories only occurred as a result of the cession specifications, effective as of the date of the coming into force of the Spanish American Peace Treaty in 1899,'" she quoted. "But I studied Cuban history in high school, and according to what I learned, the post-war peace treaty did not cede Cuba to the United States."

"Yes, very much true," the professor admitted. "I don't claim that the professors conducting this lecture series are infallible. I am glad you caught that, but at the same time let me say that the discussion we are having today about the undetermined legal status of Teufwaffen Castle has a direct relationship to the legal status of Cuba after the Spanish American War. And I would go so far as to say if you can't precisely determine the legal situation of Teufwaffen Castle in my story here, you won't be able to coherently discuss the legal status of Cuba after April 11, 1899, when the peace treaty came into force."

"So, there is a relationship?" student #39 seemed unsure of herself.

"Definitely," the professor said confidently. "Additionally, I feel sure that if you cannot dissect the legal status of Cuba during this period, you won't be able to understand more

complicated examples, such as when the surrender ceremonies and ensuing military occupation are delegated to co-belligerents.”

“Co-belligerents?” student #39 asked tentatively.

“Allies,” the professor clarified. “OK, coming back to the Cuban situation, several possibilities for the legal status of the limbo cession of Cuba have been given. Should we classify it as terra nullius? Does the territorial sovereignty actually remain with Spain? Or does it revert to the government of the people who populated the island before the conquest of Cuba by the Spanish in the early 1500s? That would be the Taíno, who were an indigenous people of the Caribbean who had also populated the island of Cuba.”

“I am sure it cannot be classified as a United Nations Trusteeship, because the United Nations did not exist in that era,” one student spoke assertively.

“Yes, certainly,” the professor agreed. “But it might be classified as a quasi-trusteeship of some country or another, that is a distinct possibility.”

“Quasi-trusteeship?” the student asked.

“That would be the situation where a particular country treats this territory as a ‘trusteeship,’ complying for the most part with what international law experts view as the customary precedent involved in maintaining that type of relationship, but at the same time WITHOUT a formal trusteeship agreement in place.”

The slide of Teufwaffen Castle appeared on the screen again.

“Let’s continue with our Castle example, the professor said. “Nearly five years after the Jelineksky family had their dealings with the law firm in 1972, a new ‘Governor’ of the local Province was elected. While taking a tour of all the different areas in this Province, he happened to notice the Teufwaffen Castle, whose grounds were completely overrun with weeds, vegetation, along with massive piles of randomly dumped garbage. After returning to his office, he made inquiries and determined that the acreage of the Castle was within a township named Nuxxelle.”

Mountainous piles of garbage appeared on the screen, spreading into a lake, fields, forested areas, etc.

“After some inquiries, the local township chief determined that the last known owners of the Castle were the Jelineksky family,” the professor continued. “Hence, the township chief issued a sternly worded letter to several prominent members of the Jelineksky family in the local community, stating that the persons in charge should come forward, and take immediate action to bring the condition of the estate into conformance with current environmental regulations, etc., etc. The township chief threatened legal action if no efforts at compliance were forthcoming within 60 days.”

An aerial view of a large rural estate with garbage scattered over a wide geographic area, including fields, lakes, forest, gardens, with dilapidated sheds, broken fencing, large trees seemingly ready to topple over, etc. appeared.

“Within two weeks the Jelineksky family lawyers replied with full documentation saying that the ownership of Teufwaffen Castle had been formally renounced in 1972, and all required legal formalities had been completed,” the professor stated. “But the township chief replied that in examining the paperwork submitted, he was still unable to determine the names of the new owners. Since the specific designation of new owners had not been made, in his view the Jelineksky family still had ‘residual ownership,’ and were responsible for upkeep of the Castle grounds to conform to relevant environmental regulations.”

A picture of the front lobby of a large and well-appointed law firm appeared.

“After another month had gone by, the leading members of the Jelineksky family who had signed the original 1972 paperwork received formal notices from the township that if the Teufwaffen Castle and all adjoining grounds were not cleaned up to comply with local environmental regulations, the township authorities would hold a public tender and bids would be accepted for qualified companies to complete this environmental cleanup work. The township would pay these expenses initially, but would expect all financial outlays to be reimbursed by the Jelineksky family,” the professor continued with his narrative. “After consultations, the lawyers filed notice with the township chief that all future paperwork regarding this matter should be sent to the law firm. They advised the Jelineksky family to wait for more concrete developments.”

After another six months had gone by, the law firm received a bill from the township chief for several hundred thousand dollars, US\$ equivalent. Payment within 30 days was demanded, and it was noted that legal action would be forthcoming.

Of course, the township chief was well aware that the members of the Jelineksky family

had no intention of paying this bill, so after 30 days formal legal action was initiated.

In the first court hearing, lawyers for the Jelineksky family presented all the paperwork from 1972, saying that the family had instituted formal renunciation procedures at that time, and had received formal notice that their ownership deeds had been canceled. These documents were also presented to the court. They then moved for dismissal of the lawsuit.

“Not surprisingly,” the professor explained, “the lawyers for the township were very frustrated at this point, and asked the court for permission to clarify who the current owners of Teufwaffen Castle actually were. The lawyers for the Jelineksky family stated that the determination of the current owners, if there were any current owners, was not their responsibility.”

The judge asked both parties to submit some additional depositions and documentation. Some four months later the township chief received notice that his lawsuit had been dismissed. In a lengthy ruling, the judge concurred that the Jelineksky family’s ownership of Teufwaffen Castle had ceased in 1972. However, notably absent in the ruling was any indication regarding the judge’s thinking into who the current owners actually were, or how that fact might be determined.

After consultation with his assembled directors of the government departments under his authority, it was determined that although the grounds of Teufwaffen Castle were contained in the geographic boundaries of the township of Nuxxelle, those grounds were certainly not owned by the township of Nuxxelle. After a series of meetings, the best suggestion received was to file a lawsuit against the provincial government for recovery of the monies spent on the environmental cleanup work. The logic was simple and straightforward. Since Teufwaffen Castle was located in this province, and it did not belong to the township of Nuxxelle, its ownership must have reverted to the provincial government.

Over the coming weeks, the township chief visited a number of offices in the provincial capital and talked to the officials there. Everyone he spoke to was adamant in stating that Teufwaffen Castle was not owned by the provincial government, and they certainly were not responsible for any associated environmental cleanup costs. However, the township chief said that his own yearly budget was very limited, and he certainly could not afford to assume the financial responsibility for this environmental work, especially in consideration that Teufwaffen Castle was not owned by the township of Nuxxelle.

With no other course of action available, and upon the strong recommendation of the township council, the bill for the environmental cleanup costs was submitted to the provincial government, demanding payment within 30 days. When no response was forthcoming, a lawsuit was filed against the provincial government.

In the first court hearing, lawyers for the township of Nuxxelle presented all of the Jelineksky family paperwork from 1972, explaining the details of the renunciation procedures completed at that time. They then advanced their reasoning that since Teufwaffen Castle was located in this province, and it did not belong to the township of Nuxxelle, its ownership must have reverted to the provincial government.

Lawyers for the provincial government argued however that a thorough search of all provincial government records involving real estate ownership, or transfers of ownership, had failed to produce any evidence that the provincial government, or any branch or agency thereof, owned Teufwaffen Castle. In other words, no official documentation proving ownership of the Castle and/or its surrounding lands had ever been issued after 1972. The lawyers for the provincial government then moved for dismissal of the lawsuit.

The judge asked both parties to submit some additional documentation. One additional brief hearing was held. Some six months later the township chief received notice that his lawsuit had been dismissed. In a brief ruling, the judge concurred that the Jelineksky family's ownership of Teufwaffen Castle had ceased in 1972. However, based on the abundant evidence presented by the lawyers for the provincial government, it was clear that the ownership had not reverted to the provincial government. Again, notably absent in the ruling was any indication regarding the judge's thinking into who the current owners actually were, or how that fact might be determined.

The township chief was back to square one. After consultation with the assembled directors of the government departments under his authority, it was determined that although the grounds of Teufwaffen Castle were contained in the geographic boundaries of the township of Nuxxelle, and within their province, those grounds were neither owned by the township of Nuxxelle, nor by the provincial government. Therefore it was clear that the best course of action would be to file a lawsuit against the central government for recovery of the monies spent on the environmental cleanup work. The logic was simple and straightforward. Since Teufwaffen Castle was located within the national boundaries, and it did belong to neither the township of Nuxxelle, nor the provincial government, its ownership must have reverted to the central government.

Over the space of ten days, the township chief visited a number of offices in the central government capital and talked to the officials there. Everyone he spoke to was adamant in stating that Teufwaffen Castle was not owned by the central government, and they certainly were not responsible for any associated environmental clean-up costs. However, the township chief said that his own yearly budget was very limited, and he certainly could not afford to assume the responsibility for this environmental work, especially in consideration that Teufwaffen Castle was not owned by the township of Nuxxelle.

With no other course of action available, and upon the strong recommendation of the township council, the bill for the environmental cleanup costs was submitted to the central government, demanding payment within 30 days. When no response was forthcoming, a lawsuit was filed against the central government.

In the first court hearing, lawyers for the township of Nuxxelle presented all of the Jelineksky family paperwork from 1972, explaining the details of the renunciation procedures completed at that time. They then presented all of the provincial government paperwork, which strongly indicated that neither the provincial government, or any branch or agency thereof, owned Teufwaffen Castle.

They then advanced their reasoning that since Teufwaffen Castle was indeed located within the national boundaries, and it did not belong to the township of Nuxxelle, or the provincial government, upon the Jelineksky renunciation in 1972, its ownership must have reverted to the central government.

Lawyers for the central government argued however that a thorough search of all central government records involving real estate ownership, or transfers of ownership, had failed to produce any evidence that the central government, or any branch or agency thereof, owned Teufwaffen Castle. No supporting documentary evidence could be found. The lawyers for the central government then moved for dismissal of the lawsuit.

The judges asked both parties to submit some additional documentation. Two additional brief hearings were held. Some eight months later the township chief received notice that the lawsuit had been decided in his favor. In a lengthy ruling, the judges concurred that the Jelineksky family's ownership of Teufwaffen Castle had ceased in 1972. Moreover, based on the abundant evidence presented by the lawyers for the provincial government, it was clear that the ownership had not reverted to the provincial government. Therefore, basing their decision on several broad provisions in the National Property Act, as well as customary law regarding the general practice of national land ownership, as respected from

Medieval times, the judges decided that Teufwaffen Castle did indeed belong to the central government.

Not surprisingly, many central government officials were completely baffled by this ruling. Hadn't their lawyers carefully explained to the judges that no documentary evidence supporting the ownership of Teufwaffen Castle could be found? This important point was fully clarified in the ruling however, where the judges stated that the lack of documentary evidence regarding ownership of Teufwaffen Castle by the central government was due to a lax in central government procedures. The relevant ownership details should have been completely specified and appropriately registered with the National Property Bureau (or other agency in charge of such matters) in 1972 after the Jelineksky renunciation, but they weren't. This was clearly a failure on the part of central government officials to do their jobs properly.

“Of course, not everything ended well for the township,” the professor explained. “Certain other provisions in the national law held that unknown or unplanned for expenses of this nature needed to go through additional approval processes with the Premier and the Legislature. However, no appeal was filed in this case and the environmental cleanup bill was eventually paid for by the central government.”

Several of the students were nodding at this point.

“So, it has been a long, complicated, and somewhat repetitive narrative,” the professor said. “What does anyone suppose are the key points that I want to make?”

Student #11 offered an opinion. “What I get out of this is that a simple misunderstanding can lead to a massive lawsuit, or series of lawsuits!” she stated.

There was scattered laughter throughout the classroom.

“I can't deny that,” the professor admitted, with a shrug of the shoulders. “Any other ideas?”

The screen at the front of the room was blank. No lights went on.

“I suggest that you consider the following. First, what do government officials do? The answer to that question is that, for the most part, they follow established internal government procedures. Those are called ‘standard operating procedures’ or SOPs. Many government offices will have many shelves over-flowing with SOPs, describing the correct

procedure for dealing with any situation which comes to their office, and alternatively, describing how to decide if something does not fall within their scope of authority,” the professor stated carefully. “Back in the 1970s, these SOPs were written or typed, and placed in various folders, or binders, for easy reference. Today, of course, everything is computerized.”

The students waited for the professor to continue.

“But, what about a totally unique occurrence?” The professor paused. “Interviews with even the oldest government employees serving in the central government, or even with their retired parents or grandparents from those departments, would fail to reveal that any similar situation had ever occurred. Hence, there is no SOP. That is what we have described here.

“With no SOP in place, what is the result? Of course, the paperwork regarding the renunciation of Teufwaffen Castle by the Jelineksky family in 1972 was placed in some dusty file cabinet and forgotten about. The implications of that renunciation, and the supplementary or remedial actions which the central government should have taken at that time were never explored. Why? The answer is because there was no relevant SOP.

“Additionally, and this is no small point,” the professor seemed to perk up, “It is extremely interesting to note that when the township filed their lawsuit against the central government, various media reporters quickly contacted central government officials to obtain their views on the legal proceedings. The government officials’ most commonly offered responses were ‘totally unsubstantiated,’ ‘without the slightest legal basis,’ and ‘completely frivolous’. In other words, in the *quote unquote* educated opinion of these relatively highly placed government employees, even though many of them have advanced degrees in law, politics, economics, social sciences, etc., yet the simple facts regarding the ownership of Teufwaffen Castle could not be analyzed. Confronted with the facts of the case, we could say that only one sentence floated into their consciousness, and that sentence was –

DOES NOT PROCESS

“Again, the thinking of these government officials has been trained to rely on the production of documentation produced by strict adherence to established SOPs. However, in this case, there was no SOP, and hence there was no documentation. Any further discussion on this issue exceeded the limits of their cognitive ability.”

A student in the front row said, “You spoke a little bit about the subject of custody rights, and I wonder if you have more comments on that aspect? I suppose that guardianship responsibility or fiduciary obligations might be included in that.”

“Yes, indeed. When you have renunciations of this type, the various responsibilities of the relevant superior agency certainly need to be explored in detail. Or, indeed, you may need to spend some time determining what (or “who”) the relevant superior agency is. Going back to the situation of Cuba, it was ceded in the post-war treaty with no designation of a receiving country. So, in such a situation we look to see who the legal occupier aka (principal) occupying power is. That is fairly easy, because the treaty spells out the details in Article 1,” the professor said, reviewing the historical record. “If you are looking at a peace treaty, and you see situations of this type, you certainly want to examine the various Articles in detail. Most likely there will be some agency or organization acting in the role of custodian or guardian.”

“Are there any other questions today?”

The light for student #25 went on. “I am just wondering if the custodian or guardian responsibilities need to be specified in the treaty ? For example, we might have some communique, manifesto, or other formal Statement of the international community to say that such and such a piece of territory should be given to, awarded to, or otherwise transferred to some other country, let’s say we call that country C-1. So then, when the treaty comes into force, and the territory in question is ceded by the original mother country without the designation of a receiving country so then under those circumstances could the officials of country C-1 step forward and say, ‘OK, now we have administrative rights over this territory, and here is our documentation to prove that’ Would that work?”

“The layman would probably think so,“ the professor replied.

“But it is an extremely interesting question. You will be happy to know that we will be delving into a very similar situation to the one you have described in our next lecture. You may want to make travel arrangements to attend that in person, or you can watch it on our private university channel approx. three days afterward.”

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 4

A MANSION IN SOUTH AMERICA

[DATELINE CAMBRIDGE, MASSACHUSETTS]
PRESENT DAY

“Today’s lesson has been made into a movie. Please sit back in your seats and listen to the narration as you watch everything appearing on the screen,” an administrative assistant said, without introducing herself.

=====

It was a large and well-appointed mansion, with a modest 17 acres (7 hectares) of accompanying grounds, which sat on the outskirts of a large South American city. Situated on a small hill, standing on the roof on an especially clear day it was possible to see the Andes in the distance.

The history of the mansion stretched back slightly over a hundred years. It had been built by a wealthy landowner who made a fortune exporting illegally mined minerals during the pre-WWI era. He had been known as Viscount Antonio Tairsoranto, and his painting hung above the fireplace in the library on the first floor.

His descendants had also done well in various types of business and later made a fortune by buying and selling commodity futures. In fact, they had done so well that they had

mansions in several locations in South America, and some in Europe. The current owner, Francisco, hadn't visited the mansion in over two decades. He was 82 years old and lived in a retirement home in Sao Paulo, Brazil. His health was not good.

A Mansion in South America

Francisco's son Reynaldo would typically live in the mansion for a total of about 90 days a year. He was currently coordinating with a law firm in Panama to set up a series of shell companies so that he could do international trading with various blacklisted regimes throughout the globe. It was all highly illegal and highly profitable.

Several of his European, Asian, and Pacific island associates had visited the mansion on numerous occasions. Many had expressed interest in buying it. But he had never had the chance to speak to his father about it. Currently, however, considering the father's recent health reports, it certainly appeared that the old man wouldn't be living much longer. With his mother having passed away several years previously, and he being the lone heir, he appeared to be in a good position to inherit the mansion and all its grounds.

Some years ago he had made plans to sell the mansion and its surrounding grounds immediately after his inheritance was finalized. However, with the recent progress of his import-export work, the value of the mansion no longer seemed that important. What he needed was to "upgrade" his business connections with a trusted associate, so that they could both expand their international business by working together. Maybe the mansion would make a nice gift, and could "seal" their business relationship.

Steffen, who currently carried an Italian passport, had visited the mansion several times. He was also interested in buying it. He said that it reminded him of his uncle's former estate in Valparaíso, Chile, where he spent many enjoyable summers as a boy.

The following month Reynaldo met with several associates in Cairo, Egypt, to discuss the purchase and shipment of military hardware to various Middle-Eastern regimes that are hard to locate on any map. Steffen was also in attendance. After the group went over the details of the entire transaction, it became clear that Steffen had some important contacts in Cyprus who could greatly facilitate their final deliveries and customs clearances.

Carlos Smithson had visited the mansion previously, and had held some large parties there. He had a large collection of expensive wines and liquors in the basement.

Brandan O'Reilly had collected a number of world-famous paintings, many of which were listed in international art catalogues as "missing," and those were stored in the basement as well.

This seemed a good time to bring up the issue of the transfer of the ownership of the mansion. Reynaldo had a small printer attached to his laptop computer, and quickly typed up a short document.

As allies, the four of us present today have agreed upon the course of our future military operations in the Middle East.

We are supplying military hardware to various regimes so that they may fight for the liberation of their native soil. We are assured that the leaders of these regimes covet no gain for themselves, and have no thought of territorial expansion beyond what has always been considered to be their historical homelands.

In recognition of the assistance which Steffen Allegretti is giving to the present operations, and all the services he has rendered, financial, logistical, and otherwise, we state our common purpose that the Acrupalma Mansion be awarded to him, along with all of its current contents. Reynaldo Taisoranto hereby promises to vacate the premises within one month after his inheritance.

With these objects in view, we four allies, and with spirits in harmony with those of all the oppressed peoples on the globe, will continue to persevere in the serious and prolonged operations necessary to procure the best world future for ourselves and our descendants.

Cairo, Egypt

This was printed out, and all four members agreed to its contents. After some discussion, they added the date (December 5) and imprinted their thumbprints at the bottom. Each person received a copy.

As their business continued to expand, some twenty months later, the four met in Port Said to discuss additional cooperative efforts. Steffen hoped to be assured that the arrangements for his obtaining the Acrupalma Mansion in the future were still on track. Again, Reynaldo typed up a short document.

The terms of the Cairo Agreement, previously agreed to by we four allies, shall be carried out and all ownership in the Acrupalma Mansion shall be handled according to the terms previously outlined therein.

After his inheritance is finalized, Reynaldo Taisoranto unconditionally promises to leave the contents of the mansion in their current condition, and then vacate the premises within one month.

Port Said, Egypt

As in with the document produced in their previous meeting, they added the date (July 30) and imprinted their thumbprints at the bottom. This new document they referred to as the Port Said Assertion. Each person received a copy.

Reynaldo contacted his father and explained his future plans for the mansion. His father agreed to trust Reynaldo's judgment in all related matters. He sent a number of documents related to the original purchase of the mansion, and other matters, to Reynaldo by international express mail.

A month later, Reynaldo received news of his father's passing. He assumed that his inheritance could soon be finalized, and contacted his father's lawyers to learn about further details.

Approx. three weeks later, Reynaldo learned that Steffen Allegretti was travelling through the area. Reynaldo wanted to go to Thailand for a lengthy vacation, and he suggested that they both meet at the mansion for the "handover." All the legal details could be handled later.

Steffen agreed. After a large dinner, Reynaldo gave him the keys to the mansion, showed him the location of the three safes and gave him the combinations, and told him where all other documents relating to the house, its upkeep, and maintenance of the various electrical appliances were located. He also drafted a simple document.

INSTRUMENT OF HAND-OVER

I, acting in my capacity as the sole surviving heir to the estate of Francisco Taisoranto, hereby reaffirm the acceptance of the provisions set forth in the Assertion issued by my associates Carlos Smithson, Brandan O'Reilly, Steffen Allegretti, and myself on 30 July [year] at Port Said, Egypt, which four persons are hereafter referred to as the four allies.

I, as authorized representative of the four allies, hereby proclaim the unconditional hand-over to Mr. Allegetti of the Acrupalma Mansion and all its contents as of this date.

Attached to this INSTRUMENT is a personal note from my father, and verified by the officials where he was staying in Sao Paulo.

Signed,

Reynaldo Taisoranto

Reynaldo added the date, and put his personal signature at the bottom.

The attached note read as follows.

To: Steffen Allegetti

My doctors inform me that I do not have long to live. My son Reynaldo has said that he intends to transfer the ownership of Acrupalma Mansion to you after the details of his inheritance are finalized.

I trust that the two of you will agree on a suitable financial settlement.

Wishing you best wishes for your future life in Acrupalma Mansion, I remain,

Yours truly,

Francisco Taisoranto

CEO Cassikoko Airlines

Headquarters: Buenos Aires, Argentina

This note was also signed personally, dated approx. two months previously, and with additional signatures of two witnesses for verification. These were the Director and chief resident physician at the retirement home where he was staying in Sao Paulo.

Early the next morning Reynaldo left the mansion and flew to Thailand.

Visiting the nearby city some days later, Steffen read in a local newspaper of the passing of Francisco Taisoranto, Reynaldo's father. Indeed, Reynaldo had mentioned this to him

before his departure for Thailand. However, what Reynaldo had not mentioned, and perhaps had not been aware of, were the legal problems now confronting Francisco's estate. As the story was explained, approx. one week before the elderly Taisoranto died, an airplane owned by the small airplane chartering business of which he was sole owner, had been involved in a horrific accident.

As the story had unraveled over the past month, a pilot with an expired license had flown one of the company's aircraft, which had not been properly maintained, on an unregistered 450 mile (725 km) flight. The pilot lost control of the aircraft, and it crashed into a skyscraper in Rio de Janeiro, killing all 28 people on board and 110 people in the building and on the ground. A team of lawyers had been assembled and were now instituting proceedings to seize all of the elderly Taisoranto's assets, which were reputedly spread among four South American countries, the Maldives, and southern Thailand.

Steffen contacted a prominent lawyer of his acquaintance in Cayman Islands, and faxed him the three relevant documents in his possession. He explained the entire situation, and asked if he still had a valid claim to the Acrupalma Mansion in consideration that Reynaldo Taisoranto, the sole surviving heir, and his associates had drafted written "promises" to him saying that in the future Reynaldo Taisoranto would vacate the premises shortly after his father's death, and he would obtain the mansion's ownership.

The lawyer explained that these written documents were not actually "promises," but something more like "statements of intent." Setting aside for the moment the elderly Taisoranto's liability for the deaths of 138 people in Rio de Janeiro, the lawyer suggested that it might be useful to look at the broader picture. He explained that in dealing with "statements of intent" for the transfer of the legal ownership of property, there was in fact one key factor which needed to be considered. In any type of future legal actions or legal pleadings, this would be extremely important.

After this the lawyer said that he had an urgent call on another line, and only static ensued. Steffen hung up. He considered that first of all, the verification of all the documents in his possession by Reynaldo Taisoranto would probably be extremely important. Therefore, before contacting the lawyer again he arranged to hire a private detective agency to determine Reynaldo's current whereabouts. Unfortunately, but no trace of him was ever found.

= = = = =

The movie ended here. A well dressed British gentleman came on the screen, with a panorama of London in the background. He said: “Temporarily ignoring any considerations of the legal problems which the elderly Taisoranto’s estate is facing at the moment, and assuming that the three documents in question can all be verified as genuine, and as expressing the true will of the so-called four allies, what is the one key factor which needs to be considered, in order to determine if Steffen Allegretti has a valid legal claim to the Acrupalma Mansion?”

The screen slowly faded out, and then went blank. A middle aged lady in conservative business attire walked into the classroom. “Hello, my name is Martha Halpendorf. I will be your moderator for the discussion portion of the class.”

One student toward the front of the classroom raised her hand. “We are supposed to be discussing ‘one key factor’ and I think it still has to be something involved with the verification of the documents. In the story, we heard that at the bottom of the first two documents there were only thumbprints. I think these documents need to be more official. They need to be signed, sealed, and notarized, by these four individuals, and then with several witnesses doing a similar procedure for formal verification.”

“Many people would agree with your logic,” Martha said. “But I think the British gentleman’s remarks were intended to clarify this. He stated that we are ‘assuming that the three documents in question can all be verified as genuine, and as expressing the true will of the so-called four allies so, I think it is fair to say that adding signatures and other verifications does not amount to the ‘one key factor’ that we are looking for.”

A student in the third row stood up. “I really don’t agree with the analysis that these documents only express ‘statements of intent,’ and are not ‘promises.’ It seems to me that if they were given in good faith, and all parties present agreed to the conditions stated, then they should certainly be regarded as promises. I checked the dictionary definition of promise, and I found this –

a declaration or assurance that one will do something or that a particular thing will happen.

So that is what I think, and that is my input.” She sat down.

“OK, very good,” Martha agreed. “Certainly everything you have said makes a lot of sense. You provided a definition of the word ‘promise’ to back up your reasoning. On the surface, we don’t see any faults in your evaluation of all of this. Importantly, however, we still need to find the ‘one key factor’ which will serve to truly determine if Steffen Allegretti has a

valid legal claim to the Acrupalma Mansion. When we find that, we will also be able to determine if the intentions expressed in those documents can be regarded as promises or not.”

Several students seemed quite puzzled by Martha’s explanation. Frowns could be seen throughout the classroom.

A student near the back of the room raised her hand. “I think there needs to be some exchange of money.” Hearing this, several students laughed. She continued “I mean you are going to give someone a mansion, and the value of that would be hard to estimate. It might be two million U.S. dollars, three million U.S. dollars, or more who knows? So, it seems to me that in the future if a judge, or a lawyer, or some other legal person were carefully examining this entire flow of events, the Cairo Agreement, the Port Said Assertion, the Instrument of Handover, etc. might say that the essential elements of the ‘transaction’ (if we can call it that) are unfair. Well, anyway, this is the best idea I could come up with.”

Martha walked across the front of the classroom. “Your analysis is actually very well thought out. However, I would just point out that I believe that originally in the Cairo Agreement there was some relevant wording.” She took out a pocket notebook and opened it up. “Yes, here is the sentence –

In recognition of the assistance which Steffen Allegretti is giving to the present operations, and all the services he has rendered, financial, logistical, and otherwise, we state our common purpose that the Acrupalma Mansion be awarded to him, along with all of its current contents.

So, it appears there has been an exchange of money, in some form or another. In light of that, I think that your concerns have been effectively dealt with.”

Martha put her notebook back in her pocket. “Alright, it seems that there are no other ideas. So, let’s approach this a different way. I need four volunteers.”

Several students raised their hands. Martha picked two boys and two girls. They came to the front of the classroom. She handed one of the girls a device which looked like a remote control of some sort. The screen at the front of the classroom came back on.

“As most of you know, if we travel about 72 miles (116 kilometers) from Boston in a southeastern direction, we will reach Hyannis Port. This is a low angle aerial photograph

taken of Hyannis Port within the last hour. You can probably count over 70 yachts in this picture.”

"We obtained the permission of the U.S. Coast Guard and U.S. Navy to use this photograph and the accompanying software. You will find that it is completely interactive," Martha explained. "Our volunteers here have a laser pointer, and I will now ask them to point to any particular yacht in the picture and push the small yellow button."

The student holding the laser pointer directed it at a random yacht near the center of the photograph. She pushed the yellow button and a very thin laser beam extended over to a medium-sized yacht. At the same time a large text-box appeared on the side of the screen.

"What do you see in the description?" Martha asked.

One of the male student volunteers moved closer to the screen. "It appears to be a full description of ownership, maintenance, insurance, recent travel itineraries, customs clearances, and other data." After a pause, he added, "There are also additional pages of data."

"Fine. That is the capability of this interactive software. Now I want the four of you to look at all the yachts on the screen, and pick one which you think might be worthy of further investigation."

After a brief discussion, and some gesticulating, the four students made a decision. The laser pointer was directed at one large yacht near the upper right hand corner of the photograph. A text box also appeared on the screen.

"What is the name of this yacht?" Martha inquired.

"The Kogomastin."

"Who is the owner?"

"Vladimir Potemibski."

"Home port?" Martha's interest was aroused.

"Vladivostok, Russia."

“Any outstanding fines or customs violations?”

“None.”

“Alright,” Martha seemed satisfied. “Now please tell me your name.”

“I am Michael Rosellvin.”

“Now I want the four of you to think about how you would draw up a brief Agreement to transfer the ownership of The Kogomastin to Michael.

The four students looked rather surprised.

“I don’t think we could,” offered the female student holding the laser pointer. “This yacht does not belong to us, either individually or collectively.”

“Brilliant,” Martha seemed very pleased. “And that is the one key factor which needs to be considered in our story involving the transfer of the ownership of Acrupalma Mansion to another party. To sum this up “

You cannot make a valid agreement to transfer the ownership of property when in fact you do not own the property.

The screen at the front of the room went blank.

“You may want to go back and review the entire video of today’s lecture. You can watch it on our private university channel approx. three days from now.

“I also urge you to make travel arrangements to attend our next lecture in person. Public transportation to Philadelphia is available, both by bus and by train.”

CHAPTER 5

**U.S. DEFENSE OF TAIWAN
RESPONSIBILITY REPORT**

[DATELINE TAIPEI, TAIWAN]
PRESENT DAY

When the subject of Taiwan’s defensive needs is brought up, it is easy to turn to the internet and find many reports by both individuals and think-tanks, giving a detailed analysis of Taiwan’s current military capabilities, along with what aspects need further upgrading or refurbishment. Of course, the subject of “budgeting” is also frequently raised, and many experts say that Taiwan’s yearly “national budget” should increase the funding allocated for the acquirement of military hardware.

However, to the knowledge of the author and compilers of the present volume, none of these reports have examined the fundamental question which should be central to all of these discussions. That question is:

Should Taiwan be responsible for its own defense?

This is no idle question. Taiwan sits off the coast of the People’s Republic of China (PRC). The PRC claims Taiwan as part of its national territory; however, it currently exercises no form of jurisdiction over the island. To what extent does the PRC consider itself

responsible for Taiwan's defense needs? Obviously, the PRC has no PLA troops currently stationed in Taiwan.

PLA is the commonly used abbreviation for "Chinese People's Liberation Army," which is the armed forces of the People's Republic of China (PRC) and of its founding and ruling political party, the Communist Party of China (CPC). The PLA consists of five professional service branches: the Ground Force, Navy, Air Force, Rocket Force, and the Strategic Support Force.

More shocking perhaps is the fact that the PRC has 1600 or more missiles stationed along its eastern seaboard, all pointed at Taiwan. Casual observers could easily conclude that the PRC is more interested in attacking Taiwan than in defending it from external attack, a most curious situation in consideration that the PRC "claims Taiwan as part of its national territory."

If one interviews a large number of people on the streets of Taiwan's major cities, and asks them a question such as "What is the major military threat that Taiwan faces?" No one will mention that they fear being attacked by North Korea, Japan, the Philippines, Vietnam, or other countries to the north, south, or southwest. In over 95% of the responses, these people will point to the looming possibility of an "invasion by the PRC" as being Taiwan's major military risk.

Most interviewees will also agree with the premise that the reason Taiwan has a "national defense" establishment in the first place is to protect their homeland from attacks by this "unfriendly neighbor" to the west.

The other 5% would probably stress the need for a comprehensive cross-strait peace agreement, argue that Taiwan should simply declare itself to be an internationally neutral and non-aligned nation, or propose some related strategy, whereby (in their view) the need for a "Ministry of National Defense" would be eliminated altogether. However, realistically speaking, such views are very much in the minority in Taiwan.

Since the end of WWII, under the leadership of Chiang Kai-shek and his followers, the Republic of China (ROC) in Taiwan has concentrated much effort, in addition to a great portion of the "national budget," into establishing its own defensive capabilities. This has included the development of its own indigenous defense industries, as well as the purchases of large amounts of defensive hardware from other countries, primarily the United States.

For anyone attempting to re-evaluate the entirety of this history from the 1940s to the present, in an attempt to determine whether or not Taiwan should be responsible for its own defense, many problems soon become apparent. In particular, regardless of what “scenario” is advanced, numerous alternative arguments will immediately be presented by various interest groups, factions, research organizations, etc. in Taiwan and overseas.

Hence, it is quickly seen that unless one is prepared to thoroughly research and investigate all of these “alternative arguments,” along with the underlying historical and legal parameters which accompany them, it will be impossible to successfully promote any one conclusion as being the definitive “line of reasoning” in making the determination of responsibility for Taiwan’s defense needs.

Faced with this task, the author and compilers of the present volume have decided to depart from the traditional style of report writing and to use an entirely different format. The nomenclature of “historical narrative” is felt to be a fitting description of this presentation method. Chapters 2, 3, and 4 are examples of this style of writing. The following characteristics are notable:

- The narratives are presented chapter by chapter. They are organized to include a discussion of historical events, blending historical facts and relevant legal analysis together with imagined “characters and situations” in the present day, or in the not too distant past. For the most part, these characters and situations are presented in a classroom, meeting room, or auditorium on the campus of a college or university. In a few instances, the setting may be a law office, a hotel, a restaurant, or even written “dialogue” via email correspondence.
- Typically, there is a large group of students, and there is a professor or other knowledgeable person who is serving as moderator. Additionally, many times there are assistants, or student volunteers who take on various roles. The moderator is leading the discussion, and as the classroom situation develops, students will often ask a variety of questions, or even challenge the moderator on his/her presentation of various points.
- Each class is typically viewed as a “session.” The locations of the various sessions are completely varied, they span the entire globe, and sometimes that fact also leads to some interesting dialogue or interaction, this of course being an additional technique to embellish the stories. In many of the sessions, movies are shown.

- The historical narrative is in chapters 2 to 4 and 6 to 15. Generally speaking, each “chapter title” is just describing one or more important themes, topics, or subjects that are covered in that chapter. While the “chapter title” serves as an important point of reference, nevertheless the content of each chapter is not strictly limited to this aspect or to this issue.
- Many people view the presence of Chiang Kai-shek’s “Republic of China” government in Taiwan as having some direct relationship to the outcome of the Chinese civil war. This is not entirely correct. The ROC military forces first arrived in Taiwan in Oct. 1945, having been directed to handle the Japanese surrender ceremonies on the island. This, of course, was after Japan had suffered defeat in the Pacific War.
- Based on the above, it can be argued that the “Taiwan question” is an issue left over from WWII in the Pacific. In this regard, the author and compilers of the present volume believe that a detailed knowledge of “wartime issues” (in the broadest sense) from other geographic regions can be of much reference value in more thoroughly understanding Taiwan’s situation in the world today.
- Therefore, the reader is urged to avoid becoming alarmed when, upon making an overview of the chapter titles in the Table of Contents, very little content which has a relationship to Taiwan is found. In fact, the content of each chapter does have a significant relationship to Taiwan, but this is left to the moderator and the students to discuss, debate, and dissect.
- The combining of all the “circumstances” in the classroom, and in the locality, is an attempt to aid in the development of a lively dialogue. Often times the verbal interaction, while still maintaining the decorum of the classroom setting, can become quite vigorous. In consideration that the moderator is directing this flow of classroom interaction, we believe the resultant teaching process may be correctly described as a “modified Socratic method.”
- In response to the subject matter at hand, and while taking into account the students’ feedback, the moderator will often go into many and a wide variety of digressions, in order to present additional points of analysis. The students, of course, react to these additional points as they see fit, sometimes asking for still further clarifications, questioning the accuracy of various statements, or advancing their own rationale. As regards to these seeming digressions, sometimes the information presented will

appear only moderately relevant at the time, and in some instances will appear largely irrelevant. However, in the vast majority of cases, what appears to be marginally relevant (or irrelevant) information in one chapter will take on much greater significance in later chapters.

- In consideration that different sessions are held in different geographic locations, and are under the direction of different moderators, a variety of teaching styles becomes apparent. Some moderators are comfortable with restroom breaks, coffee breaks, lunch breaks, or the presentation of “in class entertainment.” Other moderators are much more formal, or conservative. Some moderators divide the class into numerous groups, and specify that homework be completed on a group basis; others direct that the entire class brainstorm together to complete a homework assignment. Many moderators assign no homework at all.
- The subject matter treated in each chapter does not strictly limit itself to issues directly concerned with the defense of Taiwan. Many other issues of importance to the Taiwan public, and to researchers concerned with Taiwan, are examined in detail. Many of these involve human rights, transitional justice, the court system, governmental organization, peculiarities of the Chinese language, curious aspects of Taiwan history, etc. or what in Taiwan are largely ignored legal concepts, comparative international practice, etc.
- When issues involving the defense of Taiwan are discussed, the “legal capacity” of both the ROC on Taiwan and the United States, with respect to handling Taiwan’s defense needs, are also explored in detail. In this way, many often overlooked legal and historical events that have a direct bearing on this “defense responsibility” topic are brought to light.

Importantly, a close examination of the content of each chapter will reveal that for every issue relevant to a discussion of Taiwan’s history or legal position, as raised by the moderator and the students, even after some exchange of opinions and point-counterpoint interaction, a firm “conclusion” is reached nearly 99% of the time. The author has strived to ensure that these “conclusions” in regard to historical and legal interpretation are entirely accurate.

This being said, the reader should understand that the historical narrative form in which all of this information is presented, which is blending together the classroom participants, the classroom situations, the dialogue back and forth, etc. is merely a vehicle for

presentation of this material so that the “classroom management” format (as devised by the author in each chapter) can keep moving at a brisk pace. This, in turn, will hopefully enable the reader to maintain a high-interest level, while at the same time will serve as an aid in the overall comprehension and absorption of the information being made available, chapter by chapter.

Accordingly, with respect to the individuals attending each session in the many college or university classrooms which the author describes, or in the law firm’s offices, or in the email correspondence, etc. the author hereby makes the standard disclaimer that any resemblance to actual persons, living or dead, is purely coincidental. A few well-known personages in the public and private sectors are the rare exceptions.

On a very infrequent occasion, a moderator will make a deliberate misstatement of historical fact. Typically, this is discovered in later sessions by one or more extremely attentive students, and it is resolved or rectified. In retrospect, however, the reader will generally find that the rectification of these misstatements is actually serving to reinforce certain key concepts.

Volume 1 is being presented together with a “U.S. Defense of Taiwan Responsibility Investigation Law” draft proposal (approx. 150 pages in the Chinese language), which is being posted on the internet for the reference of interested members of the Taiwan public, Taiwan Legislators, and overseas Taiwan compatriots. This draft proposal is an attempt to urge the members of the Taiwan (ROC) Legislative Yuan to undertake their own thorough investigation in regard to whether the United States should bear the responsibility for Taiwan’s defense needs. It is available at the following internet address –

<https://www.twdefense.info/>

Most surveys of “reading preferences” come to the conclusion that people like to read stories, as opposed to dry listings of all types of facts, data, and erudite scholarly opinion. With this essential truth in mind, in the present volume, the large quantity of information which needs to be reviewed and dissected is carefully woven into what is termed an “historical narrative” format. This is the result of the author’s attempt to bring all relevant historical and legal data together in the form of stories, or (arguably) “short novels.”

In the situations of the various university classrooms presented, as imaginarily constructed by the author, there is a large group of students that is common to the different sessions. However, there are additional students who attend certain sessions and don’t attend others

(i.e. “partial attendance students”), and they are instructed to view the videos of previous sessions which are made available on the internet. Nevertheless, the existence of this latter category of students serves to explain why not all of those in attendance are intimately familiar with the content of previous sessions.

By the end of these 15 chapters, the reader should be very familiar with all the legal and historical principles which must be taken into consideration in making a determination of Taiwan’s current international status, as well as all “competing points of view.” Accordingly, in the event that some debate or disagreement arises, the reader should then be able to deal with any and all of the relevant points in a competent manner.

Obviously, after reading Volume 1, one is immediately faced with the debate topic of “What Entity Should Be in Charge of Taiwan’s Defense Needs?”

Ideally, the reader will come to his/her own conclusions based on the information presented herein. However, if there are still some lingering doubts, the best course of action may be to briefly review Volume 1 and then proceed directly to reading Volume 2.

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 6

MEXICAN MILITARY FORCES ABANDON THE PORT CITY OF TAMPICO, 1846

[DATELINE PHILADELPHIA, PENNSYLVANIA]
PRESENT DAY

“The Fall of Singapore and a large number of related topics were discussed in a previous lecture. I will be the moderator of our discussion today, and my name is Samuel Whittenburg. Now let’s look at the situation leading up to what we might call the fall of Tampico, Mexico, in late 1846.”

“The military forces involved in the fighting were those of the United States and Mexico. Some people who are unfamiliar with the history of that era might jump to the conclusion that the United States launched an unprovoked attack on this Mexican port city, in somewhat of a similar fashion to what the Japanese did at Pearl Harbor.”

“However, in fact,” Samuel clarified, “the Mexican American War had already been underway for over seven months when this particular battle occurred. I think it is instructive to overview the causes of the Mexican American War, and to delve into the official explanations of various circumstances which arose out of the war, so that we can fully understand the key historical and legal points.”

“There’s an old saying, ‘The past cannot be changed.’ But we should learn from our mistakes and the mistakes of others because there are valuable lessons in those failures. Our goal should be to use what we’ve learned to improve our odds of dealing more effectively with all related situations in the future.”

“Can anyone tell us what some of the major causes of the Mexican American War were?” Samuel solicited answers from the assembled students. “We are in classroom 11, and every seat number begins with an 11.”

The student in seat 11-14 raised her hand. “I believe it probably goes back to the entire issue of illegal immigration,” she began to explain. Some of the other students were amused by this, and began to talk among themselves. “No, seriously, I think that in those times there would still be numbers of Mexican people looking for more work or for better work, so they would illegally cross the border, and then come into the United States and eventually, there would be problems because they didn’t pay income taxes.” She paused to collect her thoughts and noticed several other students looking in her direction and frowning. “Well, I mean, many Americans would think that was unfair, and would demand that some action be taken to stop the illegal inflow of people.”

Samuel was nodding his head. “From the viewpoint of the present day, your analysis makes a lot of sense, but going back to roughly the mid-1800s, you have to be aware of some important details of the real situation between the United States and Mexico. Let’s start with the border. That would be Concern #1. At that point in time, there certainly was a western border of the United States, even before Texas joined the Union in 1845, and before Oregon territory was organized in 1848. Such a border certainly existed on many maps. However, if you were to take a trip to visit the so-called border area by yourself, you might find that in many places different people had different ideas of where the border actually was. In some instances, their estimations might vary by 20 or 30 miles or more.

“Moving along,” he continued, “what about the I.D. documents needed to distinguish between a U.S. citizen and a Mexican citizen? That would be Concern #2. When were those first issued? And U.S. passports, when did those come into wide use?”

A student in the back left corner of the room stood up slowly and then raised his hand. Samuel acknowledged him.

“If you are talking about driver’s licenses or similar I.D. documents, then those were certainly not issued before Henry Ford opened his factory in Detroit, which would have

been 1903 or thereabouts, and indeed probably not for some time after that. So, they certainly didn't exist in the mid-1800s," he said. "As for U.S. passports, I seem to recall reading somewhere that they only came into wide use after WWII."

"That is certainly an adequate answer for our purposes," Samuel commented. Next, let's go to the subject of income taxes. That is Concern #3. Who can explain that?"

The student in seat 11-21 raised his hand. "In my understanding, income taxes throughout the United States only took effect with the ratification of the 16th Amendment in 1913."

"And then the concept that U.S. citizens are being treated unfairly because *quote unquote* undocumented immigrants are coming into the United States and not paying their fair share of income taxes , that would be Concern #4. Historically speaking, where did that idea come from?"

A student in seat 11-5 waved her hand. "It was probably the U.S. Immigration Reform and Control Act, which came into force in 1986, which brought these issues to the attention of most Americans. That Act set penalties for employers who knowingly hired undocumented immigrants." She paused briefly. "I took a course on Immigration and we discussed these things."

"So those comprise the Four Concerns," Samuel said somewhat authoritatively. "After that brief 'back and forth' I think we are warmed up here today, and our brains are focused to some degree. Let's move on to the movie clip which we have prepared."

===== MOVIE PART 1 ===== MEXICAN AMERICAN WAR =====

The movie began with paintings of a young boy wearing Spanish attire in the period of the late 1700s. The boy was introduced as Antonio López de Santa Anna, growing up in his hometown of Xalapa, which is located in the current Mexican state of Veracruz. He later fought in the Mexican War of Independence, which achieved victory in late September of 1821. He also fought in the Mexican American War.

A montage of famous Texans from the 1830s then began assembling on the screen. These included Sam Houston, James Fannin, William Travis, James Bowie, Frank W. Johnson, Edward Burleson, Stephen F. Austin, George Fisher, and others.

The imagery slowly faded into an Italian Renaissance Revival-style capitol building, which

was introduced as the Texas State Capitol in Austin, Texas. A woman in casual attire appeared, as the title of **The Texas Revolution** slowly moved across the screen.

This announcer was introduced as a former chief of staff to a lieutenant governor of Texas. She began the narrative --

The military conflict which began on October 2, 1835, between the government of Mexico and the Texas colonists, marked the beginning of the Texas Revolution. The following month, a provisional government of Mexican Texas was established to oppose the regime of President Antonio López de Santa Anna, who had revoked the 1824 Mexican Constitution and began to take on dictatorial powers.

The Causes of the Texas Revolution included major disputes over --

- Customs Duties collected by the Mexican government
- Limitations on the Institution of Slavery
- Application of the Mexican Constitution in the Province of Texas

Some three months later, on March 1, delegates of the American settlers in Texas convened the Convention of 1836, and the following day declared independence from Mexico, establishing the Republic of Texas.

Republic of Texas
Declaration of Independence from Mexico
March 2, 1836

However, it was not long before the vast majority of Texas citizens began to favor the annexation of the Lone Star Republic by the United States.

In 1843, U.S. President John Tyler decided to promote the admission of Texas into the Union. His staff compiled a draft version of a treaty of annexation, and reached agreement with Republic of Texas officials, including President Sam Houston, by April of 1844. The treaty was then submitted to the U.S. Senate for ratification, and became a central point of debate in the Presidential election of 1844.

U.S. Presidential election of 1844
James Polk, Democratic nominee
Henry Clay, Whig nominee

Pro-expansionist northern Democrats helped secure the nomination of James K. Polk, who ran on a pro-Texas & Manifest Destiny platform. His opponent was Whig Party candidate Henry Clay, who was an announced anti-annexationist. Polk won the election, succeeded Tyler, and entered the White House on March 4, 1845.

James Polk 11th President of the United States In office: March 4, 1845 to March 4, 1849
--

In Texas, some four months later, an annexation convention was held, which resulted in the passing of the annexation proposals with a large majority on July 4, 1845. A state constitution, drawn up by the convention, was ratified by popular vote in October. President Polk then signed the federal legislation making the former Lone Star Republic the 28th state of the Union on Dec. 29, 1845.

Texas joins the Union Dec. 29, 1845 28th state
--

Surprisingly, however, during the period of all of these negotiations, the border of Texas as an independent state, and later as a state in the USA, was never completely settled. Many historians cite one major cause of the Mexican American War as a territorial ownership dispute over a piece of land approx. 240 km (150 miles) wide in what is today the southern part of Texas, known as the Nueces Strip. The United States claimed that this land belonged to Texas; however Mexico said that this land was theirs.

- | |
|--|
| <p>The Causes of the Mexican American War included major disputes over --</p> <ul style="list-style-type: none">• Location of the boundary line between Texas and Mexico• Admission of Texas to the Union as the 28th state• Unjust arrest and imprisonment of Americans in Mexican territory• Outstanding property claims by Americans against Mexico• Unwillingness of Mexican government to negotiate for resolution of these, and other, controversies |
|--|

On April 24, 1846, American forces were attacked near the Rio Grande. On May 13, the U.S. Congress declared war against Mexico.

The Mexican American War

During the course of the war, which lasted a little over two years, the United States military troops conducted actions against locations in Mexico both on land and by sea. An overview of the battle between the United States and Mexican military forces in the eastern port city of Tampico will be useful in illustrating United States Military Government (USMG) jurisdiction over Mexican territory, and other interesting aspects of the customary laws of warfare.

===== MOVIE ===== END OF PART 1 =====

The lights came up and Samuel walked from the back of the classroom to the front. “We have watched an overview of some basic information regarding the Mexican American War. Let me ask an important question: ‘In this war, who is the aggressor?’”

No hands went up.

“It could be argued that Mexican President Antonio López de Santa Anna was becoming very dictatorial, the settlers in Texas were very angry about that. Then the Texas Revolution and Texas independence saw many lives lost on both sides. This set off an entire chain of events which brought the United States into the Mexican American War,” he continued. “So, we can go back and forth. It is not an easy issue to sort out. Both the Mexicans and the Americans felt that there were serious disputes that needed to be settled. Truthfully speaking, it is hard to point to one side and say, ‘This side was the aggressor’.” He turned toward the screen.

“OK, let’s move on to Tampico.” Some data came on the screen.

Tampico, Mexico

In late October 1846, under onslaught by the U.S. navy warships, Mexican forces in the port city of Tampico determined that their situation was indefensible, and abandoned the city.

On November 14, U.S. troops captured the city without a fight. The U.S. flag was raised. In this way, the military occupation of Tampico, Mexico began.

Tampico, Mexico

Captured: Nov. 14, 1846

	Tampico, Mexico USMG begins: Nov. 14, 1846
--	---

Let's discuss a few more issues before we begin Part 2 of the movie. First, we want to consider the issue of 'When does Tampico become U.S. territory?'

The student in seat 11-2 raised her hand. "Previously, we heard that surrender ceremonies marked the beginning of the military occupation. But here in Tampico, it appears that there were no surrender ceremonies. Moreover, the U.S. flag was raised. These factors seem to indicate that Tampico was immediately annexed by the United States."

"A surrender ceremony is exactly that, a ceremony, and indeed it is a significant marker in time indicating when the *jurisdiction over the territory* changed hands. At the same time, it might be considered a good opportunity to give speeches and make paintings, or take photographs, or whatever," Samuel explained. "But a surrender ceremony is not 100% necessary. The key point is that the territory has actually come under, or been placed under, the authority of the hostile army. Then the territory is considered occupied."

Student 11-2 continued, "I seem to recall that it was stated that military occupation does not transfer sovereignty. And yet here in Tampico the U.S. flag has been raised, so that would indicate that Tampico is U.S. territory."

"Let's look at an example from WWII," Samuel countered. "The Battle of Iwo Jima took place from February 19 to March 26, 1945. Undoubtedly, you have all seen the famous picture which depicts six United States Marines raising a U.S. flag there. So, let me ask, did Iwo Jima become U.S. territory?"

Student 11-5 tentatively raised his hand. "I don't ever recall seeing Iwo Jima as being displayed on a map as part of U.S. territory," he said. "So, my opinion is: No, it didn't."

"So, what happened there?"

Student 11-14 was quick with an answer. "Obviously, the correct answer is to say that Iwo Jima became occupied territory of the United States."

"We have to be careful of our phrasing," Samuel clarified. "At any rate, however, we phrase it, we have to make clear that after the battle was over, Iwo Jima still belonged to Japan. However, it was being occupied by the United States." He stopped speaking momentarily.

“In the post-Napoleonic period, the CUSTOMARY RULE is that the transfer of territorial sovereignty is done in a formal treaty. For the disposition of territory after war, we can cite that RULE as part of the customary laws of warfare.”

Student 11-14 interjected. “What if I am the leader of some country, and I find some island on the map that I really like, and I want to use some other way to transfer the territorial sovereignty of that island to my country? What can I do?”

“It is actually a very good question, and it touches at the core of some very essential and elemental legal concepts,” Samuel stated. “The larger question might be put this way: ‘When you don’t have a specific legal reference, out of some internationally accepted legal code for example, and you don’t have a treaty reference, or court ruling, etc. then how can you use customary law to justify or validate your point of view?’”

Student 11-18 stood up. “My name is Mason, and I have done quite a bit of travelling in Asia and Africa,” he said. “What I have seen on many occasions is this -- the regime in power offers a so-called ‘official explanation’ regarding the legal significance of various current events, or historical events, or its own actions in regard to dealing with various matters, or whatever, and then everyone who doesn’t agree with that is put in jail.”

A number of students applauded, clearly indicating their ‘recognition’ that such events did indeed happen.

Student 11-14 waved her hand back and forth, and then commented: “I was hoping to be a benevolent leader, and my goal is to promote democracy and human rights in my country!”

“You have my vote,” Samuel asserted, “Nevertheless we cannot deny the validity of the remarks Mason made, however uncomfortable that may be. Now, returning to the issue of justifying or validating some ‘point of view’ or some ‘action taken’ from the customary law angle, of course it is very straightforward. In regard to the opinion you hold, or the action you did, you must produce evidence to show that similar actions have been done before, moreover the international community has recognized these actions as having the consequence of such and such a result, which is exactly the result which you are claiming.”

Student 11-18 commented further. “A lot of times in the newspapers we see various government officials stating that they, or their predecessors, undertook some series of actions, which we might call ‘Actions A,’ and therefore now they can legally claim certain rights or benefits, which we might call ‘Results B’. But they don’t produce any proof. It is

just their statement against some other statements given by other people.”

“Exactly,” Samuel agreed. “In the absence of a specific reference from some internationally accepted legal code, or treaty, or court ruling, etc. they should be using customary law to justify their actions. In other words, they should give examples of similar situations that have occurred before, and explain that the international community recognized those actions as leading to such and such fully accepted results.”

The screen came on. “Here is a specific reference which illustrates this aspect,” Samuel said.

ALLEGED “NULLIFICATION OF CESSION”

On December 9, 1941, the same day that the Republic of China (ROC) declared war against Japan, Mr. Lin Shen, Chairman of the Chinese Nationalist Government, proclaimed that all treaties, agreements, and contracts between China and Japan were abrogated. Of course, the major point of this exercise was to advance a claim that this proclamation served (1) to nullify the 1895 treaty of peace between the Qing Dynasty and Japan which had stipulated the cession of Taiwan to Japan and thus (2) restored Taiwan to the pre-cession conditions.

On August 5, 1952, Article IV of the Treaty of Peace between the ROC and Japan stated that –

It is recognized that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.

As the direct effect of this 1941 proclamation and this 1952 treaty, many Chinese scholars assert that there was a “nullification” of the 1895 treaty, therefore Taiwan’s original position as part of China’s sovereign territory was restored, and the concept that Taiwan was ceded to Japan in 1895 should therefore be erased from the history books. Accordingly, as these scholars further emphasize, the stipulations in the April 28, 1952, San Francisco Peace Treaty regarding the disposition of Taiwan are irrelevant, or at best do not carry any legal weight. In other words, in their view, Taiwan had already been returned to China.

ANALYSIS

In international law, there are divergent theories over the definition of the "effects of war on a treaty," however, it is widely recognized that a clause of cession will not be affected by war. This is because once the obligations of territorial cession have been fulfilled; the relevant clause of the treaty itself is no longer "active".

In other words, given that the particular provision in the Sino-Japanese Peace Treaty of 1895 regarding the cession of Taiwan had already been fulfilled by the Qing Dynasty, any portion of this treaty which can be nullified as a consequence of the war must necessarily be limited only to those provisions which are still "active," and had not yet been fulfilled in their entirety. The cession provision had already been carried out, and was no longer "active." Therefore, the cession provision could no longer be subject to nullification.

Student 11-18 was nodding his head. "This is a good illustration I think. What you are saying here is that the Chinese officials should be giving examples of previous situations where treaties containing a provision for the cession of territory were declared as nullified, or rendered null and void, or whatever, and then the international community recognized that the territory in question had been automatically subject to being 'retroactively returned' to its *quote unquote* previous owner."

"Indeed. That would be the presentation of PROOF based on customary law," Samuel agreed. "Otherwise, the advancement of these 'retroactive return' arguments strongly appears to be based on an overactive imagination."

Samuel added a clarification, "I mean 'baseless assertions'."

Student 11-2 stood up. "Frankly speaking, I am more confused than ever. After Nov. 14, 1846, have we decided whether Tampico is U.S. territory or not?"

"Let's watch Part 2 of the movie," Samuel said as the lights went down.

===== MOVIE PART 2 ===== MEXICAN AMERICAN WAR =====

Arguments in Philadelphia about Import Taxes

On May 13, 1846, the U.S. Congress declared war against Mexico.

In March and June of 1847, an import firm in Philadelphia, Pennsylvania, doing business under the name of Fleming and Marshall, imported various goods from Tampico, Mexico, into the United States. Import duties were assessed by U.S. customs officials. The firm disputed that such customs duties were collectable on goods imported from Tampico, and after failing to resolve their disagreement with the U.S. customs collector, James Page, then filed a lawsuit for recovery of the duties paid. Their rationale was that Tampico, Mexico, then under military occupation by U.S. military forces, was not a “foreign port” under the laws of the United States regarding the collection of import duties from overseas areas.

This case was argued at several levels of the U.S. court system, eventually reaching the Supreme Court. The Court addressed several issues, including:

Within the meaning of the acts of Congress regarding import duties to be assessed on goods from Mexico, or any part thereof, and within the customs and usages of war, --

Whether (1) Tampico, in the year 1847, while in the military occupation of the forces of the United States, ceased to be in a foreign country, and therefore (2) whether during such military occupation, said acts of Congress did not apply to Tampico, but entitled the city to be treated in a similar fashion to a U.S. domestic port.

Fleming v. Page U.S. Supreme Court (1850)
--

After a thorough dissection of all relevant legal principles, the decision of the Justices held that after Tampico was subdued, it was still uniformly treated as an enemy's country. In other words, it remained a foreign port, even though the U.S. flag was flying. Indeed, after the conclusion of the treaty of peace, Tampico was promptly restored to the possession of the Mexican authorities. Under the laws and usages of war, during the period of its subjugation it was not proper for the United States to regard it as a part of U.S. domestic territory, or to give to it any form of civil government, or to extend to it our laws.



The capture of the city did not mean that there was a transfer of the territorial sovereignty to the country of the arriving military forces. After capture, and during the period of military occupation, Tampico would be best classified as an independent customs territory under USMG on Mexican soil. The military forces of the occupying army were neither entitled to seize public or private property in the city, nor to promulgate an entirely new

code of laws. Nor could they undertake a mass naturalization of the local inhabitants. The occupiers were required to follow the rules of usufruct.

usufruct -- (1) the right to the use and enjoyment of another's property and its profits, (2) the right to use and enjoy the profits and advantages of something belonging to another as long as the property is not damaged or altered in any way.

===== MOVIE ===== END OF PART 2 =====

“The term *usufruct* often appears in commentaries about military occupation,” Samuel explained. “including many manuals compiled by the U.S. Army or Dept. of Defense. We also often hear that the occupying power is regarded as administrator and *usufructuary* of the public buildings, real property, forests, and agricultural works belonging to the occupied territory.”

He pulled a stack of large cards out of his pocket, and distributed them to students sitting in the front row. “I will be discussing some of the information on these cards, so if I refer to the data in the card you are holding, please stand up and read it for us.” He paused.

“Now we have to come back to the discussion of the legal status of Tampico, Mexico, during its period of military occupation by the United States. You will recall that we formerly defined some important terms as follows, including military occupation and military government.”

One student in the front row raised his hand. Standing, he read aloud from his card.

DEFINITIONS:

[as used in the United States legal system]

- **Military occupation** is a condition in which territory is under the effective control of foreign armed forces.
- **Military government** is the form of administration by which an occupying power exercises governmental authority over occupied territory. 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. (Birkhimer, p. 21)
 - The default status for territory under military government is “military occupation.”

➤ The period before the peace treaty comes into force is often referred to as “belligerent occupation.”

- **Martial law** is the temporary government of the civil population of domestic territory through the military forces, as necessity may require, and governed solely by the domestic law of the United States.

“So, we need a clarification of the legal status of Tampico, Mexico. In fact, the answer was given in Part 2 of the movie.”

Another student in the front row stood up. He read aloud from his card.

Independent Customs Territory

After conquest by U.S. military forces, Tampico was an independent customs territory under USMG on Mexican soil.

“Now we need to look more carefully at the subject of whether Tampico was part of the United States at this point, and so now I will ask for a DEFINITION of the term ‘United States.’”

A third student in the front row briefly raised his hand and then stood up. “This is from the Code of Federal Regulations,” he said.

The United States

The term "United States", as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States.

“So, let me ask this student directly. In your estimation, during this period, was Tampico, Mexico, under the jurisdiction of the United States?”

“Yes, it certainly was,” the student said. “Tampico was an independent customs territory under USMG on Mexican soil.”

“From the point of view of the United States, would the territory of Tampico be considered domestic or foreign?”

“According to the analysis of the U.S. Supreme Court, it is foreign.”

“We should look at a summary of this Supreme Court case which has relevant details,” Samuel added.

A fourth student in the front row stood up and began reading.

The Port of Tampico

During the war between the United States and Mexico, the port of Tampico, in the Mexican State of Tamaulipas, was conquered, and possession of it held by the military authorities of the United States, acting under the orders of the President.

The President acted as a military commander prosecuting a war waged against a public enemy by the authority of his government, and the conquered country was held in possession in order to distress and harass the enemy.

It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest.

Tampico was therefore a foreign port within the meaning of the Act of Congress passed on 30 of July, 1846, and duties were properly levied upon goods imported into the United States from Tampico.

The administrative departments of the government have never recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on unless it had been previously made so by an act of Congress and the principle thus adopted has always been sanctioned by the circuit courts of the United States and by this Court.

*-- excerpted from the <https://www.justia.com/> website
Justia Legal Resources*

“In the Spanish American War, there were several territories which were conquered by United States military forces, and the consensus that the Supreme Court Justices arrived at was to say that such territories were under the **‘dominion of the United States,’** Samuel clarified. “But that terminology seems to have gradually come out of use in the last one hundred years. Today we commonly hear that after the conquest of a territory by U.S.

military forces, it is described as ‘foreign territory under the jurisdiction of the United States.’”

“Are these distinctions important?” one student in the back row questioned.

“Well, they certainly might be . . . since most people do not have a clear grasp of what types of territory can come under the jurisdiction of the United States,” Samuel explained.

A fifth student in the front row stood up and read the information on his card.

Two Important Categories of Territory under U.S. Law

- Domestic territory under the jurisdiction of the United States
- Foreign territory under the jurisdiction of the United States

Note: In making these distinctions, full respect is being given for the fact that the United States of America is a sovereign nation.

“OK, so here you have conquered territory of the United States, and what if at some point you needed to talk about the ‘defensive responsibility’ for this territory? When might that be necessary?”

The fifth student attempted an answer. “I suppose the situation might arise that Tampico was attacked by the military forces of Nicaragua. That would be a valid example where you would need to talk about the ‘defensive responsibility’, would it not?”

“Yes, to be attacked by some nearby country would be very serious, and would require a strong response, but to be *threatened with attack* is also quite serious. That would also necessitate the determination of who is responsible for the defensive needs of the conquered territory and I think we have another quotation from Fleming v. Page.”

A sixth student stood up, then turned hesitantly to face the assembled students before reading.

The Law of Nations

The messages of the President to Congress during the war, and the instructions from the heads of departments, contain authoritative declarations as to the right of the United States to acquire foreign territory by conquest, and as to the effect of such conquest

upon the sovereignty of the conquered territory, in accordance with the principles above stated. Thus, the President, in his message of December, 1846, says: -- 'By the law of nations a conquered territory is subject to be governed by the conqueror during his military possession, and until there is either a treaty of peace or he shall voluntarily withdraw from it. The old civil government being necessarily superseded, it is the right and duty of the conqueror to secure his conquest, and to provide for the maintenance of civil order and the rights of the inhabitants. This right has been exercised and this duty performed by our military and naval commanders, by the establishment of temporary governments in some of the conquered provinces in Mexico, assimilating them as far as practicable to the free institutions of our own country.'

Samuel spoke in a more serious tone. "Today you were presented with a Summary of this Supreme Court case and some excerpts from the decision. Please note that in regard to the disposition of conquered territory, there is the phraseology of 'the customs and usages of war' and this is regarded as part of "the law of nations". Fundamentally, the scope of these 'customs and usages of war' are what we are referring to in this lecture series as the customary laws of warfare.

"However, a few additional points need to be noted. First, the conquered territory is regarded as 'acquired'. Court cases or legal commentary in the 1800s frequently describe Tampico as being acquired by the United States, and in some commentaries Mexico is described as 'acquired' as well. So, in the writings of some of these eminent judges or legal scholars in the 1800s, conquered territory is often described as 'acquired' or 'held in possession,'" and even 'assimilated' and military occupation is often described as 'an exercise of the rights of sovereignty.'

"Doesn't that deny the premise we have learned that military occupation does not transfer sovereignty?" The student in seat 23-11 blurted out. "Or is something being hidden? Are there certain conditions whereby the sovereignty of the conquered territory can be transferred immediately?"

Some students had leaned back in their chairs and were beginning to frown.

"This use of the words 'acquire,' 'possession,' assimilate may be somewhat different from the sense in which we use those words today. Let's go back to the U.S. Constitutional Convention in 1787," Samuel said.

A seventh student stood up.

On the Subject of “Dominions”

The delegates to the 1787 Constitutional Convention in Philadelphia were all intimately familiar with English law, and indeed *Blackstone's Commentaries on the Laws of England* (originally published 1765 - 1769 by the Clarendon Press at Oxford) are a standard reference for investigating the intent and scope of applicability of many clauses in the United States Constitution.

As we know, the difference between the “military occupation” of territory and territorial acquisition by “invasion and annexation” has been recognized among the principles of international law since the end of the Napoleonic Wars (circa 1820), and much earlier in some countries such as the United States and Great Britain.

Indeed *Blackstone's Commentaries*, compiled in the mid-1700s, also gave emphasis to this legal formulation. All of the territories Blackstone lists as **dominions** are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on.

Samuel interrupted. “To apply Blackstone's reasoning to the United States, we need merely substitute ‘federal government’ for ‘Crown,’ and the meaning becomes clear. Very importantly, here you see that Blackstone has used even stronger language to describe territory which he categorizes as ‘conquests’. In his scholarly opinion, they are sovereign territory of the Crown.”

The seventh student continued.

American Insurance Co. case

Indeed, as early as 1828, US Supreme Court Chief Justice Marshall offered this penetrating analysis in the famous American Insurance Company case:

"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."

“Let’s turn to Joseph Story’s *Commentaries on the Constitution of the United States*, published in Boston in 1833.”

An eighth student stood up and read aloud.

U.S. Constitution

Article 4, Section 3, Clause 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Joseph Story, *Commentaries on the Constitution*

Re: Article 4, Section 3, Clause 2

Section 1318. As the general government possesses the right to acquire territory, either by conquest, or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern, what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any state. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all. In cases of conquest, the usage of the world is, if a nation is not wholly subdued, to consider the conquered territory, as merely held by military occupation, until its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the government of the conqueror.

-- excerpted from the <http://press-pubs.uchicago.edu/> website
The University of Chicago Press

“Isn’t this commentary very much out of date?” the eighth student queried. “I mean we read about the U.S. Constitution in high school, but I always thought that some of the concepts and some of the analysis our teacher gave were rather out of date. This seems to be another example.”

“It comes back to the doctrine of ‘originalism,’” Samuel commented.

A ninth student stood up and read aloud.

Originalism

In the context of United States law, “originalism” is a concept regarding the interpretation of the Constitution that asserts that all statements in the constitution must be interpreted based on the original understanding of the authors or the people at the time it was ratified.

“In the current era, we frequently see that various decisions of our Supreme Court Justices are criticized for being too expansive, or overly broad in their interpretation, or straying too far away from the original meaning of the Constitution. So, what I am attempting to explain here is the original meaning of these clauses and how they were interpreted in the early days of the United States.”

“But you have just quoted from the territorial clause of the U.S. Constitution,” the eighth student pointed out. “Are you implying that after U.S. military forces conquered Tampico, it became subject to the territorial clause of the U.S. Constitution?”

“Well, according to the U.S. Supreme Court cases we just overviewed, including *Fleming v. Page* and *American Insurance Co.*, along with Blackstone's *Commentaries*, Joseph Story's *Commentaries*, and in consideration of the customs and usages of war of the post-Napoleonic period, I would hold that such an interpretation is entirely reasonable.”

“It is all quite confusing,” the student who had read the fifth card exclaimed.

“It is not confusing if you attempt to put all of this information together within a specific framework. That framework, of course, is the customary laws of warfare.” Samuel paused to let his statement sink in.

“The point that needs to be made is that when you are reading all of this data, commentary, analysis, court decisions, scholarly opinions, etc. from the late 1700s, the whole of the 1800s, and even into the early 1900s, you have to be cognizant of the fact that the way the terminology is used can often be somewhat different from the way it is used in the modern era, And for ‘modern era’ I would say from the 1940s up to the present,” Samuel attempted to explain further.

“How are we supposed to deal with that?” a student near the rear of the classroom blurted out.

“For military occupation issues, everything you read should be understood within the framework of JURISDICTION OVER TERRITORY,” Samuel explained. “Military occupation is military government jurisdiction. Contrary to that, if you read all of this within the framework of ANNEXATION OF TERRITORY, you will misconstrue everything.” He looked around the classroom. No one was moving; no hands were raised.

“Let’s continue next time with a discussion of the promulgation of new laws in occupied

territory,” he said. “The date and time are on your scheduling sheets. But we are changing to a different venue.”

He pulled a sturdy foldable carry-all bag out of his pocket. As he unfolded it, a large picture of Abraham Lincoln imprinted on its side became visible. “Beginning an hour before that class, there will be several people standing at the front entranceway of the old Pennsylvania State House here in Center City. It is located between Walnut and Chestnut Streets, just above South 5th Street. They will be carrying bags like this. Just ask them, and they will give you the exact address for the class, which is a seminar room in a large commercial building nearby.”

As the students began to gather their belongings, he continued “You will recall that the U.S. Constitutional Convention of 1787 met in that building. Personally, I prefer the nomenclature of ‘old Pennsylvania State House,’ however, the modern preference is just to call this building ‘Independence Hall.’”

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 7

**THE MEXICAN AMERICAN WAR EXTENDS
INTO THE ADMINISTRATION OF
PRESIDENT LINCOLN**
(A Thought Experiment)

[DATELINE PHILADELPHIA, PENNSYLVANIA]
PRESENT DAY

Samuel Whittenburg continued as the Moderator of the following session. “I seem to remember most of you from last time; however, there are a few new faces. It has been three weeks, so I hope you have had a chance to review the video of the previous class, and earlier classes, on the internet. Today we are in seminar room 23. We will begin today with Part 3 of the movie,” he said.

===== MOVIE PART 3 ===== COMPILATIONS OF LOW =====

[pictures of James Polk, Franz Lieber, and Abraham Lincoln appeared on the screen]

COMPILATIONS OF THE "LAWS OF WAR" (LOW)

The Mexican American War occurred during the administration of President James Polk. Some fifteen years later, President Lincoln promulgated the Lieber Code. With respect to making compilations of the customary laws of warfare of the post-Napoleonic period, this was an important milestone.

Franz Lieber and the drafting of the Lieber Code

The Lieber Code of April 24, 1863, was an instruction signed by U.S. President Abraham Lincoln to the Union Forces of the United States during the American Civil War that dictated how soldiers should conduct themselves in wartime. Its name reflects its author, the German–American legal scholar and political philosopher Franz Lieber.

On its website, the International Committee of the Red Cross has the following description

–

The "Lieber Instructions" represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The "Lieber Instructions" strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.

Lieber had fought for Prussia in the Napoleonic Wars and had been wounded at the Battle of Waterloo. He had lived and taught for two decades in South Carolina. Beginning in October 1861, as professor of history and political science at what later became Columbia University, Lieber delivered a series of lectures at the new Law School entitled "The Laws and Usages of War." He believed the methods used in war needed to align with the goals and that the ends must justify the means.

While traveling in St. Louis, Lieber met Union General Henry Halleck, who had been a lawyer in civilian life and had published *International Law, or, Rules Regulating the Intercourse of States in Peace and War* in early 1861. In the summer of 1862, Lieber was invited to share his research with Secretary of War Edwin Stanton.

By year's end, Halleck and Stanton invited Lieber to Washington to revise the 1806 Articles of War. Lincoln issued the Lieber Code in April 1863, complete in 157 Articles.

Having been compiled and published in the 1860s, the Lieber Code became a part of the customary laws of warfare, and indeed it became an important reference for compilations made in later years.

In the modern era, and specifically in keeping with the purpose of this lecture series, we will want to make reference to a compilation of the Laws of War which was published in 1940. This will be quite important for us when we discuss the many developments arising from WWII in the Pacific. These developments will be a major point of focus when we do our overview of the development of the legal status of Taiwan.

First, let us turn to Basic Rules and Principles, as outlined in Chapter 1 of this volume.

FM 27-10
War Department Field Manual

RULES OF LAND WARFARE

WAR DEPARTMENT
October 1, 1940

CHAPTER 1
BASIC RULES AND PRINCIPLES

1. General. -- Among civilized nations the conduct of war is regulated by certain well-established rules known as the rules or laws of war. These rules cover and regulate warfare both on land and sea. Those which pertain particularly to war on land are called the rules of land warfare. It is the latter with which this manual is concerned.
2. Written rules. -- Many of the rules of war have been set forth in treaties or conventions to which the United States and other nations are parties. These are commonly called the written rules or laws of war.
3. Unwritten rules. -- Some of the rules of war have never yet been incorporated in any treaty or convention to which the United States is signatory. These are commonly called the unwritten rules or laws of war, although they are well defined by recognized

authorities on international law and well established by the custom and usage of civilized nations.

4. Basic principles. -- Among the so-called unwritten rules or laws of war are three interdependent basic principles that underlie all of the other rules or laws of civilized warfare, both written and unwritten, and form the general guide for conduct where no more specific rule applies, to wit:

- a. The principle of military necessity, under which, subject to the principles of humanity, a belligerent is justified in applying any amount and any kind of force to- compel the complete submission of the enemy, with the least possible expenditure of time, life, and money;
- b. The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and
- c. The principle of chivalry, which denounces and forbids resort to dishonorable means, expedients, or conduct.

5. Force of rules. -- The unwritten rules are binding upon all civilized nations. They will be strictly observed by our forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy.

Chapter 10 of this edition of FM 27-10 is entitled “MILITARY OCCUPATION AND GOVERNMENT OF ENEMY TERRITORY,” and contains 74 paragraphs.

As we might expect, the first paragraph in Chapter 10 is –

Territory is considered occupied when it is actually placed under the authority of the hostile army.

This is a direct quote from the Hague Regulations (H.R.) of 1907, Article 42.

The Lieber Code and FM 27-10

Some graduate students in International Humanitarian Law have previously posed the questions -- Do the laws of war compiled by these early scholars ever become defunct? What if I read through the Lieber Code and I find a rule or stipulation which is not mentioned in FM 27-10? Does this mean that that rule has expired or been canceled?

In responding to this, we might first look at the stated purpose of the compilation of FM 27-10.

The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States. Although certain of the legal principles set forth herein have application to warfare at sea and in the air as well as to hostilities on land, this Manual otherwise concerns itself with the rules peculiar to naval and aerial warfare only to the extent that such rules have some direct bearing on the activities of land forces.

Next, it must be pointed out that Chapter 10 of this Manual appears most relevant to our discussion in this lecture series. But of course, some Articles of the Lieber Code may have been edited into other Chapters of FM 27-10. That would be an explanation of why some particular rule or specification compiled in the 1860s was not in Chapter 10 of this Manual compiled in the 1930s and published in 1940.

Additionally, some Articles of the Lieber Code may have been edited into what was formerly called the “Articles of War,” and which were compiled for the purpose of governing the conduct of the United States military forces. These regulations were separately promulgated as the *Uniform Code of Military Justice* on May 31, 1951.

Still other Articles may have already become so widely known, and so thoroughly documented, that they are considered common sense, so they are no longer included in written compilations of this material. Indeed, even before the compilation of the Lieber Code, we could note that –

1) There was much content of the customary laws of warfare which was not written down in any compilation, but was well documented as part of the “custom and usages of war.”

Moreover, a further factor which we must be aware of is –

2) There are some differences in the use of terminology between the Lieber Code and the content of FM 27-10.

Let’s turn to this second issue and deal with it first.

A large map of North America and Central America appeared on the screen, and then

zoomed into the southern portions of the states of California, Arizona, New Mexico, Texas, and Louisiana, as well showing all of Mexico and most of its southern neighbor Guatemala. Major cities in all these areas were indicated.

Distances Travelled by the U.S. Army

The screen zoomed into to Texas and then zoomed out again. The announcer was an attractive woman who was introduced as a former U.S. Congresswoman from Texas. She explained the geographic details as some lettering was overlaid on the screen --

Doing a rough estimate of the distance from El Paso, Texas, (which is at the southwest corner of the state) to the Guatemala border, we get a figure of about 1865 miles (3000 km).

If we separate this distance horizontally on a map, in one hundred km segments, and use light-gray colored lines to separate each segment, we will be able to draw thirty lines. Each segment represents a distance of 62 miles (100 km). This map with thirty gray lines appeared on the screen and was labeled as the Mexican Incursion Map.

Our question is: How far south did U.S. military troops get in the Mexican American War?

The screen image now changed to a wide-angle view of the historic Hollywood Walk of Fame on Hollywood Blvd. in Hollywood, California. As the scene zoomed in, a well known U.S. television talk show host became visible, and a large version of the Mexican Incursion Map was mounted on a wall behind him. He was surrounded by a large group of people, no doubt tourists visiting this famous area.

The T.V. host was pointing back and forth at the map, and at people in the crowd. Some people ventured forward and placed a hand on the map at various places.

This scene continued, and then a graphical summary appeared on the screen. A total of 250 people had offered their opinions. Separating these answers into groups, --

- The first group, composing nearly 28% of the total, guessed “Within 310 miles (500 km).”
- The second group, composing another 40% of the total, felt the correct answer was beyond this, but “Within 620 miles (1000 km).”
- The third group, another 20%, guessed the correct answer was beyond that, but

“Within 930 miles (1500 km).”

- The fourth group, comprising another 12% of the total, held that the correct answer was beyond group three’s estimate, but “Within 1088 miles (1750 km).
- The remaining answers ranged all over the place, with some people estimating that U.S. troops fighting in the Mexican American War had gotten as far south as Bogota, Colombia; Lima, Peru; Buenos Aires, Argentina; or even the Strait of Magellan at the southern tip of South America.

In fact, the correct answer would be a distance of approx. 1120 miles (1800 km), which is just somewhat beyond the estimate of the fourth group. That would be the 18th segment on the map.

U.S. General Winfield Scott was in Mexico City, and proclaimed that the city was under _____ effective as of the date of Sept. 17, 1847.

The T.V. host who had just been questioning tourists on Hollywood Blvd. appeared on the screen and asked: “What is the correct terminology to put in the blank?”

===== MOVIE ===== END OF PART 3 =====

The lights came back on. Samuel passed a card to a female student in casual clothing. She stood up, adjusted her glasses, and read aloud.

DEFINITIONS:

[as used in the United States legal system]

1. **Military government** is the form of administration by which an occupying power exercises governmental authority over occupied territory.
2. **Martial law** is the temporary government of the civil population of domestic territory through the military forces, as necessity may require, and governed solely by the domestic law of the United States.

Samuel asked her to take a hand count of the members of the class, to answer the question posed by the T.V. host. It was a simple matter to make a quick determination of which term best fit the situation in Mexico City in Sept. 1847.

The overwhelming majority of the students voted for (1), military government.

Samuel nodded slowly. “This is the problem we have in reading the Lieber Code, and in a lot of information promulgated by U.S. military personnel **before** the Ex parte Milligan decision of the U.S. Supreme Court in 1866. Unfortunately, before that time, we often saw that the use of these terms was not standardized.”

A copy of the document promulgated by General Scott came on the screen. “As you can see, it says ‘Martial Law Order’.”

“President Abraham Lincoln got the terminology right. At the outset of the Civil War, in July 1861, Congress ratified most of the martial law measures which he had declared. Those martial law declarations gave the Union military forces the authority to arrest persons and conduct trials in areas in rebellion against the national government.”

The screen came on and more information regarding martial law appeared.

Martial law on the national level may be declared by Congress or the President, but in practice; however, this is extremely rare. Under Article I, Section 8, Clause 15, of the Constitution, Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions." Article II, Section 2, Clause 1, of the Constitution declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

Neither of these clauses in the Constitution includes a direct reference to the terminology of martial law. However, the Supreme Court has interpreted both to allow the declaration of martial law by the President or Congress. On the state level, a Governor may declare martial law within the state's boundaries. The power to do this is usually granted in the state constitution.

He continued. “The decision of the Justices in Ex parte Milligan (1866) appears to have standardized the use of these terms in the fashion we are familiar with today, and in the way which they are used in FM 27-10.”

“Which would mean that in Sept. 1847, Mexico City was correctly viewed as being under United States Military Government (USMG) jurisdiction,” a student in the third row stated.

“Precisely.”

Unwritten and Uncodified Content

“Alright, now we can return to our first concern. I previously stated that there was much content of the customary laws of warfare which was not written down in any compilation, but was well documented as part of the ‘custom and usages of war’. Does anyone have questions on that?” Samuel inquired.

A female student at the front of the room appeared happy to have a chance to ask an easy question. “What would be an example of this? I mean it would be some content of the customary laws of warfare which has not been written down in any compilation from the early 1800s to the present, but is well respected as part of the customs and usages of war?”

“That is it. You are looking for a rule which is always followed, and for which we can find abundant examples in history, in the time period you mentioned, and which therefore could be easily documented as part of the customary laws of warfare,” Samuel attempted to rephrase her question, “but at the same time we don’t find it written down in any compilation of this material That is your question, correct?”

“Yes,” she said, “I am wondering what an example of that would be.”

Samuel looked around the seminar room. “Any ideas?”

No hands went up.

Samuel took three cards out of his pocket and handed them to a quite formally dressed student in the front row. “Please read.”

The student stood up slowly, straightened his tie, turned, and addressed the student body.

<h3>A Customary Rule of Warfare</h3>

<p>This rule is always followed, but it is not known to be contained in any military manuals or other compilations of relevant instructions rules, guides, laws, regulations, directives, or tenets.</p>
--

He cleared his throat before continuing.

RULE

After the treaty comes into force, any (foreign) military forces still in territory not ceded to their country should promptly leave, and/or establish a definitive timetable as to when they will leave.

EXCEPTIONS: Two notable exceptions to this RULE would be as follows: (1) When other specific arrangements are made in the treaty; (2) when the (foreign) military forces negotiate a formal SOFA with the recognized legal government of the area.

EXPLANATION

The application of this RULE was clearly seen in the situation of Mexico. Although U.S. troops had made incursion into Mexican territory approx. 1120 miles (1800 km) further south than the current USA-Mexican border, none of these lower regions were inside the territory ceded to the United States, or more precisely “within the new boundary line drawn between Mexico and the United States.” Therefore with the coming into force of the Mexican American Peace Treaty, the proper action was for the U.S. troops to leave. And that is exactly what they did.

After the peace treaty has come into force, such statements as “We are here, so the territory belongs to us,” or “Our citizens and our military officers visited this territory in previous eras, so we have a historical claim to sovereignty,” etc. are not acceptable under modern norms of international law.

The application of this RULE was also seen in the four territorial cessions of the Spanish American War. Those four territories were all ceded to the United States Military Government (USMG). The original sovereign was Spain, and her military forces all left before, or within a relatively short time after, the peace treaty came into force in April 1899.

“Thank you,” Samuel smiled, and your name is ____?”

“Hemmelton.”

‘Excellent. If anyone finds that some of that explanation is difficult to follow, don’t worry, we will discuss those aspects in detail when we overview the Spanish American War.’

One hand went up in the back of the seminar room, and a question was asked about SOFA.

“Oh, yes,” Samuel said. “SOFA means Status of Forces Agreement.”

The screen came on again and more information appeared.

A status of forces agreement (SOFA) is an agreement between a host country and a foreign nation stationing military forces in that country. SOFAs are often included, along with other types of military agreements, as part of a comprehensive security arrangement. However, a SOFA itself does not constitute a security arrangement; it merely establishes the rights and privileges of foreign military personnel present in a host country in support of the larger security arrangement.

Under international law, a SOFA is **not** equivalent to military government jurisdiction (i.e. “military occupation”).

“But coming back to the application of the RULE we are discussing here, the key point is that we need to study the post-war treaty carefully, and make sure that all (new) arrangements are carried out according to the terms of the treaty. And of course this will be very important in determining the future defense responsibility for all areas under the geographic scope of the treaty.”

A female student sitting near the middle of the seminar room waved her hand. “So, in the Mexican American Peace Treaty, for example, Tampico was **not** awarded to the United States, so of course, the U.S. military troops must leave,” she said. “And in the future, if Nicaragua or Honduras launch an attack against Tampico, Mexico, then it is clear that the Mexican government bears the responsibility for the national defense. But, if the U.S. military forces do not leave, and the attack by Nicaragua or Honduras occurs, then the legal status of Tampico and the responsibility for its defense become very muddled.” She paused to catch her breath. “That is my understanding.”

“And you are _____?” Samuel inquired.

“Amanda.”

“Thank you. Your remarks are quite insightful. And we might expand this into a **Thought Experiment** to gain even more insights,” Samuel suggested.

“Different moderators may occasionally introduce various Thought Experiments into our lecture series. This will be one. Let’s suppose that the Mexican American War had extended into the administration of Abraham Lincoln, and in the early months of 1865 the Government of the Confederacy had fled to Tampico, and driven out the pre-established ‘Union forces’ which had (for some unexplained reason) remained there after the treaty of peace with Mexico was finalized.”

Pictures of the U.S. flag (thirty-six stars) and the Confederate flag appeared on the screen.

“So, you are speaking of the Union forces that did not leave Tampico when the Mexican American Peace Treaty came into force in 1848, and continued their governance of that port city, even though the peace treaty contained no such provisions,” Amanda remarked. “and this is being put in the form of a Thought Experiment, is this correct?”

“Yes, correct. The U.S. Civil War ended in early April 1865, but we are supposing that the Government of the Confederacy is now well established in Tampico, Mexico. Our question becomes: What is their legal status there?” Samuel questioned.

“It is a straightforward situation of military occupation, is it not?” the student sitting in seat 23-11 commented.

“Military occupation, I would agree,” Samuel stated. “But straightforward, probably not. The Civil War ended on April 9, 1865. The history books tell us that President Davis met with his Confederate Cabinet for the last time on May 5, 1865, in Washington, Georgia. They officially dissolved the Confederate government on that date. So, after that time, even if his government officers announce the official transfer of their central government offices to Tampico, they can only be classified as a government in exile.”

Some of the students seemed perplexed at this remark.

“The classification of a government in exile arises from the fact that the Government of the Confederacy has completely departed the area, (i.e. primarily encompassing South Carolina, Mississippi, Alabama, Florida, Georgia, Louisiana, Texas, Virginia, Arkansas, Tennessee, and North Carolina) where it had any claim to territorial sovereignty.

“With that clarification out of the way, where do we go from here?” Samuel asked.

“In my opinion, if the Government of the Confederacy wants to bolster its military

resources, of course, its most obvious move is to immediately institute a mass naturalization of the local populace in Tampico and the surrounding area, and then announce the imposition of military conscription policies over the local Mexican populace,” student 23-11 spoke up. “That will ensure that it has adequate military personnel on hand in the event of any attack by the military forces of any neighboring countries.”

“Mass naturalization and military conscription in occupied territory are war crimes,” Samuel stressed, but several female students seemed alarmed at this statement. He paused briefly. “Well, to use softer language, we can just say that these are major violations of the customary laws of warfare.”

“But what is the Government of the Confederacy supposed to do?” the student in seat 23-02 questioned. “I mean if it is prohibited from drafting new personnel into its armed forces? Why can’t it promulgate laws such as these?” She flipped open a small notebook on her desk. “I was looking at my notes here, and last time you specifically mentioned that in this session you would discuss the promulgation of new laws in occupied territory.”

“Yes, Samuel said, “and now is a good time to bring that up. The general rule, as established in the customary laws of warfare, and later more carefully codified in Chapter 10 of FM 27-10, in the 1940 edition, is this.

An occupant may create new laws for the government of a country. He will promulgate such new laws and regulations as military necessity demands. In this class will be included those laws which come into being as a result of military rule; that is, those which establish new crimes and offenses incident to a state of war and are necessary for the control of the country and the protection of the army.

Student 23-02 seemed somewhat perturbed. “But, undertaking a mass naturalization and implementing military conscription procedures over the local populace, those are all based on the need to defend the territory in case of attack! How can those actions fail to meet the criteria of ‘military necessity!’”

“Well, some actions are specifically forbidden,” and those are two of the most common ones. Making an announcement of the annexation of the territory is also forbidden,” Samuel clarified. “Seizure of private and public property is also forbidden.”

“So, how are we to know which are which?” the student seemed somewhat exasperated.

“Well, that brings us back to the subject of the assigned outside reading for this course. For starters, I suggest the Hague Regulations of 1907, and FM 27-10 of 1940. Those are very good references for this lecture series,” Samuel added. “As a general rule, you have to look at the underlying rationale for the new laws being issued. What are the underlying premises? If it is for the betterment of relations between the occupying forces and the local inhabitants? If so, then that would most likely be considered reasonable. If it amounts to a violation, or multiple violations, of the local inhabitants’ human rights, property rights, etc. then that is no doubt illegal, and a violation of the laws of war. For reference, you would want to look at what kinds of laws have been issued in other localities of the world, in areas that came under military occupation.”

“How about promulgating an entirely new Constitution for the occupied territory?” another student asked.

“Well, you are raising the subject of a new Constitution, and I don’t know all the specific details of its content, but I would assume that it would be illegal. I mean what is it based on? Is it making the assumption that the occupied territory has already been annexed? And that all public property has been seized? And that the ‘government’ has the power of eminent domain? Is it based on previous mass naturalization of the local populace, and saying that they are citizens or nationals of the country promulgating that Constitution? And that they have the duty of allegiance to that country? And that criminal penalties apply to any act which appears to be harboring the intent to promote sedition? In occupied territory, those all sound like gross human rights violations to me.”

“But what about military necessity?” student 23-02 pressed her point further.

“No, you have exceeded it,” Samuel stated rather sternly.

“What’s left?” the student asked in a somewhat irritated tone.

“It is what I said before,” Samuel said. “What the occupant is supposed to do is to study the post-war treaty carefully, and make sure that all new arrangements are carried out according to the terms of the treaty. As part of the parameters for this Thought Experiment, we have already established the fact that after the Mexican American War, regardless of whether it was fought over three years, six years, or eighteen years, or more the post-war treaty did not award Tampico to the United States. So, in light of that, whether Tampico is occupied by U.S. military forces that are loyal to the ‘Union’ or

loyal to the ‘Confederacy,’ it doesn’t really matter. What is important is that they should leave.”

“In the real world, I would imagine that this RULE is uniformly followed,” the student in seat 23-9 stood up and walked to the front of the seminar room. She approached the student holding the three cards, and took them from him. She held up the second card, and then read it aloud again.

RULE

After the treaty comes into force, any (foreign) military forces still in territory not ceded to their country should promptly leave.

“And in the 19th, 20th, and even the 21st centuries, if you didn’t follow that RULE, then you would probably have some international coalition demanding that you follow the correct course of action!”

“Maybe yes, maybe no,” Samuel commented dryly.

A male student in seat 23-15 commented loudly: “What? In the present day, I feel confident that the members of the United Nations would be passing Resolutions to have you expelled from the territory which you illegally occupied!”

“Maybe yes, maybe no.”

“There would be an international outcry!” another student stated loudly.

Samuel shrugged.

“I don’t understand why you are adopting such a non-committal attitude,” student 23-15 remarked pointedly.

Samuel clicked his remote control, and a picture of the United Nations Headquarters in New York City came on the screen. “Maybe the people representing the membership of the United Nations are themselves very unclear about the content and scope of the customary laws of warfare,” Samuel offered. “Maybe they have never heard the story of the South American Mansion, and they think that for any transfer of the ownership of real estate, there can be extenuating circumstances that somehow change the basic nature

of the transaction. Maybe they think that people who don't have legal possession of certain real estate can still make *quote unquote* valid promises to transfer the ownership of that real estate to a third party."

"Maybe they are unfamiliar with the concept of customary law, and don't recognize that it is binding on all parties concerned," Samuel continued. "Maybe they have not heard of the unwritten RULE which we are discussing here today."

"Wait a minute," Hemmelton stood up rather excitedly. "I think I just thought of something. What was the name of the treaty after the defeat of Japan in WWII?"

"The San Francisco Peace Treaty. It came into force on April 28, 1952," student 23-9 answered, then sat down in an empty seat in the front row.

"Was Taiwan awarded to the Republic of China in that treaty?"

"No," Samuel stated emphatically. "The official position of the U.S. State Dept., as detailed in a 1961 Memorandum on the "Legal Status of Taiwan" was that –

The most tenable theory regarding the status of Formosa and the Pescadores is that sovereignty over the islands has not yet been finally determined.

"But," Hemmelton said, "let's look at the U.S. Presidents in the following years. Eisenhower moved into the Whitehouse on Jan. 20, 1953, and served for eight years. Then we had Kennedy, Johnson, Nixon When was Nixon in office?"

Samuel clicked his remote control and a picture of Richard Nixon appeared. His dates in office were shown on the side –

Jan. 20, 1969 to Aug. 9, 1974

"Alright, so when I was growing up in California, I always heard that Mr. Nixon had been a real wheeler-dealer," Hemmelton smiled. "So, let me ask this, 'Who or what was considered to be the legal government of Taiwan during Mr. Nixon's administration?'"

Several students raised their hands. One said: "Of course, it was the Republic of China."

"But the post war San Francisco Peace Treaty didn't award Taiwan to the Republic of China," haven't we established that?" Hemmelton looked at Samuel somewhat hesitantly.

Samuel reassured him. “You are doing a good job, and I think you are on to something. Keep going!”

“It looks like a big diplomatic mess to me,” Hemmelton said. “Why didn’t the Republic of China government leave Taiwan when the San Francisco treaty came into force?”

The seminar room was silent.

One student ventured an idea: “The communists had already overrun the China Mainland. Millions of supporters of the Republic of China had already fled to Taiwan, and they couldn’t go back.”

A male student wearing a blue dye-tied shirt and sitting in the back of the seminar room spoke up. “President Davis had a similar problem when he met with his Confederate Cabinet on May 5, 1865. The course of action they chose was” his voice trailed off.

Hemmelton didn’t seem to hear him. “But then there was Nixon,” and he wanted to make a name for himself in the history books. He thought an excellent way to do that would be to establish formal diplomatic relations with the communist regime in Beijing, China. That was a regime which the United States had never recognized since its founding on Oct. 1, 1949.”

Samuel clarified this point further. “We had always recognized the Republic of China, which was founded in Nanjing, China, in 1912, and which the USA formally recognized, originally, as the sole legitimate government of China in July 1928. We continued recognizing the ROC all through the WWII years, into the 1950s, 1960s, and even into the late 1970s, as the ‘legal government of China’.”

“But Taiwan was formally ceded to Japan in an 1895 treaty,” Hemmelton commented.

“Yes, and the United States recognized the validity of that in the 1922 Washington Naval Treaty,” Samuel pointed out. “In that treaty, we recognized Taiwan as an insular area of Japan.”

“So, the issues become even more muddled,” Hemmelton’s brow seemed to furrow, “Considering that the Republic of China moved its central government to Taiwan in December 1949, and after the coming into force of the post-war treaty in late April 1952

the U.S. government was continuing to recognize the Republic of China as the legal government of China, we need to know the answer to one important question: When was Taiwan returned to China?”

Several hands went up. One student spoke up. “The Republic of China regime announced Taiwan Retrocession Day on October 25, 1945, the date of the Japanese surrender ceremonies in Taiwan. They claimed that the territorial sovereignty of Taiwan was returned to China on that date.”

Hemmelton waved his hands in the air as if to lodge a protest. “But under the customary laws of warfare, the surrender ceremonies mark the beginning of the military occupation. Moreover, military occupation does not transfer sovereignty.”

The student who offered the explanation of Taiwan Retrocession Day was quick to offer some additional reasoning. “Well, Taiwan would be considered the sovereign territory of the Republic of China because the local people were all mass naturalized in January 1946, and then the Republic of China Constitution was promulgated in Taiwan effective late 1947, and as you said the ROC formally moved its central government to Taiwan in early December 1949. Then a few years later mandatory military conscription policies were implemented so, all of these factors would serve to bolster the legitimacy of the Republic of China regime in Taiwan.”

“Of course, with the ROC administration firmly in place, there were protests from some of the local Taiwan people, but the ROC officials contributed that to the brain-washing the local populace had received during fifty years of Japanese governance,” she added. “In order to ensure social stability, martial law was declared in Taiwan effective May 20, 1949.”

“Martial law declared in territory which has been proclaimed as ‘annexed’, in violation of the laws of war,” Samuel said non-committally. “A curious legal arrangement, indeed.”

“And I repeat it looks like a big diplomatic mess to me,” Hemmelton stated emphatically. The creases in his brow were becoming more noticeable. He began to talk again. “For some reason, I just started to think about the publishing house my father used to own. The story seems relevant; I hope you don’t mind if I tell it.”

“Go ahead,” Samuel said.

Hemmelton began his narrative. “Well, my grandfather formerly owned a large publishing

business. My father inherited it. I will give it a fictitious name; let's call it 'Poppentuttle Publishing.' Over the years, however, my father gradually became aware of various aspects of new technology, and in the 1990s, he learned of this new invention called the internet. He forecast that in the not too distant future there would be large quantities of books, magazines, and other information, including whole libraries, available on the internet. Realizing that, he decided he should look for some buyers for his publishing business while it was still profitable.

“It was some time before some potential buyers could be located, and they were kind of ambivalent about this publishing house's future prospects.

“Finally, my father had an idea. He decided to take out some big advertisements in some writers' magazines. His advertisements said that his publishing house was having a large competition for new books in six different categories, and that winners would each be awarded with a large amount of prize money. However, the conditions of the contest were that the publishing rights to these books would be sold outright to Poppentuttle Publishing. There would be no further royalty payments. He hired a legal consulting firm, and the prize money was put in escrow in a local bank.

He had lots of submissions for new books. He and his Editorial Board chose over thirty new books, and the prize monies were paid out.

An Asian publisher with an interest in expanding into the American market was located. The Editorial Staff there were extremely happy that my father had already negotiated for the outright purchase of over thirty new book manuscripts, and that these were ready to be published, with no need for royalty payments.

“Moreover, my father explained that those thirty new book manuscripts were all included in the purchase price for Poppentuttle Publishing, as originally quoted in previous meetings, when their initial negotiations had been held in Hong Kong and Seoul.

“On that basis, the sale of my father's publishing house was quickly finalized,” Hemmelton said, concluding his narrative.

“Well, in the field of negotiation, there is a name for that,” Samuel pointed out.

“A large gift to sweeten the deal” Hemmelton said, “I believe that is what it is called.”

“What about Nixon and Kissinger?” Samuel asked.

“They wanted to negotiate an agreement to establish diplomatic relations with the People’s Republic,” Hemmelton said.

Student 23-9 stood up. She adopted a serious tone. “And they needed a large gift to sweeten the deal.”

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 8

**DISPUTES OVER THE CONTINUATION OF
MILITARY GOVERNMENT IN CALIFORNIA
TERRITORY, 1848**

[DATELINE SACRAMENTO, NORTHERN CALIFORNIA]

PRESENT DAY

“I want to thank everyone for coming. I hope that the travel arrangements made by those of you from out of town were convenient. You will probably have some time to do some touring in the area during your stay here. Notable tourist attractions are the California State Railroad Museum, the Crocker Museum of Art, the California Automobile Museum, the Sacramento Zoo, the State Capitol, and others.

“For those who like to go jogging, there is the American River Bike Trail designed for cycling, jogging, walking, and horseback riding. The nearby parks also allow fishing and picnicking.

“Now returning to the subject of today's session, let's start off by looking at a map of California from the early 1800s.”

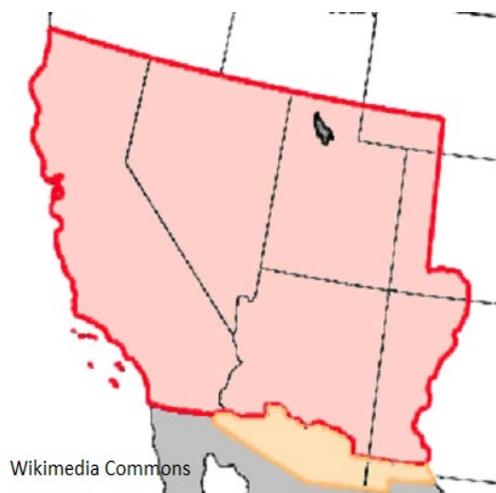
Images came on the large screen at the front of the classroom.

Map of Mexican California



“And a map of the territory ceded by Mexico after the war, the so-called Mexican cession.”

Mexican cession



“Following the Treaty of Guadalupe Hidalgo (May 30, 1848) that ended the war, (commonly called the Mexican American Peace Treaty), the westernmost portion of the newly obtained Mexican territory of Alta California soon became the American state of California, and the remainder of the this ‘California territory’ was later subdivided. Of course, many people simply called this area California, . . . and you can see that at that time California was much larger than today.

“Over the years, the eastern portion of this ‘California territory’ was subdivided into the new American Territories of Arizona, Nevada, Colorado, and Utah, as well as becoming parts of New Mexico and Wyoming. The lightly populated and arid lower region of old Baja California remained as a part of Mexico.

“I will be your moderator for today’s lecture. My name is Elizabeth Mackelburg. Now let’s sit back and watch the movie.”

===== MOVIE PART 4 ===== USMG IN CALIFORNIA =====

The host of the movie was introduced on screen as a prominent U.S. tax attorney practicing in San Francisco. She began the narrative --

Arguments in California about U.S. Military Jurisdiction

On May 13, 1846, the U.S. Congress declared war against Mexico.

We discussed the situation of Tampico, Mexico, in a previous lecture. A more involved situation occurred in California territory, which was separated from Mexico in the peace treaty and became part of the United States. Mexican forces had been defeated, and (Upper) California had been progressively occupied by U.S. military forces by late 1846, and early January 1847. United States Military Government (USMG) was in force, and the U.S. flag was flying.

According to the U.S. State Dept. publication *Treaties in Force*, the Mexican American Peace Treaty (aka Treaty of Guadalupe Hidalgo) came into force on May 30, 1848. However, some other sources give alternate dates, such as July 4, 1848.

Areas Conquered by U.S. Military Forces and therefore under USMG Jurisdiction -- with later "new disposition" by peace treaty

Area	Treaty	Treaty came into force	End of USMG	USMG supplanted by
California	Treaty of Guadalupe Hidalgo, Art. 5	May 30, 1848	Dec. 20, 1849	civil government for California (USA)

In 1848, after the conclusion of the treaty of peace with Mexico, an import firm doing business under the name of Cross, Hobson, & Co., imported various goods from foreign places into the United States. These goods were assessed import duties by U.S. military officials at the port of San Francisco. The firm disputed that such customs duties should be paid, and after failing to resolve their disagreement with the U.S. customs collector, Edward Harrison, then filed a lawsuit for recovery of these customs duties. Their rationale was that under international law and U.S. law, USMG established in California territory as a result of the Mexican American war could only operate while hostilities were in progress. Hence, after the conclusion of the treaty of peace with Mexico, there was no longer any legal basis for the operation of such a military government or the collection of customs duties by its officers in ports of California.

This case was argued at several levels of the U.S. court system, eventually reaching the U.S. Supreme Court. The Court addressed several issues, among the most important of which was:

Within the customs and usages of war, --

Whether (1) the United States Military Government, established in California during the period of hostilities in the Mexican American War, did continue functioning past the date when the peace treaty came into effect, and (2) whether officials of such military government had the right to collect customs duties continuing past such date.

Cross v. Harrison U.S. Supreme Court (1853)
--

After lengthy debate, the decision of the Justices held that the government, of which Colonel Mason was the military governor, had its origin in the lawful exercise of a

belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States, James Polk. It was the government when the territory was ceded in the peace treaty, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace.

The pictures of four U.S. Presidents who served from the mid-1840s to the mid-1850s appeared on the screen, along with their dates in office.

<i>11) James K. Polk</i>	<i>March 4, 1845 to March 4, 1849</i>
<i>12) Zachary Taylor</i>	<i>March 4, 1849 to July 9, 1850</i>
<i>13) Millard Fillmore</i>	<i>July 9, 1850 to March 4, 1853</i>
<i>14) Franklin Pierce</i>	<i>March 4, 1853 to March 4, 1857</i>

The narrative was continued by a U.S. Army officer who had formerly served in Iraq, but was now stationed at Fort Bliss, an Army base located in El Paso, Texas. He explained --

This is one of the most important concepts which we need to learn about military occupation, and indeed it is exactly what we will see in our future overviews of the legal developments of Cuba, Guam, Puerto Rico, and the Philippines after the Spanish American War. It may be summarized by saying that after war, in situations where a territory is separated from the "motherland" via the specifications of a peace treaty, the military government of the legal occupier does not end with the coming into force of that treaty.

Your moderator will provide more details in the follow-up discussion. The following definitions will be helpful for gaining a more in-depth understanding.

Civil Government v. Military Government

<p>Civil Government -- [in the practice of the United States] (1) administrative authority conducted by civilian officials in a government of a territory (or a state) under constitutional powers of the US Congress, (2) a government as distinguished from "military government."</p> <p>Military Government -- [in the practice of the United States] (1) administrative authority used for "foreign territory" under control by conquest; (2) the international laws of "martial law," (3) in general, military government is the form of administration by which</p>
--

an occupying power exercises governmental authority over occupied territory; however, it may be composed of both civil and military components. (4) RULE: Military government continues until legally supplanted.

The Northwest Territory

The Northwest Territory in the United States was formed after the American Revolutionary War, and was known formally as the “Territory Northwest of the River Ohio.” It included all the land west of Pennsylvania, northwest of the Ohio River, and east of the Mississippi River below the Great Lakes. It spanned all or large parts of six eventual U.S. States (Ohio, Indiana, Illinois, Michigan, Wisconsin, and the northeastern part of Minnesota). It was created as a Territory by the Northwest Ordinance on July 13, 1787. On August 7, 1789, the new U.S. Congress affirmed the Ordinance with slight modifications under the U.S. Constitution.

The United States Constitution and National Territory

The United States Constitution was drafted during the period of May 25, to Sept. 17, 1787, when the final version was produced.

On June 21, 1788, the constitution had been ratified by the minimum of nine states required under Article VII. Towards the end of July, and with eleven states then having ratified, the process of organizing the new government began. The Continental Congress, which still functioned at irregular intervals, passed a resolution on September 13, 1788, to put the new Constitution into operation with the eleven states that had then ratified it.

The United States federal government began operations under the newly ratified Constitution on March 4, 1789. By the end of 1789, the United States was functioning with twelve states and the Northwest Territory. The final state, Rhode Island, subsequently ratified the Constitution on May 29, 1790.

The history of the United States, therefore, includes states and territories.

Incorporated v. Unincorporated Territory

Incorporated: Under United States law, incorporated territory is territory that is on its way to statehood.

All territories acquired by the United States *before 1898* were classified as “incorporated” by default.

Through all of U.S. history before 1898, regions that were admitted to become U.S. states were, for the most part, prior to their admission to the Union, territories, or parts of territories. As the United States grew, the most populous parts of the territory (“incorporated” by default) would achieve statehood. The remainder frequently kept at least some of the governing structure of the old legal entity (territory); however, they would be renamed to avoid confusion.

Some territories existed only a short time before becoming states, while others remained territories for decades. The shortest-lived was Alabama Territory at two years, while New Mexico Territory lasted more than 50 years.

Unincorporated: Under United States law, an unincorporated territory is an area where the U.S. Constitution applies only partially. This classification of territory arises from a series of U.S. Supreme Court cases decided in the period of 1901 to 1905. In unincorporated territories, "fundamental rights apply as a matter of law, but other constitutional rights are not available" unless enacted via the specifications in a local constitution. Selected constitutional provisions apply, depending on congressional acts and judicial rulings according to U.S. constitutional practice, local tradition, and law.

All overseas territories acquired by the United States *after 1898* have been classified as “unincorporated” by default. Hawaii is the lone exception.

The United States government currently recognizes 13 unincorporated territories. Whether there is *an additional one* which has not been recognized is subject to debate.

Puerto Rico alone comprises the vast majority of both the total area and total population. It covers 3,515 sq. mi. (9,104 sq. km.) and has a population of 2.9 million.

Of the 13 recognized territories, five are inhabited. These are Puerto Rico, Guam, Northern Mariana Islands, U.S. Virgin Islands, and American Samoa. There are also nine uninhabited U.S. possessions, of which only Palmyra Atoll is incorporated.

===== MOVIE ===== END OF PART 4 =====

The lights came up.

“There are several points that we want to make note of in regard to decisions of the U.S. Supreme Court concerning wartime powers of the United States,” Elizabeth began.

“First, we all learn in High School that laws regarding import taxes must be passed by the Congress. However, what we see here is that the Justices have held that U.S. military jurisdiction takes precedence.

“U.S. Army Brigadier General William E. Birkhimer wrote a book entitled *Military Government and Martial Law*, and it has some definitive commentary on this issue in Chapter VI: ‘Effects of Occupation on Local Administration,’ para. 59:

While war lasts, the military authorities regulate the matter of commercial duties; but when the territory becomes incorporated into that of the Union, Congress alone can do this.

“Please notice here that many authors use the term ‘incorporate’ in different senses. Fundamentally, this word means “to take in or contain (something) as part of a whole; to include.” So, in this sense, the word ‘incorporated’ would mean ‘(something) taken in or contained as part of a whole; included, brought in.’ Interestingly, when this is used casually in conjunction with the formal classifications of territory as discussed above, we may encounter some unusual phrasing such as the following:

- (1) This territory was incorporated into the United States as unincorporated territory.
- (2) The incorporation of this territory was made in the form of unincorporated territory.
- (3) The unincorporated status of this territory was confirmed after its incorporation into the United States.
- (4) Under the standard incorporation rules applied when acquiring new territory by treaty, the territory was attached to the United States, as unincorporated territory.

“So, we need to remember that if we write sentences like these, many readers will be confused. If we look back to our Birkhimer quote –

While war lasts, the military authorities regulate the matter of commercial duties; but when the territory becomes **incorporated** into that of the Union, Congress alone can do this.

“It may be useful to point out that instead of using the word “‘incorporated’ here, such words as ‘assimilated,’ ‘combined,’ ‘amalgamated,’ etc. may be more appropriate. ‘Conjoined’ might work as well. ‘Unified’ is another choice.

“Let’s open up this session for discussion now. I prefer a friendly atmosphere, so if you ask a question, please give your name,” Elizabeth said happily.

“So, we need to re-phrase the content of some of these old volumes in order to understand them more completely?” One of the students asked. “My name is Amy.”

“That is often the case with these older materials which are discussing war matters,” Elizabeth stated. “The book *Military Government and Martial Law* was originally published in 1892, so that was before the Supreme Court elucidated the distinction between incorporated territory and unincorporated territory at the federal level.” She paused briefly. “I believe the third edition was published in 1914. Today many people who do research on wartime issues still consider it to be a good reference.”

The students were quiet. She continued: “The main body of this work was written after the promulgation of the Lieber Code by President Lincoln, and before the Hague Conference of 1907. So, it can serve as an excellent reference regarding much customary practice which is followed in wartime.”

“The customary laws of warfare,” a student in the front row commented. “I’m Jonathan.”

“Yes,” Elizabeth said.

“Regarding the issue of ‘unincorporated territory,’ haven’t there been many criticisms over the years by various legal scholars, saying that there is no basis in the U.S. Constitution for such a distinction?” Amy challenged.

“Well, that aspect is often debated, and indeed different moderators in this series no doubt have different opinions. Obviously, it is a development from the Spanish American War,” Elizabeth replied. “However, as a general comment, I must mention the subject of ‘duties, imposts, and excises’ You may recall that the U.S. Constitution specifies that ‘all Duties, Imposts and Excises shall be uniform throughout the United States’, that is Article I, Section 8, Clause 1. So, in trying to reply to your assertion that there is no basis in the Constitution for a delineation between ‘incorporated’ and ‘unincorporated’ territory”

She stopped her explanation temporarily, then took off her glasses and held them up to the light for examination. Taking a small piece of cloth from her purse, she proceeded to wipe her glasses carefully. “They seem fogged,” she remarked.

“But, returning to the issue at hand,” she continued, “What was the size of the United States in the early 1900s?”

None of the students raised their hands.

“Well, Utah had been admitted as a state in 1896, making it the 45th state,” Elizabeth offered this as a point of reference.

She glanced around the classroom. “The Supreme Court Justices were aware of the fact that as of the early 1900s, ‘duties, imposts, and excises’ within the pre-existing 45 states were very much higher than anything the Spanish government had ever assessed in Puerto Rico, the Philippines, Guam, or Cuba.”

The expressions on many of the students’ faces began to change, as they started to understand the implications of Elizabeth’s remarks.

“This was the dilemma the Justices faced,” she explained. “And in my opinion, the advancement of the doctrine of ‘unincorporated territory’ was their attempt at a solution. However, we can leave that controversy alone for the moment, and return to our discussion of ‘customary practice which is followed in wartime’.”

Elizabeth looked at the assembled students, trying to estimate how many might eventually go into government service in the future. They would certainly need to have much detailed legal knowledge. “What we learned from the decision in *Cross v. Harrison* confirms that RULE that military government continues until legally supplanted.

“Birkimer has a quotation about this as well. I would add that I consistently refer to the 1914 edition. This is from page 26.” The screen came on.

Military government continues till legally supplanted

New Mexico was not only conquered, but remained thereafter under the dominion of the United States. The provisional government established therein ordained laws and adopted a judicial system suited to the needs of the country. The Supreme Court of the United States held that these laws and this system legally might remain in force after the termination of the war and until modified either by the direct legislation of Congress or by the territorial government established by its authority. We have had the same experiences in Cuba, Porto Rico, and the Philippines.

Elizabeth explained. “According to my analysis, the ‘provisional government established therein’ would be a military government. The ‘territorial government’ spoken of here would be a civil government.”

“However,” she adopted a warning tone, “After the conquest of territory, a government is in charge, and we can usually determine which military officer is in a position of superior command responsibility. In many instances, this person is described as leading a ‘military government,’ other times as leading a ‘civil government.’”

“So, it varies?” a student on the far side of the room questioned. “My name is Michael.”

“No,” it does not vary,” Elizabeth tried to make the concepts clearer. “But we need to look more closely at the meaning of the terminology of ‘civil government’ and ‘military government’.

“For example, after the Battle of Okinawa ended in June 1945, the United States assumed governance over the Ryukyu Island group in the Pacific Ocean. In late 1950, it established the ‘United States Civil Administration of the Ryukyu Islands’.”

“So that is obviously a civil government ?” Michael ventured, seeming unsure of himself.

“No, that is a military government,” Elizabeth pointed out. “In order to differentiate this, you have to look to the source of the power for establishing that government. Civil government is generally based on some legislation made by a legislative body, and when civil government is officially established, it replaces military government. But if this government over foreign territory has been established by the military authorities, then it is a military government. The nomenclature itself is not determinative.”

“Birkimer has a relevant quotation from his book, on page 1. This also serves as an introduction to the volume.” She spoke forcefully.

Military jurisdiction is treated in the following pages in its two branches of Military Government and Martial Law. The former is exercised over enemy territory; the latter over loyal territory of the State enforcing it.

Moreover, military government may be exercised not only during the time that war is flagrant,

but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.

. . . The distinction is important. Military government is thus placed within the domain of international law, its rules the laws of war, while martial law is within the cognizance of municipal law.

From a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory.

“So, in previous lectures we discussed ‘military government’ as being jurisdiction over foreign territory. However, we can see here from Birkhimer’s explanation, and from the decision in *Cross v. Harrison* that legally speaking such jurisdiction continues over territory ceded to the United States, “Elizabeth pushed some hair out of her eyes. “Such jurisdiction does just not ‘disappear’ because the territory was converted to domestic territory.”

“My name is Hubert. What I want to know is how does all of this apply to the doctrine of incorporated and unincorporated territory? In other words, what was the classification of the Ryukyu Island group after conquest by U.S. military forces? Additionally, what was the classification of California territory after conquest by U.S. military forces? ”

“After conquest it is foreign territory under U.S. military government. That is a default status. At the same time, it comes under the common defense clause of the United States Constitution, which is also section 8, clause 1.” The screen came on.

U.S. Constitution Common Defense clause
Article 1, section 8, clause 1

“Can it be handled this way? I don’t quite see how,” a student queried. “My name is Norman. Wouldn’t the Congress need to pass legislation to bring California under the defensive umbrella of the United States in 1848? And to pass legislation to bring the Ryukyus under the defensive umbrella of the United States in 1945?”

“Well, I am afraid that it has never been interpreted that way,” a middle-aged student sitting near the center of the room offered his opinion. “My name is Steven. I served in the Army for several years.” He stood up. “According to what we learned, the United States Department of War, also called the War Department, or occasionally the War Office, was

the United States Cabinet department originally responsible for the operation and maintenance of the United States Army, also bearing responsibility for naval affairs until the establishment of the Navy Department in 1798. It also was responsible for most land-based air forces until the creation of the Department of the Air Force in September 1947.”

He continued: “The head of the War Department was known as the Secretary of War. A U.S. government reorganization in 1949 resulted in the creation of a successor agency, the Dept. of Defense (DOD), headed by the Secretary of Defense.”

He walked over and stood beside Elizabeth, speaking to her in a low tone of voice. She nodded, and pressed some buttons on her remote control. Some data appeared on the screen.

The Treaty of the Danish West Indies

Officially known as the “Convention between the United States and Denmark for cession of the Danish West Indies,” was a treaty transferring the territorial sovereignty of the Virgin Islands in the Danish West Indies from Denmark to the United States for the payment of US\$25,000,000.

The treaty was signed on August 4, 1916, in New York City by Danish Minister Constantin Brun and Secretary of State Robert Lansing. The U.S. Senate approved the treaty on September 7, 1916. A Danish referendum was held on December 14, 1916, and on December 22, the Danish parliament ratified the treaty. U.S. President Woodrow Wilson ratified the treaty on January 16, 1917.

“So, if the military forces of Venezuela attacked the U.S. Virgin Islands in late January 1917, the War Dept. would be responsible for coordinating an immediate response. Being ceded to the United States, the Virgin Islands immediately come under the geographic scope of the common defense clause in the U.S. Constitution,” Steven clarified.

“I understand that,” Amy said. “But the Virgin Islands were formally ceded to the United States in a treaty. But before the Mexican American Peace Treaty came into force, California was originally just conquered territory. As for the Ryukyu Island group, before the San Francisco Peace Treaty came into force, they were conquered territory as well. After the treaty came into force, it seems that their status was not further elevated.”

“But California was recognized as a state,” a student near the entranceway blurted out.

“Not as a result of the peace treaty coming into force,” Elizabeth explained. “The procedure whereby California became a state in the Union was a separate issue.”

The student who had raised this statehood concern offered no further comment.

“Let me clarify something,” Elizabeth interjected. “When we say ‘conquered territory,’ that itself is a legal status of territory. Of course, the default form of governance for this territory will be military government. But you should definitely regard ‘conquered territory’ to be a legal status of territory, and many civilians totally overlook this fact. Importantly, under U.S. law it is possible to discuss the rights of the local inhabitants, and the defensive responsibility for the territory, as well as other concerns. For example, for the people, Fifth Amendment protections are considered fundamental. For the territory, being under U.S. jurisdiction would bring it under the common defense clause of the Constitution, as we are explaining

“I believe this quotation from the Code of Federal Regulations was overviewed in a previous session,” she added.

The United States

The term "United States", as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States.

“According to my understanding,” Steven interjected, “the Ryukyus were conquered territory, but according to the 1952 treaty, they were later subject to being elevated to the status of a United Nations trusteeship, with the United States as the sole administering authority.”

“And according to my understanding, in Article 4(b) the treaty authorizes direct U.S. military government jurisdiction over the Ryukyu Island group,” Amy explained further.

“And Taiwan,” Elizabeth added.

Amy seemed to ignore this clarification. “And this was effectuated by the establishment of the United States Civil Administration of the Ryukyu Islands (USCAR), which of course is US military government.”

“Correct,” Elizabeth confirmed.

“And if North Korea had attacked the Ryukyus in 1953, 1955, 1957, or whenever, the U.S. Department of Defense, in conjunction with the local U.S. military authorities in the Ryukyus, would be in charge of coordinating a response. No supplemental U.S. Congressional legislation is needed,” Steven gave this additional analysis.

“But could you review why that is so?” a student sitting near Elizabeth spoke out. “Everyone calls me Issac. I mean, the Ryukyus were not ceded to the United States.”

“It comes back to the issue of military jurisdiction,” Elizabeth attempted to explain this point more carefully. “In the Ex parte Milligan case of 1866, the Justices identified three kinds of military jurisdiction under the U.S. Constitution.”

She pressed some more buttons on her remote control. More information appeared on the screen.

MILITARY LAW is exercised both in peace and war; and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces.

In the current era, this body of law is primarily found in the *Uniform Code of Military Justice (UCMJ)*.

MILITARY GOVERNMENT is exercised in time of foreign war without the boundaries of the United States, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress.

“Birkhimer speaks of this in his book, see page 21.

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.

“Please remember that when the 1952 treaty came into force, the future plans for any envisioned ‘final disposition’ of the Ryukyu Island group and Taiwan were still up in the air. So, it is important to recognize that U.S. military government includes the administration of interim cessions, and that such military government jurisdiction is commonly composed of both civil and military components,” Elizabeth summed up.

“In the Army we learned that military government can be for the interim and provisional government of undetermined cessions, and especially for ‘foreign territory’ under control by conquest,” Steven added.

MARTIAL LAW is exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise; and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

“I believe we have discussed this previously,” Elizabeth commented.

“But if the 1952 peace treaty stipulated direct U.S. military government governance over the Ryukyus and Taiwan, doesn’t that mean that there should have been a ‘United States Civil Administration of Taiwan (USCAT)’ established in Taiwan? Of course that would be U.S. military government.” A female student in a bright green blouse questioned.

Other students began to point at her.

“Oh, right, please call me Melanie I mean we often hear that the 1952 treaty left the legal status of Taiwan as ‘undetermined,’ so that would be what you are describing here as an interim cession, would it not?”

“Yes, very good,” Elizabeth offered some praise. “What is important is that you have to understand that by attending this series of lectures, and reviewing the videos of each session, you have gained a lot of knowledge which is totally outside the comprehension of most civilians. This includes a great majority of those people working in the Executive Branch of the U.S. government.”

Another middle-aged man stood up and walked over to stand beside Steven and Elizabeth. Steven introduced him as another Army veteran. He stated that his name was Preston.

“What these two people are trying to explain is that the officials working in the U.S. Dept. of State in the 1940s, 1950s, and 1960s, probably had less knowledge of the intricacies of military jurisdiction under the U.S. Constitution and the historical development of all related concepts than those of us who have attended this lecture series,” Preston offered.

“But isn’t the failure to implement an Article in a Senate-ratified treaty a violation of the ‘faithful execution clause’ of the Constitution?” Norman asked.

The screen came on.

U.S. Constitution Faithful Execution clause
Article 2, section 3, clause 5

Elizabeth looked at Steven. Steven looked at Preston. “I would say so,” the three of them said in unison.

Hubert wanted to get back to the discussion of territorial classifications. He asked Elizabeth to explain that aspect more fully.

“Well, some people argue that the distinction between incorporated territory and unincorporated territory would only apply to territory ceded to the United States,” Elizabeth spoke carefully. “But what about the situations in the peace treaty after war where no ‘receiving country’ is specified and the U.S. is the legal occupier, (aka ‘the principal occupying power’)? In fact, that qualifies as being ‘ceded to USMG, on an interim basis’ but most people totally ignore this type of eventuality.

“And I want to clarify an additional point as well. When using the word ‘cede’ we will include such instances as California, where the peace treaty specified the drawing of new ‘boundary line’ between two countries.

“After the Mexican American Peace Treaty came into force, California immediately became incorporated territory, and it is on its way to statehood,” Elizabeth continued. “That is the default status for newly obtained territory in the pre-1898 world. At the same time, California continues under military government, and it remains as occupied territory.”

“Why would it still be occupied territory?” a student asked. “My name is Angela. “I always heard that military occupation ended when the peace treaty comes into force.”

“That is for territories that are returning to their *quote unquote* original status. Post-war Japan for example. The San Francisco Peace Treaty came into force on April 28, 1952, and the civil government for the four main Japanese islands began functioning. Japan was not a

ceded territory. Or perhaps we should say that *Japan within its new territorial boundaries* was not a ceded territory.

Post-war Mexico would be another example. The Mexican American Peace Treaty came into force on May 30, 1848. 'Mexico within its new territorial boundaries' was not a ceded territory.

"But for territories ceded to another country, or for limbo cessions, military government continues. This is what we learn in *Cross v. Harrison*. According to present day practice here in the 21st century, if an 'event' such as the coming into force of the Mexican American Peace Treaty had occurred today, the military governor there would no doubt immediately announce the establishment of the United States Civil Administration of California."

"Which is a nice-sounding name for military government," Angela conjectured.

"Correct. Now let's go back to the situation of the Ryukyu Island group, with the end of the Battle of Okinawa in June 1945. After conquest it is foreign territory under U.S. military government. That is a default status. If you want to force me to make a distinction, of course, I will have to say in relation to the states of the Union, the Ryukyus are unincorporated territory," Elizabeth clarified.

"In the San Francisco Peace Treaty, direct United States Military Government (USMG) jurisdiction was confirmed for the Ryukyus and Taiwan. That is in Article 4(b). Neither the Ryukyus nor Taiwan was ceded to the United States, but both of them, according to the peace treaty, remain under USMG jurisdiction."

"I also read somewhere that there is a distinction between organized and unorganized territory," Hubert pointed out a further issue. "Could you explain that?"

"That is fairly straightforward," Elizabeth said calmly. "Any territory described as 'organized' means that it has an organized government authorized by an Organic Act passed by the U.S. Congress. That would usually consist of a territorial legislature, territorial governor, and a basic judicial system."

"What exactly is an Organic Act? Would that include providing economic relief for local farmers involved in organic farming?" a student at the back of the room queried. "My father was a farmer. My name is Amos."

“No, and I am sorry for the confusion,” Elizabeth said, trying to control her laughter. “Under United States law, an organic act is an act of the United States Congress that establishes a territory of the United States and specifies how it is to be governed. For example, we can look at the U.S. Virgin Islands.” She pushed some buttons on her remote control.

The screen at the front of the classroom came on.

Governance of the U.S. Virgin Islands

- The “Organic Act of the Virgin Islands of the United States of 1936” established a government for the U.S. Virgin Islands, replacing previous temporary provisions enacted in March 1917. It was replaced in 1954.
- The “Revised Organic Act of the Virgin Islands of 1954” repealed and replaced the previous Organic Act of the Virgin Islands.
- From the 1960s to the present, there have been several political movements in the U.S. Virgin Islands to call a Constitutional Convention and draft a local Constitution. The local population has yet to take any positive action on these or any related proposals.

“In the absence of an organic law, a territory is classified as unorganized,” She added.

“My name is Albert. Let me ask a question. After the coming into force of the San Francisco Peace Treaty, what flag was flying over the Ryukyus?”

“The United States flag,” Elizabeth answered.

“And over Taiwan?” Albert continued.

“The Republic of China flag,” Elizabeth answered.

The bell rang at this point and Elizabeth announced a bathroom break of 20 minutes.

= = = = Bathroom Break = = = =

When the students had reassembled, a female student named Bianca, who had spoken with Elizabeth during the break, spoke up. “The Constitution says ‘New States may be admitted by the Congress into this Union;’, and I understand that there is actually a U.S. Statehood Movement in Taiwan. Could you comment on that?”

The screen came on.

U.S. Constitution New States clause
Article 4, section 3, clause 2

Steven and Preston had returned to their seats. Elizabeth spoke up. “My opinion is that it is impossible.”

“Why?” Bianca pushed on.

“Well, the basic reason is that the U.S. Supreme Court ‘changed the rules’ in the early 1900s, as we discussed earlier today. For new territory that is ‘amalgamated’ into the Union after 1898, it is unincorporated by default. In other words, it is not considered to be on its way to statehood, not necessarily anyway,” Elizabeth stressed.

She paused and smiled. “Please be aware that I am being careful not to carelessly use the term ‘incorporated’ in my explanation!”

“Thank you,” Bianca acknowledged.

“Also, please remember the Four Concerns that were discussed in our first session about the situation in Tampico, Mexico. Does anyone remember what those were?”

No hands went up. Elizabeth pulled a large card out of her pocket. “I forgot what they were too so let me just read this.” There was scattered laughter in the classroom.

1. Exact border boundary specifications.
2. Issuance of I.D. documents
3. U.S. federal income taxes
4. Issues involving undocumented immigrants

“Do areas under USMG jurisdiction face legal difficulties when they consider issuing identification documents to members of the local populace?” Bianca questioned further.

“Not at all,” Elizabeth said casually. “USCAR issued Certificates of Identity to local residents of the Ryukyu Island group during its period of administration. By the way, I should add that in the practice of the United States, the end of military government is formally announced by the Commander in Chief. For the Ryukyu Island group, President Nixon made the announcement, to become effective May 15, 1972.”

“So, the Ryukyus became independent on that date?” Amos hesitantly posed a question.

“No, they were returned to Japan.”

“So, which one of the Four Concerns is especially important when we discuss ‘statehood’ for some particular territory?” Bianca pushed forward with her questioning.

“Well, after 1898, we don’t discuss ‘statehood’ for any particular territory Any ‘new’ territory anyway, That is the point I am trying to make. But if we did, Yes, one of those concerns would quickly become a source of serious anxiety,” Elizabeth pointed out. “I believe that in the final analysis, the local populace would want to retain their status as an undetermined cession, or at best establish some sort of ‘commonwealth’ arrangement, or other ‘upgraded’ arrangement, with the U.S.”

“Which concern is that?” Bianca seemed increasingly frustrated.

“Well, that aspect will be discussed more thoroughly in a future session when we overview the Spanish American War.”

“And what is a commonwealth?” a Hubert asked.

“I thought someone might ask that,” Elizabeth said, pushing some buttons on her remote control.

Commonwealth
Four states of the United States officially designate themselves as "commonwealths." These are Kentucky, Massachusetts, Pennsylvania, and Virginia. All four were part of Great Britain's possessions along the Atlantic coast of North America prior to the

formation of the United States of America in 1776. As such, they share a strong influence of English common law in some of their laws and institutions.

According to the codification of current U.S. State Department policy in the department's Foreign Affairs Manual –

The term 'Commonwealth' does not describe or provide for any specific political status or relationship. It has, for example, been applied to both states and territories. When used in connection with areas under U.S. sovereignty that are not states, the term broadly describes an area that is self-governing under a constitution of its adoption and whose right of self-government will not be unilaterally withdrawn by Congress.

Two overseas U.S. territories are called commonwealths. Both are organized but unincorporated. They are

- Commonwealth of Puerto Rico, since 1952
- Commonwealth of the Northern Mariana Islands, since 1978

“Hi, my name is Doris,” a student walked over and stood next to Elizabeth, at the same time handing her some sheets of paper. They shook hands. “I have a website which is devoted to the territorial expansion of the United States. Here is some introductory information.”

“Devoted to *what?* That seems an unusual topic for a website. Do you have a lot of visitors?”

“Yes, and many of them buy our merchandise.”

“What kind of merchandise do you sell?”

“Well, we have a wide variety of stickers, buttons, pins, labels, banners, etc. Some of them have a serious intent, others are simply humorous.”

“What are some examples?” Elizabeth seemed genuinely puzzled.

“Examples, well we have one series which advocates that the United States purchase the Strait of Magellan. That is perhaps somewhat tongue in cheek. Some citizens of various African countries have urged us to promote this ‘U.S. purchase’ agenda for their countries, so we have a variety of pins, buttons, labels, etc. with those themes. We are also promoting

the annexation of many island groups in the south Pacific, in areas that are currently being flooded due to rising water levels. We are urging the U.S. government to take 'land' from various mountainous areas of the 50 states and then go to these island groups to engage in extensive 'land-fill' operations. This would enable these islands to be built up to a much higher elevation, and then avoid the problems caused by rising ocean levels. By doing 'land-fill' operations using U.S. 'land,' we would also hope that these islands could be recognized as U.S. territories."

Elizabeth seemed more and more bemused by this narrative.

Doris continued. "We also advocate that the U.S. government give the local islanders financial stipends for the use of their territory, and then make arrangements to establish naval stations, other military facilities, etc."

"So, the final goal is to establish U.S. military facilities?" Elizabeth tried to summarize what she had just heard in a reasonably constructive fashion.

"Not entirely, no," Doris explained. "International investment which would encourage local job creation would also be encouraged. Another important fact that I would want to point out is that in 1946, President Harry Truman's administration made a formal offer to purchase Greenland from Denmark. President Trump made a similar proposal in 2019."

"And in 2019 the international news media described President Trump's proposal as ridiculous," Hubert stated dryly.

"But why is it ridiculous?" Doris asked. "We purchased the Virgin Islands from Denmark in a treaty that came into force in 1917. As far as I know, the upkeep of Greenland is a big drain on the Danish treasury. As far as my organization is concerned, any advocacy efforts for the U.S. purchase of Greenland should be encouraged. I say 'full steam ahead!'"

"And this somehow relates to the subject of our lecture series ?" Elizabeth seemed even more mystified.

"Yes, well, you have just explained Well, I mean you have given perhaps 85% of the explanation as you why to feel that any U.S. Statehood Movement for Taiwan could not be successful. But it occurs to me that there is another possibility. Why couldn't the United States just buy Taiwan? Or 'Formosa' as it was formerly called?"

“Oh!” Elizabeth explained. “That’s what you want to talk about. Indeed, that is an interesting topic! And it was researched and discussed in the 1850s.”

“According to the best historical sources I have been able to locate, Commodore Matthew Perry of the United States Navy commanded a fleet which visited Formosa and Japan in 1853 and 1854.

“In a separate development, in 1854, a Mr. Townshend Harris, then living in Macao, concluded that Formosa had great commercial potential, and drafted a 119 page report which he submitted to Secretary of State William L. Marcy in late March of that year. His recommendation was that Formosa be acquired by purchase.

“Upon returning to the United States in 1855, Commodore Matthew Perry presented a lengthy report to the Franklin Pierce administration, strongly advocating that some sort of arrangement similar to an American protectorate be negotiated for Formosa.

“In that era, the idea of making an outright purchase of this island in the Far East, or arranging for it to become a U.S. protectorate, was quite a novel idea. In his report, Perry stated that he felt that a United States presence in the Far East could achieve much in encouraging measures to better the political and civil condition of various countries and territories in the region. He felt that a foothold in Formosa would be an ideal starting point, and would greatly facilitate these efforts. He also saw that Formosa had great strategic value in its naval and military position.

“However, after reviewing these two reports, the President and his Cabinet members in Washington took no concrete action.” Elizabeth pressed some buttons on her remote control, and some information was displayed.

United States Protectorates

- Liberia (1822–1847)
 - Cuba (1898–1904)
 - Haiti (1915–1935)
 - Honduras (1903–1925)
 - Nicaragua (1912–1933)
 - Panama Canal Zone (1903–1979)
- etc.

“Some researchers have categorized these areas as United States protectorates, during the periods mentioned. In the current era, some agencies of the U. S. government, such as the Environmental Protection Agency, still use the term protectorate to refer to insular areas of the United States such as Guam, the Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, the U.S. Virgin Islands, etc. This was also the case with the Philippines and Cuba, before they achieved independence.

“So, I believe that sums up the idea of ‘protectorate.’ As for trying to negotiate a ‘purchase price,’ in the current era, I strongly suspect that the idea of buying Taiwan would not get very far. That is because the vast majority of high ranking government officials in Taiwan in the current era are all Republic of China exiles from Mainland China, or their descendants, and they respect Chinese cultural norms, which stress a loyalty to the motherland.”

“ROC exiles?”

“Yes, you have to remember that the Republic of China was founded in Nanjing, China, in 1912. It was recognized as the sole legal government of China up through the period of WWII in the Pacific, and beyond. In the late 1940s however, the Chinese Civil War flared up again, and the communists were achieving victory in almost every encounter. The supporters of the (old) Republic of China regime saw that their days in Mainland China were numbered, and fled in every direction of the compass. Many of them came to Taiwan. Mao Zedong announced the founding of the People’s Republic of China in Beijing, on Oct. 1, 1949. After that, a virtual flood of ROC loyalists fled to Taiwan. For the latter half of the 1940s, many historians estimate this number at about 2.2 million people.

“If these ROC loyalists had gone to the Philippines, Indonesia, Japan, etc. they would probably have been immediately recognized as Chinese refugees, and if the numbers got too unmanageable, they would no doubt be put in refugee camps. However, in Taiwan, they were considered citizens.

“The leader of the ROC in Taiwan in that era was Chiang Kai-shek. He and his wife had a strong affinity for their fellow countrymen from the Mainland of China. “Hence, as I just pointed out, it was these people who obtained all of the high ranking government positions in Taiwan. So, today, if you go to Taiwan, you might find that the ratio of people with Taiwan ancestry is 78%, but the Mainlanders (or their descendants) is only 20%. However, when you look at the composition of people in the central government, city and county governments, etc. it is nearly 80% Mainlanders and only 20% people with Taiwan

ancestry,” Elizabeth elaborated these statistics carefully.

“By the way,” she said, thinking of an additional important point.

“Geneva Conventions (IV) Article 49, paragraph 6, clearly stipulates that mass immigration of this type is illegal under the laws of war. The wording is –

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Of course, this rule would apply to any occupying power, whether a principal occupying power, a subordinate occupying power, or anything similar,” Elizabeth clarified further.

Hubert raised his hand. “I assume that you are using the terminology of ‘subordinate occupying power’ to indicate an occupying power that is not the ‘conqueror,’ he remarked. “But I can’t recall that terminology being employed in any of our outside readings. Is there a synonym for that?”

“The more modern terminology is ‘proxy occupying forces’,” she said in a somewhat grim tone. She pushed some buttons on her remote control, and the screen came on.

For nearly fifty years, U.S. Commander in Chief has been the ringmaster of a three-ring circus called the "One China Policy." Undoubtedly, it is a clever riddle of foreign policy to keep the participants in a quandary as they attempt to peacefully resolve the final status of Taiwan. Nevertheless, in consideration of the major errors in the handling of the Taiwan question from 1945 to the mid-1950s, the legal circumstances of the U.S. being the paramount authority and having the ROC continuing as the designated local administrative authority is the ostensible creation of an illegal situation of proxy occupation.

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 9

AFTERMATH OF THE EXPLOSION OF USS MAINE IN HAVANA HARBOR, 1898

[DATELINE MIAMI, FLORIDA]
PRESENT DAY

At the scheduled time, the students arriving to attend this session assembled in the auditorium of a private foundation located in the suburbs of Miami. At the front of the auditorium was a large stage, but no microphone or podium was in appearance. No professor or other personnel appeared.

However, after a few minutes, the lights began to dim and a large screen gradually came down. A view of the island of Cuba taken from space first appeared. A graphic rendering of the international space station flew by, and the island slowly came into sharper focus as the camera zoomed in. A montage of various Cuban scenes appeared, and the host, an attractive Cuba lady in her mid-20s, came on screen to introduce the Top 12 tourist attractions in Cuba. This introduction ended in Havana Harbor, where a Cuban musical group, introduced as the “Cuban Jazz All-Stars,” was playing some lively Cuban music. Their selections included Bossa Nova, Samba, Mambo, Salsa, Tango, Timba, Smooth Jazz, and other musical styles popular in Cuba. After twenty minutes of music, the film ended, and the screen began to roll up.

Assuming that this musical portion was over, the assembled students were quite surprised when the “Cuban Jazz All-Stars” came out live on the stage, and played several more pieces of lively Cuban music. The end of their performance was greeted with wild applause by all present.

As this musical group left the stage, the host who had appeared in the movie and introduced Cuban tourist attractions came on stage holding a microphone. The students again erupted in applause.

“Hello, everyone, my name is Gloria Martinez, and I will be your moderator for today’s session.”

There was more applause.

“Thank you. In a number of the Survey Forms which we have received back from students, many have questioned why we are conducting this series of lectures in such a wide range of cities around the world. The answer is very simple. The information which we are presenting can be described as something like a mosaic. If assembled in the proper way, it is very politically sensitive.

“Why is it politically sensitive? The primary reason is that there are certain groups of people in the world, and this even includes the officials of some governments, who have been, for seventy or more years, promoting a misinterpretation of history and law, in order to promote their own hegemonic goals.

“Think about that for a moment. It is a disinformation campaign of huge proportions. One supposes it began with certain elements of ‘fake news,’ but it has expanded over the decades and now includes large quantities of ‘fake history.’

“As a result, and here I am repeating myself to some extent, I want to stress that there are certain groups of people in the world today who are using all of their efforts to promote the idea that *certain territory* belongs to their country, when in fact this is not true. However, at the same time, they strongly promote the idea that if their view of history and law is not accepted, their populace will be grossly insulted, and take affront in the strongest way.

“And so, at this juncture, we come back to a central issue, which is ‘Why are we responsible for the fact that your country’s leaders have been promoting this ‘disinformation’ for such

a long period of time, and now if your people find out about the truth they are going to be offended? Or they are going to stage a revolt against your government?

“And if that is not bad enough, in support of their view of ‘history,’ the leaders of one particular country in question are also threatening military action against other countries!

“Let’s think back for a moment. The United Nations was founded Oct. 24, 1945. The UN Charter reads in Article 2(4):

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

“However, one could argue that this caveat does not apply if you have convinced the world community that the territory against which you are advancing *the threat* of military force, and against which you are advocating *the right* to use military force, is part of your country’s national territory to begin with.

“Isn’t that clever?” Gloria smiled slightly.

“So this brief analysis may give you some idea of the dangers about which the organizers of this series of lectures need to be concerned. There is the possibility of violent opposition to the historical and legal data we are presenting. That opposition could make the annual protests at the G7 Summits look like ‘a walk in the park.’ Therefore, with all of these considerations in mind, the organizers have taken the simple expedient of **not** holding multiple sessions in close geographic proximity.

“Today, we are here in Miami, Florida. Upcoming sessions will be held in Honolulu, Hawaii; two cities in Germany; and perhaps Dubai, UAE, but we are still arranging those venues.

“Alright, after these few introductory remarks, let’s watch a movie.”

===== MOVIE PART 1 ===== SPAIN EXTENDS OVERSEAS =====

THE HISTORICAL OVERSEAS SPANISH POSSESSIONS

A DOCUMENTARY FILM

Produced by Miguel Tolentino

Directed by Carlos Bautenista

Host and Announcer: Angelika Padillo

GUAM

The first known contact between Guam and Western Europe occurred when a Spanish expedition led by Ferdinand Magellan, a Portuguese explorer sailing for the Holy Roman Emperor King Charles I of Spain, arrived from Spain with his three-ship fleet on March 6, 1521, after a long voyage across the Atlantic and Pacific Oceans. Notably, the expedition had started out in Spain with five ships. By the time they reached the Marianas they were down to three ships and nearly half the crew. This was due to storms, diseases, and mutiny of the sailors on one ship.

Despite Magellan's visit, Guam was not officially claimed by Spain until 1565 by Miguel Lopez de Legazpi. However, the island was not actually colonized until over 100 years later. On June 15, 1668, the galleon San Diego reached the island of Guam. Jesuit missionaries led by Padre Diego Luis de San Vitores initiated efforts to promote trade, develop local agriculture, raise cattle, and follow the teachings of Catholicism, in addition to adopting western-style clothing.

CUBA

Christopher Columbus, on his first Spanish-sponsored voyage to the Americas in 1492, sailed south from what is now the Bahamas to explore the northeast coast of Cuba and the northern coast of Hispaniola, east of Cuba. The first sighting of a Spanish ship approaching the island was recorded by the local Cuban inhabitants as October 28, 1492, off of the eastern point of the island.

During a second voyage in 1494, Columbus passed along the south coast of Cuba, landing at various inlets. With the Papal Bull of 1493, Pope Alexander VI commanded Spain to conquer, colonize and convert the pagans of the New World to Catholicism. Columbus landed and toured the local Taíno dwellings, describing them as being “beautifully constructed of palm branches.”

The Spanish began to create permanent settlements on the island of Hispaniola, east of

Cuba, soon after Columbus' arrival in the Caribbean, but the coast of Cuba was not fully mapped by Europeans until 1509, when Sebastián de Ocampo completed this task. In 1511, Diego Velázquez de Cuéllar set out from Hispaniola to form the first Spanish settlement in Cuba, with orders from Spain to conquer the island. However, The new settlers were initially greeted with stiff resistance from the local Taíno population. However within three years the Spanish had gained control of the island. In 1514, a settlement was founded in what was later to become Havana.

PUERTO RICO

On Sept. 24, 1493, Christopher Columbus set sail on his second voyage with 17 ships and 1,200 to 1,500 soldiers from Cádiz, Spain. On Nov. 19, 1493, he landed on the island, naming it San Juan Bautista in honor of Saint John the Baptist. The first European colony, Caparra, was founded on August 8, 1508, by Juan Ponce de León, a lieutenant under Columbus, who intermingled with the local Taíno population and who later became the first governor of the island.

In 1509 the colony was abandoned in favor of a nearby islet on the coast, named Puerto Rico (Rich Port), which had a very good harbor. In 1511, a second settlement, San Germán was established in the southwestern part of the island. According to the views of modern historians, on March 3, 1513, Juan Ponce de León, organized and commenced an expedition (with a crew of 200, including women and free blacks) departing from "Punta Aguada" Puerto Rico. Puerto Rico thus became the historic first gateway to the discovery of Florida, which opened the door to the settlement of the southeastern United States.

During the 1520s, the island took the name of Puerto Rico while the port became known as San Juan.

PHILIPPINES

The earliest documented European expedition to the Philippines was that led by Ferdinand Magellan, in the service of the king of Spain. Landfall was made in mid-March 1521, on the small, uninhabited island of Homonhon at the mouth of the Leyte Gulf. On Easter Sunday, March 31, 1521, in what today is believed to be Limasawa island in Southern Leyte, Magellan solemnly planted a cross on the summit of a hill overlooking the sea and claimed for the king of Spain possession of all the islands he had seen, naming them Archipelago of Saint Lazarus.

Magellan visited islands in the archipelago and sought alliances among indigenous Filipinos, taking special pride in teaching them about Catholicism. Unfortunately, Magellan and many members of his crew were killed in a battle on Mactan Island in late April 1521.

===== MOVIE ===== END OF PART 1 =====

“This movie gives a good overview of how Spanish rule initially developed in these four overseas areas,” Gloria said as the lights came up. “Visitors to these islands often remark that the Spanish cultural influence is still widely noticeable.”

“But if you want to listen to some good music, you need look no further than Cuba, isn’t that right?” One student proclaimed.

“Well, that is a matter of personal opinion!” Gloria said, laughing, “The Philippines also have some excellent music!”

“And the music here in the United States is pretty good too!” another student added.

“And speaking of the United States,” Gloria nodded. “How was it that the United States later obtained jurisdiction over these four areas? That is a somewhat complicated situation in itself. Let’s watch another movie.”

===== MOVIE PART 2 ===== SPANISH AMERICAN WAR =====

An immense explosion shattered the stillness of the night, and the USS Maine, anchored in the harbor at Havana, Cuba, began to list heavily to port. It was February 15, 1898, and the calamitous series of events which would lead to the declaration of war against Spain on April 25 were only just beginning.

The screen showed the interior of a modern art gallery, and then panned across some paintings of Spanish American War scenes. A middle-aged gentleman wearing jeans and a Havana shirt was introduced as the host, and began the narrative.

The Spanish–American War was an armed conflict between Spain and the United States in 1898 which originally arose out of human rights concerns, leading to U.S. intervention in the Cuban War of Independence.

The picture of the two U.S. Presidents who served during this tumultuous period appeared on the screen, along with their dates in office.

25) William McKinley March 4, 1897 to Sept. 14, 1901

26) Theodore Roosevelt Sept. 14, 1901 to March 4, 1909

Hostilities began after the unexplained explosion of the USS Maine in Havana Harbor in Cuba. Many Americans regarded this as an act of war, some disagreed since the cause was never definitively determined, but what could not be denied was that this event served as a catalyst that accelerated the events leading up to the war. As a result of the United States victory, the war led to the emergence of U.S. predominance in the Caribbean region, and resulted in the U.S. acquisition of Spain's Pacific possessions.

American public opinion was agitated by reports of gruesome Spanish atrocities in Cuba. Contrastingly, however, the American business community had just recovered from a deep depression and feared that a war would reverse the gains. It lobbied vigorously against going to war. President William McKinley ignored the exaggerated press reports and sought a peaceful settlement. The U. S. Navy armored cruiser USS Maine had originally been sent to Havana to protect U.S. interests during the Cuban War of Independence, and to put the Spanish authorities on notice that a blockade of the island might be declared at any time. McKinley hoped would that this show of force would compel the Spanish authorities into making a negotiated settlement. However after this cruiser mysteriously exploded and sank, with a loss of life of over 250 U.S. sailors, the mounting public anger in every quarter, along with the political pressures from Congresspersons and Senators, quickly merged into a rallying cry for action. Banners with the phrase "Remember the Maine!" appeared in many public locales, pushing McKinley into a war that he had initially wished to avoid.

The main issue was Cuban independence. Revolts had been occurring for some years against Spanish rule over Cuba. U.S. public opinion supported the local Cuban population in this conflict, and many U.S. government officials were also supportive, hence upon entering the war the U.S. military later gave full aid and assistance to the many paramilitary groups espousing independence.

On April 20, 1898, the U.S. Congress passed a joint resolution demanding Spanish withdrawal and authorizing the President to use military force to help Cuba gain

independence. McKinley signed it. In response, Spain severed diplomatic relations with the United States on April 21. On the same day, the U.S. Navy began a blockade of Cuba. On April 25, the U.S. Congress declared a state of war, making it retroactive to April 21. Spain responded with her own declaration of war; neither side had allies.

THE SPANISH AMERICAN WAR

The ten-week war was fought in both the Caribbean and the Pacific. As U.S. agitators for war well knew, U.S. naval power would prove decisive, allowing expeditionary forces to disembark in Cuba against a Spanish garrison already facing nationwide attacks of Cuban insurgents and further wasted by yellow fever.

When war broke out, Theodore Roosevelt was serving as Assistant Secretary of the Navy. He immediately resigned from his position and helped form a regiment of volunteers. The "Rough Riders" enlisted cowboys and college men to be led by Roosevelt under the command of Leonard Wood. They arrived in Cuba in time to take part in the Battle of San Juan Hill.

During the war, the U.S. military forces obtained the surrender of Santiago de Cuba and Manila despite the good performance of some Spanish infantry units and fierce fighting for positions such as San Juan Hill. Madrid sued for peace after two Spanish squadrons were sunk in Santiago de Cuba and Manila Bay and a third, more modern, fleet was recalled home to protect the Spanish coasts.

The Spanish military forces surrendered on the following dates:

Locality	End of Hostilities
Guam	June 21, 1898
Cuba	July 17, 1898
Puerto Rico	Aug. 12, 1898
Philippines	Aug. 14, 1898

Many commentators mistakenly regard these dates as the end of the war in each locality. However, that is incorrect. The end of the war occurs when the peace treaty (formal peace settlement) comes into force. The surrender ceremonies only mark the end of hostilities.

The final settlement was the Treaty of Paris, (aka Spanish American Peace Treaty), which came into force on April 11, 1899. United States Military Government (USMG)

jurisdiction over these four areas continued after the peace treaty came into force. In the treaty, Spain ceded the territorial sovereignty (aka ownership) of Puerto Rico, Guam, and the Philippine islands to the United States, and Cuba was a limbo cession. Notably, the cession of the Philippines involved payment of \$20 million by the U.S. to reimburse Spain for various pre-existing infrastructure projects.

The defeat and loss of the last remnants of the Spanish Empire was a profound shock to Spain's national psyche and provoked a thorough philosophical and artistic reevaluation of Spanish society. The United States gained several island possessions spanning the globe, which elicited a vigorous new domestic debate over the wisdom of international expansionism.

===== MOVIE ===== END OF PART 2 =====

"I want to introduce one my friends, Enrico. He has a background in Cuban military history," Gloria motioned toward the rear of the classroom.

Enrico stood up and walked to the front, then stood facing the assembled students.

"After this introduction, I am sure that most of our students here today realize that after the Spanish American War, Puerto Rico, the Philippines, and Guam were ceded to the United States in the Treaty of Paris, which came into force, on April 11, 1899. Enrico has good knowledge of the military history of the entire Spanish American War period, so, let me ask this first question. If we look at the situation in mid-October 1899, which is six-months after the peace treaty has come into force, how would we describe the situation in these three areas?"

"All three of these areas remain under the jurisdiction of the United States Military Government (USMG)," Enrico replied.

One student raised her hand. "I am Martha. I missed a few sessions but I have watched each of the online videos several times. But in my understanding, after a war, when you have a peace treaty, if a territory is ceded to another country, such as the United States for example, then what that effectively means is that the Legislative Branch of that country has been given permission to pass a law providing for the civil government of the territory. Some people call that an organic act."

Gloria pushed a few buttons on her remote control. The screen came on.

Organic Act

In United States law, an organic act is an act of the U.S. Congress that establishes a territory of the United States and specifies how it is to be governed In the absence of an organic law a territory is classified as unorganized.

An example of an Organic Act is the Foraker Act of 1900, which established civil government in Puerto Rico. Some years later, it was superseded in 1917 by the Jones–Shafroth Act, which was superseded in 1952 by the Constitution of Puerto Rico.

"Go on," Gloria said.

"So wouldn't that mean that military government would immediately end when the cession of territory came into force -- which would be the date the treaty came into force -- and civil government would immediately be instituted in Puerto Rico, the Philippines, and Guam?"

"Well," Gloria replied, "many civilians immediately jump to this conclusion. But what you have to remember is that civil government cannot just appear out of nowhere. There has to be some authorization for its formation. When the territory is ceded to the United States, the correct situation would be for the U.S. Congress to pass the necessary legislation."

Gloria continued. "In the last session we quoted from *Military Government and Martial Law*, by William E. Birkhimer, and that quotation is very relevant here –

. . . military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.

"What this means is that there is necessarily a certain amount of delay before civil government can be established, and military government continues during this period," Gloria this further clarification. "OK, moving right along, let me ask Enrico a second question. If we look at the situation in mid-April 1899, which is just a few days after the treaty has come into force, how would we describe the situation in Cuba?"

"Under the treaty, Cuba is a limbo cession with the United States as the (principal) occupying power. USMG is in effect, which means that for all practical purposes, Cuba is under military occupation by the United States. For clarification, we can also note that the

United States was the principal victor in the Spanish American War.”

“I believe that the film stated that the United States had no allies in conducting this war,” Gloria pointed out.

“Well, even though the U.S. had no international allies, it did coordinate with numerous insurgent groups in many locations, and treated them as co-belligerents (aka ‘allies”),” Enrico summarized. “Therefore I believe there is still some significance in referring to the United States as the ‘principal victor.’”

“And if we look at the situation in mid-October 1899, which is six months after the peace treaty has come into force, how would we describe the situation in Cuba?”

“It is the same. Under the treaty, Cuba was ceded by Spain but no ‘receiving country’ was designated. The United States is the (principal) occupying power. USMG is in operation, that is the default status. After the peace treaty has come into force, to use today’s terminology, we would probably call the governance structure there the ‘United States Civil Administration of Cuba.’ That, of course, is military government. So, after April 11, 1899, Cuba remains under military occupation by the United States, but we tend to use the friendlier nomenclature of ‘civil affairs administration.’”

"We know that during the war period, U.S. Army General Leonard Wood commanded the Rough Riders, with Theodore Roosevelt as his second-in-command. Wood later became military governor of Cuba. Do you know where his headquarters were located?"

"I believe they were located in Havana, but in terms of verifying the existence of U.S. military occupation over Cuba, the location of the headquarters of USMG administration is not particularly determinative," Enrico replied. "Those headquarters could be located in Havana, which is on the far western side of the island, or they could be located in Baracoa, which is on the far eastern side of the island, or located in the Florida Keys, or located in Washington, D.C. or wherever."

"So **what is determinative** of the existence of military occupation in Cuba after the peace treaty has come into force?"

"We would look at the content of the customary laws of warfare in conjunction with the content of the treaty," Enrico was quick to reply to this. "And you would also consider that Cuba, at that point, was not yet either (1) an independent country, or (2) part of any other

country. Hence, it should be clear that Cuba has not yet reached a 'final status' under the law of occupation."

"And **what is determinative** for a recognition that the United States is the conqueror of Cuba?"

"Well, I would stress that (1) over 95% of the military attacks on Cuba during the Spanish American War were conducted by U.S. military forces, and (2) the Spanish military troops surrendered. Those two facts are the most important."

"What about the fact that the United States was the principal victor?"

"That could be mentioned as well."

"What about the surrender ceremonies? Do we have to take into account who surrendered to whom?"

"The surrender ceremonies are just that – ceremonies. But for more detailed analysis alright, we can look at the development of the customary laws of warfare, even up to the present day we can examine the internationally compiled content such as the Hague and Geneva Conventions. But nowhere in there do you find any specifications to the effect that any legal relationships arise based on a consideration of what military troops accept the surrender."

"Legal relationships?" Gloria asked. "Legal relationships in regard to what?"

"In regard to governance of the territory or the people thereon," Enrico explained.

"Alright, the United States is the legal occupier. And how long did USMG continue in Cuba?"

"Until May 20, 1902."

"That is a period of about three years. Is there any significance to that?"

"Not in particular. That was the period of time it took for the United States government officials to nurture local groups and associations to come together to form a civil government for Cuba. The local Cuban people also drafted a local constitution."

More information appeared on the screen.

The 1901 Constitution

The 1901 Constitution of Cuba took effect in Cuba on May 20, 1902, and the government of Cuba operated under it until the 1940 Constitution of Cuba came into force. It was adopted by delegates to a Constitutional Convention in February 1901, but later amended to include certain provisions specified by the U.S. military authorities.

As early as September 1900, General Leonard Wood, the U.S. military governor of Cuba, had called for the meeting of a local constitutional convention. The convention met in Havana for the first time on Nov. 5, 1900. Wood opened the meeting by instructing its thirty-one delegates (representing a local population of approx. 1,600,000) to draft a constitution for the governance of their island, and to include therein a clear formulation regarding the future relationship between the U.S. and Cuba.

"So, that 'authorizing legislation' for establishing civil government in Cuba was not passed by the U.S. Congress?"

"No, of course not. In the 1899 Treaty of Paris, Cuba was **not** ceded to the United States. Hence, inherently, there was no authorization for the U.S. Congress to pass legislation to establish a civil government for Cuba," Enrico stated. "Cuba was a territorial cession with no receiving country specified, and with the United States as the (principal) occupying power. That clearly means that the Cubans have to come together to form their own civil government. That would be following the customary precedent."

Moving into the Modern Era

"Let me ask another question about military occupation. In the current era, here in the 21st century, we know that Article 6, section 3 of the Geneva Conventions (IV) of August 1949 states:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations;

"And I have read in some law journals that there has been some dispute over the terminology of 'general close of military operations' as used in this Article. Could you explain that?"

"Well, the general consensus among modern scholars of international humanitarian law (which is also known as the 'law of armed conflict,' or 'laws of war', or more broadly 'customary laws of warfare') here in the 21st century is that Article 6 in fact provides that --

*. . . . insofar as occupied territories are concerned, application of the Convention 'shall cease one year after the general close of military operations', **not on the** 'general close of military operations leading to the occupation',*

"So, in many instances that would be an important clarification. But, in general, are there any hard and fast rules regarding the termination of a military occupation?"

"The 1907 Hague Regulations and 1949 Fourth Geneva Convention are both silent on the termination of occupation. What we have is just the statement in Article 6 section 3 of GC(IV), and you and I have just spoken about it."

"But Article 6, section 3 is still somewhat difficult to understand. On the surface, it appears to **reduce** the scope of protection that the local population enjoys under the GC(IV), as opposed to maintaining it."

"Yes, some international scholars have made this charge," Enrico said, expressing his agreement. "Additionally, many commentators on the GC(IV) have also argued that Article 6 section 3 **cannot be interpreted to have survived** the adoption of Article 3(b) of 1977 Additional Protocol I which provides, in part, that the application of the Geneva Conventions and Additional Protocol I in occupied territory '*only ceases on the termination of the occupation*'."

"So, the primary concern of this lecture series is various mid-20th-century events in the Pacific, but we have stepped back to look at occupied territories in 1898, and now we are dissecting the GC(IV) of August 1949. Would you want to make any special clarifications to our students about all of this?"

"Well, on the one hand, it could be argued that any analysis of the content of GC(IV) or the '1977 Additional Protocols I and II' is not at all relevant to a discussion of the United States military occupation of the four Spanish American War cessions beginning in 1898. On the other hand, from the perspective of the customary laws of warfare as applied in 1898, by making careful note of this analysis you gain a valuable insight into the future development of international humanitarian law. With that, you are better equipped to make

a correct interpretation of the content of the customary laws of warfare to be applied in similar situations."

"So, this insight could be useful if you were debating similar issues in the present day, such as limbo cessions in the 1952 San Francisco Peace Treaty (SFPT)."

"I believe so."

"Let me ask another question in regard to the military occupation of territorial cessions. In the Commentaries on the Hague and Geneva Conventions by various international scholars, and in particular by the International Committee of the Red Cross (ICRC), is there any discussion of the concept of 'prolonged occupation'?"

"No. To my knowledge, neither the 1907 Hague Regulations, the 1949 GC(IV) nor any of the scholarly Commentaries have any analysis of a so-called 'prolonged occupation.' Nor do we find any conveniently-referenced internationally-recognized listing of what 'important subjects' the legal occupier, or his agent, should be paying special attention to under such circumstances. Nothing like that is readily available."

"What would be an example of such an 'important subject'?"

"Well, we all know that there is a RULE that 'Military occupation does not transfer sovereignty.' However, after a period of prolonged occupation, whether it be 10 years, 20 years, 30 years or more, you have a lot of people calling for the doctrine of 'prescription' to be invoked."

The screen came on.

Prescription

(1) the process of acquiring title to property by reason of uninterrupted possession of specified duration, (2) acquisition of ownership or other real rights in movables or immovables by continuous, uninterrupted, peaceable, public, and unequivocal possession for a period of time.

"That is the first item I would point out. It needs to be specifically clarified that in situations of military occupation, the doctrine of 'prescription' does not apply." Enrico paused briefly. "At this point we could go into an in-depth discussion of the situation of Northern Cyprus,

but I am afraid that would take us too far away from the Spanish American War and WWII in the Pacific.”

Territorial Cessions

“Yes, those are our two major areas of concern at this point,” Gloria agreed. “But returning to this codified content, what about the special considerations that would apply to the military occupation of territory that has been separated from the mother country in a peace treaty?”

"Again I would state that neither the 1907 Hague Regulations, the 1949 GC(IV) nor any of the scholarly Commentaries have any analysis of territorial cession issues. Not that I have seen. Nor do we find any conveniently-referenced internationally-recognized listing of what 'important subjects' the legal occupier, or his agent, should be paying special attention to under such circumstances. Nothing like that is readily available," Enrico seemed saddened by having to make these remarks.

He continued slowly. "We can also examine the content the 1940 edition of U.S. Dept. of War Field Manual FM 27-10 'Rules of Land Warfare' from this vantage point. In terms of military occupation, FM 27-10 primarily deals with situations which are 'in and out.' In other words, U.S. troops land on the beaches or at the border, the territory is conquered, military occupation is conducted, a peace settlement is reached, sovereignty is restored, and the troops leave. This is what we might call the classical model."

"So, FM 27-10 has no specific content directed toward the particular situations of the military occupation of territories that become territorial cessions in a peace treaty?" Gloria asked.

“Not, nothing like that is specifically delineated.”

“That might be considered a major lack in a volume of this nature.”

“I would say so,” Enrico agreed. “For territorial cessions in a peace treaty, such considerations would include such subjects as –

- (1) the rights and responsibilities of the new incoming administration,
- (2) the determination of the effective date for the transfer of territorial sovereignty,

- (3) specific statements regarding what RULES are to be regarded as prohibitions on action before territorial sovereignty has been transferred,
- (4) the recognition that ‘conquered territory’ is itself a legal status of territory, and there are certain ‘rights’ for (a) the local people and (b) the territory, which are associated with this status,
- (5) the Supreme Court’s recognition that the conqueror has jurisdiction over conquered territory, which indeed can be cited as a fundamental principle of the laws of war,
- (6) the definition and/or determination of the (principal) occupy power,
- (7) the recognition that after the peace treaty comes into force, in regard to any territory which is designated as ceded, the legal occupier aka (principal) occupying power should nurture local civic groups to come together to form a local ‘civil government,’
- (8) specific statements regarding the delegation of administrative authority to proxy occupying forces, and under what circumstances the proxy occupation forces must evacuate the territory, and/or dissolve their existing governmental apparatus,
- (9) the recognition that in a peace treaty after war, in regard to territory which is ceded , it is always true that such territory will remain under the jurisdiction of the legal occupier, aka (principal) occupying power, until final determination of its status,
- (10) The Rule discussed in a previous session here in this lecture series --

RULE

After the treaty comes into force, any (foreign) military forces still in territory not ceded to their country should promptly leave, and/or establish a definitive timetable as to when they will leave.

(EXCEPTIONS should be specifically listed.)

“And a little bit of research could probably uncover many more,” Enrico stated confidently.

"Again, what you are indicating here is that there is a lot of content (of the customary laws of warfare) that has not been specifically compiled."

“In respect to many situations regarding armed conflict in general, and in respect to the related situations involving territorial cessions in particular, that is true,” Enrico stated more comprehensively. “But more specifically, I believe all scholars recognize that the laws of war **do indeed include** much unwritten and uncompiled content. To find out what that content is, you have to look at established precedent in the post-Napoleonic period.

And that is why we use the terminology of 'customary laws of warfare,' which I believe contains both all of the written, compiled, officially assembled, etc. content, plus everything which is based on precedent, which for the most part is unwritten and uncompiled."

"So if five of our students sit down and read through the 1907 Hague Regulations, and the August 1949 GC(IV), they will still have a hard time knowing which Articles apply to the specific considerations of territorial cessions after war, is that correct?"

"I would say so."

"They might even differ on the definition of 'territorial cession.' For example, do you truly consider what you are calling a 'limbo cession' to be a territorial cession? I have heard that some people would dispute that. They look at the phrasing in Article 1 of the Treaty of Paris

Spain relinquishes all claim of sovereignty over and title to Cuba

And they look at Article 2(b) of the San Francisco Peace Treaty

Japan renounces all right, title and claim to Formosa and the Pescadores

and they say that Cuba is **not** a territorial cession, and Taiwan is **not** a territorial cession."

"Well, according to my analysis, both Cuba and Taiwan fit the definition of 'cession'. The definition I am using is –

cede

(1) to renounce possession of, especially by treaty, (2) to transfer control of or sovereignty over specific property or territory, especially by treaty, (3) to relinquish and/or give up something such as land, rights, or power, (4) [noun] cession

Ecuador in Cuba

"Alright, let me ask another question. Suppose in the late 1890s the U.S. President and the members of the Cabinet, along with many Congresspersons and Senators, heads of

prominent foundations, etc. are on very good terms with the high ranking government officials of Ecuador. How about inviting those Ecuadorian officials to Cuba to establish a civil government for the island?"

"In the post-Napoleonic period, I am aware of absolutely no precedent for making such arrangements. It comes back to the fundamental American value of self-government."

"Alright, I have invited my associate Cornelius Ramond Wittenberg to join us after the coffee break. He attended a number of seminars at the Department of War Studies, King's College, London, and also has a background in philosophy."

= = = = Coffee Break = = = =

Cornelius Wittenberg's attire and bearing gave the impression of being a wealthy member of the British Parliament. He walked into the classroom slowly, and stood next to Enrico.

The students broke out in applause.

Gloria began this part of the afternoon session. "Thank you for coming today. We were just discussing self-government, and more specifically under that general category, we were discussing 'civil government.' So, we were hoping you could give us some insights."

"Certainly. And I can show my data-notes on the screen in the front?"

"Yes, we received your data and made in into individual graphics," Gloria said, passing him the remote control.

"Excellent. Here is the first screen."

Self-government

[DEFINITION] a system in which the citizens of a country (or smaller political unit, such as a 'state,' 'province,' etc.) rule themselves and control their own affairs.

Self-governments are **largely free** from external government control or outside political authority. Republican governments and democracy in the United States are based on principles of self-government.

Between 1619 and 1776, American colonists had representative colonial governments for making laws. In 1619, the House of Burgesses in Jamestown, Virginia, was established as the first representative assembly.

In 1620, the Pilgrims in Massachusetts signed the Mayflower Compact, agreeing to form a government and submit to the will of the majority. This form of direct democracy meant that laws would be subject to the citizens for their approval and consent. These, along with other colonial assemblies, laid the foundation for future self-government in America.

Criticism: Even though there were elected assemblies in the colonies, in truth, no English colony was fully democratic or completely self-governing. However, there were different levels of control exercised by the U.K. government officials over different colonies. Moreover, most of the colonists felt that “The sky is high, and the king is far away,” so they tried to keep a low profile in the conduct of their daily affairs.

“Various problems began appearing in the 1760s,” Mr. Wittenberg said, as the following graphic images came up.

Disputes over the Control of North America

Following the French and Indian War between Great Britain and France for control of North America, which lasted from 1754 to 1763, Great Britain ended the policy of salutary neglect. This policy had allowed the colonies to govern themselves without much interference. However, these changes in British policy prompted resistance by the colonists and ultimately led to the American Revolution.

Belief in Self-government leads to an independent United States

The American colonists' belief in self-government was influenced by the writings of political activist and theorist Thomas Paine. In his fifty-page pamphlet *Common Sense*, published in 1776, Paine made the argument for political independence from Britain and a representative self-government. He also helped draft a constitution for the colonies. Paine felt that the monarch had no place in government and that the people themselves were the legitimate authority for establishing a government.

Quotations from *Common Sense*, by Thomas Paine

“In the early ages of the world, according to the scripture chronology, there were no kings; the consequence of which was there were no wars; it is the pride of kings which throws mankind into confusion.”

“As the exalting one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty, as declared by Gideon and the prophet Samuel, expressly disapproves of government by kings.”

“There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required.”

“When we are planning for posterity, we ought to remember that virtue is not hereditary.”

“A long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom.”

“The cause of America is in a great measure the cause of all mankind.”

“We have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth. We have it in our power to begin the world over again. A situation, similar to the present, hath not happened since the days of Noah until now.”

birth and death

Thomas Paine 1736 -- 1809	Thomas Jefferson 1743 -- 1826
------------------------------	----------------------------------

Pictures of Thomas Jefferson and Thomas Paine appeared on the screen, along with their relevant dates.

Mr. Wittenberg said, “Thomas Jefferson was also influenced by the ideas of the Enlightenment philosopher John Locke.”

“Yes, and that is one of the primary reasons I invited you here today,” Gloria interrupted. “I know that Locke wrote *Two Treatises of Civil Government*, published in 1689. I was hoping you could give us some insights into his thinking.”

“Well, according to Locke, the main purpose of government should be to protect the people's natural rights.”

Natural Rights

Natural rights are those that are not dependent on the laws or customs of any particular culture or government, and so are universal and considered essentially inalienable.

The concept of natural law is related to the concept of natural rights. Natural law first appeared in ancient Greek philosophy, and was referred to by Roman philosopher Cicero. It was subsequently alluded to in the Bible, and then further developed in the Middle Ages by Catholic philosophers such as Albert the Great and his pupil Thomas Aquinas.

During the Age of Enlightenment, the concept of natural laws was used to challenge the divine right of kings, and became an alternative justification for the establishment of a social contract, positive law, and government – and thus legal rights – in the form of classical republicanism.

Mr. Wittenberg continued. “Looking at Locke’s *Two Treatises of Civil Government*, he begins by describing the state of nature, a picture much more stable than Thomas Hobbes' state of "war of every man against every man," and argues that all men are created equal in the state of nature by God. From this, he goes on to explain the hypothetical rise of property and civilization, in the process explaining that the only legitimate governments are those that have the consent of the people.”

“And how does he connect this type of argument back to natural rights?” Enrico inquired.

“To put it simply, natural rights are those you are born with. According to John Locke, these are the rights to life, liberty, and property. He also said that kings should not have absolute power, that is, power without limits. One of the most famous sentences written by Thomas Jefferson in his lifetime was that 'all men are created equal' in their right to enjoy 'life, liberty, and the pursuit of happiness.’” Mr. Wittenberg added. “Jefferson goes on to say that government derives its power from the consent of the governed. Basically,

this means that governments must be representative of the people and limited in power by the recognition of basic political rights.”

“So, having listened to Mr. Wittenberg’s comments up to this point, are there any questions?” Gloria motioned toward the students, some listening attentively, some talking among themselves.

“Ahem ,” one female student cleared her throat. “My impression is that Locke is basically talking about ‘self-government.’ Based on Mr. Wittenberg’s comments so far, I am getting the strong impression that the content of Locke’s *Two Treatises of Civil Government*, has essentially nothing to do with the establishment of civil government in conquered territory, in order to supplant military government.”

“That is the key point you want to recognize,” Gloria agreed, as Mr. Wittenberg smiled broadly. “However, I think that Mr. Wittenberg wants to add something.”

“Yes, there is a slight clarification which needs to be added,” he said. “In John Locke’s works we do find that he spent quite a bit of time writing about the so-called ‘just war tradition.’ That was an attempt by some philosophers to lay out moral rules that should govern armed conflict. As such, it represents a philosophical position somewhere between principled pacifism and realism.”

Philosophical Positions on the ‘Just War Tradition’

(A) Principled Pacifism

* claims that war is morally wrong

(B) Realism

* claims that war may be necessary as a means to an end, but at the same time ‘moral rules’ cannot be applied to it

(C) John Locke’s Stance

* supports the idea that the correct opinion to hold on this important philosophical question lies somewhere between (A) and (B)

“So, if our students want to research the content of some old books, something that we might call ‘primary sources,’ in order to gain more insights into laws of war issues,

including the establishment of civil governments in that context, what would be some of your suggestions?" Gloria asked.

Mr. Wittenberg was quick to reply. "I would suggest you begin with *On the Laws of War and Peace* by Hugo Grotius, published in 1625, or *The Law of Nations* by Emerich de Vattel, published in 1758. I have no doubt you can find the full text, as well as summaries, and collections of quotations, on the internet."

"With that I am going to thank Mr. Wittenberg for his attendance, and announce another break for refreshments and snacks. We have hired a local Cuban delicatessen to be our caterers this afternoon, and I understand they are in Lounge Area 3, down the hall."

= = = = = Refreshments Break = = = = =

"Before Mr. Wittenberg came, we were discussing the situation after the close of hostilities in Cuba on July 17, 1898. In particular, we were discussing the feasibility of certain high ranking officials from Ecuador being invited to establish a civil government there," Gloria brought the discussion back to Ecuador. "Ecuador was indeed an independent sovereign nation during this period, having achieved its independence in 1822."

"And you think that if the Ecuadorian officials established a civil government in Cuba, that would somehow be able to be considered as a truly 'Cuban civil government,' is that your proposal?" Enrico queried.

"I am just wondering if it might be possible," Gloria said hesitantly.

"The Cuban civil government should be established by local Cubans. That is the only way to comply with the fundamental American ideal of self-government, in my opinion," Enrico stressed. "After all, the United States is the (principal) occupying power. They will have significant input into how the post-war government organization in these islands will be affected."

"And is Cuban independence the only option?" Gloria asked.

"No, obviously, there are other options. But you would have to go into a time tunnel and return to the original drafting of the treaty. You would have to revise it. For example, Cuba could be ceded to some other country, such as Guyana I mean assuming that Guyana was already an independent sovereign nation in that era. That would be another

option. Alternatively, Cuba could be split in two, and the two different pieces ceded to other countries, so there are many options Cuba could become an unincorporated territory of the United States, similar to Puerto Rico, the Philippines, and Guam. For that, you would specify that Cuba be ceded to the USA. And one supposes that if there was strong support, with Cuba being ceded to the USA in the treaty, Cuba might be able to become a state in the United States."

"How many states were in the USA at that point?"

"In the late 1890s, there were 45 states. So, Cuba would have been number 46. (In fact, that #46 position was later assumed by Oklahoma, which joined the Union in 1907.) But even in that time era, I wouldn't consider it very likely. To my knowledge, beginning in 1898 all newly acquired territories were unincorporated by default. That means that they are **not** on the way to statehood. Hawaii was the only exception. Additionally, there would be the matter of the Four Concerns, as discussed in a previous session "

- | |
|---|
| <ol style="list-style-type: none">1. Exact border boundary specifications.2. Issuance of I.D. documents3. U.S. federal income taxes4. Issues involving undocumented immigrants |
|---|

"Well, you mean 'One of the Four Concerns," Gloria clarified. "But actually, that would not have been relevant in 1898. It would have come into play in later years."

"Yes, well that is a better way to explain it, I agree. 'One' of the Four Concerns."

"Why was the option of Cuban independence chosen, in your opinion?"

"That was more or less in the cards from the beginning," Enrico said. "The entire Spanish American War primarily came about due to the fact that the U.S. had decided to support the cause of Cuban independence. After the United States won the war, all plans were put in motion to make Cuba independent."

"So, the treaty specifically stated that Cuban independence was recognized , is that correct?"

"No, the treaty left Cuba under the jurisdiction of USMG. The RULE is that military government continues until legally supplanted. Legally supplanted by what? By a local civil government for the territory. These arrangements are all part of the **customary laws of warfare**. Or"

"Or what?" Gloria asked.

"Or such arrangements could be cited as part of the **customary law of treaties**. In other words, this is the way treaties function in the post-Napoleonic period."

"Well then, let me be the devil's advocate. Let me suppose that for some reason or another the local Cuban people were not able to come together to form their own civil government. What would be the status of Cuba territory at that point?"

"Well, Cuba **has not** been elevated to any new status in the treaty, so it remains as conquered territory of the United States. We say that its '(final) legal status' is undetermined. It is an interim cession under USMG, and an independent customs territory. Importantly, however, there are certain human rights associated with this status. For the people, Fifth Amendment protections are considered fundamental."

"And how would you view the responsibility for handling the defensive needs of Cuba during this period of undetermined status?"

"For Cuba territory, being under U.S. jurisdiction would bring it under the common defense clause of the Constitution ((Article 1, section 8, clause 1). Of course, that is the direct responsibility of the U.S. Secretary of War. He is the head of the War Dept."

Some information came on the screen.

U.S. Secretaries of War 1897 to 1908

Name	Dates in office
Russell A. Alger	March 5, 1897 to Aug. 1, 1899
Elihu Root	Aug. 1, 1899 to Jan. 31, 1904
William Howard Taft	Feb. 1, 1904 to June 30, 1908

"So, you view Cuba as being under the 'jurisdiction' of the United States as the result of

the conquest by U.S. military forces?"

"100%"

"And you consider that the common defense clause of the U.S. Constitution would apply to Cuba **after** (1) its conquest by the United States, and **before** (2) the end of USMG in Cuba and **before** (3) the formation of the Republic of Cuba? I would note that these latter two events were both proclaimed by the United States President on May 20, 1902."

"100%"

"Have we overlooked anything?" Gloria asked.

"In consideration that under the terms of the peace treaty, Spain ceded Cuba without the specification of a 'receiving country,' some people are always curious about whether any scholars have ever recognized that the cession itself was 'incomplete,' or if Spain retained residual sovereignty over Cuba ?"

"And the answers are" Gloria asked.

"No, neither the United States nor Spain ever raised such 'legal issues,'" Enrico clarified. "And I have never seen such theories advanced in the historical accounts."

"So, anything else?"

"I assume that fiduciary duties will be discussed in a future session."

"I believe so," Gloria replied. "Are there any further questions?"

No hands were raised.

"Let's watch another movie," Gloria said matter of factly. The lights went out. On the screen, a man dressed in what appeared to be a French military uniform of the early 1800s walked across a large stage. He received a statuette from a man and woman, both dressed in exquisite evening clothes, standing at the podium. He bowed to the audience, and gave a short speech in French.

The subtitles on the screen indicated that he was receiving the 'Best Actor' award for his

portrayal of Napoleon Bonaparte in a movie about the Napoleonic Wars. The English translation of the movie title was “New Insights on the Life of Napoleon.”

The screen images then shifted to a movie studio workshop, where the Director and Producer of this film were introduced, along with Heads of Special Effects, CGI, etc. The screen went dark, and then an overshot of a small Corsican village appeared. The year was 1769.

The movie, a somewhat shortened version and overdubbed in English, ran for 48 minutes.

After the final scenes and credits, the French flag was shown, and then gradually faded out. Gloria clicked her remote control, and some information that had been presented on Napoleon in a previous session appeared again on the screen.

The Napoleonic Wars

The Napoleonic Wars (1803–1815) were a series of major conflicts pitting the French Empire and its allies, led by Napoleon I, against a fluctuating array of European powers formed into various coalitions, financed and usually led by the United Kingdom. The wars stemmed from the unresolved disputes associated with the French Revolution and its resultant conflict. The wars are often categorized into five conflicts, each termed after the coalition that fought Napoleon: the Third Coalition (1805), the Fourth (1806–07), the Fifth (1809), the Sixth (1813), and the Seventh (1815).

Napoleon I

aka Napoléon Bonaparte, a famous French general, born August 15, 1769, in Ajaccio, Corsica; died May 5, 1821, on St. Helena Island (British Overseas Territory).

“Let's turn to a fundamental issue,” she announced. “Is 'conquest' legal? Here is some information I found on the internet.”

The Conquest may refer to:

- The Norman conquest of England in 1066
- The Spanish Conquest of the Aztec Empire in 1519
- The Conquest of 1760, where England acquired parts of New France during the French and Indian War

“Let's not limit our discussion to the period of the 1840s to the early 1900s. Let's consider the situation not only during those times, but also into the present era.”

More information came on the screen.

<p>The Treatment of Territory which has been “Conquered” <i>Differing Norms Existed in the Earlier Times</i></p>

In the period of the late 1820s or earlier	In the period of the 1830s or later
Territory is considered annexed when it is actually placed under the authority of the hostile army.	Territory is considered occupied when it is actually placed under the authority of the hostile army.
	Note: Military occupation does not transfer territorial sovereignty.

“Can anyone clarify the significance of these dates? ‘late 1820s or earlier’, ‘1830s or later’?”

A girl in the front row raised her hand. “I believe those are basically just references for saying ‘the pre-Napoleonic period’ and ‘the post-Napoleonic period.’” She smiled. “I grew up in France, my name is Danielle.”

“Yes, your analysis is correct. In some areas of the world these post-Napoleonic norms were recognized earlier. But by the post-1830s, the majority of world governments should be clear about these differences.”

“You mean the difference between ‘annexation’ of territory and ‘military occupation’ of territory,” Danielle added.

“Yes. Fundamentally speaking, invasion followed by immediate ‘annexation’ ceased to be recognized as valid by international law and were no longer accepted as a valid means of territorial acquisition. Later, as we know, the Convention respecting the Laws and Customs of War on Land (Hague IV, 1907) contained explicit provisions concerning the protection of civilians and their property in occupied territories. Those are the so-called Hague Regulations.”

“And a major reference for drafting those was the Lieber Code,” a student in the center of the room added.

Gloria nodded. Some additional information regarding the Spanish American War cessions came on the screen.

Areas Conquered by U.S. Military Forces and therefore under USMG Jurisdiction -- with later "new disposition" by peace treaty				
Area	Treaty	Treaty came into force	End of USMG	USMG supplanted by
Puerto Rico	Treaty of Paris, Art. 2	April 11, 1899	May 1, 1900	civil government for Puerto Rico (USA)
Philippines	Treaty of Paris, Art. 3	April 11, 1899	July 4, 1901	civil government for Philippines (USA)
Guam	Treaty of Paris, Art. 2	April 11, 1899	July 1, 1950	civil government for Guam (USA)
Cuba	Treaty of Paris, Art. 1	April 11, 1899	May 20, 1902	civil government for Cuba (Republic of Cuba)

“Maybe we need to return to John Locke and his views on the ‘Just War Tradition,’” a student introducing himself as Nigel offered. “I mean in order to delve into a deep analysis of whether ‘conquest’ is legal or not. But, then again, I am not sure I really understand what his conclusion on that topic was.”

“I don’t think we would classify Locke as a legalist,” Gloria said. She pushed some buttons on her remote control.

John Locke

(August 29, 1632 to October 28, 1704) was an English philosopher and physician, widely regarded as one of the most influential of Enlightenment thinkers.

“I believe that he recognized that the entire problem was something of a moral dilemma.”

“After the Battle of Waterloo, I guess Napoleon would have had a lot of time to think

about these issues after he was exiled to the island of Saint Helena by the British,” Danielle added.

Gloria smiled. “We can gain many insights from the writings of Locke, but more immediately relevant to our concerns here in this lecture series is to try to do some analysis of the subjects of war and conquest from the legal perspective. As we have mentioned before, two very influential writers in that regard were the Dutch jurist Hugo Grotius, who published *On the Laws of War and Peace* in 1625, and the international lawyer Emerich de Vattel, born in an area which is now part of Switzerland. He wrote *The Law of Nations*, which was published in 1758. These two gentleman looked at the many and various situations which arise in warfare and offered their rationale as to which should be considered allowable and which should not.”

“And what were their conclusions,” Nigel queried.

“What is ‘allowable’ is basically everything that we are discussing under the topic of the ‘customary laws of warfare,’” Gloria clarified. “The early U.S. Supreme Court cases are also good for understanding various fundamental concepts. Let’s look at a case from 1828, which I believe was briefly mentioned in an earlier session.”

American Insurance Company v. Canter (1828)

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.

The usage of the world is if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose.

Gloria offered some additional analysis. “Many people don’t like the wording used in this decision because they insist that ‘possesses the power of acquiring territory by conquest ‘ is equivalent to annexation. And they associate ‘annexation’ as arising from a war of aggression. And then they view that as illegal under modern international law norms.” She frowned.

“But that is incorrect,” Gloria continued. “What is being spoken of in this court case is ‘dominion.’ In more modern terminology, I suppose we would just say ‘jurisdiction.’”

The screen came on.

Comments on the Legality of Conquest in the Modern Era

- Territory may be acquired as a result of conquest by military forces, and the "conqueror" is the (principal) occupying power,
- The administration and disposition of such territory must be conducted according to the laws of war, which include the laws of military occupation,
- The territory is under military occupation, and military occupation does not transfer sovereignty,

Re: Military Occupation

- Military occupation is conducted under military government,
- Military government continues until legally supplanted by a recognized "civil government" for the area,
- Military occupation is period of "interim (political) status."

“So, can we reach a conclusion?” a student in the back of the room asked.

Enrico raised his hand. “I think that conquest is **not illegal** if when, (1) from the beginning, your motive for getting engaged in this war is not “aggression,” and (2) you are adhering to the relevant international norms in conducting your military action.”

“And that is the subject of this lecture series. The international norms he is speaking of are the ‘customary laws of warfare.’ In presenting this information, we could have just given you students long lists of data to memorize, and assigned numerous weighty books as required reading.” Gloria defended the overall organization of the course. “Instead, we have tried to use a modified Socratic method in presenting these lectures, so that you can fully understand the historical development of the different concepts.”

Mr. Wittenberg walked back into the classroom and there was scattered applause.

“I have been sitting in an adjoining media equipment room, and continuing to watch the interaction and discussion in this classroom. As you know, all of these lectures are recorded, but even a fairly comprehensive examination of your surroundings here fails to reveal any of that equipment. That is because we are using some of the best miniature cameras and microphones which the U.S. National Security Council”

He suddenly seemed startled at the remarks he had just made, and raised his right hand to cover his mouth. He was clearly embarrassed. “Well, I guess that was an unfortunate choice of wording! I didn’t mean to imply that the NSC was involved in the planning, management, or running of these lectures! At any level I was just trying to point out that we are using some of the most advanced electronics equipment available!”

“Let me get back on focus. Oh yes,” he said, “If I may, please allow me to return again to this subject of ‘conquest.’ I believe that there are one or two important points that need to be made. The first is that, well, what we have seen in regard to the United States and her overseas territories acquired by conquest it was the by-product of exercising our inherent right of ‘self defense,’ and consequently becoming involved in a war. Of course the Spanish American War happened in 1898, and for WWII in the Pacific, the hostilities had concluded by Sept. 1945. So, technically speaking, we would not be bound by the provisions of the Oct. 24, 1945, United Nations Charter. However, you will recall that the Article 51 of the UN Charter affirms that “in the case of an armed attack,” the right of self defense is recognized.

“Additionally, you have to realize that these overseas territories are not ‘part of’ the United States in the same way that the states are. President Lincoln’s interpretation of the U.S. Constitution was to say ‘Once a state, always a state.’ In other words, there could be no dissolution (or “termination”) of that statehood status. Later Presidents have also followed along with his interpretation.

“As a result, when various southern states began to secede from the Union, it resulted in the U.S. Civil War. But overseas territories **can** become independent. They can divorce themselves from their ties to the USA if they so desire.

“The Philippines was ceded to the United States, but later they expressed a desire for independence. The result was the Tydings-McDuffie Act of 1934, passed by the U.S. Congress, and commonly known as the Philippine Independence Act. This law established

the process for the Philippines to become an independent country after a ten-year transition period.

“And while some people complain about the overseas territories’ lack of direct representation in the U.S. Congress, nevertheless in the current era there are other ways to get things done in Washington, D.C. Let’s be realistic, there are a lot of countries in the world today who seem to be able to advance their agenda in Washington, D.C. quite successfully and we all know that that is called ‘lobbying.’

“Significantly, as a U.S. overseas territory, which we commonly call ‘insular’ area,’ you have the added advantage of coming under the geographical scope of the common defense clause of the U.S. Constitution. So, you don’t have to budget for defense spending, unless you want to organize some modest self-defense forces at the local level, or whatever. But more importantly, the local ‘island citizens’ in U.S. insular areas, and the companies with headquarters there are excluded from U.S. federal income taxes on local source income has that been discussed that yet?”

“I am afraid that you just let the cat out of the bag,” Gloria said, seeming somewhat frustrated. “Our moderators have consistently just hidden this fact behind a passing mention to the so-called ‘Four Concerns’ we didn’t actually make explicit remarks to clarify that U.S. federal income taxes are not “

A student on the far side of the room was waving his hand somewhat vigorously. Gloria acknowledged him and he stood up. “Excuse me,” he said, “but I believe that your information may be incorrect. I have a friend who recently spent some time investigating investment opportunities in Guam. He told me that for the most part the income tax laws in Guam exactly mirror the U.S. federal income tax laws.”

“Well, let me reply to that,” Mr. Wittenberg said somewhat formally. “The tax laws in Guam may indeed exactly mirror the U.S. federal income tax laws, however the revenue received by the government of Guam goes into the local treasury, it does **not** go to the U.S. Internal Revenue Service (IRS).”

The student seemed somewhat perplexed. “But is there a legal basis for such an exclusion?” he asked.

“We made a graphic about that,” Gloria said, reaching for her remote control.

Election of the US President

As per Article 2, section 1, clause 3, the Constitution provides for the election of the President by electors appointed by the states. Therefore, American citizens who reside in the insular areas cannot vote for the President. Local 'island citizens' in the insular areas cannot vote for President either.

- Although residents of the insular areas are not eligible to vote in presidential elections, most of the larger insular areas participate in the nominations process, which is governed by party rules and local law rather than by the Constitution.
- Additionally, in recent years a trend has developed for US insular areas to hold primary elections to nominate presidential candidates. After that, they then send delegates to the Republican and Democratic national conventions.

"It is called lobbying," Mr. Wittenberg clarified.

"But the fundamental legal issue is that since the local 'island citizens' in the U.S. insular areas do not have voting rights in US federal elections, they have no representation in the Congress," Gloria added. "In the history of the United States, representation and taxation have always been tied closely together. Hence, for these insular areas, no representation means no federal income taxes on local source income."

US Income Taxes

Congress has authority to impose income taxes on the worldwide income of U.S. citizens and corporations, including income from the insular areas. However, federal individual and corporate income taxes as such are not currently imposed in any U.S. insular areas on local source income.

- The Congress is vested with power "to lay and collect Taxes" under Article I, sec. 8, of the Constitution and the Sixteenth Amendment.
- However, U.S. citizens and corporations in the insular areas may be subject to Federal income tax laws if they have (1) domestic [50-state] US or (2) foreign source income.

Re-directing the Discussion Back to Taiwan

A girl in the front row raised her hand, and stood up. “My name is Helen, and my family moved to the United States when I was in junior high school. I grew up in Taiwan, but my father was transferred to Nanjing, China, at one point, so I spent two years there, and then there were some summers I spent in Hong Kong. I have been attending these lectures, but I find it all very confusing. We have been talking about the Spanish American War for two sessions already, but I really don’t see what relevance there is.

“My teachers in Taiwan and China always just gave us very clear analysis. After the end of WWII in 1945, Taiwan was returned to China based on two documents (1) the Cairo Declaration of 1943, promulgated by Winston Churchill, President Franklin Roosevelt, and Chiang Kai-shek. Later, there was a Potsdam Conference in July 1945, with Winston Churchill, President Harry S. Truman, and Chiang Kai-shek attending. They issued (2) the Potsdam Proclamation, when reaffirmed that the Cairo Declaration must be carried out. And I believe that at some point Soviet leader Joseph Stalin assented to all of these arrangements as well.

“So, it is all very clear. With the surrender of Japanese troops in Taiwan on Oct. 25, 1945, the sovereignty of Taiwan was transferred to the Republic of China based on these two documents. Additionally, there were the Japanese surrender documents which reconfirmed all of this as well.

“Moreover, in recent years, Chinese legal scholars have confirmed that under the terms of the *Vienna Convention on the Law of Treaties*, which came into force in 1980 I believe, both the Cairo Declaration and the Potsdam Proclamation qualify as ‘treaties.’

“But the legal and historical data you are presenting in this series of lectures runs all over the place. And I really can’t see what the significance of all this is for a discussion of Taiwan” Helen concluded, sitting back down.

“OK,” I think I can reply to that,” Mr. Wittenberg said calmly. “I made some graphics” he said, fiddling with the remote control.

<p>Six Qualifying Criteria for recognition as a Type 1 Insular Area of the United States</p>
--

“United States insular areas have been acquired in various ways. For ‘Type 1 Insular Area’,

what I am referring to is an insular area acquired by conquest,” he clarified.

“Here is a listing of the relevant criteria, and then a ‘yes’ or ‘no’ evaluation for each territory we are looking at, to see if it meets this criteria.”

1. There was a formal declaration of war.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

2. Each area had been conquered by U.S. military forces.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

3. After the surrender ceremonies, there was a formal peace treaty.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

4. The USA is the legal occupier.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

5. The territorial sovereignty of the original "mother country" was ended via the terms of the peace treaty.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

6. The jurisdiction of the United States over each area has been specified in the peace treaty.

Puerto Rico	Philippines	Guam	Cuba
yes	yes	yes	yes

“But those are the Spanish American War cessions,” Helen said, somewhat exasperated. “There is no relationship to Taiwan that I can see. I thought that in this lecture series we were supposed to be learning about Taiwan”

“Alright,” Mr. Wittenberg said, “I will add in the analysis for Taiwan.”

Six Qualifying Criteria for recognition as a Type 1 Insular Area of the United States
--

1. There was a formal declaration of war.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

2. Each area had been conquered by U.S. military forces.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

3. After the surrender ceremonies, there was a formal peace treaty.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

4. The USA is the legal occupier.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

5. The territorial sovereignty of the original "mother country" was ended via the terms of the peace treaty.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

6. The jurisdiction of the United States over each area has been specified in the peace treaty.

Puerto Rico	Philippines	Guam	Cuba	Taiwan
yes	yes	yes	yes	yes

“So, what does this mean?” Helen asked. “Taiwan is a Spanish American War cession?”

“No, Taiwan is a Type 1 Insular Area of the United States, under military government.” Mr. Wittenberg said slowly. “Also, let me spend a few moments examining the statements you made earlier.

“First, you made remarks to the effect that WWII, or WWII in the Pacific, which is most relevant to us, ended in 1945. But that is incorrect. The surrender ceremonies in 1945 marked the end of hostilities, not the end of the war. The end of the war is when the peace treaty comes into force.

“Second, you said that according to the *Vienna Convention on the Law of Treaties*, both the Cairo Declaration of 1943 and the Potsdam Proclamation of 1945 qualify as treaties. However, the definition of ‘treaty’ in the *Vienna Convention* is quite vague. From the vantage point of U.S. law, neither one of these documents were ratified by the Senate. Therefore they are not treaties. Also, I had some Taiwan friends who studied law. I believe that if you examine the procedures under Taiwan law for the recognition of something as being a formal treaty, you will find that these two documents do not qualify. Hence, the statement that according to the *Vienna Convention on the Law of Treaties*, blah, blah, blah, that is just a smokescreen, in my opinion.

“Third, I am curious as to why anyone would consider the content of two unsigned press releases to carry more legal weight than the fact of ‘conquest’ under international law I believe that such a ‘conclusion’, if we may call it that, shows a very poor understanding of the customary laws of warfare.

“As an additional clarification on the above,” Mr. Wittenberg stated, “Even if we accept that the Cairo Declaration and the Potsdam Proclamation have some directional value, in other words, they can perhaps serve as a ‘direction’ for the assembling of the new world order after the war, how could anyone propose that they would be ‘implemented’ at the SURRENDER CEREMONIES? That strikes me as totally absurd.

“The surrender ceremonies are only concerned with matters related to the surrender. That is primarily personnel and equipment. I would challenge anyone to show me any precedent in the post-Napoleonic period where a new disposition of territorial sovereignty is being made at any surrender ceremonies. That is 100% a non-starter. The overwhelming precedent is that such arrangements are made in the post-war peace treaty.

“So, we need to look over this situation carefully. The San Francisco Peace Treaty is very clear about that as well. The renunciation of all right, title, and claim over Formosa and

the Pescadores (aka “Taiwan”) by Japan is effective with the coming into force of the peace treaty, i.e. April 28, 1952. Before that time, Taiwan was sovereign Japanese territory.

“Therefore, it follows directly that when the Republic of China moved its central government to Taiwan in early December 1949, it was moving outside of China’s national territory. I will leave it to you to determine what effect that would have on the ‘legitimacy’ of the ROC regime” Mr. Wittenberg concluded.

Another female student stood up. “I find all of this very confusing as well. I was born in Penang, Malaysia, but I always attended Chinese schools growing up. I think that if you presented this type of analysis in a seminar to Chinese communities in Southeast Asia, most of the people would just stand up and walk out. They wouldn’t even want to listen to what you had to say. Let me repeat this: *Everyone knows that* legally speaking Taiwan was returned to the Republic of China in 1945, and that the Republic of China, founded in Nanjing in 1912, is the legal government of all of China!”

There seemed to be a fracas in the rear of the classroom. Two male students stood up and proclaimed “The People’s Republic of China, founded in Beijing in 1949, is the legal government of all of China!”

“Well, I guess not everyone knows that but anyway, you get my point,” she said.

“No, I am afraid I don’t,” Mr. Wittenberg said, frowning perceptibly. After a short pause, he continued. “But here is my point. I respect freedom of speech. You can say what you like. However, I know that some of you will be going into U.S. government service. For you, you need to adhere to the Constitution, the U.S. laws, and all relevant established precedent. In that respect, there can be no hesitation on your part.”

With that, he picked up his handkerchief and his notebook, bowed slightly, and walked out of the classroom.

The bell rang. Gloria announced that there was a “Fundamental Rights Supplement,” which could be downloaded from the class webpage. That related to the U.S. Constitution’s Bill of Rights. The URL appeared on the screen. She quickly sped out the door, and caught up with Mr. Wittenberg.

“Excuse me,” she said, somewhat loudly, her voice trying to rise above the commotion in the hallway. “That part at the end, where you said that the people in U.S. government

service should adhere to the Constitution, the U.S. laws, and all established precedent I am curious, is that what you currently see in regard to US Executive Branch officials' handling of Taiwan?"

"No, not at all," he shook his head. He started suddenly as an earthquake tremor began. Slightly further down the hallway, a large Chinese vase had been sitting on a small pedestal recessed into the wall. It swayed back and forth before falling to the floor and smashing into a thousand pieces.

Mr. Wittenberg hurried to get out of the way.

APPLICATION OF THE U.S. CONSTITUTION'S BILL OF RIGHTS

in U.S. overseas territories (aka "insular areas")

The U.S. Supreme Court has consistently maintained that not every provision of the U.S. Constitution applies in overseas territories, the major rationale being that these territories have "wholly dissimilar traditions and institutions." Since 1901, the Court has issued numerous rulings which have held that inhabitants of overseas territories are only guaranteed "fundamental" constitution rights -- "*inherent principles which are the basis of all free government.*"

These so-called "fundamental rights" also 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 of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments"

The Insular Cases of the U.S. Supreme Court are all concerned with the integration of the overseas territories acquired as a result of the 1899 Treaty of Paris into the United States legal system. Many legal scholars maintain that the most important are following six opinions: *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); and *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901). Most likely, the integration of other overseas territories would follow the same precedent.

In past eras, Hawaii and the Philippines were U.S. overseas territories ("insular areas"), and at the present time the United States still maintains the overseas territories of Guam, Puerto Rico, the Virgin Islands, American Samoa, and the Northern Mariana Islands. Hopefully, a consensus by U.S. government officials should enable Taiwan to be added to this list in the near future.

Bill of Rights

The following information on U.S. Supreme Court decisions in relation to the U.S. Constitution's "Bill of Rights" (i.e. Amendments 1 - 10), as applied in overseas territories, are provided for reference.



James Madison and George Mason
"Fathers of the Bill of Rights"

Amendments	U.S. Supreme Court rulings	Comments
<p>Amendment I: Freedom, Petitions, Assembly</p> <p>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.</p>	<p>See Justice White's concurring opinion in <i>Downes v. Bidwell</i>, 182 U.S. 244 (1901) ["natural rights" include the right to one's own religious opinion . . . to freedom of speech and of the press . . .].</p>	<p>Freedom of religion, freedom of speech, freedom of the press, etc. are all considered "fundamental."</p> <p>With the expected future establishment of a "civil government" in Taiwan fully recognized by the officials of the U.S. Executive Branch and members of Congress, the native Taiwanese people will have all necessary and appropriate channels to "petition the Government for a redress of grievances."</p>
<p>Amendment II: Right to bear arms</p> <p>A well regulated Militia,</p>		<p>Militia refers to "civilians trained as soldiers but not part of the regular army," and is a form of military organization</p>

<p>being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.</p>		<p>which existed in the American colonies. Taiwan does not have any history of the establishment of militia, or the private ownership of arms, with the possible exception of some aboriginal groups which have engaged in the hunting of live game. In the future, any changes in the rights of the Taiwanese people to bear arms would no doubt require the support of the majority of the Taiwanese populace, as well as the approval of the U.S. High Commissioner, the Dept. of Defense, and the Commander in Chief.</p>
<p>Amendment III: Quartering of soldiers</p> <p>No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.</p>		<p>As part of the United States' handling of Taiwan's defense responsibilities, the establishment of U.S. military bases in Taiwan is entirely appropriate. All U.S. soldiers should be assigned dormitory space and/or living quarters on such bases or at other officially established military housing facilities as necessary.</p>
<p>Amendment IV: Search and arrest</p> <p>The right of the people to be secure in their persons, houses, papers, and effects, against</p>	<p>The rights provided by the Fourth Amendment are generally considered to be "fundamental," which means that they apply of their own force to all individuals subject to the sovereignty of the</p>	<p>It is notable that local legislation or local constitutional provisions of each of the larger U.S. insular areas either explicitly apply the Fourth Amendment, or offer equivalent protections</p>

<p>unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.</p>	<p>United States. No statute is necessary to extend them to U.S. territories and possessions.</p>	<p>under local law, to insular area residents.</p>
<p>Amendment V: Rights in criminal cases</p> <p>No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken</p>	<p>See Justice White's concurring opinion in <i>Downes v. Bidwell</i>, 182 U.S. 244 (1901) ["natural rights" include personal liberty and individual property; . . . free access to courts of justice; to due process of law and to an equal protection of the laws; . . .].</p> <p>See <i>Ocampo v. United States</i>, 234 U.S. 91 (1914) [Fifth Amendment grand jury provision inapplicable in Philippines].</p> <p>See <i>Hawaii v. Mankichi</i>, 190 U.S. 197 (1903) [provisions on indictment by grand jury inapplicable in Hawaii].</p> <p>See <i>Malloy v. Hogan</i>, 378 U.S. 1 (1964) [Fifth Amendment privilege against</p>	<p>In <i>Dorr v. United States</i>, 195 U.S. 138 (1904), the Supreme Court held that the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to trial by jury " . . . are not fundamental in their nature, but concern merely a method of procedure."</p> <p>According to the precedent in <i>Kent v. Dulles</i>, 357 U.S. 116 (1958), and subsequent INS-USCIS interpretations, the right to travel, and to obtain travel documents, is a part of the "liberty" of the Fifth Amendment.</p> <p>In <i>Dickerson v. United States</i>, 530 U.S. 428 (2000), the Supreme Court did not hold that the Fifth Amendment is violated whenever a statement obtained in violation</p>

<p>for public use, without just compensation.</p>	<p>self-incrimination is a fundamental right].</p> <p>See <i>Milliken v. Meyer</i>, 311 U.S. 457 (1941); <i>Priest v. Las Vegas</i>, 232 U.S. 604 (1914); <i>Roller v. Holly</i>, 176 U.S. 398 (1900), as quoted in <i>Armstrong v. Manzo</i>, 380 U.S. 545 (1965) [An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections].</p>	<p>of <i>Miranda</i> is admitted against the accused. Indeed, the Supreme Court has repeatedly said that the rights created by <i>Miranda</i> are "not themselves rights protected by the Constitution." See <i>Michigan v. Tucker</i>, 417 U.S. 433, 444 (1974); <i>Oregon v. Elstad</i>, 470 U.S. 298, 306, 307 (1985); and <i>Davis v. United States</i> 512 U.S. 452, 457-58 (1994). Also see <i>Withrow v. Williams</i>, 507 U.S. 680, 690-691 (1993); <i>Duckworth v. Eagan</i>, 492 U.S. 195, 203 (1989); and <i>Connecticut v. Barrett</i>, 479 U.S. 523, 528 (1987).</p>
<p>Amendments</p>	<p>U.S. Supreme Court rulings</p>	<p>Comments</p>
<p>Amendment VI: Right to a fair trial</p> <p>In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by</p>	<p>See <i>Hawaii v. Mankichi</i>, 190 U.S. 197 (1903) [Sixth Amendment provisions on jury trial inapplicable in Hawaii].</p> <p>See <i>Dorr v. United States</i>, 195 U.S. 138 (1904) [jury trial provision inapplicable in the Philippines].</p> <p>See <i>Balzac v. Porto Rico</i>, 258 U.S. 298 (1922) [Sixth Amendment right to jury trial inapplicable in Puerto Rico].</p>	<p>In <i>Powell et al. v. State of Alabama</i>, 287 U.S. 45 (1932), the Supreme Court held that during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, the ongoing investigation and preparation are vitally important, the defendants . . . are as much entitled to aid of legal counsel</p>

<p>law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.</p>		<p>during that period as at the trial itself.</p> <p>Over and above this aspect, to the extent suitable for application in Taiwan, the rights provided in this amendment may be specified in more detail in the new Taiwan Constitution.</p>
<p>Amendment VII: Rights in civil cases</p> <p>In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.</p>	<p>See <i>Dorr v. United States</i>, 195 U.S. 138 (1904) [jury trial provision inapplicable in the Philippines].</p>	
<p>Amendment VIII: Bail, fines, punishment</p> <p>Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.</p>	<p>See Justice White's concurring opinion in <i>Downes v. Bidwell</i>, 182 U.S. 244 (1901) ["natural rights" include immunities from . . . cruel and unusual punishments . . .]</p>	<p>In <i>Trop v. Dulles</i>, 356 U.S. 86 (1958), the Supreme Court held that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.</p> <p>Deprivation of a recognized nationality or being stateless is considered "cruel and unusual punishment," because it amounts to a</p>

		destruction of the individual's status in organized society. It strips the individual of his rightful status in the national and international political community.
<p>Amendment IX: Rights retained by the People</p> <p>The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.</p>		<p>The Framers of the Bill of Rights, most notably Mr. James Madison and Mr. George Mason, did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.</p>
<p>Amendment X: States' rights</p> <p>The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.</p>		<p>As an overseas territory of the United States under the jurisdiction of USMG, Taiwan does not qualify as a "state." However, the native Taiwanese people will be able to call a Constitutional Convention in the future to draft a true Taiwan Constitution for their territory under overall U.S. administrative authority.</p>

U.S. overseas territories (aka "insular areas")
are also known as
Unincorporated Territories

1. Article IV, Section 3 of the U.S. Constitution states that the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Indeed, numerous Supreme Court decisions have

held 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.

- A). The United States has a long history of administrative authority over territories. A very early example is the situation of the "Northwest Territory," which dates back to 1787. (The Northwest Territory was later divided into the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and eastern Minnesota.)
- B). So-called "unincorporated territory," however, is an area over which the Constitution has not been expressly and fully extended by the Congress within the meaning of Article IV, Section 3. The recognition of the existence of "unincorporated territory" was determined by the U.S. Supreme Court after the Spanish American War in a series of decisions known as the "Insular Cases."
- C). As the name indicates, unincorporated territory is an overseas territorial status. The defense needs for U.S. insular areas ("overseas territories") are handled by the Dept. of Defense in the Pentagon.

2. As a result of the Spanish American War and WWII in the Pacific, Cuba and Taiwan became "conquered territory of the United States of America," which itself is distinct legal status. With the coming into force of the Treaty of Paris on April 11, 1899, and the SFPT on April 28, 1952, the sovereignty of the original "mother country" was terminated, but no further elevation, modification, or alteration of the legal status of Cuba or Taiwan was specified. Cuba later achieved independence in 1902.

In the current era, according to the statements of U.S. Executive Branch officials, Taiwan is neither independent nor part of any other country. Based on the WWII conquest of Taiwan by U.S. military forces, it is clear that the legal occupier of Taiwan is the United States. Article 4(b) of the post-war SFPT further serves to confirm this status. Moreover, none of the above facts have been altered by the Taiwan Relations Act, the Three Joint USA-PRC Communiques, or the adoption of a One China Policy. Hence, under the Constitution, and according to relevant Supreme Court interpretations, it is evident that Taiwan remains as an area under United States military jurisdiction.

More specifically, the inescapable conclusion is that Taiwan must be recognized as an insular area of the United States under U.S. military government.

Such a conclusion is reinforced by the specifications of 22 USC 611 (m).

U.S. Code Title 22. Foreign Relations and Intercourse

22 USC 611 (m)

The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, and all other places now or hereafter subject to the civil or military jurisdiction of the United States;

3. In *Reid v. Covert*, 351 U.S. 487 (1956), Justice Black in a plurality opinion of the US Supreme Court asserted that wherever the United States acts it must do so only "in accordance with all the limitation imposed by the Constitution Constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home."

4. In *Dorr v. United States*, 195 U.S. 138 (1904), the Supreme Court held that: "The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901)."

5. In *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993), the Court of Appeals for the Eleventh Circuit held that the U.S. Congress' decision to permit self-governance in Puerto Rico does **not** remove Puerto Rico from application of the Constitution's Territorial Clause (Article IV, Section 3).

6. As per Article 2, section 1, clause 3, the Constitution provides for the election of the President by electors appointed by the **states**. Therefore, American citizens who reside in the insular areas, as well as local residents, may **not** vote for President or Vice-President.

Although residents of the insular areas are **not** eligible to vote in presidential elections, most of the larger insular areas participate in the nominations process, which is governed by party rules and local law rather than by the Constitution.

7. For overseas territories under the jurisdiction of the United States, all asylum and refugee matters are the responsibility of the U.S. federal government.

8. The Constitution establishes the House of Representatives and the Senate, comprising representatives elected by the citizens in each state, as per the specifications of Article 1, sections 2 - 3. The Constitution does **not** yet provide for the insular areas to elect representatives or senators to the Congress.

9. The U.S. Congress is vested with power "to lay and collect Taxes" under Article I, sec. 8, of the Constitution and the Sixteenth Amendment. Therefore, the Congress has authority to impose income taxes on the worldwide income of U.S. citizens and corporations, including income from the insular areas. However, ***federal individual and corporate income taxes*** as such are **not** currently imposed in any U.S. insular areas on local source income.

However, U.S. citizens and corporations in the insular areas may be subject to Federal income tax laws if they have (1) domestic [50-state] U.S. or (2) foreign source income.

10. The Supreme Court's Insular Cases are much maligned in the 21st century. However, the Justices' decision in *Downes v. Bidwell* outlined substantive reasons why these new island territories ceded to the United States could not be placed under the same administrative system, as already in use in the states of the union, in respect to matters of revenues, taxes, excises, and the like. A new formulation was needed, and this resulted in the creation of the doctrine of unincorporated territory.

MR. JUSTICE BROWN, in announcing the conclusion and judgment of the Court. The Island of Porto Rico is not a part of the United States within that provision of the Constitution (Article 1, section 8, clause 1) which declares that "all duties, imposts, and excises shall be uniform throughout the United States."

Indeed, it is scarcely possible that Congress could do a greater injustice to these islands than would be involved in holding that it could not impose upon the states taxes and excises without extending the same taxes to them. Such requirement would bring them at once within our internal revenue system, including stamps, licenses, excises, and all the paraphernalia of that system, and apply it to territories which have had no experience of this kind, and where it would prove an intolerable burden.

This subject was carefully considered by the Senate committee in charge of the Foraker

bill (enacted April 12, 1900), which found, after an examination of the facts, that property in Porto Rico was already burdened with a private debt amounting probably to \$30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and goodwill of that people for the United States.

-- excerpted from U.S. Supreme Court
Downes v. Bidwell, 182 U.S. 244 (May 27, 1901)

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 10

THE BATTLE OF OKINAWA, THE PEACE TREATY, AND THE EIGHT EXPLANATIONS

[DATELINE HONOLULU, HAWAII]
PRESENT DAY

“I am sorry for the delay in getting started today, but as you have just seen, the security personnel are scanning everyone’s attendance IDs so that they have a record of who is here today. I am told that we have a tsunami alert, and so the university officials want to be sure that they know what people are in what classrooms.

“Let me put some geographical information up on our screen.”

Ryukyu islands –

a chain of Japanese islands in the western Pacific Ocean at the eastern limit of the East China Sea. They stretch southwest from the island of Kyushu (the most southwesterly of Japan's four main islands) toward the island of Taiwan. The largest of the Ryukyu islands is Okinawa Island.

“My name is Paula Sakkinheim, and I will be your moderator today. Regarding the alert, I heard the following explanation. It is fairly straightforward. On the Board of Directors there are several members who have childhood memories of their grandparents telling them about the great Hawaiian tsunami. As a result, they have always been especially sensitive about any impending disasters of this type.

“My assistant today is Mr. Henri Duval,” she stated. After pausing for several seconds, she pronounced his name more loudly: “Henri!”

A tall man opened the door and entered the classroom. He was approximately 40 years old and appeared to be dressed in clothes suitable for the “Master of Ceremonies” of a traveling circus.

“According to later research reports,” Paula continued, “it was an 8.6-magnitude earthquake off the Aleutian Islands that triggered that great tsunami in 1946, and waves reaching Hawaii topped 50 feet. Hundreds of people died.”

“That was about seven months after the Japanese surrender, but there was still no warning system,” Henri added.

<p>Great Hawaii Tsunami April 1, 1946</p>

“As you might guess, back in 1946, even when the radio announcements about the imminent tsunami began to be broadcast, many people thought it was a joke, and so they didn’t bother to flee to high ground,” Paula explained.

There was a knock on the door. Henri walked over and opened the door slightly, speaking in a very low tone of voice. After a few seconds he closed the door gently. He nodded in Paula’s direction, then raised his hand, gesturing toward a large piece of dark green drapery which was rolled up and hung over the entire entranceway. He quickly moved two chairs over to this area, and then stepped up on the chairs and began adjusting the drapery.

Paula continued her presentation.

“Hawaii has certainly had its share of tragedy over the years. Here is some comparative data for Pearl Harbor.” More data came on the screen.

<p>Japanese Attack on Pearl Harbor, Hawaii December 7, 1941 US Casualties: Military Personnel and Ships</p>	
Killed	2,403
Wounded	1,143
Ships sunk or run aground	18, including five battleships

“As a result of the Pearl Harbor attack and the 1946 tsunami, I am told that there is an unwritten rule here in the islands. The rule says that there is no joking about air raids or tsunamis, those are always treated in the utmost seriousness.

“So, on that somber note, let’s turn to the Battle of Okinawa,” Paula moved on to the main topic of the session. A map of the Ryukyu islands appeared on the screen, and was followed by a short movie entitled “The Battle of Okinawa.”

= = = = MOVIE PART 1 = = = = = BATTLE OF OKINAWA = = = = =

Battle of Okinawa

April 1 to June 22, 1945

In U.S. history books, when speaking of WWII in the Pacific, the Battle of Okinawa has often been characterized as the bloodiest battle and the largest amphibious assault, resulting in the biggest U.S. naval loss of any battles fought. Estimates of casualties exceeded 100,000 on both sides.

Shortly after this battle began, Harry S. Truman ascended to the Presidency of the United States after Franklin D. Roosevelt died suddenly on April 12.

The battle was set in motion by a seven-day U.S. naval bombardment of the landing beaches on Okinawa island. U.S. naval units were joined by a combined British, Canadian, New Zealand, and Australian naval task force. More than 180,000 Army soldiers and Marines eventually participated.

The distance from Okinawa to the nearest Japanese islands is approx. 340 mi (550 km), and the distance to Tokyo is approx. 1536 kilometers (955 miles). U.S. military advisors estimated that the capture of Okinawa would be the final push toward a planned invasion of mainland Japan, in order to force the Emperor to surrender. The military top brass in

Washington D.C. felt that Kadena Air Base on the large island of Okinawa would be an ideal starting point for the final military thrust toward Japan proper. Indeed, the entire Ryukyu island group also contained fleet anchorage, troop staging areas, and airfields, which were regarded valuable military assets.

As expected, upon launching the assault, the Allied fleet was attacked by waves of Kamikazes who attempted to crash their airplanes directly into ships. Statistics compiled after the Battle of Okinawa showed that the U.S. navy lost 36 ships, with another 368 ships suffering damage. Hundreds of Allied airplanes were shot down.

Battle of Okinawa

Ground Forces: United States
Naval Support: United States naval forces, combined U.K., Canada, N.Z., and Australian naval forces

After seeing the large number of American and Allied casualties in the battles for Iwo Jima (Feb. 19 to March 26) and Okinawa (April 1 to June 22), the new resident of the White House, Harry S Truman, had serious second thoughts about the advisability of sending American ground troops into the four main Japanese islands. Accounts by soldiers returning from Iwo Jima and Okinawa recounted gruesome stories of hand-to-hand combat against fanatical Japanese troops who were willing to continue fighting against impossible odds, and preferred to take their own lives rather than surrender. As a result, some U.S. military strategists estimated that potential American casualties in a “Japanese homeland invasion” could exceed 1.5 million. Others considered that estimate “very conservative.”

Consequently, Truman was actively considering effective alternatives. Overviewing the strategy employed in other conflicts in the Pacific Theatre, he was aware that U.S. bombing raids against targets in Japanese Taiwan had begun in November 1943. Notably, the largest U.S. military invasion conducted against Taiwan during this period was the “Taipei Air Raid” (aka Taihoku Air Raid) of May 31, 1945. By employing a strictly airborne attack, American casualties were reduced to nearly zero. During the Pacific War, this was the chosen strategy for the final conquest of Japan’s major insular area: Taiwan.

===== MOVIE ===== END OF PART 1 =====

“After the battle of Okinawa, the official surrender ceremony was held on Sept. 7, 1945, near Kadena Air Base. As conquered territory of the United States, the Ryukyu island group then came under the jurisdiction of a United States federal agency,” Paula explained. “That would be the United States Military Government (USMG).”

“Of course, as we know, the default status for territory under military government is ‘occupied territory,’” Paula explained further.

“I took a course in the history and development of the United Nations,” one student offered. “I seem to recall that the Ryukyus were under consideration for a United Nations trusteeship.”

Paula nodded in her direction. “Let’s introduce ourselves and get to know each other.”

“Right,” the student continued. “My name is Megyn, and I am on a one semester leave of absence from the University of British Columbia.”

“Well, Megyn is correct, and the original plan was for the Ryukyus to be placed in the United Nations trusteeship system. Megyn’s comments bring us to the specifications in the post-war peace treaty. I believe it is convenient to review the situations of the Ryukyus and Taiwan together, since they are related. We have the relevant Articles of the treaty, so I can put them up on the screen now.”

Henri moved his chairs over to the far side of the room, where the control center for the audiovisual equipment was located. Another large piece of dark green drapery was rolled up and hanging from the ceiling there, in front of this area. He stood with his right and left legs on two different chairs, and focused his attention on adjusting the drapery.

Peace Treaty specifications

Article 2

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

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island

and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

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.

“I taught a seminar in Tokyo last year, and some of the students commented that they have never seen the Ryukyu island group on any listing of United Nations Trusteeship territories,” Paula noted. “Why is this? you may ask. For an explanation, we need to do a careful reading of two important Articles in the United Nations Charter.”

United Nations Charter

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council.
2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

“I have underlined the words ‘strategic areas,’ which is the phraseology of major concern to us here,” Paula explained further. “According to U.S. Executive Branch records, as early

as the summer of 1952, officials of the Dept. of State (DOS) and Dept. of Defense (DOD) were having serious doubts about the feasibility of coordinating with the United Nations to put the Ryukyu island group under a UN trusteeship.

“Primarily, this was because the United States was taking on the role of sole administering authority. Accordingly, the use which the United States was intending to make of these islands, as all concerned parties knew, would undoubtedly cause all or part of these areas to be designated as ‘strategic,’ thus bringing them under the scope of Article 82.

“Then, with respect to the specifications of Article 83, all functions of the United Nations relating to the areas designated as ‘strategic’ would be exercised by the Security Council, and therefore subject to a Russian veto.

“Hence, DOS and DOD officials foresaw that even if a UN trusteeship arrangement were to be granted, the most likely outcome would be that the United States would be constantly harassed in the administration of such a trusteeship by the blocking tactics of the USSR in the Security Council.”

“So, in the final analysis, the UN trusteeship idea was abandoned,” Henri said in summation.

The screen reverted to the previous graphic: Peace Treaty specifications.

“Alright, I will leave that information up on the screen,” Paula said casually. Now I want to introduce some concepts from the realm of ‘alternate reality.’”

The students in the room seemed puzzled. “Of course, that is in reference to research into Taiwan’s post-war legal status,” she added.

“Looking at the San Francisco Peace Treaty, most people only look at Article 2(b),” Paula continued. “Based on that, we often see that there are various theories or explanations advanced. We will overview these first, before the lunch break.”

“I don’t know if you saw in the newspapers recently that two students from Hawaii won the top prizes in the ‘Alternate Reality Essay Competition,’ junior high school division, held in Geneva, Switzerland. Their papers were presented online, and I had a chance to overview them. Although the content was a little over my head, I thought the design and layout were very attractive.

“I invited them here today to help with our presentation. Paula opened the door and two junior high aged students, one boy and one girl, entered the classroom, but remained very close to the entranceway. They were wearing dark blue T-shirts decorated with pictures of comets, supernova, and irregularly shaped galaxies. Paula introduced them as Robert and Jessica.

“Alright, I gave you several computer files last week, and I understand that you were able to put those into an attractive format for showing to our group today, is that correct?”

They both nodded.

“Are you familiar with some of the international research which is now being undertaken regarding Taiwan’s post-war legal status?”

“Not really,” Robert answered. “But we learned a little bit from reading the summaries you provided.”

“So in relation to this Taiwan legal status issue, do you think that some of the groups who advance their theories or explanations might actually be living in a kind of alternate reality? Or parallel universe?”

Jessica laughed. “Well, their explanations are all over the place, and according to what you said, they are not working to coordinate their research in any way . . . so I guess it would be fair to describe them that way!”

“So what sort of film-clips have you made for us today?” Paula asked.

“It is just eight short clips, and an introduction,” Robert said. “It is basically just the text you gave us, and we have overlayed that on pictures of star-clusters, galaxies, planets, and various unusual cosmic phenomenon. Sometimes we have a supernova explosion which then forms into a bright image of Taiwan.”

“Sometimes we do a rotation of the whole screen, or part of the screen, maybe vertically, maybe horizontally, etc. and try to give the impression that there are other groups of planets or stars hiding in the background. This is one cinema-graphic technique that illustrates the alternate reality aspect,” Jessica added.

“Alright,” Paula said affirmatively. She then turned to the students and announced: “In

addition to my research into international law and international relations, Henri and I also do some stage magic at some of the larger hotels here in Honolulu.”

Henri walked back to a position near the entranceway, but off to the side. Paula nodded at him. He pulled a small rope, and the green drapery next to the entranceway dropped, covering Robert and Jessica. Paula then quickly walked to the far side of the classroom and lowered the green drapery in front of the audio-visual control area.

At the count of three, they both raised their drapery. Robert and Jessica were already seated in the audio-visual control area, adjusting the controls on the equipment.

The films began.

===== FILM CLIPS ===== ALTERNATE REALITY =====

Eight Explanations/Theories regarding Taiwan’s Legal Status after April 28, 1952

Introduction

- Terra nullius
- Already independent, in other words sovereignty was transferred to the people and/or local people should hold a plebiscite, under auspices of UN, for independence, and/or local governing authorities should declare its independence
- Taiwan has already attained independence after a UN Trusteeship
- Japan holds residual sovereignty over Taiwan
- Taiwan has remained under military occupation by the Allies, (or) Taiwan belongs to a condominium formed by the Allies, and related theories
- The Republic of China is the legal government of Taiwan
- The PRC is the legal government of Taiwan
- Taiwan should join the USA as a new state

“What do we have for transitions between the film clips?” Paula asked.

“For the left side of the screen, we are just using an outline image of Taiwan and then overlaying it with different fractal images,” Jessica replied.

“And on the right side of the screen we have pictures and video footage of U.S. aerial attacks against Taiwan during the Formosa Air Battle of October 12 – 16, 1944,” Robert added.

“So, it is ‘Taiwan fractals and Formosa Air Battle’ transitions,” Paula summarized.

With that, the first film clip came up on the screen.

1. Terra Nullius

Terra nullius is a Latin expression meaning "nobody's land", and is used to indicate a territory with no population, or no permanently-established population. A newly formed volcanic island would be a good example. Under traditional principles of international law, it was often held that the sovereignty of such land could be obtained by establishing a local population there and inhabiting the area for a period of many years. This was often stated as “territory may be acquired by a state's occupation of it.”

The word “occupation’ has many meanings, and as used here it simply means “settling, taking over, and/or making use of land or property.”

Unfortunately, the force of this ‘terra nullius’ term seems to have been lost on many Chinese speakers, and they also equate it with the notion of “land with no ownership.” This misunderstanding, coupled with a lack of “abstract reasoning ability,” often brings about the idea (or “belief”) that “if I don’t see (the governance structure), it doesn’t exist.”

Hence, when the Republic of China authorities expelled all of the Japanese from Taiwan in 1946, it appeared to most people that the Japanese governance and ownership of Taiwan had ended. Therefore, they regarded Taiwan as terra nullius, hence confirming a seizure or annexation of Taiwan at the pleasure of the ROC authorities.

Criticism: In addition to the Japanese who left, there was a population of nearly six million native Taiwanese living in Taiwan at that time. Hence, Taiwan was not terra nullius.

Nevertheless, when discussing the development of the international legal status of Taiwan from the 1940s to the present, this “terra nullius” explanation is often advanced.

2. Popular Sovereignty resulting in Independence

Some people hold to the notion that when Japan gave up all its right, title, and claim to Taiwan in the San Francisco Peace Treaty, and no “receiving country” was designated, the sovereignty of Taiwan immediately reverted to the people of Taiwan. As many public opinion polls have confirmed, the Taiwan people want to establish their own country, hence (based on their reasoning) the existence of the “Republic of Taiwan” is already 95% a fact, and should be fully recognized by the international community.

Criticism: At the most fundamental level, this explanation appears to confuse the concepts of “territorial sovereignty” and “popular sovereignty.” Examination of the historical record quickly proves that territorial sovereignty is always held by a “government.” Additionally, negotiations for the cession of territory are always made between “governments,” they are not made between random groups of people.

The notion of “popular sovereignty” simply means that the people shall have the right of election, recall, initiative, referendum, and related matters, along with the right of taking public examinations, holding public offices, etc. It has absolutely nothing to do with national territorial issues.

Nevertheless, when discussing the development of the international legal status of Taiwan from the 1940s to the present, this “popular sovereignty” explanation is often advanced.

3. Taiwan has already attained Independence after a UN Trusteeship

Let’s look at the UN Charter.

Chapter XII: International Trusteeship System

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- a. to further international peace and security;
- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1 The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- a. territories now held under mandate;
- b. territories which may be detached from enemy states as a result of the Second World War; and
- c. territories voluntarily placed under the system by states responsible for their administration.

2 It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

The highlighted portions are most relevant to a discussion of this “Taiwan was a UN trusteeship and is now independent” theory. When discussing the development of the international legal status of Taiwan from 1952 to the present, this “UN Trusteeship” explanation is often advanced in scholarly circles in Taiwan.

According to the proponents of this theory, with the coming into force of the San Francisco Peace Treaty, Taiwan is detached from Japan, and therefore immediately meets the qualifications of Articles 76 and 77 of the UN Charter, hence it is *automatically* elevated to the status of UN Trusteeship.

After this, it is claimed that a 20 year or 25 year period under trusteeship is adequate toward the attainment of independence as specified in Article 76(b). But at any rate, with the suspension of operations of the UN Trusteeship Council on Nov. 1, 1994, Taiwan must be regarded as an independent sovereign nation in the current era (in their view).

Criticism: The first problem most westerners note about this theory is that the United Nations has never concluded a “trusteeship agreement” for Taiwan, as specified in Chapter XII of the UN Charter. Additionally, the United Nations has never issued any official paperwork in regard to Taiwan being under a UN trusteeship. However, the proponents of this theory downplay these aspects.

= = = *Transition: Taiwan fractals and Formosa Air Battle* = = =

4. Japan holds residual sovereignty over Taiwan

John Foster Dulles is often credited as being the chief architect of the San Francisco Peace Treaty. He gave the following remarks at the signing ceremony in Sept. 1951.

John Foster Dulles on the Status of Okinawa

Sept. 8, 1951

Article 3 deals with the Ryukyus and other islands to the south and southeast of Japan. These, since the surrender, have been under the sole administration of the United States.

Several of the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over these islands in favor of United States sovereignty. Others suggested that these islands should be restored completely to Japan.

In the face of this division of Allied opinion, the United States felt that the best formula would be to permit Japan to retain residual sovereignty, while making it possible for these islands to be brought into the U.N. trusteeship system, with the United States as administering authority.

You will recall that the Charter of the United Nations contemplates extension of the trusteeship system to "territories which may be detached from enemy states as a result of the Second World War" (Article 77). The future trusteeship agreement will, no doubt, determine the future civil status of the inhabitants in relation to Japan while affording the administering authority the possibility of carrying out Article 84 of the Charter, which provides that "It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security.

In the current day, proponents of the theory that Japan holds residual sovereignty over Taiwan point to this speech of Mr. Dulles, and claim that since Japan renounced its right, title, and claim to "Formosa and the Pescadores" (aka Taiwan) in the peace treaty, and no "receiving country" was specified, then the same conditions (as for the Ryukyus) must hold for Taiwan as well.

To bolster their claims in this regard, they offer some concise constitutional analysis as follows –

Under the Meiji Constitution which came into force on Nov. 29, 1890, the Japanese Emperor held the ultimate power. Hence, when Taiwan was ceded to Japan in 1895, this was a transaction between the Qing Dynasty Emperor and the Japanese Emperor.

However, the current Japanese Constitution came into force on May 3, 1947. In this 1947 Constitution, in contrast with the Meiji Constitution, the Emperor's role is almost entirely ceremonial, and he does not have powers related to government.

Close examination shows that in the San Francisco Peace Treaty, the renunciation of Taiwan was made by the Japanese government, not by the Emperor. Accordingly, it must be interpreted that the Japanese Emperor still retains residual sovereignty over Taiwan in the present day.

Criticism: In opposition to this view, many people have pointed out that beginning in the 1980s, several Japanese court decisions have definitively ruled that Taiwan ceased to be a territory of Japan as of April 28, 1952. In these decisions, the judges typically quoted the following two treaty provisions –

The Treaty of Peace with Japan, which came into force April 28, 1952. This treaty provides in Article 2(b) that --

Japan renounces all right, title and claim to Formosa and the Pescadores.

The Treaty of Peace between Japan and the Republic of China (Treaty of Taipei), is a subsidiary treaty under Article 26, and recognizes this treaty provision in Article 2 --

It is recognised that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.

However, the proponents of this “Japan holds residual sovereignty over Taiwan” theory say that these court decisions are a misinterpretation, and therefore are not relevant to a discussion of their residual sovereignty claims.

= = = *Transition: Taiwan fractals and Formosa Air Battle* = = =

5. Taiwan has remained under military occupation by the Allies, in other words Taiwan belongs to a condominium formed by the Allies

Observation #1: The text of the San Francisco Peace Treaty contains 27 Articles. However, a thorough examination of this content fails to reveal any clauses which support the theory that this treaty has vested the sovereignty of Formosa and the Pescadores (aka “Taiwan”) in its signatories. Moreover, an examination of the post-war historical record fails to reveal any statements, testimonials, or declarations by any of the signatories that their country is exercising (or participating in the exercise of) a condominium over Taiwan.

Notably, in regard to the “Legal Status of Taiwan,” the U.S. Dept. of State issued the Czyzak Memorandum of Feb. 3, 1961, and the Starr Memorandum of July 13, 1971. In the earlier memorandum, author John Czyzak mentioned the occasionally-heard theory that Taiwan (and its associated islands) formed a condominium belonging to the parties to the Japanese Peace Treaty. However, he was unable to find any definitive proof to back up this theory.

Observation #2: A noted international law authority, here referred to by the abbreviation of “S(15)”, previously wrote learned commentary to the effect that “. . . . some scholars hold that (1) Japan's surrender created a condominium over Taiwan in favor of

the Allies jointly and that (2) this condominium, reinforced by the Peace Treaty with Japan, continues to the present day.”

Rebuttal of the Analysis of S(15): After doing extensive research into the customary laws of warfare of the post-Napoleonic period, no legal or historical proof for the contention that the surrender ceremonies can create legal relationships between the victorious party/parties and the defeated state/states has been found. More specifically, it is certainly worthy of note to say that neither the Hague nor Geneva Conventions contain any such stipulations.

In conclusion, the claim that Taiwan is a condominium of the 48 signatories of the San Francisco Peace Treaty is without legal or historical basis. In particular, the legal establishment of a “condominium” or the specification of “a joint power of disposition” to determine the status of Taiwan in the future is not specified in the treaty itself, nor is there any documentary evidence from that era to suggest that the signatories envisaged the existence of any such arrangement after the final version of the treaty was signed on Sept. 8, 1951.

Footnote: Identifying information for the scholar S(15) is provided as follows. His surname begins with an “S” and has 15 letters. He was born in May 1908 in Germany.

Observation #3: As an afternote, it should be understood that when the San Francisco Peace Treaty was signed, it was fully expected that the Allies would, for all intents and purposes, disband *shortly after the treaty came into force*, because at that point in time the war would have formally ended.

Accordingly, it is easily seen that the peace treaty has specifically confirmed the existence of (or “designated”) a “principal occupying power” to assume full responsibility for any unfinished administrative control matters, including the continuance of military government jurisdiction, over the territories which have not yet reached a final political status. Primarily, these are the limbo cessions in Article 2. Additionally, reference to Article 23(a) clearly shows that the United States of America is confirmed as the principal occupying power.

== = *Transition: Taiwan fractals and Formosa Air Battle* == =

6. The Republic of China is the legal government of Taiwan

Items of Note (A): Qing Dynasty China ceded Formosa and the Pescadores (aka “Taiwan”) to Japan in perpetuity at the end of the First Sino-Japanese War by concluding the Treaty of Shimonoseki in 1895.

In 1941, in accompaniment with its declaration of war against Japan, China announced the abrogation of all treaties with Japan, including the 1895 treaty. Although the response to this proclamation by international diplomats as well as researchers in law, history, and geography was essentially zero, China pressed its case at meetings of the Allies and succeeded, at last, in having some of its territorial demands incorporated in the Cairo Declaration of Dec. 1, 1943, stating that Japan shall restore Formosa and the Pescadores to the Republic of China after its defeat.

Additional postwar policies were again enunciated by the three major Allies -- the United States, the United Kingdom, and the U.S.S.R. -- at Potsdam in 1945. The concluding Potsdam Proclamation July 26, 1945, also contained a confirmation of the Cairo Declaration.

According to Chinese scholars, the Cairo Declaration and Potsdam Proclamation were given legal force by the Instrument of Surrender of Japan in 1945, and the territorial sovereignty of Taiwan was transferred to the ROC on Oct. 25, 1945. Therefore, in their view, the completion of the surrender ceremonies has reaffirmed in unequivocal terms the Republic of China's sovereignty over Taiwan as a matter of international law.

Criticism: Officials in the US and UK governments have repeatedly stated that the Cairo Declaration and Potsdam Proclamations were just a war-time statements of intention, expressing common foreign policy goals, in order to maintain strong morale among the Allies, and to keep Chiang Kai-shek in happy spirits (so that he would not conduct a separate “surrender” to Japanese military forces at an inappropriate time), but did not themselves have the legal force to complete a transfer of the territorial sovereignty of Taiwan from Japan to China.

Moreover, there is no basis in the customary laws of warfare to hold that territorial sovereignty can be transferred upon the holding of surrender ceremonies. Article 42 of the Hague Regulations of 1907 states: “Territory is considered occupied when it is actually placed under the authority of the hostile army.” Under international law, no exceptions to the application of this RULE based on common foreign policy goals of certain parties at war has ever been recognized.

Items of Note (B): Another noted international law authority, here referred to by the abbreviation of “C(8)”, in discussing the force of Article 2(b) of the SFPT, previously wrote learned commentary to the effect that “. . . . that Japanese relinquishment, which took place against a background of a commitment to return Taiwan to 'China', and the continued occupation of Taiwan by a recognized government of 'China', operated to re-vest sovereignty in China as a State without taking any position as to the government entitled to exercise that sovereignty.”

Rebuttal of the Analysis of C(8): Under the Hague and Geneva Conventions, the Oct. 25, 1945, Japanese surrender ceremonies in Taipei can only be regarded as the beginning of the military occupation. Under the customary laws of warfare, military occupation does not transfer sovereignty. Accordingly, Japanese sovereignty over Taiwan only ended with the coming into force of the SFPT on April 28, 1952; moreover the specifications of that treaty did not award Taiwan to “China” (however “China” may be defined).

Under such a legal framework, it would be impossible for the interplay of a continued occupation of Taiwan by a recognized government of China, taking into consideration the wartime “statements of intention” in regard to Taiwan’s future disposition, along with the influence of various other factors, including the content of the post-war treaties, to operate together and re-vest Taiwan’s sovereignty in China as a State.

Footnote: Identifying information for the scholar C(8) is provided as follows. His surname begins with a “C” and has 8 letters. He was born in Nov. 1948 in Australia.

= = = *Transition: Taiwan fractals and Formosa Air Battle* = = =

7. The People’s Republic of China is the legal government of China, including Taiwan
PRC officials essentially accept the ROC viewpoint that the territorial sovereignty of Taiwan was transferred to the Republic of China on Oct. 25, 1945.

In consideration of United Nations General Assembly Resolution 2758, it is easily understood that the PRC has become the internationally recognized “successor government” to the ROC. Therefore, based on a doctrine of the “national inheritance” of states, Taiwan now belongs to the PRC.

Criticism: As stated in Item #6 above, there is no basis in international law for saying that the Oct. 25, 1945, surrender ceremonies in Taiwan resulted in the transfer of Taiwan's territorial sovereignty to Republic of China. We may agree with the premise that the PRC has become the internationally recognized "successor government" to the ROC, nevertheless the PRC cannot inherit the territorial sovereignty of any areas of which the ROC did not have legal ownership to begin with.

Hence, Taiwan does not belong to the PRC.

= = = *Transition: Taiwan fractals and Formosa Air Battle* = = =

8. Taiwan should join the USA as a new state

This explanation appears to arise from a misreading of the U.S. Constitution.

The Constitution says 'New States may be admitted by the Congress into this Union; (Article 4, section 3, clause 1). However, in order to discuss this clause comprehensively, it is necessary to understand the United States' territorial expansion in the years after its founding, and the difference between incorporated and unincorporated territory.

Through all of U.S. history before 1898, regions admitted as U.S. states were, for the most part, formerly territories or parts of territories. As the United States grew, the most populous parts of the territory would achieve statehood. Importantly, all territories acquired by the United States before 1898 were classified as "incorporated" by default. Hawaii was the only exception.

Contrastingly, under United States law, an unincorporated territory is an area where the U.S. Constitution applies only partially. This classification of territory arises from a series of U.S. Supreme Court cases decided in the period of 1901 to 1905. In unincorporated territories, "fundamental rights apply as a matter of law, but other constitutional rights are not available" unless enacted via the specifications in a local constitution.

Therefore, after 1898, we don't discuss 'statehood' for any new territory which might be acquired, or which is now in the current era is (retroactively) fully recognized as having been acquired. This is because for new territory that is 'amalgamated' into the Union after 1898, it is **unincorporated** by default. In other words, it is **not** regarded as being on its way to statehood.

Therefore, if it is recognized that since April 28, 1952, Taiwan has been an overseas territory of the United States under military government, Taiwan still falls into the overall general category of “unincorporated territory” by default, and would not be considered to be on its way to statehood.

===== FILM CLIPS ===== END OF Alternate Reality =====

Robert and Jessica stood up and prepared to leave. “Do you have anything else you want to show us today?” Paula inquired.

Robert said: “We have a large folding display which introduces a new petition which we have submitted to some US government websites. We hope everyone can support this petitioning work.”

Robert and Jessica walked over to the front of the classroom, which was a large slightly-elevated area. As the screen rolled up, the rear wall became visible. Henri walked over and handed them the corner of a large multi-colored cloth. Robert and Jessica grasped the upper left corner, and lifted it up high. Henri walked in the other direction, holding up the cloth and stretching it out to a distance of over ten feet between them.

On the count of three they dropped the cloth, and a colorful seven-panel folding display, designed in the style of a folding Chinese-screen, appeared. There were some exclamations from the students. The information on the panels appeared to be introducing the U.S. Centers for Disease Control. The central portion had many pictures of pigs, and was devoted to information about swine fever. Toward the right was a large picture of some swarming mosquitoes, and lower down the words “Dengue Fever” and “Malaria” appeared. A drawing of human lungs occupied the left portion, highlighted by a title of “The Spread of Tuberculosis in China and nearby Areas.” Additional health warnings were displayed in other sections, including specific advice on the dangers of pneumonic plague and bubonic plague.

“We are hoping that the U.S. Center for Disease Control can set up a branch in Taiwan directly, and coordinate closely with the Taiwan authorities,” Jessica said. “Special care needs to be taken so that diseases common in China do not spread to Taiwan or other areas.”

A number of students applauded. Robert and Jessica collected their materials, walked to the back of the classroom, and exited by the back door.

“After the lunch break, our afternoon session will be held in a Room A-5 of the Audio-Visual Center, which is three buildings down,” Henri announced.

“Beginning about 2:15, there will be a short documentary by a Taiwanese filmmaker. He assembled a collection of pictures of U.S. aircraft which crashed in Taiwan during the WWII period, and has also added some interesting historical commentary. Our session will begin fifteen minutes after that is completed.”

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 11

DISPUTES ABOUT THE AFTERMATH OF THE PACIFIC WAR

[DATELINE HONOLULU, HAWAII]
PRESENT DAY

During the morning session, the seat-backs of the chairs had been colored blue. Here in the Audio-Visual Center they were of a military camouflage coloring. There had been a seven-panel folding display introducing the USCDC in the morning, but for the afternoon session there was a photo collage of the yearly “Fulong International Sand-Sculpture Art Festivals” held on the three kilometer-long golden beach between Yanliao and Fulong on the northeast coast of Taiwan. The accompanying descriptions explained that due to its soft, highly cohesive white quartz sands, this beach has been acknowledged by the World Sand Sculpting Association to be ideal for making sand sculptures.

After the documentary had finished showing, most of the students came forward and examined the dozens of photos. They talked among themselves and then slowly returned to their seats. As everyone got comfortable, Paula explained that some new cutting-edge psychological research suggested that learning ability could often be increased by slight changes in the colors of one’s environment, or alterations in the design of accompanying graphics displays.

There was a knock at the door. A large man dressed in a conservative gray suit entered the room, followed by three females of medium height. "These three students got special permission from the Chancellor to attend your lecture today," he announced. "They thought that you might be crowded, so they brought their own chairs."

Paula welcomed them into the room.

He continued, "I am Professor Canterberg, and I teach a class on Global Business Strategy in the next building."

Several male students in the front row came forward to help with the chairs. The three new students were very polite, and proffered their registration cards as they explained that they had recently applied with the Chancellor's office to obtain access to the online course videos. They proudly stated that they had watched each of the previous sessions more than once. Paula saw that their names were Nora Dreckindale, Nancy Clippenworth, and Natalie Brockman.

Professor Canterberg announced that he would welcome any students from this session to audit his Global Business Strategy class, and answered one question from a student regarding prerequisites for the course, and whether any sort of paper or thesis was required. Without further ado, he left.

"This afternoon, I want to present some analysis from a scholarly paper which was presented at an academic conference a few years back in Taiwan," Paula explained. "The subject of the conference was the disposition of Taiwan in the post-war era, and the specifications of the San Francisco Peace Treaty were discussed at length. The panelist in question did actually examine Article 4(b), and he came to some conclusions.

"Before the lunch break, we presented Eight Theories/Explanations regarding the international legal status of Taiwan. In a few moments we will discuss this other scholar's views on this subject.

"If you learn nothing else from the presentation of all this data, at the minimum you should become strongly aware of the fact that people from another cultural tradition can look at the specifications of the peace treaty, or the UN Charter, or various court cases, as translated into their mother tongue, generally, but also with some amount of reference to the original English language text, and they can arrive at totally different conclusions as to the meaning of the different clauses.

“This, added to the fact that they have different ideas about the concept of ‘what constitutes proof’ or ‘how a definitive explanation can be achieved’ etc., and as a result, it should not be surprising that they have ‘alternative world views’

“And this is especially true when considering that the Taiwan problem is an issue left over from WWII in the Pacific, and which the post-war treaty dealt with, to a large degree, in essentially the same manner as for the Ryukyus. Most researchers totally ignore the Taiwan-Ryukyu connection. Additionally, while many so-called scholars like to advance their own legal explanations, the sad fact is that the overwhelming majority of these people lack any detailed knowledge of the customary laws of warfare.”

“Isn’t the end of U.S. military government typically done by a formal announcement of the U.S. President?” one of the students near the back questioned. “I seem to recall that President Theodore Roosevelt announced the end of USMG in Cuba effective May 20, 1902. President Nixon announced the end of USMG in the Ryukyus effective May 15, 1972, isn’t that right?”

“Yes,” Paula replied. “We will have a more detailed discussion of all related aspects in this afternoon’s session. Notably, however, up to the present date, no U.S. President has yet announced the end of USMG in Taiwan.”

There was another knock on the door. Henri stepped inside. In his right hand, he had a bottle of mineral water.

“I thought you were bringing that ‘Disclaimer’ you designed for our afternoon session,” Paula said, seeming somewhat confused.

“Yes, I brought it,” Henri stated somewhat loudly, while at the same time making his exit and closing the door.

The large green drapery in front of the audio-visual control area dropped down, and then quickly rose up again. Henri was standing behind the bank of controls and holding up a large cardboard sign, which appeared to be over four feet in width. He slowly lowered it, and then pushed some buttons on his control panel. The lettering on his sign appeared on the large screen in the front of the classroom.

The Pacific War and its Aftermath

After the attack on Pearl Harbor, Hawaii, on Dec. 7, 1941, the United States' entry into the Pacific War can only be characterized as self-defense – it was not aggression. The conquest of certain areas, in particular the Ryukyus and Taiwan, by U.S. military forces was in full accordance with the strategic goals developed during the course of the war.

After the dropping of atomic bombs in early August 1945, and the surrender of the Japanese Emperor, various factors came to play in the design of the new world order for Asia and the Pacific. Among these were regime changes in various Asian nations, the military occupation of Japan and her overseas territories, President Truman's personal dislike of Chiang Kai-shek, the collapse of the ROC in Mainland China, internal U.S. Executive Branch disagreements over the possible recognition of "Two Chinas," the decapment of the ROC's central government to occupied Taiwan in Dec. 1949, the need to thwart the rapid rise and spread of communism, the outbreak of the Korean conflict, etc.

Under the terms of the San Francisco Peace Treaty, the United States' acquirement of "jurisdictional authority" over various territories detached from Japan, including (but not limited to) the Ryukyus and Taiwan, was a direct result of the interplay of all the above factors, and was a decision agreed upon by the Allies as a group. Although not contemplated at the time of the U.S. declaration of war in Dec. 1941, the responsibilities of the United States under the peace treaty are clear, and it behooves the Executive Branch to carry them out in good faith.

"That is a good summary," Paula agreed.

"My Disclaimer," Henri said.

"OK," Paula nodded. "With that being said, let's return to the specifications of the San Francisco Peace Treaty. Article 2 of the treaty includes clauses (a) to (f), and covers the following geographic areas: Korea, "Formosa and the Pescadores" (aka Taiwan), the Kurile Islands, Sakhalin Island, League of Nations Japanese Mandate Territories (i.e. Palau, Saipan, Truk, Ponape, and Jaluit Atoll), Antarctic areas under Japanese control, Spratly Islands, and Paracel Islands.

"Article 3 of the treaty covers the geographic area of the Ryukyu island group.

“Article 4(b) is of particular significance.” A large map of the Pacific Ocean and environs came on the screen. Some lettering moved up from the bottom of the screen toward the center.

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.

“As I stated earlier, during my attendance at various academic conferences discussing the Taiwan legal status issue, I have occasionally heard some panelists make comments about this Article,” Paula clarified.

“I want to offer one particular example here today, remarks made by one particular panelist, and I note that this was translated from the Chinese into English by a university professor. I will also provide some context, as follows --

Background remarks by the panelist: *During the period of WWII in the Pacific, U.S. military attacks on Taiwan and the Ryukyu island group caused much damage. In addition, there were instances where U.S. military personnel took other actions in regard to the disposition of Japanese property in these areas, before the formal surrender of Japan on Sept. 2, 1945. The recognition of these facts is essential to understanding the meaning of Article 4(b).*

Analysis by the panelist: *The legal effect of Article 4(b) of the SFPT is to say that after the treaty comes into force, Japan will not challenge, dispute, or make other objections to the destruction of, damage to, or any other “disposition” of any Japanese property done by U.S. military government personnel in any of the areas listed in Articles 2 and 3, during the period of hostilities. But this does not mean that U.S. military government has been established in these Article 2 and 3 areas after the treaty has come into force.*

“Now, in trying to dissect the comments of this panelist, it strongly appears to me that he is confused. First, let’s overview the Branches of the US Armed Forces.

Branches of the United States Armed Forces

Branch	Abbreviation	Founded	Common Nomenclature in conducting war overseas
Army	USA	June 14, 1775	US Army
Navy	USN	Oct. 13, 1775	US Navy

Marine Corps	USMC	Nov. 10, 1775	US Marines
Coast Guard	USCG	Aug. 4, 1790	US Coast Guard
Air Force	USAF	Aug. 1, 1907	US Air Force

Notes:

- 1) The Marine Corps (USMC) has been a component of the U.S. Navy since June 30, 1834.
- 2) 2) The Air Force (USAF) was initially formed as a part of the U.S. Army on Aug. 1, 1907, and later established as a separate branch of the U.S. Armed Forces on Sept. 18, 1947.

“It would seem logical to many civilians that in order to conduct war overseas, there must be some form of administration, or governing structure, or ‘government’ by the Branches of the Armed Forces involved. Hence, when overviewing this panelist’s remarks, I get several impressions. First, it appears that he is using the term ‘United States military government’ in this sense, as a synonym for ‘United States military governing authorities’ or ‘the jurisdiction of United States military governing authorities.’ This is a very generalized usage, but it makes sense to many civilians.

“However, if we look at the column regarding ‘Common Nomenclature in conducting war overseas,’ we don’t see the terms ‘governing authorities.’ In other words, when conducting war overseas, the US Army is not referred to as the ‘US Army governing authorities’ or any similar term. This applies to the other Branches as well.

“Second, in regard to any restrictions on the applicability of Article 4(b) in relation to the geographic scope of territories included in Articles 2 and 3, of course there would be some. The application must necessarily be limited to those areas which are under military occupation. In order to determine this, we would have to look at the specific wartime events, and then make an evaluation for each territory based on our knowledge of the customary laws of warfare. For example, my guess is that the Antarctic areas under Japanese control were not under military occupation, so Article 4(b) would not apply there.

“Third, he is falling into the logical trap of saying ‘If I don’t see it, then it must not exist.’ However, if we want to talk about a particular U.S. military command headquarters, there is no strict requirement that it be established in any specific location. In other words, we might be coordinating military action in New Guinea, but our headquarters was established in Darwin, Australia. We might be coordinating military action in the Kurile Islands, but

our headquarters was established in Kushiro, a city on the southeastern coast of Hokkaido Island, Japan.

“In response to questions, this panelist did later confirm that he had verified that an organization called United States Military Government had been established in Korea, Saipan, the Ryukyus, etc. to assist with transitional administration in those areas. But he was adamant in saying that the U.S. military authorities had not extended their jurisdiction to most of the other Article 2 areas. So, in this sense he was again falling back on the rationale that ‘If I don’t see it, then it doesn’t exist.’

“In a similar fashion, many civilians who visit a particular area, and are asked whether that area is under military occupation or not, will make their evaluation based strictly on whether they saw significant numbers of uniformed military personnel in the streets. However, neither the Hague nor Geneva Conventions have any hard and fast requirements in this regard.

[DEFINITION]

- Military occupation is a condition in which territory is under the effective control of foreign armed forces.

“At the most fundamental level, the existence of a state of military occupation must be based on legal criteria. Casual visual impressions of civilians touring the area would not be authoritative.

“Now returning to this panelist’s remarks in my impression he is totally unaware of the fact that ‘military government’ has a very specific meaning in the context of military jurisdiction under the U.S. Constitution.

[DEFINITION]

- Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory.

“The default status for territory under United States military government is ‘occupied territory.’ This was the original status of the Ryukyu island group as well. However, after the assignment of more personnel and drafting of various organizational procedures, it was later known as the ‘United States Civil Administration of the Ryukyu Islands,’” Paula clarified. “But of course, that is also military government.” She paused briefly.

“Fourth, this panelist appears to assume that United States Military Government would necessarily end upon the coming into force of the peace treaty. For the four main Japanese islands, this is true. In my impression, this is the only situation that most civilians are familiar with.

“The RULE is that military government continues until legally supplanted. In order to apply this RULE to territories separated from the ‘mother country’ in a peace treaty after war, it is easily seen that military occupation, and military government, will continue after the peace treaty comes into force. This is because the local civil government has not yet been formed. All related aspects of this were thoroughly discussed in a previous session in regard to the military occupation of California territory after the Mexican American War.

“Fifth, we need to look at the meaning of the word ‘property’ as used in Article 4(b).”

Important definition

Property --

- (1) something, as land and assets, legally possessed,
- (2) a piece of real estate,
- (3) something tangible or intangible to which its owner has legal title,
- (4) the right of ownership; title.

“Here is some comparative Chinese data.”

English terminology	Chinese translation	ROMANIZATION [Yale]	ROMANIZATION [Hanyu Pinyin]
property	財產	tsai chan	cai chan
title			
ownership	所有權	tswu you chywan	suo you quan

“In the English language, when speaking of territorial cession(s) between states, land area is certainly considered to be "property." In other words, Louisiana was originally the property of France, but was ceded to the USA in 1803. Florida was originally the property of Spain, but was ceded to the USA in 1821. Other examples are quite numerous, including:

Name of Cession	Date	Originally the property of
California	1848	Mexico
Gadsden Purchase	1853	Mexico
Alaska	1867	Russia
Guam	1899	Spain
Puerto Rico	1899	Spain
Virgin Islands	1917	Denmark

“In Article 27 of the peace treaty, it is specified that the English, French, and Spanish versions are considered equally authentic. So, one could argue that the English version takes precedence over any Chinese translation. Nevertheless, just from the point of view of promoting international understanding, I offer the following observation --

In my experience, most people who have been raised in a Chinese cultural background, and educated in the Chinese schools, do not immediately equate the term ‘property’ as including the ‘territorial sovereignty’ of an area.

“I am not exactly sure why this is the case. Perhaps it is because in their thinking the concept of ‘property’ is a very concrete thing that has to be listed on a ‘Balance Sheet’ somewhere. Also, it appears to be true that the concept of ‘territorial cession’ is quite alien to most Chinese.

“With that being said, let’s turn to the concept of title. Above, I have **not** even given a Chinese translation for it. If we look in an English dictionary, here are some of the many entries given for the word ‘title’ –

1. Title

- a) An identifying name given to a book, play, film, musical composition, or other work.
- b) A general or descriptive heading, as of a book chapter.

2. Title

- a) A written work that is published or about to be published: the titles in the publisher's fall catalog.
- b) A division of a legal code, generally consisting of multiple related statutes.

3. Title

- a) [often] titles. Written material to be read by viewers that is included in a film or television show, typically presenting credits, narration, or dialogue.
- b) A written piece of translated dialogue superimposed at the bottom of the frame during a film; a subtitle.

4. Title

- a) A formal appellation attached to the name of a person as a sign of office, rank, profession, or hereditary privilege.
- b) A descriptive name; an epithet: *e.g.* the dubious title of the worst freezer salesman in Alaska.

5. Title (*Sports & Games*) A championship: The surname of the boxer who won the heavyweight title was Tyson.

6. Title (*Ecclesiastical*)

- a) A source of income or area of work required of a candidate for ordination in the Church of England.
- b) (b) A Roman Catholic church in or near Rome having a cardinal for its nominal head.

“So, for a native Chinese speaker, this is all very confusing. In fact, what we are looking for is –

7. Title (*Law*)

- (a) A form of ownership free of valid claims by other parties.
- (b) The aggregate evidence that gives rise to a legal right of possession or control.
- (c) A right or claim, or the basis of a right or claim.
- (d) The instrument, such as a deed, that constitutes this evidence.

“But again, in my experience, many online translation programs, when translating the word ‘title’ into Chinese, do not provide any Chinese explanation related to this last ‘definition’ at all.

“Here are some suggested translations that the university professor friend of mine and I worked on. But of course, the average individual would be unaware of these translations.”

In regard to Property held by people or by juridical persons	
English terminology	Recommended Chinese translation
Title, Ownership	所有權
Ownership Certificate	所有權狀
Abstract of Title	所有權來歷摘要說明書

In regard to Territorial Sovereignty	
English terminology	Recommended Chinese translation
Title	領土主權權利之名義
Abstract of Title	領土主權權利名義之來歷摘要說明書

“So, this assembled information and our attempted clarifications give you some idea of the problems which people in Asia often run into in trying to decipher the meaning of Article 4(b).”

Henri stepped to the front of the classroom. “Let’s consider Taiwan for a moment. From the point of view of the customary laws of warfare, if someone wants to know the application of Article 4(b), in my view it is very simple. The proper point of reference can be obtained by seeing how it has been implemented for the Ryukyu islands.”

“After all, both the Ryukyus and Taiwan are conquered territory of the USA,” Henri remarked. “That the conqueror has jurisdiction over conquered territory is a fundamental tenet of the laws of war.” He pressed some buttons on the remote control in his hand. A painting of the U.S. Constitutional Convention of 1787 appeared, and then slowly faded into an image of Chief Justice Salmon P. Chase and his assembled Justices from 1872.

"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 "

U.S. Supreme Court, *United States v. Huckabee* (1872)

“In regard to territory conquered by U.S. military forces, for those with knowledge of the customary laws of warfare, our initial assumption would be that such territory would come under the jurisdiction of the United States Military Government (USMG). Not surprisingly, the San Francisco Peace Treaty confirms this,” Henri continued.

Article 4(b) *Commentary and Analysis*

According this Article in the San Francisco Peace Treaty of April 28, 1952, the disposition of both the Ryukyus and Taiwan (which were "Japanese property") are subject to the directives of the United States Military Government (USMG).

Based on these treaty specifications, the Ryukyus were (tentatively) subject to being elevated to the status of United Nations Trusteeship, while continuing under the jurisdiction of USMG. In 1950, the governance nomenclature was changed to “United States Civil Administration of the Ryukyu Islands (USCAR).”

Some groups of the Ryukyu island chain were returned to Japan as early as 1953. In the following years, the United States began returning additional island groups in this chain to Japan. The last island group was returned effective May 15, 1972, and both USCAR and the Office of U.S. High Commissioner on Okinawa (Ryukyus) ceased on this date.

After the SFPT came into force, the idea of applying for a UN trusteeship for the Ryukyus was abandoned by U.S. Executive Branch officials. Additionally, there was no UN trusteeship arrangement put in place for Taiwan. Accordingly, with the coming into force of the peace treaty, Taiwan could be described as a quasi-trusteeship under USMG. A similar description would probably be suitable for the Ryukyus.

In summary, in relation to the geographic areas of Taiwan and the Ryukyus, the content of this Article is (i) a recognition that USMG is in force, and at the same time (ii) a confirmation that direct USMG jurisdiction over Taiwan and the Ryukyus is authorized.

It is unknown why the United States military authorities did not implement direct governance over Taiwan by the early summer of 1952. According to the precedent established in the Ryukyus, the suitable nomenclature for this governance structure would be “United States Civil Administration of Taiwan (USCAT).”

Paula interrupted. “Importantly, in the peace treaty, we do not find any specifications for the continuing delegation of the administrative authority for the ‘military occupation of Taiwan’ to the ROC. In other words, the signatories of the treaty have certainly **not** given their assent for the Republic of China government structure to continue operations in Taiwan after April 1952.”

“Can some other legal basis be found for the Republic of China’s continuing presence in Taiwan after this time?” a student on the far side of the room asked.

Henri attempted a reply. “A frequently heard justification for this, which appears on the surface to have some modicum of validity, is based on the content of General MacArthur’s General Order No. 1 of Sept. 2, 1945.”

General Order No. 1

The senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek.

“However, legally speaking, to the extent that the content of this General Order contradicts the later arrangements as specified in the post-war peace treaty, they would be considered to have expired,” he added.

“You mean ‘rendered null and void’,” Paula corrected. “Clearly, the peace treaty **has not** awarded the sovereignty of Taiwan to China, nor have the signatories authorized the ROC government structure to continue operations in Taiwan after April 1952.”

Let’s ask Adriana if she has any comments on this,” Henri said. “Adriana?”

A woman stepped out from behind the seven-panel folding display of sand-sculpture photos. She was wearing a uniform of the Australian Navy. She cleared her throat, coughing slightly. “In my opinion, these types of basic interpretations of the content of the peace treaty, as both of you have just presented here, must be considered binding on all U.S. government officials,” she said.

“Thank you,” Henri said. “Can you offer us any comments on the official view of the Australian government in this matter?”

“Officially, no,” Adriana replied. “But off the record, I would stress that we expect the officials in the Pentagon to do their jobs.”

“Alright,” Henri said, “Fair enough.”

Paula spoke up. “We are left to conclude that after April 1952, the ROC government structure has continued operations in Taiwan purely based on the ‘tacit approval’ and/or ‘full consent’ of the United States military authorities, which of course would include the top brass in the Dept. of Defense. However, the legal basis for such arrangements is entirely unclear.”

“For the U.S. military authorities to *fail to* establish USCAT in Taiwan, and then to blatantly allow the ROC to continue governance over the island” Paula stammered.

“It really appears to be without precedent.”

“Such actions certainly appear to be in direct violation of several important specifications in the U.S. Constitution,” Henri pointed out.

U.S. Constitution

By Article 2 Section 2 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 it is specified that “this Constitution and the laws 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.*”

By Article 2 Section 3 Clause 5, [the President] “shall take Care that the Laws be faithfully executed.”

“In the current day, scholarly commentary on the Constitution’s Take Care Clause (Article 2 Section 3 Clause 5) typically emphasizes the President’s power over law execution. In order to correctly exercise his executive power, the President must faithfully execute the nation’s laws, in addition to overseeing the lawful execution of the nation’s laws by others. Obviously that includes the contents of Senate-ratified treaties.

“The Take Care Clause is also known as the Faithful Execution Clause. This clause is meant to ensure that a law is faithfully executed by the President *even if* he disagrees with the purpose of that law, or with certain of its provisions.

“The Supreme Court and the Attorneys General have long interpreted the Take Care Clause to mean that the president has no inherent constitutional authority to suspend the enforcement of the laws, whether federal statutes or treaties, or any parts thereof.”

Henri asked Adriana if she was aware of the underlying parameters of the USA – Taiwan – China trilateral relationship.

“Well, according to the announcements of your DOS officials, and the White House, this trilateral relationship is based on the three elements of the One China Policy, the Taiwan Relations Act, and the Three Joint USA-PRC Communiques.”

“Of course the Six Assurances are included as part of that overall framework,” Paula clarified.

“But some things are missing,” Henri adopted a puzzled attitude. “Class?”

“The San Francisco Peace Treaty,” Nora said forcefully.

“The U.S. Constitution,” Nancy offered.

“The customary laws of warfare,” Natalie added.

“For those of you contemplating careers in U.S. government service, you need to consider all of these matters carefully,” Paula said in a serious tone. “And now I will give the homework assignment.”

There was a collective sigh from the students.

“Alright, we have divided all of you into seven groups. You can get full specifications on the class website. Your assignment is to come up with a detailed chart which illustrates the following,” Paula explained.

The screen in the front of the classroom came on showing Shifen Waterfall in Pingsi Township, northern Taiwan. It was gradually overlaid with the titles for the required five columns on the chart.

- | |
|---|
| (1) Location of ROC government |
| (2) Japanese sovereignty over Taiwan |
| (3) ROC sovereignty over Taiwan |
| (4) USMG jurisdiction over Taiwan |
| (5) Defensive Responsibility for Taiwan |

“On the far left-side of your Chart, you should put the dates, and I will prefer the YYYY.MM.DD format. The next column is a description of the significance of those dates, and then you put in your columns (1) to (5) labeled as above. Use arrows as appropriate. You can begin at May 8, 1895, or just 1895 for short.

“Here are the dates which would be most appropriate for you to use.” More data came on the screen.

1895	1928.07	1945.09.02	1945.10.24	1952.08.05
1952.04.28	1912	1949.12.10	1943.12.01	1949.10.01
1945.10.25	1945.07.26	1941.12 ~ 1945.Fall	1945.09.02	1955.03.03

“Your Chart only needs to extend to 1955.03.03, which is the date when the ROC-USA Mutual Defense Treaty came into force. We have not touched on that yet, but you should go to the website of the U.S. Senate, or some other appropriate website, and download the authoritative statements there regarding the official interpretation of this treaty. You can include that information in your accompanying explanation at the end.”

“The best entry received is the winner, and their Chart will be posted on the class website for reference,” Paula pointed to the screen as images of Hilo and its environs were shown. “The members of the winning group receive an all-expenses paid four-day tour of the Big Island, including a visit to Mauna Loa, an active volcano. We have some travel brochures for your reference.”

Cheers came up from the students.

“Henri and I will add the additional chart data for the period of 1956 to the present,” Paula added. “We may add some other data as well.”

As the students began to collect their belongings, Paula, Adriana, and Henri assembled in the audio-visual control area. Each was holding a stack of travel brochures. Henri looked at the students and announced: “We are planning to take a trip to the Big Island first, to reconnoiter the area.”

Adriana said: “Good idea.”

Paula said: “Count me in.”

The large green drapery descended slowly, and then was quickly raised up. All of the audio-visual equipment had disappeared. Henri, Adriana, and Paula were nowhere to be seen. What remained was a large stack of travel brochures piled neatly in the center of the floor.

Analysis relevant to a Determination of the Defensive Responsibility for Taiwan 1895 to 1955

		(1)	(2)	(3)	(4)	(5)	
Date	Historical Event	Location of ROC	Japan's Sovereignty over Taiwan	ROC's Sovereignty over Taiwan	USMG jurisdiction over Taiwan	Defensive Responsibility for Taiwan	
1895	Treaty of Shimonoseki	X	↓	X	X	Japan ↓	
1912	ROC is founded	Mainland China ↓		X	X		
1928.07	U.S. diplomatic recognition of ROC			X	X		
1941.12 ~ 1945.Fall	World War II in the Pacific			X	X		
1943.12.01	Cairo Declaration			X	X		
1945.07.26	Potsdam Proclamation			X	X		
1945.09.02	Japan's Surrender in Tokyo			X	X		
1945.09.02	Gen. MacArthur directs Chiang Kai-shek to Taiwan to accept Japanese surrender			X	X		
1945.10.24	United Nations is founded			X	X		
1945.10.25	Japanese troops in Taiwan surrender			Mainland China & Taiwan ↓	↓		X
1949.10.01	PRC is founded		X				
1949.12.10	ROC moves central government to occupied Taiwan	X					
1952.04.28	SFPT comes into force	Taiwan ↓	X	X	↓	USA ↓	
1952.08.05	Treaty of Taipei comes into force		X	X			
1955.03.03	ROC-USA MDT		X	X			

※ The designation of “X” is used to indicate “non-existent.”

※ The format for dates is YYYY.MM.DD

Explanation of the above chart:

Column 1: **Location of the Republic of China (ROC).** According to the historical record, the ROC was founded in Nanjing in 1912. It later relocated its capital to many different Chinese cities, and finally moved to Taiwan in 1949. Please see the attached listing “Capitals of the Republic of China” for a detailed explanation.

Column 2: **Japan’s Sovereignty over Taiwan.** According to the terms of the 1895 Treaty of Shimonoseki, Qing China ceded Taiwan to Japan in perpetuity. Hence, with the coming into force of this 1895 treaty, Japan’s exercise of sovereignty over Taiwan began. Some fifty-seven years later, Japan renounced its sovereignty over Taiwan in the post-war San Francisco Peace Treaty (SFPT), effective April 28, 1952.

Careful examination of the content of the SFPT and the Treaty of Taipei fails to find any clauses which (1) stipulate a transfer of Taiwan’s territorial sovereignty to “China,” or (2) stipulate a transfer of Taiwan’s territorial sovereignty to any government structure organized by Taiwan people themselves.

Column 3: **ROC’s sovereignty over Taiwan.** According to the historical record, the ROC was founded in Nanjing in 1912, when Taiwan was still part of Japan. In General Order No. 1 of Sept 2, 1945, the military forces under Chiang Kai-shek (ROC) were directed by General Douglas MacArthur to go to Taiwan to accept the surrender of Japanese forces on the island. The correct interpretation of the significance of the Oct. 25, 1945, surrender ceremonies is as stipulated in Article 42 of the 1907 Hague Regulations: “Territory is considered occupied when it is actually placed under the authority of the hostile army.”

While the surrender ceremonies of Oct 25, 1945, were ostensibly conducted on behalf of the Allies, the ensuing military occupation must be interpreted as being conducted on behalf of the legal occupier aka (principal) occupying power, which is the United States. Under such an arrangement, beginning Oct. 25, 1945, the United States is the legal occupier of Taiwan, and the ROC is merely serving in the role of proxy occupying forces.

Notably, a careful examination of the content of the SFPT and the Treaty of Taipei fails to find any clauses which recognize Japan as having made a transfer Taiwan’s territorial sovereignty effective Oct. 25, 1945, or any other time in the 1940s. Accordingly it can be affirmed that any

allegations that Taiwan's territorial sovereignty was transferred to China *de jure* and *de facto* on the date of the Japanese surrender ceremonies in Taiwan are, under international law, totally without legal basis.

Notably, in Dec, 1949, the ROC moved its central government to Taiwan, which at that time was still the sovereign territory of Japan, although under military occupation. By moving out of China's national territory, the ROC in Taiwan added the legal status of "a government in exile of China" to its original status of "proxy occupying forces."

Some persons may argue that during the period of Oct. 25, 1945 to April 28, 1952, the correct interpretation is to view Taiwan as being under a joint USA-ROC military occupation. Even if this premise is accepted, the SFPT of April 28, 1952, does not recognize the ROC as having any further jurisdictional authority over Taiwan whatsoever. In summary, from its founding in 1912 onward, at no point do we find that the ROC is exercising sovereignty over Taiwan.

Column 4: **USMG Jurisdiction over Taiwan.** The U.S. Supreme Court has held on many occasions that the conqueror has jurisdiction over conquered territory. Moreover, the default status of conquered territory in the post-Napoleonic world is "occupied territory." In the practice of the United States, "military government is the form of administration by which an occupying power exercises governmental authority over occupied territory." A corollary of this is "Any area under military government jurisdiction is occupied territory, unless the treaty specifies otherwise." Under the customary laws of warfare, after the conquest of Taiwan by U.S. military forces during WWII in the Pacific, as validated by the surrender of Japanese troops, Taiwan is territory under the jurisdiction of the United States Military Government (USMG), i.e. "occupied territory."

Column 5: **Defensive Responsibility for Taiwan.** As stated in the analysis for Column 3 above, some persons may argue that for Taiwan, the period of Oct. 25, 1945, to April 28, 1952, should be interpreted as a joint USA-ROC military occupation. However, even if this premise is accepted, the SFPT of April 28, 1952, does not recognize the ROC as having any further jurisdictional authority over Taiwan at all. Specifically, with no transfer of Taiwan's territorial sovereignty to the ROC in the SFPT, the operations of an ROC Ministry of National Defense (MND) on Taiwanese soil, under the authority of a so-called "ROC Constitution," is without legal basis.

According to SFPT Article 2(b), Japan's sovereignty over Taiwan has ended, hence Taiwan's fundamental legal status remains as conquered territory of the United States. Notably, both the Mexican American War and the Spanish American War provide numerous examples to

prove the assertion that *territory subject to the military jurisdiction of the United States* immediately comes under the U.S. Constitution's "common defense" clause (Article 1, Section 8, clause 1). No further action of the U.S. Congress is necessary. The situations of (1) occupied California territory before the coming into force of the Mexican American Peace Treaty, and (2) occupied Cuba territory before the recognition of Cuban Independence on May 20, 1902, are two very prominent examples.

In summary, under U.S. constitutional principles, the defensive responsibility for Taiwan (military personnel, equipment, administration, & management) is fully the responsibility of the Dept. of Defense, located in the Pentagon, in Washington D.C.

ROC – USA Mutual Defense Treaty

The first sentence of Article 6 of this treaty specifies:

For the purposes of Articles 2 and 5, the terms "territorial" and "territories" shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America, the island territories in the West Pacific under its jurisdiction.

The commonly heard allegation that Article 6 recognizes the ROC's exercise of sovereignty over "Taiwan and the Pescadores" is not supported by a close reading of this Article. Moreover, in conjunction with the ratification of the MDT, a report issued Feb. 8, 1955, by the U.S. Senate Committee on Foreign Relations specified: "It is the view of the committee that the coming into force of the present treaty will not modify or affect the existing legal status of Formosa and the Pescadores."

To avoid any possibility of misunderstanding on this aspect of the treaty, the committee decided it would be useful to include in this report the following statement:

It is the understanding of the Senate that nothing in the treaty shall be construed as affecting or modifying the legal status or sovereignty of the territories to which it applies.

Importantly, however, the wording of Article 6 does not exclude the option that "Taiwan and the Pescadores" are in some sense concurrently under the jurisdiction of both the Republic of China and the United States of America.

Analysis relevant to a Determination of the Defensive Responsibility for Taiwan 1956 to the present

		(1)	(2)	(3)	(4)	(5)
Date	Historical Event	Location of ROC	Japan's Sovereignty over Taiwan	ROC's Sovereignty over Taiwan	USMG jurisdiction over Taiwan	Defensive Responsibility for Taiwan
1971.10.25	ROC expelled from UN	Taiwan ↓	X	X	↓	USA ↓
1972.02.28	Shanghai Communique		X	X		
1978.12.31	USA-ROC break diplomatic relations		X	X		
1979.01.01	2 nd Communique		X	X		
1979.01.01	Taiwan Relations Act takes force		X	X		
1980.01.01	MDT canceled		X	X		
1982.08.17	3 rd Communique		X	X		
2000.05.20	Democratic Progressive Party wins Presidency		X	X		
2008.05.20	Kuomintang Party wins Presidency		X	X		
2016.05.20	Democratic Progressive Party wins Presidency		X	X		
Today			X	X		

※ The designation of “X” is used to indicate “non-existent.”

※ The format for dates is YYYY.MM.DD

Note: After making an careful examination of “Historical Events” which have some relation to Taiwan in the period of 1956 to the present, the first item which comes to the attention of most scholars is the expulsion of the ROC from the United Nations on Oct. 25, 1971.

Capitals of the Republic of China

Capital	Period	Notes
Nanjing 南京	Jan. 1, 1912 to April 2, 1912	Provisional Government
Beijing 北京	April 2, 1912 to May 30, 1928	Beiyang government
Fengtian 奉天	May 30, 1928 to Dec. 29, 1928	Beiyang government
Guangzhou 廣州	July 1, 1925 to Feb. 21, 1927	Guangzhou Nationalist Government
Wuhan 武漢	Feb. 21, 1927 to Aug. 19, 1927	Wuhan Nationalist Government
Nanjing 南京	April 18, 1927 to Nov. 20, 1937	The Nanjing decade
Luoyang 洛陽	Jan. 29, 1932 to Dec. 1, 1932	The Luoyang emplacement
Beijing 北平	Sept. 9, 1930 to Sept. 23, 1930	Beiping Nationalist Government
Taiyuan 太原	Sept. 23, 1930 to Nov. 4, 1930	Beiping Nationalist Government
Guangzhou 廣州	May 28, 1931 to Dec. 22, 1931	Guangzhou Nationalist Government
Chongqing 重慶	Nov. 21, 1937 to May 5, 1946	During the Second Sino-Japanese War
Nanjing 南京	March 30, 1940 to Aug. 10, 1945	Wang Jingwei Government
Nanjing 南京	May 5, 1946 to 1 May 1, 1991	From 23 April 1949 to 1 May 1991, Nanjing was the claimed capital of the ROC, even though in reality the ROC had relocated to Taipei, Taiwan, in Dec. 1949
Guangzhou 廣州	April 23, 1949 to Oct. 14, 1949	During the Chinese Civil War
Chongqing 重慶	Oct. 14, 1949 to Nov. 30, 1949	During the Chinese Civil War
Chengdu 成都	Nov. 30, 1949 to Dec. 27, 1949	During the Chinese Civil War
Xichang 西昌	Dec. 27, 1949 to March 27, 1950	During the Chinese Civil War
Taipei 台北	Dec. 10, 1949 to Present	Capital

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 12

**PRELUDE TO WAR: THE U.S.
OCCUPATION OF ICELAND, 1941**

[DATELINE MOSCOW, RUSSIA]
PRESENT DAY

With the sponsorship of several organizations temporarily united under the somewhat unwieldy title of “USA – Russia Friendship and International Cooperation Alliance,” and in conjunction with a fifteen-day “Iceland History, Culture, and Tourism Festival” held in Moscow, a number of movies with associated historical themes were presented to the general public at a large theater near Red Square. Admission was free.

One of the major themes being stressed by the sponsors, and unfortunately commonly forgotten by most people in the late 20th century and into the 21st century, was that during WWII in Europe, the Soviet Union and the United States were Allies. Importantly, during this era, references to the “Red Army” were Soviet troops and, therefore part of the Allied forces. Additional members of the Allies in the European Theatre included the Netherlands, Belgium, Greece, Yugoslavia, France, Poland, the United Kingdom, as well as dependent states, such as British India, and the independent Dominions of Australia, Canada, New Zealand, and South Africa.

Many popular Eastern European movie stars made cameo appearances in the movies, and

announcers included many popular Russian television personalities. Not surprisingly, most showings were full.

Movie #3 was entitled “Events Leading up to the United States Entry into WWII.”

Events Leading up to the United States Entry into WWII

The German invasion of Poland on Sept. 1, 1939, marked the beginning of World War II in Europe. The British had pledged support for Poland, and on Sept. 3, 1939, Britain declared war on Germany. France declared war on Germany the same day.

BATTLE OF BRITAIN

The Battle of Britain was a military campaign of WWII, in which the Royal Air Force (RAF) defended the United Kingdom (UK) against large-scale attacks by Nazi Germany's air force, the Luftwaffe. It has been described as the first major military campaign fought entirely by air forces. The British officially recognize the battle's duration as being from July 10 until October 31, 1940, which overlaps the period of large-scale night attacks known as the Blitz, that lasted from Sept. 7, 1940, to May 11, 1941. German scholars have a different historical perspective and regard the battle as a single campaign lasting from July 1940 to June 1941, including the Blitz.

In May 1940, some two months before the Battle of Britain began, Winston Churchill had replaced Neville Chamberlain as Prime Minister.

The Germans had one primary objective in conducting their attacks, which was to compel Britain to agree to a negotiated peace settlement. In July 1940, the air and sea blockade began, with the Luftwaffe mainly targeting coastal-shipping convoys, ports, and shipping centers, such as Portsmouth. On August 1st, the Luftwaffe was directed to achieve air superiority over the RAF with the aim of incapacitating RAF Fighter Command; twelve days later, it shifted the attacks to RAF airfields and infrastructure. As the battle progressed, the Luftwaffe also targeted British factories involved in aircraft production and strategic infrastructure. Eventually, it employed terror bombings on areas of political significance, which included a large number of British cities.

The Germans had rapidly overwhelmed France and the Low Countries (Belgium, the Netherlands, and Luxembourg), leaving Britain to face the threat of invasion by sea. The German high command knew the difficulties of a seaborne attack and its impracticality

while the British Royal Navy controlled the English Channel and the North Sea. On July, 16 Adolf Hitler ordered the preparation of Operation Sea Lion as a potential amphibious and airborne assault on Britain, to follow once the Luftwaffe had established air superiority over the UK.

In September 1940, RAF Bomber Command night raids disrupted the German preparation of converted barges. This combined with the Luftwaffe's failure to totally overwhelm the RAF forced Hitler to temporarily postpone and eventually cancel Operation Sea Lion. Germany proved unable to sustain daylight raids, but continued their night-bombing operations on Britain, which became known as the Blitz.

Modern day historians have pointed to Germany's failure to destroy Britain's air defenses to force an armistice (or even outright surrender) as the first major German defeat in World War II and a crucial turning point in the conflict.

LEND-LEASE AND ICELAND OCCUPATION

The year 1940 saw a marked a change of attitude in the population of the United States. The German victories in France, Poland and elsewhere, combined with the Battle of Britain, led many Americans to believe that some intervention would be needed. In March 1941, the Lend-Lease program began shipping money, munitions, and food to Britain, China, and (by that fall) the Soviet Union.

Lend-Lease

The Lend-Lease policy, formally titled "An Act to Promote the Defense of the United States," (enacted March 11, 1941) was a program under which the United States supplied the United Kingdom (and British Commonwealth), Free France, the Republic of China, and later the Soviet Union and other Allied nations with food, oil, and materiel between 1941 and August 1945. This included warships and warplanes, along with other weaponry. It was signed into law on March 11, 1941, and ended in Sept. 1945. In general the aid was free, although some hardware (such as ships) were returned after the war. In return, the U.S. was given leases on army and naval bases in Allied territory during the war.

A total of \$50.1 billion worth of supplies was shipped, totaling approx. 17% of U.S. total war expenditures. In all, \$31.4 billion went to Britain, \$11.3 billion to the Soviet

Union, \$3.2 billion to France, \$1.6 billion to China, and the remaining \$2.6 billion to the other Allies.

Lend-Lease effectively ended the United States' pretense of neutrality which had been enshrined in the Neutrality Acts of the 1930s. It was a decisive step away from non-interventionist policy and toward open support for the Allies.

Under Roosevelt's leadership, by early 1941 the United States was taking an active part in the war, despite its nominal neutrality. In the spring, German U-boats (military submarines) began their "wolf-pack" tactics, which threatened to sever the trans-Atlantic supply line. President Roosevelt extended the Pan-American Security Zone east almost as far as Iceland. The US Navy's "neutrality patrols" were not actually neutral as, in practice, their function was to report Axis ship and submarine sightings to the navies of the UK and Canada, and from April the US Navy began escorting Allied convoys from Canada as far as a point south of Iceland, where they handed off to the RN.

PREPARING FOR WAR: THE UNITED STATES OCCUPATION OF ICELAND, 1941

On June 16, 1941, after negotiation with Churchill, President Roosevelt ordered the United States occupation of Iceland to replace the British invasion forces currently stationed there. The UK Prime Minister stressed that Britain needed her troops elsewhere. On June 22, 1941, the US Navy sent Task Force 19 (TF 19) from Charleston, South Carolina, to assemble at a harbor in southern Newfoundland. This TF 19 included 25 warships and the 1st Provisional Marine Brigade of 194 officers and nearly 4000 men from San Diego, California. TF 19 sailed from Newfoundland on July 1, 1941.

On July 7, Britain persuaded the Althing (the National Parliament of Iceland) to approve an American occupation force under a U.S.-Icelandic defense agreement, and TF 19 anchored off Reykjavík that evening. U.S. Marines commenced landing on July 8, and disembarkation was completed on July 12. On August 6, the U.S. Navy established an airbase at Reykjavík with the arrival of Patrol Squadron VP-73 PBY Catalinas and VP-74 PBM Mariners.

U.S. Army personnel began arriving in Iceland in August. At the time, Iceland was estimated to have a population of about 120,000. Contrastingly, up to 40,000 U.S. military personnel were stationed on the island, a significant addition. The agreement

was for the U.S. military to remain until the end of the war. Later, this arrangement was modified when Iceland became a member of NATO in 1949.

American warships escorting Allied convoys in the Atlantic had several hostile encounters with U-boats. On Sept. 11, Roosevelt ordered American warships to attack U-boats on sight. The United States' ability to protect Allied ships in the Atlantic was significantly bolstered by the stationing of U.S. military troops in Iceland. At the same time, the Nazis were definitely interested in occupying Iceland, and their plans were effectively thwarted by the timely intervention of the British and U.S. military forces.

THE GRAND STRATEGY

The established grand strategy of the Allies was to defeat Germany and its allies in Europe first, and then their focus could shift towards Japan in the Pacific. This was because two of the Allied capitals (London and Moscow) could be directly threatened by Germany, but none of the major Allied capitals were threatened by Japan. Germany was the United Kingdom's primary threat, especially after the Fall of France in 1940, which saw Germany overrun most of the countries of Western Europe, leaving the United Kingdom alone to combat Germany.

THE ALLIES IN WWII = = = *Special Notes & Summary* = = =

The Soviet Union perforce joined the Allies in June 1941 after being invaded by Germany.

After the Japanese attack on Pearl Harbor, the United States declared war on Japan on Dec. 8, 1941.

The Republic of China had already been in a prolonged war with Japan since the Marco Polo Bridge Incident of 1937 but officially joined the Allies on Dec. 9, 1941, with a declaration of war against Japan.

On Dec. 11, 1941, Adolf Hitler and Nazi Germany declared war against the United States, the same day that the United States declared war on Germany and Italy.

= = = *War with Germany: End of Hostilities* = = = May 8, 1945

In the early morning hours of May 7, 1945, in Reims, France, the Chief-of-Staff of the German Armed Forces High Command signed an unconditional surrender document to the Allies for all German forces. Also, on May 7, a high-ranking German General announced the unconditional surrender of German troops in Norway. That announcement included the phrase "All forces under German control to cease active operations at 2301 hours Central European Time on May 8, 1945."

The movie ended with a quick tour of the 10 Top-Rated Tourist Attractions in Iceland, and a sales pitch for Icelandic natural-spring glacial water, which was claimed to have a wide variety of health benefits.

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 13

**MILITARY OCCUPATION: JOINT v. ZONE,
AND THE LAW OF AGENCY**

[DATELINE HAMBURG, GERMANY]

PRESENT DAY

The venue was a large conference room in a university in the southern part of the city. Two women wearing similar business attire were seated in the last row. One was slightly taller and carrying a Russian flag. She got up and walked slowly to the front. “If you have visited the class website in the last few days you will have seen that we had a special film screening in Moscow. You were not specifically notified of that, but according to the viewing statistics I have seen, many of you have already watched that film online. It provides some important background information about WWII, and in particular the details of the United States’ entry into the European Theater.

“In that film, we learned that the Battle of Britain (July 10, 1940, to May 11, 1941, including the period known as the Blitz) could be regarded as Germany’s first major defeat in WWII. Hitler’s original plan was for the Luftwaffe to gain air superiority over the UK first; then the Germans would launch further aggressive military assaults on Britain, both by air and by sea. However, this goal of achieving air superiority was never achieved; hence, the other plans had to be abandoned.”

A large screen at the front of the classroom was lowered, and some WWII battle scenes were shown, followed by the following data.

After the Battle of Britain, further significant defeats for German military forces in the European Theatre included the following:

- The Battle of Moscow (Oct. 2, 1941 – Jan. 7, 1942). This was a military campaign that consisted of two periods of strategically significant fighting on a 600 km (370 mi) sector of the Eastern Front.
- The Battle of Stalingrad (Aug. 23, 1942 – Feb. 2, 1943). This was arguably the largest confrontation in the European Theatre. In this engagement, Germany and the Axis powers fought the Soviet Union for control of the city of Stalingrad (now Volgograd) in Southern Russia.
- The Battle of Kursk (July 5, 1943 – Aug. 23, 1943). This was an engagement between German and Soviet forces on the Eastern Front near Kursk, which is 450 km (280 mi) south-west of Moscow. Hitler canceled the offensive at Kursk after only a short time, week, in part to divert forces to Italy. Germany's extensive losses of men and tanks ensured that the victorious Soviet Red Army, fighting as part of the Allies, enjoyed the strategic initiative for the remainder of the war.
- The Normandy landings (June 6, 1944). These were the landing operations which comprised the Allied invasion of Normandy, often referred to as D-Day. Overall, it was the largest seaborne invasion in history. The events of D-Day began the liberation of German-occupied France (and later western Europe) from Nazi control, and laid the foundations of the Allied victory on the Western Front.
- The Battle of Berlin (April 16 – May 2, 1945). This was one of the last major offensives of the European theatre, before the German surrender on May 8.

“I understand that many of you took a charter flight from Honolulu, and am happy to see such a large group in attendance today,” she continued. “The weather in Hamburg is certainly different from what you had in Hawaii!” A picture of a Hawaiian sunset came on the screen.

“Let’s continue with our overview of the defeat of Germany in WWII,” she said. “Oh, and I should give a clarification Please be aware that references to the ‘United Nations’ in these *pre-Oct. 24, 1945, documents* are merely referring to the ‘Allies.’”

The Berlin Declaration

The “Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers” (aka the Berlin Declaration) was signed by the four Allies on June 5, 1945. It included the following content:

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the French Republic, hereinafter called the "Allied Representatives," acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply:

[The Declaration contained another fifteen Articles.]

“As a legal and historical researcher, I must point out the following. Up to the present day, it is still disputed whether this assumption of power over Germany constituted *debellatio*—the end of a war caused by the complete destruction of a hostile state.

“The Allies maintained that the complete and lasting elimination of Nazism and its crimes against humanity, and German militarism in general, were their major wartime objectives. Indeed in October 1944, General Eisenhower, in his ‘Proclamation number 1’ concerning the intended Allied Occupation of Germany, had promised the total obliteration of Nazism and Militarism, the suspension of the German legal system, and the assumption by the Allies of executive, legislative and judicial power. Ostensibly, he viewed all these actions as within the scope of ‘military necessity.’”

The classroom door opened. Two people wearing the uniforms of a German express delivery company appeared. The first one announced: “I am from the airline.”

“What airline?”

“The charter flight from Honolulu. We have some information regarding discounts here in Hamburg, for various tourist attractions, hotels, restaurants, and other places of interest. Everyone gets a set, and there is a listing of internet addresses where you can get information on air quality control and environmental protection measures in Germany. ” He looked around the classroom. “Are you the professor of this class, Ms. Emma Frossmann?”

“No, Emma went to Dubai. I am the substitute. My name is Margret Ruskkol, and I am serving as the moderator.”

“The airline is also invested by a major German construction company. They have vacation villas throughout Europe, available for both short-term and long-term rental. Descriptions and other details are all included in each information packet,” the delivery man added. He then began to count the number of students in the classroom.

“Alright,” Margret said. “And speaking of the environment ,” she put the Russian flag down on a side table, and picked up an assortment of flags which had been lying there. She finally selected a German one. “Our delivery man just mentioned the environment, which reminds me that the office staff here at the university told me to give everyone some general warnings about how things are done here in Germany, and which may be different from your home countries.”

“I am giving you eight extra packets,” the first delivery man said, piling them all on the side table. He quickly made his exit.

The second delivery man raised a large bundle in his hands. “I brought the doll,” he said. “I was directed to unwrap it here in the classroom and give it a front row seat.”

He began unwrapping the large bundle. As he turned it in the direction of the assembled students, the doll’s appearance became more clear. It was a “Chiang Kai-shek” replica, dressed in a Chinese military uniform.

A male student in the center of the front row stood up, offering his seat. He walked over to the windows at the far side of the classroom. Generalissimo Chiang Kai-shek was placed in the newly available front-row seat.

The delivery man collected the wrapping paper and left.

“OK, where were we?” Margret questioned, asking no one in particular. The student who was standing near the windows chimed in, “I believe you were getting to the subject of environmental protection.”

“Oh, yes. Environmental protection has been defined as a state objective in the German Constitution since 1994,” Margret continued. “It provides that legislature, government, and all public bodies shall strive to safeguard the environment and natural resources for the benefit of future generations. This objective is also embodied in all constitutions of the 16 states (Bundesländer),” Margret stopped her description and pointed toward the rear door of the classroom. The other woman sitting in the back row promptly stood up and left the room.

“But my list is different,” Margret clarified. “The list I have put together for you today is a bit broader, and includes various prohibitions which are especially relevant to tourists or newcomers. There are six rules.”

- Be aware that garbage sorting and recycling is required everywhere.
- Don't jaywalk. Don't walk in bicycle lanes.
- Always buy a ticket for public transport. Remember to pay for AND validate your train tickets.
- Be aware of “quiet hours,” which are generally defined as 1pm to 3pm, 10pm to 7am, and Sundays.
- In a restaurant, don't order more food than you can eat, otherwise you may be subject to a fine.

There was a knock on the door. Margret walked over and opened it slowly. Four students said in unison “We are sorry, we are late.”

Margret looked at them carefully. “Please write your names on the whiteboard,” she said. “And then please assist me in giving each of our students one of these information packets.” After these new arrivals had begun passing out the packets, she added: “There are some empty seats at the rear of the classroom.” She motioned in that direction. The student standing near the windows also located a seat in the third row and sat down.

“And that brings me to rule six.”

- | |
|--|
| <ul style="list-style-type: none">• Be on time, don't be late. |
|--|

“Some stereotypes can hardly be argued with. One of them is that German people are punctual and expect others to be the same. Wasting people’s time by waiting is considered rude and objectionable,” Margret added. “Failure to be cognizant of German social norms is also unacceptable.”

The door opened and the woman formerly sitting in the back row strolled in. She was now dressed in a large loose-fitting blouse and slacks, which appeared to be made of several large pieces of fabric, of simple solid colors. “Let me introduce my associate, Emily Baumann. She will be my co-moderator today.”

Emily stood in front of the class, raised her arms parallel to the floor, and slowly turned around in a full circle. “Looking at my clothing, how many colors do you see?”

“Four,” came the answer, spoken in unison by several students.

“And what does that suggest? In relation to the legal situation beginning in Germany in 1945?” Emily asked.

There were no answers. Emily walked over to the side table. She sorted through the flags there, finally picking four, and holding them up. They were the flags of the U.K., France, the United States, and the Soviet Union.

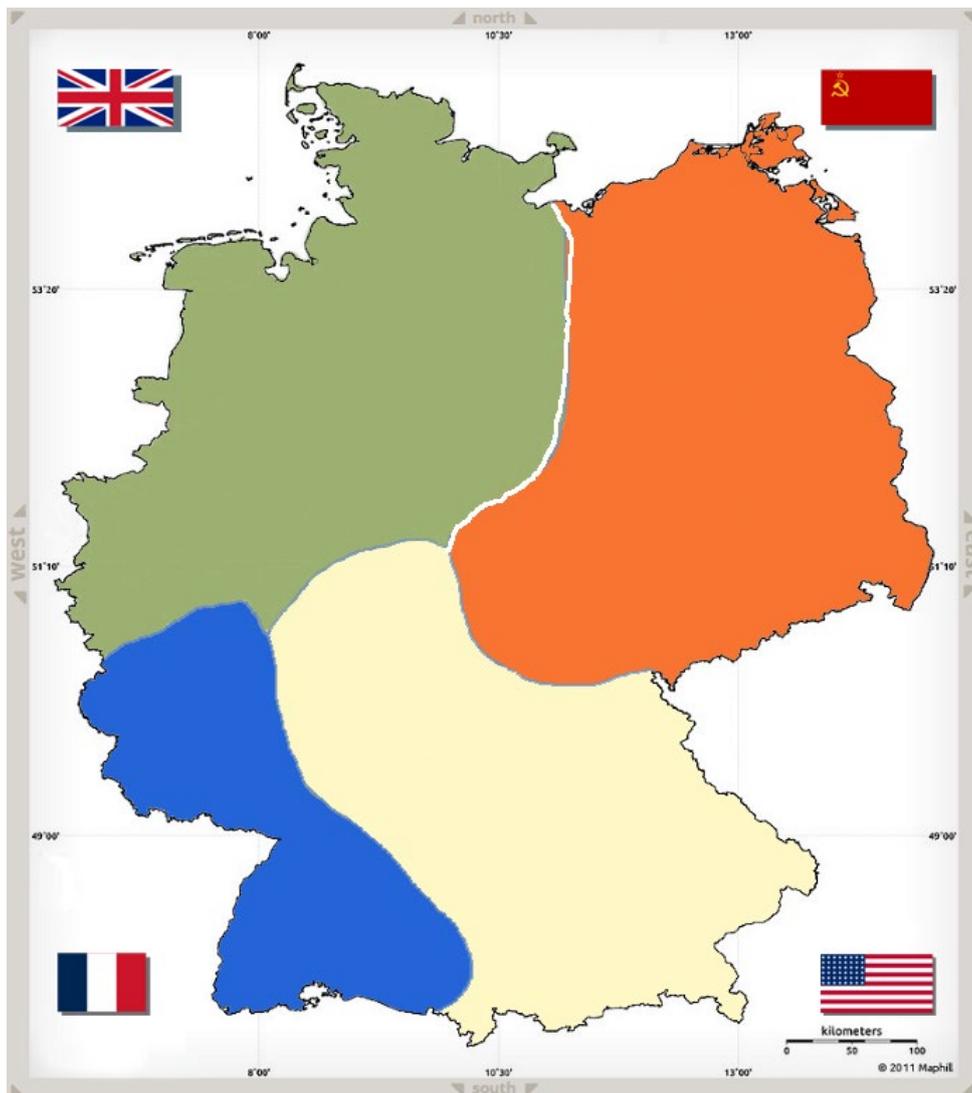
“The four occupation zones of Germany,” one student in the front row suggested, somewhat hesitantly.

“Very good!” Emily exclaimed. “You win two tickets to the Hamburg Kunsthalle. That is one of the largest art museums in Germany.”

Some of the other students applauded.

The screen came on and began showing a video introduction to the Hamburg Kunsthalle. Emily let it run for several minutes. “Our screen is interactive, and it also will occasionally have news bulletins,” she added.

Finally, the screen paused with large picture of the German flag. Emily pushed a button on her remote control and a large map of Germany appeared. It was separated into four colors. “According to my understanding, this was the original rough planning for the military occupation of Germany, after the German surrender. It was decided to give each of the four major Allies their own occupation zone.”



“So, back to fundamentals, why didn’t the Allied High Command just separate Germany into four regions and then each of the Allies could just annex one section? Or maybe I should say ‘One sector’?”

Most of the students seemed baffled by this remark.

“Or at the minimum, the two nearest countries, the U.K. and France, could be allowed to annex their sectors directly into their own countries, and this would leave the American and Soviet sectors to be put under military occupation, and then eventually returned to Germany, to form the new German nation,” Emily suggested.

The students seemed equally bewildered by this suggestion.

“Alright,” she said, “What are the fundamental tenets of military occupation?”

Relevant information appeared on the screen.

Hague Regulations of 1907

Article 42.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

“In interpreting this, it must be recognized that when the territory comes under the authority of foreign military forces, it is considered occupied, it is not considered annexed. Two words are of note here; the first word is ‘hostile’. In the current era, we often view something ‘hostile’ as being ‘marked by malevolence,’ or ‘having or showing unfriendly feelings.’ However, at the most basic level, ‘hostile’ simply means ‘of or relating to an enemy,’ or ‘openly opposed or resisting.’

“The second word of note is ‘army.’ Well, in fact, airplanes were not in wide use in 1907.”

Several students laughed.

“To give credit where credit is due, although I am an American and I have visited Kitty Hawk, North Carolina, more than once, I am aware that both Englishmen and Germans made significant contributions to early research on aviation. In truth, many historians consider the English engineer George Cayley to be the first true scientific aerial investigator and the first person to understand the underlying principles and forces involved with flight. He set forth the concept of the modern airplane in 1799, and later built and flew models and successful passenger-carrying gliders.

“Also notable was the German pioneer of human aviation Otto Lilienthal. He studied heavier-than-air flight between 1867 and 1896. He was the first person to make well-documented, repeated, successful flights with gliders. Less than a decade later, the Wright Brothers invented and flew the first airplane in 1903, recognized as ‘the first sustained and controlled heavier-than-air powered flight’.

“So, getting back to the use of the word ‘army’ here in Article 42. I doubt that any modern military experts would deny that territory can be ‘placed under the authority of the hostile navy, marines, or air force’ and would still be considered ‘occupied.’” Emily looked around the classroom. “Does anyone know the alternative nomenclature for a ‘No Fly Zone?’”

No hands came up.

“Well, many military personnel consider a ‘No Fly Zone’ to be simply ‘Aerial Occupation.’” She pressed another button, and several pictures from the “National Museum of World War II Aviation” in Colorado Springs, Colorado, appeared on the screen. After a minute, the images slowly faded out.

“So, this is a brief overview of why Germany was placed under military occupation, and not simply separated into sectors which some of the Allies might have annexed outright. Again, this is all part of the content and formulation of the laws of war of the post-Napoleonic period,” Emily clarified. “Importantly, I imagine that a thorough examination of the legal details would show that after the surrender of Germany, the Allied High Command did not have either the power or the mandate to authorize the annexation of any parts of German territory by other countries.” She paused contemplatively.

“That fact is very significant, and it is a critical point of comparison to keep in mind when looking at the events of WWII in the Pacific,” Margret interrupted. “General Douglas MacArthur issued General Order No. 1, which directed that –

a. The senior Japanese commanders and all ground, sea, air and auxiliary forces within China (excluding Manchuria), Formosa and French Indo-China north of 16 north latitude shall surrender to Generalissimo Chiang Kai-shek.

Some personnel dressed in white uniforms entered from the rear door, and began to set up some large tables. Margret motioned to Emily, and she began to stroll over toward the tables.

“Most people who discuss General Order No. 1 fail to examine one important question,” Margret continued. “That question is –

Can this General Order be interpreted as a legal basis for the military forces under Chiang Kai-shek to announce the annexation of Taiwan territory on the Oct. 25, 1945 date of the surrender ceremonies in Taipei?”

“Clearly General Order No. 1 is establishing a chain of command,” Emily said, speaking loudly from her position in the rear of the classroom. “After all, Chiang Kai-shek could accept these arrangements, or he could refuse to accept them. That was his decision. The history books tell us that he did accept General MacArthur’s orders, so the chain of command is established accordingly.”

“Here is some comparative information on the Chinese viewpoint in regard to the Ryukyu islands,” Margret added.

Ryukyu Islands

According to some researchers in Chinese history, by the early 1940s, Republic of China government officials were already including the Ryukyus in their listing of ‘China’s lost territories’. Reportedly, Chiang Kai-shek’s original plans for the Cairo Conference included a so-called “Fifth Memorandum” which clearly indicated the Chinese government’s intention to regain the Ryukyu Islands along with other lost territories. However, during the Conference, Chiang adopted a more flexible stance and indicated his willingness to participate in a joint American-Chinese administration of the Ryukyus on behalf of a suitable postwar international peace organization.

President Roosevelt later determined that such a joint American-Chinese administration of the Ryukyus would be problematic, and Chiang appeared to gradually come to the realization that Chinese administration of the nearly 60 different islands in the Ryukyu

island chain would be no easy undertaking, so the subject of awarding of the Ryukyus to China after WWII was dropped.

However, this entire incident does show that many negotiations occurred as a background to the formulation of General Order No. 1, which was issued by General MacArthur on Sept. 1, 1945. In regard to the administration of various areas, there were some territories over which the Chinese were willing to accept administration, and some over which they were not.

“But . . . Did General MacArthur have either the power or the mandate to authorize the annexation of any parts of Japanese territory by any other country, after the completion of the local surrender ceremonies?” Margret asked.

“Clearly he didn’t,” Emily replied. “So how could the completion of the surrender ceremonies on Oct. 25, 1945, possibly be interpreted to authorize the annexation of Taiwan territory by the Republic of China?” Emily returned to the front. “In Asia, that is commonly referred to as ‘Taiwan Retrocession Day’.”

The news channel feed suddenly came on, and a bulletin from one of the popular international news channels was shown. The imagery was from the South Pacific. The announcer was saying that the tops of some formerly “undersea volcanoes” had now risen above the sea, and were spewing out large quantities of lava. New islands were being formed, and the largest one was already over five sq. km. in area.

“That is terra nullius,” Emily stated confidently. “I believe the moderator discussed that topic briefly during the session in Honolulu.” She pushed a button on her remote control and the informational graphic came up again on the screen. “Maybe it is good to do a short review.”

Terra Nullius

Terra nullius is a Latin expression meaning "nobody's land", and is used to indicate a territory with no population, or no permanently-established population. A newly formed volcanic island would be a good example. Under traditional principles of international law, it was often held that the sovereignty of such land could be obtained by establishing a local population there and inhabiting the area for a period of many years. This was often stated as “territory may be acquired by a state's occupation of it.”

The word “occupation” has many meanings, and as used here it simply means “settling, taking over, and/or making use of land or property.”

Such a usage of the word “occupation” should not be confused with “military occupation.”

A girl sitting on the far left side of the room seemed to be squirming in her seat. She raised her hand excitedly. “I grew up in Taiwan, and my name is Shu-ling. My question is -- with the completion of the surrender ceremonies in Taiwan, what is the relationship between the legal occupier and the Republic of China military forces?”

“Good question,” Margret said. “And I have a good answer. The famous Dutch jurist, Hugo Grotius (1583 – 1645) would classify that relationship under the broad heading of ‘agency’.”

A quotation from Grotius’ *On the Law of War and Peace* appeared on the screen.

"We are obliged to confirm the engagements made by others, acting in our name, if it is evident that they had special, or general instructions from us to do so. And in granting a commission with full powers to any one, it may so happen that we are bound by the conduct of that agent, even if he exceed the secret instructions which he has received. For he acts upon that ostensible authority, by which we are bound to ratify whatever he does, although we may have bound him to do nothing but according to his private instructions."

-- excerpted from *On the Law of War and Peace* (1625), Book 2, Chapter XI, Sec. XII.

“Here is a summary of the Law of Agency from a more modern perspective,” Margret added.

The Law of Agency

The law of agency is the body of legal rules and norms concerned with any principal– agent relationship, in which one person (or group) has legal authority to act for another. The law of agency is based on the Latin maxim "Qui facit per alium, facit per se," which means "he who acts through another is deemed in law to do it himself."

A principal is bound by the acts of an agent if the agent has authority.

There are three types of authority: express, implied, and apparent. These are explained below:

(A) **Express Authority**

[EXPLANATION] Normally, the creation of a principal – agent relationship is granted by instructions or conduct that, reasonably interpreted, provide sufficient reasons for the agent to believe the principal desires him to act in a certain way. The principal having expressed his intention and purpose, has indicated that the agent should act for the principal in a particular way. When the agent does indeed undertake such action(s), the “agency” is effectuated.

Later, if there is any ambiguity arises concerning the principal's intent, the key issue at play will be to evaluate the principal's "objective manifestation," and not merely his "subjective intent."

However, even without **Express Authority** for the creation of a principal – agent relationship, such a relationship can still exist based on alternate criteria.

For the discussion of these alternate criteria, we will presuppose the situation where the acts of the principal and the agent are of such a nature that there exists a strong presumption that the principal has consented to the agent having some amount of authority. Under such circumstances, there is –

(B) **Implied Authority**

[EXPLANATION] In the absence of other specific agreements, the authority to conduct or carry out any action includes the authority to undertake any and all (associated) acts that are, or would be, in the view of an unbiased third party, reasonably necessary to accomplish it. Hence, the “agent,” in undertaking those actions, is acting under “implied authority,” and this binds the principal.

and/or

(C) **Apparent Authority**

[EXPLANATION] There are times when the principal’s actions or conduct (or overall acquiescence) in response to actions carried out by the agent cause any third party to

reasonably believe that the agent is acting with the principal's full authorization. Accordingly, the "agent," in undertaking those actions, is acting under "apparent authority," and this binds the principal. This "apparent authority" is also known as "ostensible agency."

Notably, it is often seen that an agent with **Express Authority** or **Implied Authority** may perform an act beyond the scope of that authority. However, if that action appears to any third party to be within the scope of the authority, there is the creation of "apparent authority," and this binds the principal.

"Let's leave that information on screen as we break for lunch," Margret said.

"I have gotten permission for us to eat here in the classroom. We will allocate about 45 minutes for eating and informal chatting. Then we will continue with our session. Today we have fried chicken, French fries, and several types of German bread. There is also green salad, fruit juice, water, and red wine, plus a selection of fruits, including oranges, apples, figs, and some other items which I don't know the names of."

As many of the students began to move toward the tables, a student sitting in the fourth row and wearing a blue shirt raised his hand. "I am slowly beginning to understand the presentation of these lectures," he stated, "although in the beginning, I must admit that I was quite confused. It seemed to me that the moderators were talking about various wartime events in other wars, and in other areas, and in connection to all types of other developments, frequently accompanied by wide digressions into the discussions of other legal issues, which seemed to me at the time to have no relation to the situation of Taiwan beginning in the 1940s, at all. I didn't really see how all of that discussion would build up into a coherent formulation of Taiwan's legal status in later years."

"Or a build into a detailed analysis of the Republic of China's legal status in Taiwan," Shu-ling added.

"And what do you think now?" Emily asked.

"Well, after watching the videos of the class presentations several times, and trying to maintain a very open mind, especially when attending the last few sessions, I am beginning to see how everything fits together," the student in the blue shirt said.

"It is all related," Emily said, "and the customary way of handling these surrender and

post-surrender situations in one war is most likely going to have a very direct bearing on how they are handled in some other war. So here in Germany, for example, after the surrender it is military occupation, it is not annexation, and final disposition of territory will be determined in the peace treaty.”

“That is the RULE,” Margret clarified. “And what is your name again?”

“Taylor van Cleave.”

“Alright, now let’s take our lunch break.”

= = = = Lunch Break = = = =

After lunch, another one of the lately arrived students walked over and stood at the front of the room. When he appeared to have everyone’s attention, he nodded to Margret.

Margret began speaking: “Before lunch, I believe I had just mentioned that –

So here in Germany, for example, after the surrender it is military occupation, it is not annexation, and final disposition of territory will be determined in the peace treaty.

She looked back at the student.

Turning Chiang’s seat around and moving it toward the front of the room, he picked up the Generalissimo sat him on the seat-back.

“But didn’t we see something else in October 1945?” Chiang’s eyes seemed to light up, and he spoke in a firm voice: “I mean, didn’t we see exactly the opposite situation develop in Taiwan in late October 1945?” The student’s lips were not moving, however Chiang continued to speak: “After the surrender it is annexation, it is not military occupation, and the final disposition of territory occurs with the conclusion of the surrender ceremonies, isn’t that right?”

“Mr. Jason Hundam,” Margret stated, “a professional ventriloquist I met on my flight over from New York. He is touring Europe this month, and agreed to make a ‘guest appearance’ at our session today.”

Many of the students applauded.

Jason nodded. Chiang continued: “After that announcement of Taiwan Retrocession Day, I was unaware of any protests, objections, or opposition by the other Allies.”

Margret raised her hand, as if to complain. “But many researchers have combed through British, United States, French, and other national archives. They found many statements by the officials of those countries denying the validity of any announcement of the annexation of Taiwan by the Chiang Kai-shek regime in late October, 1945,” she stated, seeming slightly exasperated.

“But I was unaware of that,” Chiang said, forcefully.

“And the historical record also shows that there were many Taiwan people who made strong objections to this announcement,” Margret continued. “The question they raised was simple. They said --after the surrender ceremonies, the four main Japanese islands were under military occupation, why would Taiwan be any different?”

“Well, you have to remember I needed a firm base where I could re-organize my personnel and lay solid plans for the further democratization of all of China,” Chiang explained, “While at the same time spreading the gospel of Jesus Christ.

“I was a strong promoter of the ideals of democracy, human rights, and anti-communism,” Chiang added. “You have to understand; these are lofty ideals. Moreover, my wife Soong Mei-ling, and I regularly had pictures taken of the two of us sitting together, reading the Bible. We sent those to Harry Truman.”

“And you did a very good job of selling all that propaganda to the members of the U.S. Congress as well,” Margret admitted. “In consideration that from the perspective of U.S. law, Taiwan was sovereign Japanese territory until the post-war peace treaty came into force, wherein Article 2(b) specified:

Japan renounces all right, title and claim to Formosa and the Pescadores.

“I would say that when you moved the Republic of China’s central government to occupied Taiwan in December 1949, you were already moving outside of China’s national territory, and would have to be classified as a ‘government in exile’ Immediately.”

“No, no, I don’t like that terminology,” Chiang shook his head. **“I prefer to describe Taiwan as a bulwark of freedom, democracy, and human rights in the Western Pacific.”**

“Which would explain why after the announcement of the annexation of Taiwan on October 25, 1945; the mass naturalization of the local populace as ROC citizens on Jan. 12, 1946; the outright confiscation of Japanese public and private property; and the promulgation of an entirely new legal code (i.e. “ROC Constitution”) in occupied Taiwan effective Dec. 25, 1947, etc., etc. . . . all of these actions constituting direct violations of the laws of war, you then announced the implementation of martial law on May 20, 1949, concurrently suspending all popular elections in Taiwan, or limiting the selection of candidates to those pre-approved by your party, the KMT.”

“That’s Chinese democracy in action,” Chiang nodded vigorously.

“And then there was your order instituting formal military conscription policies over Taiwanese males on July 25, 1951.”

“We needed more troops in order to recover the mainland!” Chiang said. **“There could be no wavering in our goal to overthrow the regime of the communist bandits!”**

“Somewhat earlier, there had been an outline for the military conscription policy of the ROC in Taiwan published in 1949,” Margret mentioned this point of her historical research.

The screen came on. An image of the Republic of China flag waving in the breeze was gradually overlaid by lettering:

Since 1945, the central government has exempted all Taiwanese from conscription out of sympathy for the 50 years of oppression they have suffered under the Japanese. But most knowledgeable people know that military service is the duty of all citizens. The people have expressed hope that the government implement conscription soon so that local young men can channel their patriotic passion.

“Very well said,” Chiang nodded.

“But you have forgotten that military conscription in occupied territory is a serious violation of the Hague and Geneva Conventions,” Emily butted in.

“Well, I guess you didn’t understand what I said at the beginning. Maybe I can re-phrase it. Alright, let me put it this way --

After the surrender ceremonies the territory becomes terra nullius, and therefore the territorial sovereignty can be obtained by establishing a local population there and maintaining continuous inhabitation for many years. It is annexation, it is not military occupation, and the final disposition of territory is determined with the conclusion of the surrender ceremonies, isn’t that right?”

Chiang used this lengthy verbiage to reiterate his position.

Margret and Emily both shook their heads in frustration. “Well, we realize that the date is late, but we are still hoping that you can take the time to sit through today’s session and pay careful attention to our discussion. This would be one good way for you to update your knowledge of military occupation issues,” Margret stated, in a somewhat pleading tone.

“That I can do!” Chiang replied affirmatively.

As the students applauded, Jason carried the Generalissimo to the rear of the classroom.

A student in the center of the room spoke up. “In a previous session, we discussed the promulgation of new laws in occupied territory. There seemed to be some restrictions on that. But weren’t new constitutions promulgated in Germany, Japan, *and* Taiwan? Can you give us any further commentary on those situations?”

“Very good point,” Emily stated. “We have a graphic about that here somewhere.” The screen came on.

New Constitution: Basis for Promulgation

*Japan and Germany were hostile states defeated in WWII, effectively made subject to complete subjugation, approaching **debellatio**.*

Five Questions have been formulated to provide a comparison of the framework used in promulgating new constitutions in Japan, Germany, and the Japanese territory of

Taiwan, after the close of hostilities in WWII. These are given below.

Five Questions

Does the content of the new Constitution _____?

Items	Japan May 3, 1947	Germany May 23, 1949	Taiwan Dec. 25, 1947
Fully respect the Prohibition on any Announcement of the Annexation of the Territory to become Part of Another Nation	Yes	Yes	No
Fully respect the Prohibition on any Mass Naturalization of Local Populace to become citizens of Another Nation	Yes	Yes	No
Fully respect the provisions of the Hague Regulations of 1907, especially “Section III: Military authority over the territory of the hostile state”	Yes	Yes	No
Have a solid basis in “military necessity,” including but not limited to exercising the goals of demilitarization, industrial disarmament, including the seizure and closing of munitions factories, war materiel factories, etc., and their supporting civilian industries	Yes	Yes	No
Have the full approval of the major Allies in the theatre	Yes	Yes	No

“Doesn’t this mean that the promulgation of the Republic of China Constitution in occupied Taiwan territory in December 1947 is illegal?” the student offered his additional evaluation.

“Well, based on the content of Article 43 of the Hague Regulations, it would appear that the promulgation of this new Constitution in Taiwan territory is very problematic,” Margret agreed. “At any rate, after the coming into force of the post-war SFPT, it was

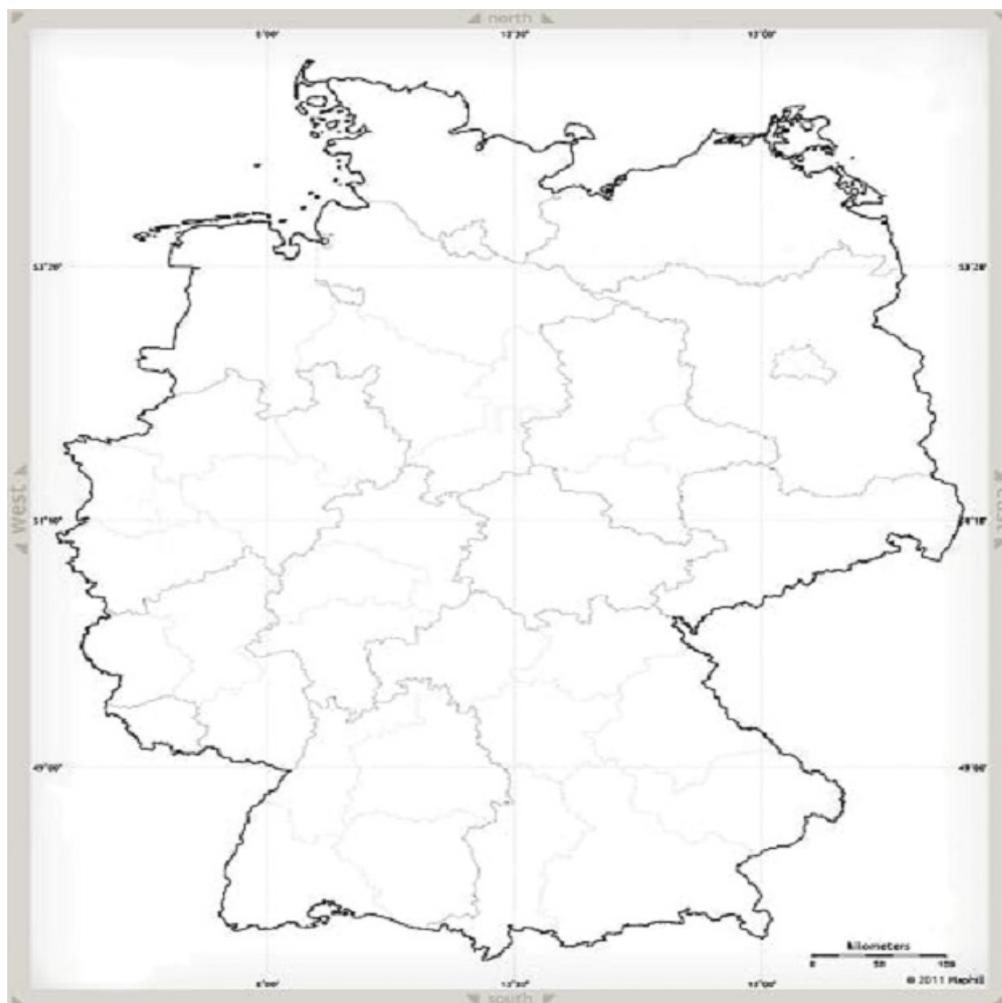
confirmed that Taiwan was not awarded to China. At that point this Constitution would have to be rescinded.”

“And was that done?” Emily asked, somewhat officiously.

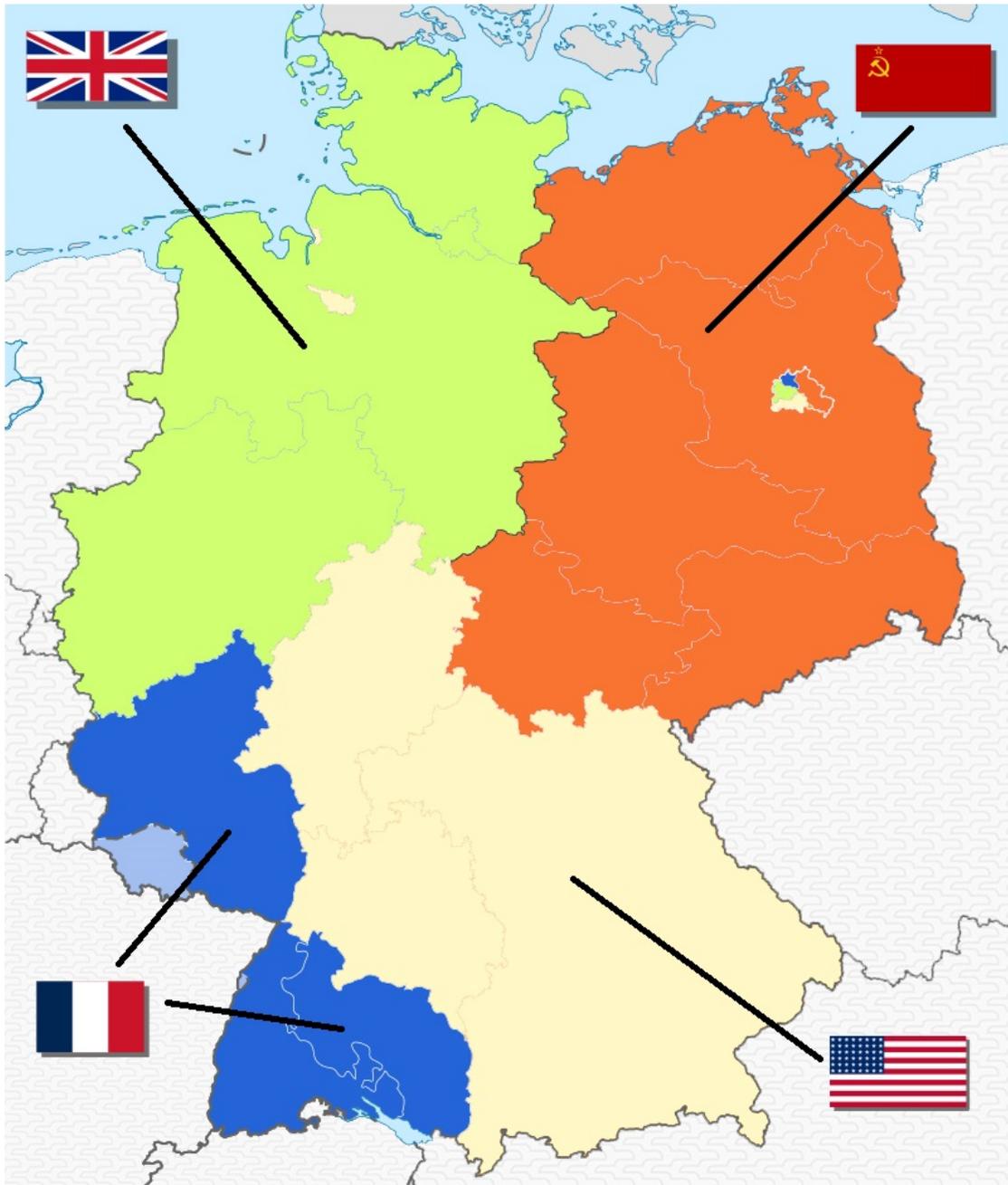
“No.”

The screen came on, and another map of Germany appeared, but it was just an outline.

Germany Outline Map



The following map was separated into four colors, but it was significantly more detailed.



“Here is a map with the actual geographic boundaries for the four different occupation zones. As you probably know, there was an Allied Control Council for the administration of occupied Germany.

Occupied Berlin and Environs



During the period of military occupation, Berlin was located in the Soviet Zone of occupied Germany.

West Berlin was administered jointly by the United Kingdom, France, and the United States, each power (arguably) being responsible for its respective sector. East Berlin was administered by the Soviet Union.

“You will want to pay special attention to the fact that Berlin is in the Soviet sector, however it was also divided into four occupation zones. The administration of occupied Berlin was handled by the Allied Kommandatura.”

The Allied Kommandatura, was the governing body for the city of Berlin following Germany's defeat in World War II. The victorious allied powers initially established control of post-war Germany and other territories via shared Military Government councils, including for Berlin. The Allied Kommandatura was often seen as being a junior partner to the Allied Control Council. It comprised representatives from the U.S., U.K., the Soviet Union, and France.

“The Allied Control Council was originally planned to function as a condominium. In terms of dealing with military occupation issues, legal experts state that:

- (1) the condominium is an association of states,
- (2) the existence of a condominium rests upon a title in international law pursuant to which a number of states are vested with ‘supreme control’ over the territory in question.

“Some comparison may be made to a related use of the word ‘condominium’, which would be in the residential area of a city where a **condominium** (i.e. ‘a building or complex of buildings containing a number of individually owned apartments or houses’) is located. To

make this comparison in relation to the Allied Control Council (ACC), we would state that the new tenants of the 'ACC Condominium' (U.S., U.K., France, and the Soviets) threw out the original German tenants ("management committee"). While each of the new tenants controlled his own 'apartment area,' at the same time they agreed to share responsibility for the management of the entire 'building.'

"We have a separate summary of all important details regarding 'Occupied Germany and the Allied Control Council,' and it will be placed on the class website as an Appendix to today's class notes. You can download it from there.

"However, basically speaking, beginning August 30, 1945, via the operations of this Allied Control Council, each Allied power had the authority to control its own zone autonomously, but agreed that Germany would be run as one economic unit.

"Unfortunately, the 'new tenants' soon had a falling out among themselves. Joint rule quickly turned out to be very problematic, first because of the general inflexibility of the French, then because of the premeditated intractability of the Soviets.

"In terms of military occupation, Margret and I have always viewed a 'Joint' arrangement, sometimes called a condominium, as a kind of 'radioactive isotope,'" Emily interjected, "if we may use that comparison."

"Inherently unstable," Margret clarified. "Typically, it will deteriorate or devolve into something else."

"So, if we were asked to sum up our observations on governance style of the four occupation zones of Germany" Emily continued, "We would advance the argument that within a few short years, the Four Powers were governing their respective zones as 'four principals'.

"Here are some simple Charts that explain the situation. Descriptions are given for Germany (proper) and German overseas territories."

The Military Occupation of Germany

Before May 5, 1955	THE OVERALL SITUATION
--------------------	-----------------------

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Germany	“Joint” [U.S., U.K., France, & USSR], <i>which gradually deteriorated into</i> “Zone”	Military occupation has begun with the surrender of German troops on May 8, 1945.
Germany: overseas territories (<i>as of late 1930s</i>)	(none)	-----

Additional notes:

- Germany lost control of all its overseas territories as a result of the First World War. Hence, no overseas territories are listed here.

After May 5, 1955	THE OVERALL SITUATION
-------------------	-----------------------

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Germany	-----	In Germany, the military occupation has ended as of May 5, 1955
Germany: former overseas territories (<i>as of late 1930s</i>)	(none)	

Additional notes:

- Germany had no overseas territories in the period leading up to WWII. Hence, no overseas territories are listed here.

- Notably, even though May 5, 1955, marked the end of military occupation in Germany proper, Berlin remained under military occupation by the Allies.

Commonly seen <i>deteriorations</i> of “Joint” Occupations
<ul style="list-style-type: none"> ● Into “Zones,” with each “Zone” being effectively administered by a “Principal” -OR- ● Into “a Principal with an Advisory Council”
Notes:
<p>1) The terminology of the occupying power is used with only some minor variations in all relevant conventions and treaties which dictate international norms regarding the disposition of persons and property in areas under military occupation. For example, while the Geneva Conventions generally refer to the occupying power, the Hague Conventions often speak of the occupying state. These terms are used in the singular.</p> <p>2) Importantly however, in dealing with military occupation matters, the “law of agency” is always available. When the administrative authority for the military occupation of particular areas is delegated to other troops, the terminology of the principal occupying power is most commonly seen, and a “principal – agent” relationship is in effect.</p>

“So, starting from 1945, we would argue that within a few years, this so-called ‘Joint Occupation’ of Germany by the U.S., U.K., France, & USSR, *deteriorated into a ‘Zone Occupation.’* As a result, this became its true nature,” Emily said.

“Yes, our preference is to call this a ‘Zone Occupation,’” Margret repeated.

“You may want to refer back to our discussion of ‘principal – agent’ relationships,” Emily added. “That is different.”

“Let’s see if we are making ourselves clear.” Margret pointed to the four names written on the whiteboard. She read the first name. “Mark Niemecka.”

“I am sorry, I am still getting used to the time change. It’s 12 hours time difference between here and Honolulu,” Mark said standing up. “But, in regard to your question, the point I get is that you are presenting us with what you have described as two types of military occupation. Number 1 is the ‘joint occupation.’ Number 2 is the ‘zone occupation.’”

“But there is a third one,” Margret said.

“I guess I wasn’t paying close enough attention,” Mark admitted.

Thought Experiment: The Holland v. Indonesia War

“Alright,” Margret said. “We can do this in a Thought Experiment. Let us suppose that there was a war in Southeast Asia, and the military forces of Holland were fighting Indonesia.

“Further let us suppose that in the Battle for Sumatra, (which is one of the bigger Indonesian islands), Holland had been allied with Malaysia. Military forces from Holland and Malaysia were fighting together in the archipelago, and after several months of heavy aerial and naval bombardments by Holland, the Indonesian commanders on Sumatra agreed to surrender.

“At this point we can imagine that Holland's military forces still had additional operations to take care of in nearby geographic areas. Hence, the General from Holland (aka “Dutch general”) would direct that senior Indonesian commanders and all ground, sea, air and auxiliary forces within Sumatra surrender to Malaysia's military forces, and direct that Malaysia should take charge of the administration of the island.”

“Oh, I get it,” Mark said. “As the conqueror, Holland is the legal occupier. Or we could say ‘principal occupying power.’ But the Dutch general wants Malaysia to take charge of the surrender ceremonies and ensuing administration of Sumatra. So he directs them to do that, and the top Malaysian military commander agrees to this. So Holland is the principal, and Malaysia is the agent.”

“What about the United States military occupation of the port of Tampico, Mexico, during the Mexican American War?” Margret raised a further point.

“I would say that is a zone occupation,” Mark said. “It is just one zone.”

“So, what is your final summation?”

“Today you have talked about three types of military occupation. Number 1 is the ‘joint occupation.’ Number 2 is the ‘zone occupation,’ which is conducted by some party which can justify itself as being ‘the legal occupier.’ Number 3 is the ‘zone occupation,’ which is conducted through a ‘principal –agent’ relationship.”

“Well, you have added some additional explanation,” Margret commented. “Very nice.” Margret looked to see what reactions there might be from the assembled students, but no one said anything. “In the listing just given, some people might consider Number 3 to just be a variation of Number 2,” she added. “However, in practice, it can appear substantially different.”

She turned to read another name off of the whiteboard. “Alexandria Tavender.” A girl with long blonde hair stood up. “Well, Alexandria, where do we go from here?” Margret asked.

“Well, according to the introduction on the class website for these sessions in Germany, my guess is that we should be ready to begin discussing the ‘1978 Polish Airliner Hijacking into Occupied Berlin,’” she said.

“Do you want some tickets to the art museum?” Margret asked. Alexandria nodded several times, indicating her affirmation.

“We will have our next session in Bremen, which is about an hour southwest of Hamburg,” Emily stated. “The date, time, and location are on the cards which we will pass out now.”

Occupied Germany and the Allied Control Council

The Allied Control Council or Allied Control Authority, also referred to as the Four Powers, was the governing body of the Allied Occupation Zones in Germany after the close of hostilities in WWII in Europe. The members were the Soviet Union, the United Kingdom, the United States, and France. The council was convened to determine several plans for postwar Europe, including how to change borders and transfer populations in Eastern Europe and Germany. As the four Allied Powers had joined themselves into a **condominium** asserting 'supreme' power in Germany, the Allied Control Council was constituted as the sole legal sovereign authority for Germany as a whole, replacing the extinct civil government of Nazi Germany.

Condominium (*in international law*)

1. (a) joint sovereignty over a territory by several states.
(b) the territory itself.
2. (a) joint or concurrent dominion,
(b) *especially*: joint sovereignty by two or more nations.
3. (a) joint exercise of dominion.
(b) a government operating under joint rule.

Allied preparations for the postwar occupation of Germany began during the second half of 1944, after Allied forces began entering Germany in September 1944. Most of the planning was carried out by the European Advisory Commission (EAC) established in early 1944. By early January of 1944, the Working Security Committee in the EAC concluded that,

It is recognised that, in view of the chaotic conditions to be anticipated in Germany, whether a capitulation occurs before invasion or after invasion and consequent establishment of military government, an initial period of military government in Germany is inevitable and should be provided for.

Gradual Failure of Inter-Allied Cooperation within the Council

The Allied Control Council commenced operations on August 30, 1945. From the beginning, the French took the position that any aspects of Allied policy which they saw

as contrary to their national interests should be opposed. In particular, they expressed objections to all proposals designed to establish common policies and institutions across Germany as a whole, and anything that they feared might lead to the emergence of a new unified German government. Primarily, this was because the French feared a new rise of German militarism.

Relations between the Western Allies (i.e. the United States and the United Kingdom) and the Soviet Union subsequently deteriorated as well, resulting in many problems in undertaking cooperative efforts for the administration of occupied Germany. Within each of the four occupation zones, each occupying power ran its own administration, such as the Office of Military Government, United States (OMGUS) in West Berlin and Frankfurt.

An early disagreement arose in September 1946, primarily in regard to the distribution of raw materials for industry in the four occupation zones. The Soviet representative in the council withdrew his support of the plan agreed upon by the governments of the United States, Britain and France. Some months later, against Soviet protests, the U.S. and the U.K. pushed for a heightened economic collaboration between the different zones. Then in 1947 and early 1948, the U.S. and the U.K. spearheaded efforts to prepare for a currency reform that would introduce the Deutsche Mark and ultimately the creation of an independent West German state. When the Soviets learned about this, they objected, claiming that such reforms exceeded the occupiers' mandate, as discussed in previous conferences and meetings. On March 20, 1948, Marshal Vasily Sokolovsky, the Soviet representative, claiming that the overall coordination efforts of the Allied Control Council had already reached an impasse, walked out of a regularly scheduled meeting, never to return.

On July 1, 1948, an official statement was issued by the Soviet Government regarding the Withdrawal of the Soviet Representative from the Allied Kommandatura, Berlin.

Further Developments after the Soviet Walk-out

According to its organizational premises, the Control Council could only act with the agreement of all four members. The Soviet's departure from the Council thus essentially shut down the institution. Shortly thereafter, the Cold War reached an early high point during the Soviet blockade of Berlin from June 24, 1948, to May 12, 1949. Although the Allied Control Council was not formally dissolved, however it ceased all coordinated activity except for the operations of the Spandau Prison and certain matters affecting airline safety.

In order to regulate and supervise the development of the newly established Federal Republic of Germany (West Germany), on Sept. 21, 1949, the Allied High Commission (also known as the High Commission for Occupied Germany), was established by the U.S., U.K., and France after the 1948 breakdown of the Allied Control Council.

In establishing the Allied Control Council as the supreme authority for Germany and the sole legal repository of German national sovereignty, the Allied Powers of 1945 had envisaged that this sovereignty would eventually be passed on to a new German state, once a unified German government adequate for the purpose had been established.

The Allied Control Council met once again in 1971, leading to the Four Power Agreement on Berlin. During the talks for the unification of Germany in late 1989, it was decided to convene the ACC again as a forum for solving the issue of Allied rights and privileges in Germany.

Despite the grants of general sovereignty to West Germany and East Germany in 1955, technically speaking, full and unrestricted sovereignty under international law was not enjoyed by any German government until after the reunification of Germany in March 1991. Though West Germany was effectively independent, the western Allies maintained limited legal jurisdiction over “Germany as a whole” in respect of West Germany and Berlin.

Hence, some commentators hold that legally speaking, Germany remained under military occupation until March 15, 1991, when the final ratification of the “Treaty on the Final Settlement with Respect to Germany” (signed: Sept. 12, 1990) came into force. This, as the final peace treaty signed by the four powers and the East and West German governments, formally restored full sovereignty to a reunified Germany. It also meant the official end of the Allied Control Council, whose final meeting was on Oct. 2, 1990. However, the final withdrawal of all remaining Allied military forces only took place in 1994, in accordance with the timeframe provided by Articles 4 and 5 of Treaty.

In September 1994, after almost 50 years, the Allied troops withdrew from Berlin.

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 14

POLISH AIRLINER HIJACKING INTO OCCUPIED BERLIN, 1978

[DATELINE BREMEN, GERMANY]
PRESENT DAY

Margret Ruskol and Emily Baumann continued as the moderators for this session. The location was a large lecture hall in a local university in Bremen.

Margret pushed some buttons on her remote control, and some data began to scroll up on the screen. “This information is all excerpted from the decision in *U.S. v. Tiede*, U.S. Court of Berlin 1979. If you need additional information, or more detailed legal references, you can read the complete decision at your leisure.”

FACTUAL BACKGROUND

On August 30, 1978, a Polish civilian aircraft on a scheduled flight from Gdansk, Poland, to Schoenefeld Airport in East Berlin, was diverted and forced to land to Tempelhof Airport in the United States sector of West Berlin. **[n1]**

Following the landing, defendants Hans Detlef Alexander Tiede and Ingrid Ruske, together with Mrs. Ruske's twelve-year-old daughter, were detained by United States

military authorities at a U.S. Air Force installation located at Tempelhof. On November 1, 1978, the United States Mission in Berlin advised the German authorities in West Berlin that it would exercise jurisdiction over the investigation and prosecution of any crimes committed in connection with the diversion of the Polish airliner. [n2]

Mrs. Ruske was released from detention on November 3; her daughter had been released several weeks earlier.

n1: Berlin has been occupied since 1945 by the four Allied Powers. As more fully discussed below, West Berlin is administered jointly by the United Kingdom, France, and the United States, each power being responsible for its respective sector.

n2: Jurisdiction was exercised pursuant to Articles 7 and 10 of Allied Kommandatura Berlin Law No. 7 of March 17, 1950.

The United States authorities, acting under the authority of Law No. 46, a law promulgated in 1955 by the former United States High Commissioner for Germany, then convened this Court. [n3]

. the Honorable Leo M. Goodman, took the oath of office as United States Judge for Berlin on December 6, 1978.

n3: Law No. 46 is reproduced in full in the appendix to this opinion.

[n4] [n5] *omitted*

On that day a complaint, supported by an affidavit executed by a U.S. Air Force investigating officer, was filed against the defendant Tiede. [n6] Based on the complaint, Judge Goodman issued a warrant for the arrest of Tiede.

The warrant was executed the same day and Tiede was brought before Judge Goodman who advised him of his rights under the United States Constitution and explained to him the nature of the criminal complaint filed against him.

n6: The complaint read in pertinent part: That on or about 30 August, 1978, Hans Detlef Alexander Tiede did, by means of force, threats and a weapon, that is a pistol, take a hostage, and divert Polish LOT Flight No. 165 while from its scheduled route of Gdansk, Poland to Schoenefeld Airport and force it to land at Tempelhof Central Airport in Berlin.

In view of Tiede's indigency, Judge Goodman assigned a member of the Berlin criminal bar as counsel for Tiede. Following Tiede's presentment, and upon the defendant's request, Judge Goodman scheduled a preliminary hearing and arraignment for mid-January.

Also on December 6, a complaint with supporting affidavit was filed against the defendant Ruske, on the basis of which Judge Goodman caused a summons to be issued, commanding Mrs. Ruske to appear before the Court in mid-January for presentation and arraignment. German defense counsel was appointed by Judge Goodman for the defendant Ruske in late December.

On January 11, 1979, the author of this opinion [n*] became United State Judge for Berlin. The defendants were arraigned the next day. Prior to arraignment, this Court appointed American counsel for both defendants because the proceedings would be conducted under American procedural law, although German substantive law would apply.

n*: Herbert J. Stern, United States Judge for the District of New Jersey, sitting as United States Judge for Berlin by appointment of the United States Ambassador to the Federal Republic of Germany.

Beginning in 1948, the Soviet Union increasingly obstructed decision making in the Allied governing bodies and imposed restrictions on access between the Western zones of occupation and Berlin. On July 1, 1948, the Soviet Commander-in-Chief withdrew from the Allied Control Council, thus frustrating that body's ability to legislate for Germany as a whole. Thereafter, the Three Western Allies began to administer the three Western zones without Soviet participation.

On October 19, 1951, the state of war between the United States and Germany was formally terminated. In 1952 a series of agreements among the Three Powers and the Federal Republic of Germany, known collectively as the "Bonn Conventions," were signed. These agreements, however, did not enter into force until May 5, 1955. On that date, the occupation regime in the Federal Republic of Germany was terminated, the Allied High Commission abolished, and the Federal Republic assumed full sovereign control over its territory.

The Bonn Conventions, however, did not provide for the termination of the occupation in Berlin. There, the occupation continued.

. . . . the U.S. President has delegated to the U.S. Ambassador to the Federal Republic of Germany his "supreme authority . . . with respect to all responsibilities, duties, and governmental functions of the United States in all Germany [including Berlin] under the supervision of the Secretary of State and subject to the ultimate direction of the President." Thus, this Court sits in Berlin as an instrumentality of the United States, executing the sovereign powers of the United States. As a matter of United States law, it is a court established pursuant to the powers granted to the President by Article II of the United States Constitution.

Taylor van Cleave raised his hand. "I have been taking some law classes at night, in the local university where I live. Under the U.S. Constitution, I am aware of 'constitutional courts' established via Article III, and then there are 'federal tribunals' created according to the legislative authority vested in Congress in Article I. But what is an Article II court?"

"It is a type of military tribunal, and often referred to as a 'military commission'. It would generally exercise its authority in situations arising out of war, such as the court proceedings in occupied territory," Emily explained.

"But there are some additional points that need to be clarified," she added. "First, as we know, the United Nations was founded on Oct. 24, 1945. The hijacking of this Polish airliner occurred in 1978, and the decision in U.S. v. Tiede was given on March 14, 1979."

"We have asked Professor Nathan Northbridge from Los Angeles to join us this afternoon. We have a live video feed from Los Angeles," Margret said.

The screen came on. Professor Northbridge was seated in a small office, with rows of books on the back wall.

"Hello from Bremen!" Margret said, somewhat loudly. "Today we are discussing the 1979 decision of U.S. v. Tiede in the U.S. Court of Berlin. According to my knowledge, you have also done extensive research into the military occupation of Berlin after WWII. We thought you could give us some of your insights."

"Yes, thank you," the Professor replied, smiling broadly. "The first consideration I would point out is that in this court decision, there was no hesitation to discuss matters regarding CONQUEST."

"However, many people will point to the UN Charter and say that war itself is illegal," the

Professor added. “So naturally, they want to outlaw any discussion of ‘conquest’ or the results of ‘conquest,’ whether those results were anticipated or not. Personally, I believe that such an interpretation exceeds the scope and content of the UN Charter. In the modern world, I also regard this kind of interpretation as unrealistic.

“You may want to review the video of the session I conducted in Los Angeles. A lot of these issues were discussed in detail there. And if we want to get more serious and try to debate the ‘original intent’ of the UN Charter, some additional considerations must come into play. In my observation, 99% of the people completely forget that when the organizational plans for the United Nations were originally drafted in the early 1940s, it was envisioned that the United Nations would have its own independent military forces.

“So, when anyone is arguing about how the UN Charter has already made war illegal, or trying to advance similar arguments, you have to recognize that the **original intent** of the UN Charter may have been resting on the assumption that before various regional conflicts elevated into a full-blown war, the UN military forces would enter the area, and then there would be UN-backed negotiations for a peaceful settlement.” He paused briefly. “However, the entire conceptualization of the UN having its own independent military forces is something that never came to fruition.

“As regards U.S. v. Tiede, here are five sentences that I excerpted from the decision. I have added bold italics to the word ‘conquest.’”

- On September 12, 1944, the United States, the United Kingdom and the Soviet Union, in an exercise of their anticipated rights of **conquest**, agreed that:
- Berlin is a territory governed by military **conquest**.
- The very last in the hierarchy of types of United States governing authority overseas is United States occupation and control pursuant to **conquest**. In such a situation international law prescribes the limits of the occupant’s power. Occupation does not displace the sovereignty of the occupied state, though for the time being the occupant may exercise supreme governing authority.
- Berlin is an occupied city. It is not United States territory. The United States presence there grows out of **conquest**, not the consent of the governed.
- the rights of the United States as an occupying power in Germany deriving from **conquest**, remained unaffected by the termination of the state of war.

“The United States was not the aggressor in this war. WWII in Europe began when

Germany invaded Poland on Sept. 1, 1939,” Professor Northbridge continued. “The ensuing development of the war, the various military actions taken by both sides, and the later multi-year occupation of Germany by the Allies, and the continuing occupation of Berlin these were not fully foreseen at the time Germany declared war on the United States on Dec. 11, 1945.

“We must be aware of this. The fact of military conquest and the resulting military occupation of various territories arose based on the conduct of the war, and its outcome. In wartime situations, it is generally seen that the occupation of territory is based on military conquest. Such an interpretation is fully supported by the customary laws of warfare.

“Therefore, in my view, the discussion of conquest, and its resulting developments, including the military occupation of territory, should **certainly *not* be considered forbidden or prohibited** in the modern world,” the Professor concluded.

“Military occupation is not annexation,” Margret added.

“I encourage the students in your class to read through the entire decision of U.S. v. Tiede carefully. That undertaking will certainly be necessary if they are going to complete the ‘group homework assignment’ which Ms. Baumann and Ms. Ruskkol have planned.”

Shock waves seemed to reverberate throughout the classroom in Bremen, as many students voiced their dissatisfaction upon hearing of this new development. The Professor ignored those as he continued. “One important point has not yet been discussed. Here it is: If Berlin was an occupation by the Allies, then when this airline hijacking occurred, why wasn’t the ‘Court of Berlin’ organized by the Allies?”

The expressions of dissatisfaction on the faces of many students now turned to disorientation and confusion. No one seemed able to formulate a reasonable answer.

“Well, let me make this as simple as I can,” Professor Northbridge asserted. “According to my research, it comes back to some essential weaknesses in the concurrent operations of multiple ‘Zone occupations.’ And the Zone occupations spoken of here may have been planned as ‘Zone occupations’ initially, or they may have been planned as ‘Joint occupations’ but later deteriorated into Zone occupations, or whatever. What we commonly see is that everyone is handling the administrative affairs of their Zone, but we

frequently overlook the fact that there needs to be the designation of a 'leader,' who can deal with the larger issues.”

“There are many reasons for this,” he continued. “In 1978 in Berlin, according to my understanding, none of the other Allies felt that they had the time, money, manpower, facilities, or expertise to organize a Court of this nature, and to conduct the trial. At the same time, they didn’t even feel that they had adequate ability to actively ‘coordinate’ with any of the other Allies in carrying out this task.”

“Therefore, the United States took charge, and the United States Court for Berlin was established, as an Article II court under the U.S. Constitution. In this sense, I believe it is fair to say that the United States is acting in the role of the principal occupying power in the military occupation of Berlin.”

“Was there any specific authorization by the other Allies for the United States to take on this ‘task?’” Margret asked for clarification.

“No,” the Professor replied. “Quite frankly, this is what you see in many many of these situations, which is that the United States takes the lead, and the other Allies are just “

“Are just what?” Margret inquired.

“Just ‘junior partners’ in conducting the overall military occupation,” the Professor stated.

“Which I believe brings us right back to the situation of the military occupation of the Pacific areas as a result of WWII in the Pacific,” Margret added. “We see the United States taking on the role of the principal occupying power, and indeed this role is fully confirmed in Article 23(a) of the SFPT.”

“I would accept that as being the correct comparison,” Professor Northbridge asserted.

Shu-ling raised her hand. “You gave us some Charts regarding the military occupation of Germany. Can you give us the same analysis for the military occupation of Taiwan?”

“Yes, we have those,” Professor Northbridge stated. “Let’s put the chart for Taiwan up on the screen now, and then we will include two additional charts as a separate Appendix in the class notes.”

The Military Occupation of Japan and Taiwan

After April 28, 1952

THE TAIWAN SITUATION:
SPECIFIC ANALYSIS AND
RELATED COMMENTARY

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Japan (four main islands)	-----	In the four main Japanese islands, military occupation has ended as of April 28, 1952
The former Japanese overseas territory of Taiwan	(p.) USA (a.) Republic of China	1. Taiwan has been completely detached from Japan with the coming into force of the peace treaty, and as confirmed by numerous decisions of the Japanese courts. 2. For territories separated from the “mother country” of Japan, such as Taiwan, military occupation continues until final determination of status and establishment of locally organized “civil government.”

※ Abbreviations used: (p.) – principal (a.) - agent

Additional Notes:

- The Allies have disbanded with the coming into force of the SFPT on April 28, 1952.

- Article 6 of the Treaty, specifying that “All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter . . .” does not apply to Japan’s overseas territories, because they have already become legally separated from Japan with the coming into force of the treaty on April 28, 1952.
- By designating (and/or “confirming”) the United States of America as “the principal occupying power” in Article 23(a), the treaty is stipulating that all remaining “military occupation” (and “military government”) duties, under the geographic scope of the treaty, have now come under the direct control of the United States of America. Again this reflects the fact that the Allies (as a group) have disbanded.

“There is one important point that deserves special attention,” the Professor continued. “After April 28, 1952, with the coming into force of the San Francisco Peace Treaty, there is no longer any legal basis for the Republic of China government structure to remain in Taiwan. That would include the Office of the President, the Five Yuan, the Ministry of National Defense, and every other government department. Clearly, the treaty has no such authorization. Taiwan was not awarded to the Republic of China.

“So, the principal-agent relationship which exists here is purely something assented to, arranged by, and/or coordinated through the United States military authorities, with the approval of the President, serving as Commander in Chief. You all may debate among yourselves whether, under the law of agency, that qualifies as (A) Express Authority, (B) Implied Authority, and/or (C) Apparent Authority.

“And who was the U.S. Commander in Chief in 1952?” Alexandria asked.

“Harry Truman,” the Professor replied. After two more seconds, the live video feed from Los Angeles terminated, and the screen went blank.

“As regards the group homework assignment,” Margret spoke up forcefully, “it is quite simple actually. Emily and I will give you the opening structure for a draft of an “Organization Law for the United States Court of Taiwan,” and then also give you the various Article headings. So, this will all be on the class website, and you can log in with your student ID number, and you can make additions wherever you think data needs to be added.”

“This will be uploaded into the university’s software development platform, which is similar to GitHub. All the additions you make are automatically annotated with your ID, the date and time, etc.,” Emily added. “It is a group project, and everyone works together on developing the final version.”

“You can use the ‘Organization Law for the U.S. Court of Berlin’ as a model, and you can find that in the U.S. v. Tiede decision. You can reference the organization laws for other U.S. Courts or international courts online, so I am sure you will not have any difficulties in finding suitable clauses to add in,” Margret explained.

“We hope to be able to have everyone’s input within 14 days. We’ll see what additional input we can gain in the faculty lounge, and post the final version up shortly thereafter.”

As the two co-moderators began to leave the classroom, Emily turned and said: “There is also an online questionnaire, and we ask that everyone give their vote. The choice is in regard to which U.S. President, from Franklin Roosevelt to the present, had the best Taiwan policy initiatives, especially in respecting the human rights of the Taiwan people.”

As they walked into the hallway, Margret looked at Emily in somewhat of a confrontational manner and said: “I didn’t know that you had added that questionnaire into the computer system. Maybe it is a good idea. But, in addition to the names of all those U.S. Presidents, I hope you added one additional choice, which would be – ‘None of the above’.”

CHAPTER 14: Appendix A

The Military Occupation of Japan and her Overseas Territories

Before April 28, 1952	THE OVERALL SITUATION
-----------------------	-----------------------

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Japan (four main islands)	“Joint” [Allies led by USA], <i>which gradually deteriorated into</i> “USA with Advisory Council”	Military occupation has begun with the surrender of Japanese troops
Japan: overseas territories	(p.) USA [as leader of the Allies] (a.) <i>case by case basis</i>	Military occupation has begun with the surrender of Japanese troops

※ Abbreviations used: ROC- Republic of China (p.) – principal (a.) - agent

Additional Notes:

- The terminology of “Japan: overseas territories” refers to any Japanese overseas territories under (a) Japanese administration, or (b) Japanese sovereignty IN OR PRECEEDING December 1941, when the United States and the Republic of China declared war against Japan.

After April 28, 1952	THE OVERALL SITUATION
----------------------	-----------------------

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Japan (four main islands)	-----	In the four main Japanese islands, military occupation has ended as of April 28, 1952
Japan: former overseas	(p.) USA	For territories separated from the “mother country” of

territories	(a.) <i>case by case basis</i>	Japan, military occupation continues until final determination of status and establishment of locally organized “civil government”
-------------	--------------------------------	--

※ Abbreviations used: (p.) – principal (a.) - agent

Additional Notes:

The terminology of “Japan: former overseas territories” refers to any Japanese overseas territory formerly under (a) Japanese administration, or (b) Japanese sovereignty, but now detached from Japan as of April 28, 1952.

In the treaty, some of these territories are specifically mentioned, some are “undemarcated.”

With the coming into force of the SFPT, and according to its specifications, these territories must be recognized as being under military occupation. These areas would include (1) Southern Kuriles, (2a) Northern Kuriles, (2b) Southern Sakhalin, (3) Dokdo, (4) Senkaku (Diaoyutai), (5) Spratly Islands, (6) Paracel Islands, (7) Formosa & the Pescadores.

After April 28, 1952	THE TAIWAN SITUATION
----------------------	----------------------

GEOGRAPHIC AREA	Military Occupation: Type & Description	Notes
Japan (four main islands)	-----	In the four main Japanese islands, military occupation has ended as of April 28, 1952
Former overseas Japanese territory of Taiwan	(p.) USA (a.) ROC	For territories separated from the “mother country” of Japan, military occupation continues until final determination of status and establishment of locally organized “civil government”

※ Abbreviations used: (p.) – principal (a.) – agent

ORGANIZATION LAW FOR THE UNITED STATES COURT OF TAIWAN

(DRAFT VERSION 1.00)

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
OF THE TAIWAN CESSION

Law No. 01

United States Court of Taiwan

The United States High Commissioner enacts as follows:

ARTICLE 1

United States Court

1. A United States Court of Taiwan (herein referred to as "the Court") is hereby established for the Taiwan cession.
2. Subject to the provisions of Article 3 the Court shall have jurisdiction to hear and decide any case arising under any legislation in effect within the area of Taiwan, including the Pescadores, in accordance to the definition of "Taiwan" in the Taiwan Relations Act, 22 USC 3314 (2), such areas herein referred to as "Taiwan," recognized by the United States as (under the jurisdiction of) the Republic of China prior to January 1, 1979.
 - (a) When used in a geographical sense, Taiwan includes the outer Island Shelf and smaller artificial islands and fixed structures thereon.

- (b) The jurisdiction of the Court may be extended to other areas according to the determination of the Commander in Chief.
- 3. The Court shall establish its main branch in Taipei City, and further branches in other cities or localities of Taiwan as the United States Secretary of Defense and Chief of Mission may determine to be necessary.

ARTICLE 2

Personnel

- 1. The Court shall be composed of one or more United States Judges for Taiwan. Any such Judge may sit as the United States Court of Taiwan.
- 2. A United States Attorney for Taiwan and such Special Assistant United States Attorneys for Taiwan as may be necessary shall be responsible for the prosecution of all criminal cases in the Court.
- 3. A Clerk-Marshall of the United States Court of Taiwan shall be authorized to authenticate documents, to affix the seal of the Court, to administer oaths, to summon witnesses and to enforce the orders of the Court.
- 4. United States Judges for Taiwan, the United States Attorney for Taiwan, and any Special Assistant United States Attorneys for Taiwan shall take an appropriate oath before performing the duties of their respective offices.
- 5.

ARTICLE 3

Jurisdiction

- 1. The Court shall have original jurisdiction to hear and decide any criminal, civil, or administrative case arising, or having arisen, under any legislation in effect in Taiwan when the circumstances of the case have a necessary or significant connection to Taiwan and involve:
 - (a) a United States citizen, or United States juridical person,
 - (b) United States military personnel,
 - (c) issues related to the nature and functioning of United States administrative authority over Taiwan, together with jurisdiction over persons and property, including but not limited to destruction or theft of public infrastructure, equipment, assets, etc.,

- (d) security, assets, or significant interests of the United States, as determined by the Chief of Mission,
 - (e)
 - (f)
 - (g)
2. In regard to jurisdiction, and in particular with reference to the specifications of paragraph (1) of this Article,
 - (a) the exact determination of whether a necessary or significant connection exists between a United States (civilian) citizen, or United States military personnel, and Taiwan, shall be made by the Court. However, in conformance to the Taiwan Relations Act 22 USC 3303 (b) (4) clause which specifies “whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose ...”, United States citizens who are concurrently Taiwan island citizens, regardless of their location of residence in the world, are considered to have a significant connection to Taiwan,
 - (b) issues related to the nature and functioning of United States administrative authority over Taiwan shall take account of agency arrangements, or the delegation of the powers to exercise United States administrative authority, dating from October 25, 1945, to the present,
 - 3.
 - 4.
 - 5.
 - 6.
 7. Any United States Judge for Taiwan shall have power to administer oaths, to punish for contempt of court (whether or not committed in his/her presence), to compel the attendance of witnesses and order their detention, to institute extradition proceedings, to compel the production of documents, to take depositions and to issue commissions for the taking thereof, to determine negligence based on the elements of *res ipsa loquitur*, to issue warrants of arrest and for search and seizure, to admit to bail, to commit for trial, to establish rules of practice and proceedings consistent with applicable legislation, and to exercise all other powers incidental to the performance of the Court.
 8. A record shall be made and kept of all proceedings before the Court. The Court

- (a) shall make findings of fact and conclusions of law in all cases decided;
 - (b) may correct clerical mistakes in judgments, orders, or other parts of a record and errors in the record arising from oversight or omission at any time and after such notice, if any, as the Court orders;
 - (c)
 - (d)
- 9.
10. In relation to all matters under the Court's jurisdiction, the Court
- (a) shall have the power to issue habeas corpus, mandamus, and other prerogative writs, to issue injunctions, notarize documents, make certifications, conduct pre-trial arbitration, and to specify procedures for the providing of legal assistance for indigent persons;
 - (b) shall apply US Federal Rules of Procedure and Evidence to the maximum extent possible.
- 11.
12. With reference to the preceding paragraphs of this Article regarding jurisdiction, the Chief of Mission may, with the approval of the Commander in Chief, appoint a special commission or separate tribunal to deal with any category or sub-category of issues, and remove it from the jurisdiction of the Court.

ARTICLE 4

Process

1. Process, which shall include summons, subpoena, notices, and other writs provided for issuance by the Court, shall be in such form as any United States Judge for Taiwan may prescribe.
2. Process shall be effective throughout all states and territories of the United States of America, including Taiwan, as well as such areas as the U.S. Secretary of Defense shall designate.
3. Process service on a defendant physically present in Taiwan shall be completed according to the local service rules of the Taiwan governing authorities.
4. Process service in a suit against the U.S. Government or any officials or agencies thereof, shall be made only with the approval of the Secretary of State.

5. Process service to foreign countries shall be made in accordance with each country's rules.

ARTICLE 5

Terminology Definitions

1. In general, courts convened under any legislation in effect within Taiwan and under the authority of the governing authorities on Taiwan are referred to in this Law as "Taiwanese courts." These courts have traditionally been broadly separated into four categories: civil, criminal, administrative, and military.
2. Administrative agencies organized under the legislation in effect within Taiwan and under the authority of the governing authorities on Taiwan are referred to in this Law as "Taiwanese administrative agencies."
- 3.
- 4.
- 5.
6. As used in this law,
 - (a) the term "Chief of Mission" means the United States High Commissioner of the Taiwan cession or the chief of the United States mission in Taiwan,
 - (b) the term "Chief Legal Officer" means the Chief Legal Officer of the United States mission in Taiwan,
 - (c) the term "United States government employee" means any person employed by the United States federal government, any state government, any territorial government, or by the United States mission in Taiwan.
- 7.
- 8.

ARTICLE 6

Fees

- 1.
- 2.

ARTICLE 7

Cases Removed or Transferred from Taiwanese Courts

1. Subject to the provisions of Article 3, a case may be removed, referred, or transferred (herein summarily referred to as “transferred”) to the Court from Taiwanese courts when one of the following conditions is met:
 - (a) a transfer of jurisdiction order has been filed with and accepted by the relevant Taiwanese court,
 - (b) the legislation in effect within Taiwan, and/or the established rules of the Taiwanese Judicial Yuan, allow for such a transfer,
 - (c) the transfer of a case affecting the security, property, or interests of the United States, or affecting the nature and functioning of United States administrative authority over Taiwan, has been ordered by the Chief of Mission,
 - (d)
 - (e)
 - (f)
- 2.
- 3.

ARTICLE 8

In-Court Mediation

1. Upon application of the plaintiff, or his/her legal representative, or other concerned party, a dispute between any level of the Taiwan governing authorities and any citizen, or juridical person, of any sovereign nation, (hereinafter “principal”), may be subjected to In-Court Mediation, when the Chief Legal Officer is satisfied that irregularities or violations regarding any of the following situations or circumstances have existed in Taiwan for a period exceeding the “day count” specified in each category:
 - (1A) Category 1: Real Estate Matters (day count: ___ days)
 - (a) fire safety requirements,
 - (b) sea-salt, sea-sand, chemical, radioactive, etc. contamination,
 - (c)
 - (d)
 - (1B) Category II: Natural Environment Matters (day count: ___ days)

- (a) management of natural resources,
- (b) prevention of pollution and/or treatment or handling of existing pollution,
- (c)
- (d)
- (1C) Category III: Monetary Matters (day count: ___ days)
 - (a) monetary compensation due,
 - (b) monetary disputes,
- (1D) Category IV: General Items (day count: ___ days)
 - (a) obstruction of streets, sidewalks, roads, entranceways, etc. by vehicles, structures, carts, peddlers, etc. on a continuing basis,
 - (b)
- (1E) Category V: Additional Items (day count: to be specified)
 - (a)
 - (b) other conditions as determined by the Chief of Mission.

- 2.
3. In-Court Mediation will also entertain any relevant allegations of “selective enforcement” of laws and regulations in connection with any of the categories of issues described in paragraph (1) of this Article, and may subpoena appropriate Taiwanese government personnel to make clarifications and explanations.
4. The qualifications for “concerned party,” as mentioned in paragraph (1) of this Article, shall be determined by the Chief of Mission.
5. The definition of “principal,” as mentioned in paragraph (1) of this Article, does not currently include Taiwan island citizens. Any change in the scope of the definition of this term shall be determined by the Chief of Mission.
6. The provisions of paragraph (1) of this Article may be subject to such exceptions as announced by the U.S. Secretary of Defense.
- 7.

ARTICLE 9

Enforcement of Judgments

1. The Court may establish procedures necessary for the enforcement of its judgments,

including but not limited to coordinating enforcement via Taiwanese administrative agencies.

2.

ARTICLE 10

Review of Decisions

1. Any party to a case decided by the Court may petition the Chief of Mission to review the conviction or sentence pronounced by the Court or both. Such petition shall be filed within thirty-five days from the entry of the final order or within such extended time as the Chief of Mission may allow.
- 2.
3. The Chief of Mission shall submit his findings to the Court, and may recommend that the Court affirm, vacate, or modify the findings, judgment, or sentence of the Court in whole or in part, and/or recommend a new trial.

ARTICLE 11

Jurisdiction Clarifications

1. In determining jurisdiction according to the specifications of Article 3, or the definition of any terminology according to Article 5, the Court will not recognize any Taiwanese law or regulation which grants immunity to any persons from the jurisdiction of, or prosecution by, the Court.
- 2.
- 3.
4. Nothing in this Law shall be construed as extending to the Court, or to any Taiwanese court, jurisdiction over the United States Government, any agency or division thereof, or any United States government employee, unless such specific authority has been conferred by the Congress of the United States.

ARTICLE 12

Amendments

1. The Chief of Mission may amend this Law at any time with twenty-one days notice; however mistakes in regard to spelling, capitalization, or romanization may be amended with three days notice.

2.

ARTICLE 13

Nomenclature

This Law shall be known as the Organization Law of the United States Court of Taiwan.

ARTICLE 14

Effective Date and Area of Applicability

This Law is applicable in Taiwan, as per the specifications of Article 1, and shall become effective on the date of its signature.

Done at Taipei, Taiwan on ____ __, 20__.

XXXXXXXX X. XXXXXXXXX

United States High Commissioner of Taiwan

BACKGROUND DATA & CONCEPTS PRESENTED AS HISTORICAL NARRATIVE

CHAPTER 15

THE 1979 COMMUNIQUE AND THE \$250 MILLION LAWSUIT

[DATELINE WASHINGTON, D.C.]

PRESENT DAY

It was raining hard as Delores Mackensmith walked into the building on Massachusetts Ave., NW, in Washington, D.C. She strolled briskly down the hall and into a large lecture room, where many students were already seated and talking among themselves. It was almost time for the class to begin. Delores got out her cellphone and opened the university's classroom APP. After entering her temporary access code and room number, the screen at the front of the room came on, first showing an aerial view of Washington D.C.

The university had an announced focus on current events. It was required that each class first watch a short news bulletin. All were edited to be approx. three minutes in length. A 'Main Menu' appeared with a multiple-choice list, and she selected "Asian Studies," and then "China Taiwan."

The titles of several news stories appeared, all available for selection. She randomly picked the first one. The title came up on the screen.

Chinese Academy of Surveying and Mapping re-writes History

The story had been put together by reporters in Hong Kong, and Beijing, but with some assistance from independent journalists in Tokyo, Seoul, and Canberra, Australia. The announcer, an attractive European lady in her mid-30s, gave the details as follows.

Reliable sources with contacts in the “Chinese Academy of Surveying and Mapping” are now reporting that a new top-secret division of the Academy has been founded, with Headquarters in a new building near the ultra-modern Beijing Daxing International Airport. That airport opened in Sept. 2019.

This new division had recruited large numbers of cartographers, primarily from China, Russia, and Eastern European countries. The Academy had been collecting ancient Asian maps from around the world for decades, and now these were being edited and modified to show that Taiwan had in fact belonged to China since the mid-period of the Sui dynasty, which would be approx. 600 A.D.

The goal was to upload these to internet websites, both to those already long-established and others newly created. In the coming years, full-color printed map reproductions in an assortment of sizes would be made available to libraries, universities, research organizations, cartography institutes, etc., as well as the general public, at a low cost, and with free airmail shipping.

The story concluded by saying that this was another example of “Chinese disinformation in action” in the modern world. A representative of “Geoscience Australia” expressed disappointment that such flagrant violations of fundamental cartographers’ ethics could be encouraged and funded by the government of a modern state.

The news story faded into an image of a large athletic hall where over twenty ping-pong competitions were being played simultaneously, and this was offered as the following news bulletin selection. Delores pressed “cancel,” and the screen changed to a panorama of a large Chinese tour group gathered on Pennsylvania Avenue in front of the Whitehouse, taking pictures. The imagery slowly became blurry, and then her name was overlaid on top.



“I believe it is time that we got started. You can see my name on the screen, and I will be your moderator for this session. Our subject matter concerns a rumor which reportedly spread around Washington in 1979. I have been unable to verify it, but I have mentioned it to some of my lawyer friends, and they have all said that they thought it was possible. In other words, they agreed that something like this could have happened.

“I later developed a full scenario on this topic for one of my political science courses in Graduate School, and I have continued to ‘embellish’ it over the years. At the present time I just view it as an interesting story. Importantly though, we can learn a lot from doing an analysis of all its parameters. In the story there are two main parties: a group of Chinese officials from Beijing, and a Washington D.C. law firm.”

A picture of a large office building in the southeastern area of Washington D.C. appeared on the screen.

“We will call the law firm by the name of Lippenberg, Flatzman, and Sleeney.” The law firm’s name appeared on the screen, along with some additional notations.

<p>Lippenberg, Flatzman, and Sleeney Washington, D.C.</p>

(Names have been changed to protect the innocent, *and the guilty*.)

“As you undoubtedly know, the United States had just broken diplomatic relations with the Republic of China on Taiwan effective Dec. 31, 1978. On Jan. 1, 1979, formal diplomatic relations were established with the People’s Republic of China (PRC), headquartered in Beijing.”

Pictures of President Jimmy Carter shaking hands with various Chinese officials appeared.

“But Nixon and Kissinger’s trip to China had been in February 1972. That was some seven years earlier. The PRC officials regarded themselves as the sole legitimate government of China, and regarded Taiwan as part of their national territory.”

A female student near the center of the room raised her hand and began speaking, “I thought that the content of all the sessions we have attended so far pointed to an entirely different conclusion.” She started to loosen a bright floral bandana, tied loosely around

her neck. “I mean, it seems that according to what we have learned, Taiwan is not really a part of China.”

“Oh, I am sorry,” Dolores said. “I forgot to introduce our classroom equipment for today. On the desk area in front of each seat is a flexible cable-like device, with what appears to be a photo-electric head. Actually, that is a combined microphone and camera. You will see that each one has a number. I will ask that our questioner with the bandana please be seated, and then push the center button on your cable-mike.”

The student sat down and pushed the button. On the front screen in the classroom, a square comprising about 1/12 of the overall size appeared. The number of this student’s seat was given as 38, and her name was indicated as Mary-Ann. Seeing that she was on camera, she smiled.

“I assume that Mary-Ann has attended some of our previous sessions in person, and is registered with us, because our computer’s facial recognition software determined who she is. So, if anyone wants to ask a question, you can remain seated, all you have to do is push the button, and your picture will come up on the front screen. That screen will handle a maximum of twelve people, but I probably will only be able to deal with two or three questions at any one time. If any of you have further questions after the session is over, you can submit those to my university email address where I teach in Seattle, and I will get back to you.

“Also, I should add that we are borrowing this large lecture hall here today. I met with the President of this University last week. She mentioned that she had made a special allowance for a number of graduate students in political science and international relations to attend our session. I believe there may be some Ph.D. candidates as well. That is one reason the group is so large. However, these students are all guests, and they don’t have access to either the class website or the information and downloads which are available there. If you want those, you need to give me a full written report on what was discussed today, and your comments thereon. If your report passes the review of our academic panel, we will issue you a Type-B student number and grant you access to most areas of the class website.

“The President also informed me that she had consented to requests from the Dept. of Defense, including the Defense Intelligence Agency, as well as the CIA, to send some personnel to today’s session. In fact, that may be quite appropriate, because we are discussing a ‘rumor,’ and they like to dissect such things.

There was some laughter among the students.

“Alright, Mary-Ann made the comment that Taiwan doesn’t really belong to China. But this is a question of perception. From my point of view, and I believe this is also the viewpoint of the sponsors of these sessions, if different groups of Chinese people or other people want to continue arguing over the legal status of Taiwan, that is their prerogative. And if they want to hire American lawyers to defend their point of view, that is their right as well. However, for those of you going into U.S. government service, or if you currently have friends and associates in U.S. government service, I would stress that your duty is to follow U.S. laws and regulations, and that includes the U.S. Constitution and Senate-ratified treaties. There must be no hesitation on your part to do so.”

A square on the screen came up, seat 26, Peterson. Dolores pushed a button on her cellphone. The border on his square changed from a light-grey to ‘red, white, and blue.’

“The ‘red, white, and blue’ border colors on your square means that you are recognized by the chair, which is yours truly,” Delores explained.

Peterson asked, “But what has been stressed in so many of the previous sessions has been the topic of the ‘customary laws of warfare.’ Is that considered part of the U.S. legal and constitutional structure as well?”

“Absolutely,” Delores replied. “It includes military jurisdiction under the U.S. constitution, and much established international precedent. There are many Supreme Court cases that discuss these topics, and related topics, such as the legal implications of conquest. The Hague Conventions of 1907, the Geneva Conventions of 1949, are also important, and U.S. government officials must respect them. In terms of the legal framework existing in the 1940s and 1950s, the U.S. Dept. of War Manual FM 27-10 ‘Rules of Land Warfare’ is also considered authoritative. All of this is included under the broad categorization of the ‘customary laws of warfare.’”

There appeared to be no further questions or comments.

“OK, where were we? Nixon and Kissinger’s trip to China had been in February 1972, and an important Communique had been issued at that time, the Shanghai Communique of Feb. 28. In that Communique, 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.

“In reality, 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,” Dolores explained. “So, it may be true that in a previous life, Mary-Ann worked for the Dept. of State.”

Mary-Ann stood up and took a bow. There was scattered applause.

“Importantly, though, in my opinion, this paragraph contains a lot of diplomatic double-talk. Look at this sentence –

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.

“What does that mean? “The PRC Chinese and the ROC Chinese have both stated that Taiwan is a part of China and **we heard them say so**” Dolores paused and looked around the classroom. “But does that mean that the U.S. government position is that “Taiwan is a part of China”? No, it certainly doesn’t.

”Several reports of the Congressional Research Service have confirmed that the USA has never recognized PRC sovereignty over Taiwan.”

Another square on the screen came up, seat 17, Samantha.

The border changed to the patriotic colors. Samantha spoke up, “I have always wondered who ‘all Chinese on either side of the Taiwan Strait’ refers to? And the sentence ‘It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves’ how is that to be interpreted?”

“In my early years as a graduate student, I often wondered about these phrasings myself,” Dolores nodded.

Another square on the screen came up, seat 19, George. After receiving his ‘red, white, and blue’, he said: “Isn’t the San Francisco Peace Treaty the highest-ranking document of

international law in regard to the disposition of Taiwan territory in the post-WWII era? That treaty did not award Taiwan to China. So, why were the U.S. President and Mr. Kissinger referring to ‘all Chinese on either side of the Taiwan Strait’? And why would there be a stipulation that the peaceful settlement of the Taiwan question has anything to do with ‘the Chinese themselves?’”

Delores frowned. George continued. “As far as I know, a very high percentage of the people on Taiwan consider themselves Taiwanese, not Chinese.”

“There is one very good explanation,” Delores said, somewhat slowly. “Let me try to describe it. The People’s Republic of China was founded on Oct. 1, 1949. So, of course, in the months leading up to that, there was a large exodus of the supporters of Chiang Kai-shek from the mainland. Those people were loyal to the Republic of China. They fled in all directions, north, south, east, and west. And large numbers of them went to Taiwan.”

“Occupied Taiwan,” George added.

“Yes, but apparently no one in the Dept. of State or the Oval Office understood that, or understood the implications of that,” Delores offered. “So, my point would be that the phrases ‘all Chinese on either side of the Taiwan Strait’ and ‘the Chinese themselves’ would appear to indicate (1) the ‘PRC Chinese’ *and* (2) the ‘ROC Chinese who had fled into exile on Taiwan’. That is effectively two groups of ‘Chinese’ people.”

The front screen began clicking as eight squares appeared. “Oh” Delores said, “Let me pick one. I recognize Benjamin in seat 42.”

“Shouldn’t the local Taiwan people have the right to come together to establish their own civil government? And then exercise their right to self-government in that way? Even if the U.S. Commander in Chief is opposed to Taiwan independence, the Taiwanese people could organize their own civil government and continue to operate under the overall administrative umbrella of USMG, which would no doubt be re-named and/or re-introduced as the ‘United States Civil Administration of Taiwan’ (USCAT), isn’t that correct?” Benjamin said.

Delores paused for a long moment. “If you want the answer to that question,” she said, “you will have to ask Dr. Henry Kissinger.”

More pictures of Mr. Nixon and Mr. Kissinger came on the screen.

“For the purpose of today’s session, I think we have gone far enough in well, in whatever direction we have been talking about so far. I think we need to get back on track and begin discussing the \$250 million lawsuit. I brought along one of my graduate school students from Seattle, she will fill us in on the background information. Please welcome Florence.”

Florence rose up out of her seat and walked to the front of the room. She was wearing a pants-suit, but the colors were dramatically uncoordinated. The jacket was a grey-checked tweed with fringed edges, but her pants were light blue denim, somewhat faded. Dark green running shoes completed her outfit. Overall, it was an odd combination. Reaching the front of the room, she gradually turned a full circle, and then smiled. “I will match-up my clothes later,” she said, seeming fully confident. She turned to Delores.

Delores pushed some buttons on her cellphone APP, and a QR code came up. Florence used her cellphone to scan the code. Her name was overlayed on the screen: Florence Wakenfield.

A notice for a news bulletin appeared. The announcer, a muscular man in his mid-40s, who was wearing a Hawaiian floral shirt, gave the details as follows.

U.S. President Hears Unexpected Plea for PRC-Taiwan Unification

The President of the United States and his wife, in accompaniment with the Chinese President and his wife, were attending the opening of a new seaside resort on Hainan Island in southern China yesterday. The weather had been extremely hot, and everyone was dressed very casually. At the noontime banquet, the waitresses had been wearing skimpy bikinis, reminiscent of something from Polynesia.

Evidently due to the heat, one of the waitresses serving the Presidential table had collapsed and fallen into the lap of the U.S. President. In the footage captured on camera, the U.S. President was seen speaking to her and patting her forehead with a damp cloth.

Talking to reporters afterward, the U.S. President confirmed that she was a very attractive lady, and he seemed quite amused at the incident. Recalling their conversation, the President said that she explained to him how during her teenage years, she had emigrated from Taiwan to Shanghai with her parents, because they wanted to live in the one true China – the PRC. Her fervent hope was that the complete unification of Taiwan with the PRC would take place in the near future.

The U.S. First Lady said that the entire incident left her feeling rather bewildered.



“Let’s go back to early 1979,” Florence said. “The basic facts are these. A number of PRC Chinese officials decided that their goal should be to bring Taiwan under direct PRC control. Obviously there are many ways by which such a goal could be accomplished. Indeed, there had been many PRC initiatives during this seven-year period, and some were even ‘ongoing’ at that time. But, after careful evaluation, it seemed that most of the planning for a take-over of Taiwan was ‘short-term’ and ‘medium-term’. Such plans were quickly ‘hatched,’ quickly put into operation, and then quickly abandoned a year or two down the road when they did not produce any concrete results.

“In summary, it could be said that from the vantage point of early 1979, no progress in the direction of getting Taiwan under direct PRC control had been made since the Nixon and Kissinger visit whatsoever. Therefore, these PRC officials who had assembled in Washington D.C. were proposing a new strategy. They wanted to hire a reputable Washington D.C. law firm to design a lawsuit to be filed in the U.S. court system whereby the end result would be that Taiwan would be recognized as PRC territory. They viewed this as a long-term strategy, and were not opposed to four, six, eight, or more years of time in court, as long as a reasonable chance of victory appeared possible.

“With this goal in mind, they attended a large number of seminars, lectures, and other events where various influential people in Washington D.C. gathered, and slowly put the word out that a certain newly established Foundation in Washington D.C. was searching for a suitable law firm to handle this litigation. The preliminary budget for this lawsuit was US\$ 250 million.

“I should note at this point that there is certainly nothing at all illegal about any of the arrangements they were proposing. Many foreign governments hire one or even multiple law firms in major U.S. cities to deal with all sorts of litigation in which they become involved. Obviously, many of those lawsuits deal with charges of unfair economic practices, or even outright violations of U.S. trade laws. They also hire lobbying firms to advance their ‘national agenda’ or ‘national interests’ at all levels.

“Some people might offer the assessment that under U.S. law the determination of what entity exercises sovereignty over any particular piece of territory is a ‘political question,’ and is up to the determination of the political branches,” Florence added.

Political Branches

An oft-heard phrase designating the Executive Branch together with the Legislative Branch.

“So that would mean that, based on what is known as the ‘political question doctrine,’ filing a lawsuit in the courts would not be the proper approach or proper procedure for making such a determination in regard to ‘the exercise of sovereignty’ over territory.”

Political Question Doctrine

In American Constitutional law, the political question doctrine is closely linked to the concept of justiciability, as it comes down to a question of whether or not the court system is an appropriate forum in which to hear the case.

This is because what the court system has the authority to hear and decide is limited to “a legal question,” and does not include anything which extends into the realm of “a political question.”

To put this another way, in the American legal system, legal questions are deemed to be justiciable, while political questions are deemed to be non-justiciable.

“I have assembled some relevant case data. Let me put it up on the screen.”

A notice for a news bulletin appeared. The announcer was standing in a forest setting, and carrying a large backpack. She was introduced as Ms. Madelyn O’Rega, on leave from the San Diego Zoo to study the mating habits of wild bears throughout the world. She was currently in southern China.

“You pushed the wrong button,” Delores spoke up. “You will have to let the bulletin show now.” The news bulletin continued.

Chinese Zoologists Confirm that “Formosa black bears” Originated in China

News reports from several southern Chinese provinces are now showing new evidence that what many mammalogists and other animal experts have traditionally called the “Formosa black bear” is actually native to China.

After mounting numerous expeditions into previously unexplored regions, local officials are now able to report that they have identified substantial populations of these bears in the southern Chinese provinces of Guangdong, Guizhou, Yunnan, Hunan, as well as the Guangxi Autonomous Region. The officials estimated that these bears have been living in these areas since ancient times.

The Institute of Zoology of the Chinese Academy of Sciences issued an official statement, purporting that: “The Formosan black bear, also known as the white-throated bear, is often identified as a subspecies of the Asiatic black bear. However, according to the latest research, it should be identified as a subspecies of the Chinese black bear. The correct Latin nomenclature would thus be: *Ursus thibetanus chinense-formosanus*.”

The Academy’s scholars speculated that some groups of the bears most likely emigrated to Taiwan when the island was attached to the mainland during the ice age some 12,000 years ago. They stressed that this new research is more proof that Taiwan belongs to China.

However, international news reporters’ interviews with the leaders of aboriginal groups in these southern provinces, and examination of traditional artwork, were unable to confirm that bears of any type were native to these regions. Local leaders recalled that large numbers of Chinese government research areas had been established in the interior regions in the 1980s and early 1990s. Accompanying forested areas had been completely fenced off. At that time, many reports of the airlifts of large animal cages and boxes had also been recorded.



“We were talking about the political question doctrine,” Florence quickly brought the discussion back on topic. “Here is the relevant case data.”

U.S. Supreme Court

Baker v. Carr, 369 U.S. 186 (1962)

The majority opinion in Baker v. Carr lists six different criteria a Court could use in determining whether a case presents a non-justiciable political question:

“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

Moreover, it is typically held that to affirm the existence of a political question, a court need only conclude that one factor is present, not all.

“So this might seem to be somewhat problematic,” Florence stated, her manner becoming somewhat troubled.

Her mood quickly lightened. “However, in the view of these PRC officials and their staff in the Embassy in Washington D.C., this issue had already been decided. With the establishment of formal diplomatic relations with the People’s Republic of China on January 1, 1979, U.S. political branches fully recognized that the PRC is the sole legitimate government of China. Moreover, the U.S. political branches have an official “One China Policy.” Of course, the One China spoken of here is the PRC.

“As everyone knows, Taiwan was a former colony of the Empire of Japan to which Japan abjured in the 1952 peace treaty all ‘right, title and claim.’ However, Japan pointedly did not designate any of the victorious enemy nations as the recipient of Taiwan’s territorial sovereignty.

“Not surprisingly, the traditional view of the U.S. political branches was that the status of Taiwan was undetermined. That can be traced back to President Truman’s statement of June 27, 1950 (which, admittedly, was almost a complete reversal of the comments he made on Jan. 5, 1950.) Fast forward to the early 1960s, and the Dept. of State (DOS) issued

the first of two Legal Memoranda regarding the 'Legal Status of Taiwan.' That was the Czyzak Memorandum of Feb. 3, 1961. Ten years later, DOS issued the Starr Memorandum of July 13, 1971. The conclusion of these two memoranda was that the status of Taiwan was undetermined. In other words, Truman's view of June 27th was confirmed and re-confirmed.

"But Dr. Henry Kissinger changed that. Reportedly, Kissinger gave a secret assurance to Chinese Premier Zhou En-lai that the State Department would no longer refer in public to the status of Taiwan as 'undetermined.' Then in the Shanghai Communique, he reformulated the Taiwan legal status question as being an issue "**between the ROC and the PRC,**" which was subject to resolution via their joint consultation.

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.

"Obviously, back in 1979, they did not have any knowledge of the information which we have presented in our sessions. So, in the PRC view, the 1972 Shanghai Communique also attests to the fact that Taiwan belongs to China.

"Additionally, I know that DOS formerly edited a 'Background Notes' series, which were regularly updated, and I would assume that those were based on internally collected and edited data assembled after 1972. The 'Background Note on Taiwan' stated that 'At the end of World War II in 1945, Taiwan reverted to Chinese rule.'" That also appeared to be a strong confirmation that Taiwan belonged to China.

"Furthermore, these arguments for *defacto* and *dejure* ownership of Taiwan by China can be buttressed by the so-called successor government theory Although some people refer to it as a doctrine or rationale. Some other scholars categorize it as 'succession of states.'

Successor Government Rationale

Logical Analysis: The people who established the PRC as a country were the Chinese citizens in mainland China, and these same people were indeed the original citizens of the Republic of China (ROC).

The final period of that civil war in Mainland China saw the founding of the PRC on October 1, 1949, with the KMT/ROC government officials fleeing to Taiwan in December of that year. Hence, effectively speaking, the ROC was put out of existence when the PRC was founded on October 1, 1949, and the PRC drafted a new constitution for China.

Under international law, this is significant, because it means that the PRC has succeeded the ROC, and therefore the PRC government gains the rights to all assets that the ROC government had.

History: The "successor government theory" began to be applied in the late 1940's in regard to the domestic Chinese political situation. Obviously, more and more people accepted the legitimacy of this theory based on further developments which occurred during the 1970s:

- (1) Upon the expulsion of the ROC from the United Nations in late October 1971. UN General Assembly Resolution 2758 of Oct. 25, 1971, recognized the PRC as the successor government to the ROC in the United Nations.
- (2) Upon the formal break in ROC diplomatic relations with the United States effective Dec. 31, 1978. At that time, the United States also announced its intent to cancel the ROC – USA Mutual Defense Treaty effective Jan. 1, 1980.

“So, all of this data was considered quite determinative that Taiwan did in fact actually belong to China. It belonged to China, but somehow it was just ‘out of reach.’ That was the quandary the PRC officials were facing.

“But, . . . again it must be stressed, the PRC officials did not feel that the ‘political question doctrine’ was an obstacle. In their view, the PRC’s status as the sole legitimate government of China was their trump card. What they needed was a suitable law firm to advance an aggressive lawsuit in the U.S. court system to have the U.S. political branches definitively recognize all the implications of this ‘sole legitimate government of China’ status. Of course, the major implication was that Taiwan should be understood to be under the governance of China, i.e. the PRC.

“Moreover, the PRC officials offered to provide additional legal and historical arguments that could be used in advancing the lawsuit.

“Alright, let’s take a break for some entertainment,” Florence announced. She made a quick call on her cellphone. “You can use the restrooms during this portion if you want,” she announced to the class.

A knock was heard and the classroom door quickly opened. A young lady appeared and made a few tentative steps into the classroom. “I was sitting in the teachers’ lounge across the hall,” she declared. Her attire was almost the exact opposite of Florence’s, and equally uncoordinated. She was wearing a blue denim jacket, and pants which were grey-checked tweed. In her hand, she was holding a flute.

“My sister Clemence,” Florence said, taking off her jacket.

Clemence took off her jacket as well, and they exchanged. Their outfits were now well-matched, quite attractive, and suitable for a more formal setting. Pointing at Clemence, Florence said, “She has a flute recital today.”

Florence continued: “But I wanted her to come to our session today and perform a few numbers, so this morning I stole her jacket.”

“I practiced two somewhat older Taiwanese songs,” Clemence said, and each is about four minutes. “The copyright permission is less of a problem with these older songs.”

She played the tunes of “A Small Umbrella” (一支小雨傘) and “Spring Breeze” (望春風).

The students gave a loud applause. Clemence then waved goodbye and hurried off to her recital, wearing her complete grey-checked tweed pantsuit.

Designing a Suitable Lawsuit

Florence put some more information up on the screen. “Now, perhaps I need to add some more details on why such a lawsuit needed to be ‘designed’. Primarily that is due to the doctrine of --

Federal Sovereign Immunity in the United States

The federal government has sovereign immunity and may not be sued anywhere in the United States unless it has waived its immunity or consented to suit.

Exceptions or waivers to the doctrine of sovereign immunity exist to a limited extent, mainly through the Federal Tort Claims Act, which waives the immunity if a tortious act of a federal employee causes damage, and the Tucker Act, which waives the immunity over claims arising out of contracts to which the federal government is a party.

Therefore, generally speaking, the United States as a sovereign has immunity from lawsuits unless it unequivocally consents to being sued.

DEFINITION

Tort: (1) a wrongful act or an infringement of a right (other than under contract) leading to legal liability.

(2) a wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction.

(3) an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. Specifically, in the context of a tort, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers.

“So, everyone must realize that it would **not** be possible for any person or group in the United States to sue a U.S. Executive Branch official directly in order to correct some alleged wrong, or rectify some alleged oversight. It would have to be done indirectly. In other words, it might be possible to design a case around the subject of China-USA trade relations, or commercial licensing, or aircraft landing rights, or registration of non-profit entities, or investment laws, or the labeling of manufactured goods, or import regulations, or copyright, patent, & trademark registrations or something else,” Florence summed up.

“Are there any questions so far?”

A square on the screen came up, seat 34, Estella. After receiving her ‘red, white, and blue’, she said: “The ROC promulgated a Constitution in Taiwan, obviously Taiwan belongs to the ROC.”

Florence laughed slightly, and a number of students in the room seemed to grimace. “Well, I think that topic was touched upon in some of the previous sessions. I won’t review any of that analysis here. But, you are right, that is one argument which the Chinese officials could advance, as they tried to work together with a qualified legal team to get this case rolling. It dovetails very nicely with the successor government rationale.”

Another square on the screen came up, seat 12, Timothy. The border changed to the patriotic colors. Timothy said, “Well, the obvious question at this point is to ask how the officials of the PRC Embassy made a choice among the many law firms who were eagerly seeking the opportunity to undertake this legal action. After all, in the late 1970s, \$250 million was no small piece of change.”

“Well, many people outside of the legal profession would assume that was indeed the reality of the situation, and that a large number of U.S. based law firms, both on the east coast and in other areas, would be lining up to take on this case. However, even after three months, there were no takers,” Florence replied.

“So, as you might expect, here is where the firm of Lippenberg, Flatzman, and Sleeny comes in. As it turns out, this law firm had seen a continuing downturn in hours billed during the latter half of 1977 and throughout all of 1978. Some of the paralegals at the firm were getting together for dinner one Saturday night, and one of them mentioned this ‘Chinese lawsuit’ which, according to his sources, was still up for grabs, so to speak.

“These paralegals were very much aware that without a quick upturn in the firm’s fortunes in 1979, they might be facing the prospect of unemployment. They did some quick brainstorming on strategy, and reached agreement to bring this issue up at the firm’s regularly scheduled weekly meeting on Tuesday morning. They would spend part of Monday doing some basic research, and seeing what data could be collected.”

[DATELINE WASHINGTON, D.C.] EARLY 1979

Tuesday came around and three of the paralegals gave a combined presentation regarding the “availability” of this well-funded lawsuit. Granted, dealing with the topics involved, which clearly extended into the history of China – US relations, was not the firm’s forte; however, there were plenty of universities in the general Washington D.C. area, as well as many think tanks. It would seem reasonable that by visiting all of these places, a large amount of authoritative information could be assembled. Moreover, there were additional Chinese research organizations in New York City, Boston, Philadelphia, etc., and those were not far away.

With the recent formal establishment of diplomatic ties between the USA and the PRC, now there were literally dozens of seminars, lectures, forums, etc. being held on the future of China – Taiwan – USA relations on a regular basis, and attendance at these events would also be another way to collect cutting-edge analysis on all relevant legal and historical issues.

There would be costs involved, but that was the point. Why not just propose to the Chinese officials that the “preliminary research” on the feasibility of launching such a court case be undertaken by Lippenberg, Flatzman, and Sleeny? If these officials are already offering \$250 million for handling such a lawsuit, it must be true that money is no object. Therefore, a proposal to do the preliminary research for \$3 million, or \$4 million should be considered quite reasonable.

The senior partners were somewhat skeptical, since they were unaware that the PRC officials were actively searching for a law firm to undertake a case of this kind. They also considered that Lippenberg, Flatzman, and Sleeny didn’t have any related experience in this area. However, if it was indeed true that several months had already passed by, and the Chinese had not yet received any solid offers, it might be worth pursuing.

The Initial Consulting Contract

Contact was made by one of the senior partners, and after approx. five weeks a consulting contract was signed for \$ 2.5 million, with 65% paid in advance.

As a group, the senior partners considered this an amazing windfall and agreed to a great deal of freedom in allowing the paralegals to design their own research strategies. Generous budgets for travel, meals, lodging, etc. were allocated.

More surprisingly, the PRC officials were willing to make direct arrangements for the paralegals and other staff to meet with a wide variety of Chinese personnel in related Chinese organizations established in the U.S., and also with Americans and other nationalities of researchers, scholars, “friends of China,” etc., all of whom were fascinating conversational partners, and provided many interesting legal and historical insights.

In accordance with Chinese social norms, it was typical that such get-togethers were held in fancy Chinese restaurants, and the paralegals were told that the bill “was already taken care of.”

Meetings were held at Lippenberg, Flatzman, and Sleeny every 10 days to assess progress.

The Importance of the Surrender Ceremonies

The Chinese often mentioned the announcement of Taiwan Retrocession Day on Oct. 25, 1945, by the Chiang Kai-shek regime. In the Chinese view, the Japanese in Taiwan

surrendered to the military forces under Generalissimo Chiang Kai-shek, and this fact was highly significant. Likewise, the international community seemed quite accepting of this event.

According to these PRC officials' knowledge, all foreign relations documents, along with other historical materials, for Chinese history 1912 to 1949 were being collected at the "Second Historical Archives" in Nanjing city. These were fully available to the public and all interested researchers.

Chinese scholars with whom they were familiar claimed to have undertaken thorough searches of these archives, and had been unable to find any documents relating to any 'international outcry' about the announcement of 'Taiwan Retrocession Day.' Therefore, in their view, it should be considered as completely valid and legally binding.

Moreover, from a broader perspective, they couldn't understand why any government officials in other countries would object to such an announcement, since "Taiwan has belonged to China since ancient times." They said that in some Chinese scholarly circles, proof had recently been found that Taiwan belonged to China much earlier than many international scholars had previously estimated.

Some Chinese scholarly reports had even advanced the premise that Taiwan had been an integral part of China as far back as the period of the Five Dynasties. Using western date notation, that would be 907 to 960 A.D.

Three Key Items

Three key items that continually came up were "Cairo, Potsdam, and the Japanese surrender documents". One of the paralegals dove into a discussion of these at one of the in-house meetings, in accompaniment with a large chart he had drawn, which surveyed the relevant content.

The Cairo Declaration (December 1, 1943) states in paragraph 2:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also

be expelled from all other territories which she has taken by violence and greed.

Notable attendees at the Cairo Conference were: President Gen. Chiang Kai-shek, President Franklin Roosevelt, and Prime Minister Winston Churchill.

The Potsdam Proclamation (July 26, 1945) states in Article 8:

The terms of the Cairo Declaration shall be carried out, and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

Notable attendees at the Potsdam (Berlin) Conference were: Prime Minister Winston Churchill, President Harry Truman, and Premier Joseph Stalin.

The Japanese Instrument of Surrender (Sept. 2, 1945) stipulates:

We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever actions may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

“So,” the paralegal explained, “the fundamental argument goes that in 1945, at the close of fighting in WW2, the Empire of Japan agreed to the conditions of the Japanese Instrument of Surrender.

“The Chinese we have spoken to are almost unanimous in saying that these three documents are the key to understanding the disposition of Taiwan in the post-WWII period. To put this in the simplest terms possible, they explain that when Japan surrendered to the Allies, they subsequently gave the mandate of governing Taiwan to the Republic of China. And what is the key component of “sovereignty,” if not governance? In the modern era, Chinese governance of Taiwan began on Oct. 25, 1945, which they call ‘Taiwan Retrocession Day.’

“So, fast-forwarding to late April 1952, Japan gave up its territorial sovereignty of Taiwan, effectively leaving the territory as ‘abandoned’ or ‘with no owner,’ but then again with no explicit cancellation of the pre-existing Chinese claims (as per ‘Taiwan Retrocession Day’). In the Chinese view, this amounts to saying that in the post-war San Francisco Peace Treaty, the sovereignty of the Republic of China over Taiwan has been confirmed.

Another of the paralegals interrupted, somewhat excitedly: “Which is **not** to say that as a

non-signatory they recognize the validity of the San Francisco Peace Treaty,” he stated. “However, for those people who want to argue about the interpretation of this treaty, this would be their analysis.”

“Yes,” another staff member offered, “I have heard them advance this type of ‘rhetoric’ on more than one occasion.”

The explanation continued. “Then there was the founding of the People’s Republic of China on Oct. 1, 1949; and its joining the United Nations on Oct. 25, 1971, as the sole legitimate government of China; and the United States’ formal recognition of the PRC as the sole legitimate government of China on January 1, 1979.

“In the PRC Chinese view, all of these facts add together to result in one undeniable conclusion: Taiwan belongs to the PRC.”

Additional Points regarding Chinese Sovereignty

The senior partners also met with Chinese officials and collected opinions about the Taiwan issue.

The promulgation of a Republic of China Constitution in Taiwan in late December 1947 was considered very important, since they were unaware of any areas of the globe where the Constitution of a particular nation was promulgated, and yet the local territory was not under the sovereignty of that nation.

Chinese researchers with whom they were familiar claimed to have undertaken thorough searches of the ‘Second Historical Archives’ in Nanjing city, and had been unable to find any documents relating to any ‘international outcry’ in regard to the promulgation of the Republic of China Constitution in Taiwan in late December 1947. Therefore, in their view, it was thoroughly valid and legally binding.

Moreover, considering this from a broader perspective, they couldn’t understand why any government officials in other countries would object to this promulgation, since “Taiwan has belonged to China since ancient times.’ They said that in some Chinese scholarly circles, proof had been found that Taiwan belonged to China much earlier than many international scholars had previously estimated, etc., etc.

The San Francisco Peace Treaty was mentioned. The Chinese were aware that many

western scholars were in the habit of referring to this as “the highest ranking document of international law regarding the disposition of Taiwan in the post-WWII era.” However, the opinion of the Chinese officials was: “We didn't sign it, so we are not affected by it.” In their idea, as a non-signatory party, the stipulations in the San Francisco Peace Treaty were irrelevant to the Chinese claims of sovereignty over Taiwan.

In the Chinese view, the Treaty of Taipei should be the most important reference document. After WWII, this “Treaty of Taipei” (August 5, 1952) was the peace treaty between China and Japan. Indeed this treaty contained several important Articles and clauses that strongly appeared to confirm Chinese sovereignty over Taiwan.

For example,

- Article 10 confirmed the nationality of Taiwan persons as ROC citizens.
- As a bilateral treaty, since one side "renounced" Taiwan's territorial sovereignty, a reasonable interpretation would be to say that the other side "received." So, to put that in simple terms, when Japan renounced Taiwan, China was the recipient.

The 1895 treaty was also mentioned. This was an unfair and unequal treaty, and should be considered null and void. Chiang Kai-shek had renounced it, and on more than one occasion. In the Chinese view, upon such a renunciation, the territorial sovereignty of Taiwan immediately returned to "China", which in the early 1940s would be "Republic of China."

Some further explanation of this was given by the Chinese as follows – it is most proper to view the cession of Taiwan in the 1895 treaty as being similar to a “contractual relationship.” Most people should understand the principle that when a contract is canceled, it is canceled. That means it is null and void. Hence, according to the announcement(s) of Chiang Kai-shek, the cession of Taiwan to Japan would be retroactively canceled, with the result that the ownership of Taiwan by the “sole legitimate government of China” in the current era would be completely confirmed.

Writing Up the “Preliminary Research” Report

The initial goal of Lippenberg, Flatzman, and Sleeny was to complete the research by the end of month-six and to finish the writing of the final report on this “preliminary research” in month-seven.

However, in month-four one of the senior partners had already directed an administrative

secretary to contact the international relations, political science, and Asian studies departments of local universities to locate “writing talent.” There was the expectation that as many as twenty university students might be hired on a part-time basis as “content creators.”

As suitable university students were located, they were asked to participate in the regularly scheduled three-a-month meetings, in order to become familiar with the issues involved. Importantly, one of the paralegals had located a well-respected and often-quoted China expert in one of the local universities who had been willing to put together a small group of (mostly) retired academics to discuss the organization of this “preliminary research” report in the most general terms.

The senior partners felt that obtaining some instruction on this aspect was imperative, because they feared that the actual analysis of the legal details would not require very much space. Based on that evaluation, several of them felt that they were going to need much “filler,” in order to justify the client’s outlay of \$2.5 million. Contrastingly, other people they consulted warned that this kind of thinking might be counter-productive. So, in order to put this matter to rest, they chose to hire this group of old China hands to obtain accurate information regarding “Chinese concepts of report writing.”

There were seven individuals in the group, and tentatively became known as C7. They met together with two of the senior partners on three occasions, and individually with the firm’s paralegals and “content creators” several more times. It was finally determined that in writing large reports of this kind, the Chinese were not only happy to see, but almost always expected to see, large amounts of background information, as well as subsidiary information.

Therefore, the C7 group came up with three primary recommendations. First, a detailed history of China – U.S. relations was certainly desirable. According to information gleaned from the National Archives and Records Administration, in 1784 the United States attempted to send a consul to China, but he was not received by the Chinese government. Formal diplomatic relations between the United States and the Chinese Empire only began on June 16, 1844, after lengthy negotiations. The angle to be presented on this was decided upon as follows –

Certainly, the failure of the two countries to begin working together constructively in 1784 was an unfortunate circumstance, and no doubt primarily due to the Americans’ failure to understand the ceremonial requirements of the Qing Court. Hence, it could easily be seen that throughout their history, and even in the present day, the Americans needed more contact with

Chinese officials at all levels, in order to better understand their thinking, customs, and traditions.

Second, it was also urged that that an essay on the “American View of Chinese History” could be added. This could include a complete review of the Chinese Dynasties, and the notable accomplishments of the different Emperors, from 2000 B.C. (or earlier) to the present, and was sure to be lengthy.

Third, an extensive report on “Needed Cooperative Efforts between China and the USA in the Future” was another suggested topic. Two of the key recommendations here were that in order to develop their high-tech sectors, the Chinese should encourage their high school and college graduates to do advanced studies in electrical engineering and related fields in the United States. At the same time, Chinese officials should encourage cooperative efforts between relevant research institutes in China and America.

There were numerous additional recommendations regarding useful content. Moreover, the C7 group even pointed out that they were aware that over the years, many of their graduate students had already completed thesis-quality in-depth research on many of these topics. As most of these former students were now teaching in various universities, it should be no problem to contact them and have them make the needed modifications to their writings, which they could then make available to Lippenberg, Flatzman, and Sleeny for a small copyright fee.

The paralegals made lists of all proposed content. Over and above what content could be directly “purchased,” the paralegals provided detailed summaries of the information they had uncovered, and the content creators were happy to fill in the gaps indeed they produced some lengthy pieces of reportage themselves.

The general instructions from the senior partners to all inside-house staff, secretaries, freelancers, part-time employees, and all other personnel who were involved in the writing was simple: “If it can be clearly described in three paragraphs, then expand it into six pages.”

Some congressional aides were also hired to write an extensive report on the “Taiwan Relations Act” which had been passed by the U.S. Congress in April, and then made retroactive to January 1, 1979. Questions regarding how this might affect future China – USA relations were analyzed in detail.

The final report containing the “preliminary research” filled six large binders, and was delivered to the office of a high ranking official in the PRC Embassy in Washington, D.C.

in the last week of December 1979.

A working outline, tentatively called an “Overall Summary,” of the high points of their research results had been developed as a guide in drafting the legal analysis content of the “preliminary overview.” However, for their own archival records, the administrative staff of the law firm hoped to make further revisions of this while their memories were still fresh. It was to be expanded upon, with further explanatory comments and legal verbiage added as necessary, phrasings and sentence structure adjusted as appropriate, and more clarity added to contrasting the “differing views” of the Chinese officials and the legal staff of Lippenberg, Flatzman, and Sleeny.

However, here below is attached the original (somewhat “rough”) version.

INVESTIGATION CONCLUSIONS OVERALL SUMMARY

PREFACE: In the subsequent summary, (1) the term “determinative legal body” will be used to refer to those official established “organizations” which rely strongly, or almost exclusively, on laws, legal standards, customary precedent, etc. in making their decisions and determinations. This term therefore would include, but not be limited to, the following: an arbitration group or association, officials in a legislative hearing, a court, any group of lawyers or legally trained personnel, a dispute resolution panel (e.g. assembled by any international organization to decide international disputes), a rights advocacy group (e.g. particularly those in the realm of international humanitarian law), a government Department (or Ministry) of Justice, etc.

(2) the term “Chinese representatives” will be used to refer to all Chinese officials with whom our law firm has been in touch during the conduct of this investigation and research project, including but not limited to officials of the Chinese Embassy and other formally established organizations, including foundations and associations, as well as all other personnel who have been active in explaining the Chinese point of view, whether in response to the questions raised by members of our law firm, or on their own initiative.

LEGAL OVERVIEW

* The announcement of “Taiwan Retrocession Day” by the Chiang Kai-shek regime on Oct. 25, 1945, was not accepted by the Allies. Officials of both the United States and

the U.K. lodged official protests at the time. Local protests in Taiwan were quickly silenced by the CKS regime.

* Our advisors with expertise in military matters say that it is the uniform opinion of international legal scholars that the surrender ceremonies in any location merely mark the beginning of the “military occupation.” Moreover, there is firm agreement in international law circles that military occupation does not transfer sovereignty.

* Moreover, the Allies recognized that Japan held the territorial sovereignty of “Formosa and the Pescadores” (aka Taiwan) until the date of April 28, 1952, whereupon according to Article 2(b) of the treaty it is specified

Japan renounces all right, title and claim to Formosa and the Pescadores.

Their signatures on the San Francisco Peace Treaty (SFPT) attest to this. Hence, we believe that no determinative legal body could agree that Japan’s sovereignty over Taiwan had been terminated, according to the completion of some specified actions, before this date.

* The Cairo Declaration (December 1, 1943) and Potsdam Proclamation (July 26, 1945) are best regarded as wartime statements of intent, and not as binding legal documents. Officials of both the United States and the U.K. have made such specific statements, and those have become part of the official record.

* Importantly, the Allies were not in physical possession of “Taiwan” when the Cairo Declaration and Potsdam Proclamation were issued. To explain the significance of this further, let us consider the group of President Franklin Roosevelt, Prime Minister Winston Churchill, President Harry Truman, Premier Joseph Stalin, and their successors as Party A. Let us further consider Chiang Kai-shek, representing the Republic of China, as Party B. The full texts of the Cairo Declaration and the Potsdam Proclamation are available in the Library of Congress here in Washington D.C. Hence, we can regard these as “written statements.” The time element we are speaking of begins with the Cairo Conference, which was November 22 to 26, 1943.

When one party (Party A) makes written statements expressing a future plan to give some physical property to another party (Party B), a determinative legal body will only regard this as a “valid promise” when it can be shown that Party A had full ownership of the property when those written statements were made. However, none of the Allies had ownership of Taiwan in late November 1943. Nor did they have ownership of

Taiwan in July 1945, or even in early Sept. 1945.

The conclusion must be that the Cairo Declaration (Dec. 1, 1943) and Potsdam Proclamation (July 26, 1945) can only be regarded as wartime statements of intent. They do not constitute “valid promises,” and cannot be interpreted as binding legal documents.

*** The Japanese Instrument of Surrender (Sept. 2, 1945) stipulates:**

We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith

However, thorough research into the conduct of Japanese officials during the period of the Allied Occupation of Japan (Fall 1945 to April 28, 1952) clearly shows that they had no “independence of action,” and were 100% subject to the overall control of the Allied occupation authorities.

Hence, it is fair to say that the final decision as to what content of the Potsdam Proclamation would be adhered to, and fully carried out, and what content would be effectively ignored, would be made by the Allied Command in Tokyo, in accompaniment with the personnel who drafted the SFPT. As we know, the peace treaty was drafted by officials of the U.S. State Dept., under the direction of Secretary of Defense George Marshall, and President Harry Truman. John Foster Dulles is often credited as supervising the completion of the SFPT.

We believe that any determinative legal body would hold that the content of the SFPT, signed by 48 nations, represents the final decision of the Allies in regard to the disposition of Japanese territory. Legal experts with whom we consulted in other law firms in the Washington D.C. area repeatedly stressed that: “With the coming into force of the SFPT, it no longer makes sense to continue debating the content of Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents in relation to the disposition of Taiwan.”

In other words, the SFPT represents the final decision. Importantly, it must be recognized that in drafting the SFPT, the personnel involved already took into account the content of the Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents.

John Foster Dulles affirmed that in the SFPT Japan "merely renounced sovereignty over

Taiwan." Based on this, Dulles held that: America "cannot, therefore, admit that the disposition of Taiwan is merely an internal problem of China."

* During the many discussions with the members of our firm, the statement that "*Governance over territory represents sovereignty*" was frequently mentioned. However, our advisors with expertise in military matters say that military occupation is a very common example of "governance without sovereignty." The Japanese occupation of Singapore during WWII and the United States occupation of the port of Tampico, Mexico, during the Mexican American War are two prominent examples. Full information on these is given in the Appendices.

Again, it is the studied opinion of all our advisors that Oct. 25, 1945, represented the beginning of the military occupation of Taiwan, and there was no transfer of the territorial sovereignty of Taiwan to China on that date.

* As we are aware, the PRC was founded on Oct. 1, 1949. However, no matter what date we pick in the period of the 1940s, the 1950s, the 1960s, the 1970s, etc. we cannot utilize the "successor states" or "successor government" theory to prove that the territorial sovereignty of Taiwan belongs to the PRC. In the simplest terms, this is explained by recognizing that the Republic of China did **not** obtain the territorial sovereignty of Taiwan

- (1) at any time before Oct. 25, 1945,
- (2) on the date of Oct. 25, 1945,
- (3) after the date of Oct. 25, 1945.

To restate this, Oct. 25, 1945, cannot be interpreted to be Taiwan Retrocession Day, and under international law, the territorial sovereignty of Taiwan remained with Japan until April 28, 1952.

Hence, although the "successor states" or "successor government" theory is valid from an international law standpoint, the PRC cannot use this rationale to claim ownership of Taiwan effective Oct. 1, 1949 (or on any other date). This is because the ROC has never held the territorial sovereignty of Taiwan.

This is further clarified by noting that according to the specifications of the April 28, 1952, San Francisco Peace Treaty, the territorial sovereignty of Taiwan was not awarded to China.

* During the many discussions with the members of our firm, the rationale that

*“In late April 1952, Japan gave up its territorial sovereignty of Taiwan, effectively leaving the territory as ‘abandoned’ or ‘with no owner.’ Clearly, the SFPT has **not** made any explicit cancellation of the pre-existing Chinese claims (as per ‘Taiwan Retrocession Day’), therefore the SFPT must be interpreted to say that the sovereignty of the Republic of China over Taiwan has been confirmed.”*

was frequently advanced. However, our advisors with expertise in military matters state the following rule –

For any territory separated from the motherland via a peace treaty after war, the military government of the legal occupier will continue until legally supplanted by a recognized civil government for the territory.

* According to the laws of war of the post-Napoleonic period, the legal occupier will be the conqueror. As best we can determine, the Republic of China military forces did not make any attacks against Taiwan territory in the period of early December 1941 to the Fall of 1945. Over 95% of military attacks against Taiwan during this period were made by United States military forces. Indeed, the SFPT identifies (or “confirms”) the United States as the principal occupying power. The position of the Republic of China military forces in Taiwan beginning Oct. 25, 1945, is best described as proxy occupying forces.

* Another implication of the fact that Japan held the territorial sovereignty of Taiwan until April 28, 1952, is that when the Republic of China moved its central government to occupied Taiwan in early December 1949, it was moving **outside** of China’s national territory and immediately became a government in exile.

We are informed that many Chinese people are **not** familiar with the concept of government in exile, and offer some appropriate definitions as follows:

- A government whose chief executive and other principal officials have fled their state in the face of hostile armed forces but which is recognized as the de jure government of its native country by at least one other state.
- A temporary government moved to or formed in a foreign land by exiles who hope to rule when their country is liberated.
- A government established outside of its territorial base.

- A political group that claims to be a country's legitimate government, but for various reasons is unable to exercise its legal power, and instead resides in a foreign country. Governments in exile usually operate under the assumption that they will one day return to their native country and regain power.
- A government which has either been forced out by revolution or usurpation, or invaded and taken over by another nation, and is now taking refuge elsewhere.
- A body which claims to be the legitimate government of a state, but which is unable to establish itself in the state in question.

* [OFF RECORD] During our meetings, Chinese representatives mentioned several items which they felt fully established the legitimacy of the Republic of China's rule (and "sovereignty") over Taiwan. Indeed, these appear significant, and we are unable to refute them. [The following analysis is to be retained in our law firm's archives; however, no mention of it will be made in the report presented to our Chinese clients.]

Specifically, in consideration that in General Order No. 1 of Sept. 2, 1945, General Douglas MacArthur had directed that Chiang Kai-shek go to Taiwan to accept the surrender of Japanese troops, and the chain of command was thereby established, with General MacArthur having superior command responsibility, we are unable to explain why General MacArthur allowed

- (A).The announcement of Taiwan Retrocession Day, on Oct. 25, 1945,
- (B).The mass naturalization of Taiwan people as Republic of China citizens on Jan. 12, 1946,
- (C).The promulgation of a Republic of China Constitution on Dec. 25, 1947, based on the above (A) and (B), and with neither a clear statement of military necessity, nor obtaining prior approval of the other (main) Allies.

Hence, we are left to conclude that these are all war crimes which, in our view, should be prosecuted by a U.S. military commission, which is an Article 2 court under the U.S. Constitution. Such a court would most properly be located in Taiwan. Authorities in international humanitarian law inform us that there is no statute of limitations on war crimes. However, even after repeated contacts and inquiries with the U.S. Dept. of State and Dept. of Defense regarding these matters, we have still been unable to obtain their views, and our requests for relevant information were replied to with the simple rejoinders of "That is classified."

* The observation that the 1895 treaty was an unfair and unequal treaty was made numerous times. However, after rigorous checking in legal archives, and interviews with legal experts in academia, we are unable to find any judicial precedent to say that a peace treaty, based on the charge of one signatory that it was “unequal,” could be invalidated, canceled, or nullified by any court or other determinative legal body. Significantly, several legal experts offered the opinion that treaties which involve “territorial cession” are unequal by definition.

The charge that the treaty was “unfair” also strongly appears to be very subjective, and we are unaware of what objective standards could be applied to this issue.

* CANCELLATION OF the 1895 treaty

It is alleged that the 1895 Treaty of Shimonoseki was announced as canceled by the Chiang Kai-shek regime (Republic of China) on numerous occasions during the late 1930s and early to mid-1940s. Additionally, a similar provision was included in the Treaty of Taipei (Aug. 5, 1952) in Article 4:

It is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.

However, the effect of such “announcements” needs to be examined. (See below.)

We are informed that many Chinese people are not familiar with the meaning of the word “title” as used in relation to matters involving property or territory, and suggest that “ownership” is a reasonable synonym. Regarding the cession of Taiwan to Japan in the 1895 treaty, an authoritative article in *The Yale Law Journal*, Vol. 81, No. 4, March 1972, entitled “Who Owns Taiwan: A Search for International Title” clarifies that --

Title vested in Japan at the time of, and/or because of, the Treaty of Shimonoseki, as the language of the Treaty clearly indicated. Such title, insofar as it is title, ceases to be a bilateral contractual relationship and becomes a real relationship in international law. Though contract may be a modality for transferring title, title is not a contractual relationship. Hence once it vests, it can no longer be susceptible to denunciation by a party to the treaty.

To put this in plain language, when a treaty is nullified, canceled, invalidated, etc. the only clauses which are affected are “active clauses.” Since the Qing Dynasty cession of Taiwan to Japan was already completed in 1895 via the specifications of Article 2 of the treaty, this Article 2 is no longer an “active clause.” Therefore at any future date, it is no longer subject to retroactive cancellation. We are unaware of the legal decisions of any

United States or international court in the period of the late 1780s to the present which would contradict this view.

* The points in our legal analysis, to be given below, are what we believe to be the most important. In our meetings, the San Francisco Peace Treaty was often mentioned, and most of the Chinese parties held the opinion that --

We didn't sign it, so we are not affected by it.

In other words, in their idea, as a non-signatory party, the stipulations in the San Francisco Peace Treaty are irrelevant to the Chinese claims of sovereignty over Taiwan.

As previously stated, in the Chinese view, the Treaty of Taipei (“Sino-Japanese Peace Treaty”) of August 5, 1952, should be regarded as most important. [Note: The Treaty of Taipei was abrogated unilaterally by the Japanese government on Sept. 29, 1972, as a result of the promulgation of the Japan-China Joint Communiqué.]

ANALYSIS OF THE TREATY OF TAIPEI

(1) On the surface, this Treaty of Taipei contains several important Articles and clauses that strongly appear to confirm Chinese sovereignty over Taiwan.

For example,

- Article 10 appears to confirm the nationality of Taiwan persons as ROC citizens.

However, further research into the records of the Japanese Diet quickly cast serious doubt on this statement. An authoritative analysis in “Historical and Legal Aspects of the International Status of Taiwan (Formosa),” Chapter III, by Ng, Yuzin Chiautong, 1972, World United Formosans for Independence (Tokyo) clarifies the following --

(3) Article X of the Treaty of Peace between the ROC and Japan stipulates as follows for the nationality of the Taiwanese:

"For the purpose of the present Treaty, the nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).... "

Simply stated, the "nationals of the ROC shall be deemed to include the Taiwanese." The use of the words "deemed" calls for attention. This is not an affirmative definition of the Chinese nationality of the Taiwanese people, but merely an agreement reached for the sake of convenience on the treatment of the Taiwanese as the ROC nationals. On this point, Mr. Eiji Wajima, Director of the Asian Affairs Bureau, the Japanese Ministry of Foreign Affairs, told the House of Representatives Standing Committee for Foreign Affairs (May 23, 1952), in his capacity as government member, that the status of Taiwan remained undefined and that since the inhabitants of Taiwan who were formerly Japanese nationals lost the Japanese citizenship, and unless some measure being taken, they were not able to travel to Japan. Therefore, they were "deemed" to be Chinese nationals.

(Reference: The 13th Japanese National Diet, House of Representatives, Standing Committee Record, Vol. 4, no. 25, p. 25)

At the same committee on May 30, Mr. Kanichiro Ishihara, Vice Minister of Foreign Affairs, was more explicit in his answer to a question raised by Mr. Hyakuro Hayashi, a member of the Standing Committee:

Hyakuro Hayashi: "When it says 'deemed to include', how different is it from saying 'are nationals'?"

Ishihara: "The word 'deemed' is used here because the territorial issue has not yet been brought to a final resolution."

(Reference: The 13th Japanese National Diet, House of Representatives, Standing Committee Record, Vol. 4, no. 28, p. 7)

(4) In the Treaty of Peace between the ROC and Japan the term "residents" is clearly distinguished from "nationals".

To refer to the Japanese the treaty says "Japanese nationals", but it does not call the Taiwanese "Chinese nationals" but instead, it prefers the term "residents". This shows that the Taiwanese are not "Chinese nationals" but only "deemed" to be such. Article III of the Treaty is illustrative of this point:

"The disposition of property of Japan and of its nationals in Taiwan..., and their claims, including debts, against the authorities of the Republic of China in Taiwan and the residents thereof, and the disposition in Japan of property of such authorities of residents and their claims, including debts against Japan and its nationals, shall be the

subject of special agreements between the Government of Japan and the Government of the Republic of China."

Arguments of both Japan and the ROC in the conduct of negotiations for the Treaty of Peace between the ROC and Japan have been made clear in the course of deliberations in the Japanese National Diet. The ROC persisted in its demand for clearly identifying Taiwan as its state territory, while Japan refused to comply with the demand.

(2) Many Chinese scholars claim that the Treaty of Taipei is clearly a bilateral treaty. Based on this simple fact, since one side "renounced" Taiwan's territorial sovereignty, it could only be interpreted to say that the other side "received." So, to put that in simple terms, when Japan renounced Taiwan, China was the recipient.

However, this analysis is incorrect. Japan's renunciation of Taiwan's territory sovereignty occurred in the SFPT as of April 28, 1952. When the Treaty of Taipei came into force on Aug. 5, 1952, Japan no longer held the territorial sovereignty of Taiwan, and therefore could not renounce it.

(3) Of primary importance, we believe, is the content of Article 2.

It is recognised that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands.

The Treaty of Taipei is a subsidiary treaty under the provisions of Article 26 of the San Francisco Peace Treaty. The representatives of the Republic of China, by concluding this bilateral treaty with Japan, have recognized that fact. Moreover, according to Article 2 of the Treaty of Taipei, these representatives have recognized that Article 2 of the SFPT clearly specified that

Japan renounces all right, title and claim to Formosa and the Pescadores. and that no receiving country was specified.

THEREFORE, IN SUMMARY, our studied legal opinion as follows: Based on the content of the Treaty of Taipei, which the government of the Republic of China concluded with Japan, the government of the Republic of China has agreed to be bound by the San Francisco Peace Treaty, and fully accept the specifications of that treaty in regard to the disposition of Taiwan territory, which means that Taiwan does not belong to China.

We finish by stating that --

“Full documentation regarding all the above items, including many excerpts from the ‘Foreign Relations of the United States’ series, published by the U.S. Dept. of State, along with analysis from leading law journals, are available in the Appendices. Some U.S. court case references are also given where they serve to illustrate the accepted U.S. legal view or legal interpretation of relevant points.”

The final recommendation of Lippenberg, Flatzman, and Sleeney was that a lawsuit of this type should not be pursued.

ADDITIONAL RECOMMENDATIONS (“BY THE SIDE”)

Setting aside the cold legal analysis temporarily, several of the paralegals and content creators thought it might be a good idea to write up a few dozen pages of “further recommendations,” which were the result of some serious efforts to “think outside the box,” and would best be regarded as “extra recommendations and supplements (ERS).” Five persons made up this group, and they called themselves “ERS5.”

This report was written in a casual style. A general overview is provided as follows.

First, ERS5 wanted to stress at the outset that all the information which the Chinese representatives had provided was indeed very good data. That data, and the viewpoints expressed therein, should still be regarded as highly significant, useful, constructive, precious, important, beneficial, worthwhile, etc. for the general purpose of promoting the PRC’s overall goal, which was to have Taiwan recognized as territory of the PRC. In terms of having debates, or writing essays for the U.S. and international newspapers, or issuing white papers, this was all good information, and very valuable if used in an appropriate way. Many powerful arguments that fully supported the PRC’s point of view could be made by utilizing this information.

Frankly speaking, most common people, whether in the United States, Europe, etc. would be unable to see the flaws in these arguments.

Nevertheless, it needed to be pointed out that it was still inadvisable to advance these arguments (no matter how “polished”) in promoting any sort of formal legal agenda. This is because these arguments would not stand up to serious scrutiny by legal professionals, including lawyers, judges, etc.

Second, ERS5 suggested that other types of persuasion techniques could be undertaken, which might prove quite effective. In other words, the “simple” can sometimes be more effective than the “complex.” An example of this is when a magician practices many months to perfect a difficult magic technique. However, when he finally has the courage to perform this in front of an audience, the response he gets approaches a collective yawn. Contrastingly, he may know another trick which is almost 100% “self-working,” but when performed in front of an audience gets an extremely enthusiastic response.

Thinking along this line, ERS5 came up with the following scenario. Let’s consider birds, reptiles, and mammals. After referring to many books on biology, the members of ERS5 note that there are some species which are considered “native” to Taiwan.

These would include the

- Formosan whistling thrush
- Formosa hill partridge
- Formosa horseshoe bat
- Formosa grass lizard
- Formosa coral snake
- Formosa black bear
- etc.

On a psychological level, the fact that these species are “native” to Taiwan appears to indicate that Taiwan is also separate from China. But, what if evidence could be found to support the contention that one or more of these species actually originated in China? Psychologically, this might be significant.

Third, the members of ERS5 recall that one evening at dinner, some of the Chinese officials elaborated on some important Chinese scholarly reports which had been published recently. These reports claimed that “new evidence” had been found which strongly supported the premise that Taiwan had been an integral part of China as far back as the period of the Five Dynasties (907 to 960 A.D.)

However, if “new evidence” can be found in the present era to support such a premise, in relation to historical events of nearly 1100 years ago, it certainly should not be difficult for the Chinese scholars involved to **redouble their efforts** and search for more “new evidence” which would support the premise Taiwan had been an integral part of China as far back as 600 A.D.

In the opinion of ERS5, the number “6” has a nice ring to it, and is more pleasing to the ear. Incidentally, one of the members of our group here at the law firm did a world history report on the period of 600 to 625 A.D. during his high school years, and so he has always been fond of that period.

The (western-calendar) New Year: January 1, 1980

The senior partners were understandably nervous as they entered the month of January 1980. While the Chinese had already paid the balance due of the \$2.5 million in early December, it was not known what their reaction might be to a report of this type. Two of the senior partners even suggested that the Chinese might feel that they paid a lot of money for a lot of useless information. This view was simply based on the undeniable fact that at the end of the report, no optimistic recommendations for future proposed legal action were given. To put that in plain language, in the considered opinion of the law firm’s top lawyers and other legal staff, it was felt that launching a lawsuit of this type in the U.S. court system was unlikely to produce any positive results. That had been their final conclusion.

Contrasted to this, the Chinese were known to be “results oriented.” Many Chinese movies attested to this fact. When a select person was sent out on a special mission and returned empty-handed, and regardless of the objective difficulties involved in the entire endeavor, that person was held “personally responsible” for failure, and then was subjected to what could only be described (in modern terms) as “the most appalling violations of the Hague and Geneva Conventions which anyone could imagine.”

As a result, in the first few weeks of January, all sorts of visions floated through the heads of the senior partners, all the way from supposing that the Chinese might use their diplomatic clout to have Lippenberg, Flatzman, and Sleeny blacklisted by various international groups or organizations, or that they might simply file complaints with the Bar Association to have the firm’s licenses revoked, or more directly that they might just hire another law firm to launch a massive lawsuit against them, listing out various charges including “misrepresentation and malpractice.”

With these thoughts floating in their minds, the senior partners began the year of 1980.

(to be continued)

Notes and References

All Wikipedia references were further verified against relevant entries in the print and/or online editions of the Encyclopedia Americana, Encyclopedia Britannica, World Book Encyclopedia, or <https://www.encyclopedia.com/>

All internet references were visited during the month of November 2019.

General References

Use of Force by States

https://en.wikipedia.org/wiki/Use_of_force_by_states

Lessons from the Spanish American War

<https://www.twclarify.com/taiwan/pages/sov2/>

Areas Conquered by U.S. Military Forces and therefore under USMG Jurisdiction

<https://www.twclarify.com/taiwan/pages/milchart/>

Treaties, Laws, and Other Interesting References

<https://www.taiwanbasic.com/treaties/tmenu.htm>

Research on Taiwan's Position as a US Insular Area

<https://www.taiwanadvice.com/research.htm>

UN Charter

<https://www.un.org/en/sections/un-charter/un-charter-full-text/>

Spanish American War

https://en.wikipedia.org/wiki/Spanish%E2%80%93American_War

Napoleonic Wars https://en.wikipedia.org/wiki/Napoleonic_Empire_Wars

Occupation <http://www.lawofwar.org/Occupation.htm>

Occupation and international humanitarian law: questions

<https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>

Treaty of San Francisco https://en.wikipedia.org/wiki/Treaty_of_Peace_with_Japan

The Laws of War and Taiwan https://www.twtreaties.net/laws_war_intro.htm

Chapters 2, 3, 4

Allodial -- legal definition of Allodial <https://legal-dictionary.thefreedictionary.com/Allodial>

Escheat <https://en.wikipedia.org/wiki/Escheator>

British Empire in World War II

https://en.wikipedia.org/wiki/British_Commonwealth_in_World_War_II

History of Singapore https://en.wikipedia.org/wiki/History_of_Singapore

<https://thecommonwealth.org/our-member-countries/singapore/history>

Chapter 6

Article 4, Section 3, Clause 2: Joseph Story, Commentaries http://press-pubs.uchicago.edu/founders/documents/a4_3_2s8.html

The True Legal Relationship between Taiwan and the USA
<https://www.taiwanbasic.com/ebooks/trelation/tcg-taiwanese-sky.doc>

Conquest and Dominion. <https://www.taiwanbasic.com/key/dc/conqudm6.htm>

Fleming v. Page, 50 U. S. 603 (1850) - US Supreme Court
https://www.chanrobles.com/usa/us_supremecourt/50/603/index.php

Rules of Land Warfare, FM-27-10, 1 October, 1940.
https://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1940.pdf

Military Jurisdiction. <https://www.taiwanbasic.com/key/milgovexref.htm>

Originalism <https://en.wikipedia.org/wiki/Originalism>

May 13, 1846: U.S. Congress Approves Declaration of War
<https://www.zinnedproject.org/news/tdih/congress-approves-declaration-of-war-against-mexico/>

James K. Polk https://en.wikipedia.org/wiki/James_K._Polk

Taiwan Perspectives (4): Lessons from the Mexican American War.
<https://www.twclarify.com/taiwan/pages/sov4/index.html>

The Law of Nations https://en.wikipedia.org/wiki/The_Law_of_Nations

The Law of Nations as Constitutional Law
https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1478&context=faculty_publications

History of Texas https://en.wikipedia.org/wiki/History_of_Texas

Chapter 7

Lieber Code https://en.wikipedia.org/wiki/Lieber_Code

Treaties, States parties, and Commentaries - Lieber Code, 1863. <https://ihl-databases.icrc.org/ihl/INTRO/110>

FM 27-10 Oct. 1, 1940 - Taiwan Governance.
<https://www.taiwanbasic.com/cbs/viewtopic.php?t=83>

Rules of Land Warfare <http://www.90thidpg.us/Reference/Manuals/FM%2027-10.pdf>

Rules of Land Warfare, FM-27-10, 1 October, 1940.
https://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1940.pdf

Hague Conventions <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/73cb71d18dc4372741256739003e6372/4d47f92df3966a7ec12563cd002d6788>

Government in Exile
<https://www.taiwanbasic.com/key/dc/rocexile-ex.htm>

MCTP 11-10C > United States Marine Corps Flagship
<https://www.marines.mil/News/Publications/MCPEL/Electronic-Library-Display/Article/1464554/mctp-11-10c-formerly-mcrp-5-121a>

Martial Law legal definition of Martial Law <https://legal-dictionary.thefreedictionary.com/Martial+Law>

“Martial Law” in the United States Today | Constitutional

<https://constitutionalmilitia.org/martial-law-in-the-united-states-today/>

Status of forces agreement https://en.wikipedia.org/wiki/Status_of_forces_agreement

Jefferson Davis https://en.wikipedia.org/wiki/Jefferson_Davis

End of World War II in Asia https://en.wikipedia.org/wiki/End_of_World_War_II_in_Asia

Chapter 8

Taiwan Perspectives (4): Lessons from the Mexican American War.

<https://www.twclarify.com/taiwan/pages/sov4/index.html>

Principle of Conquest <https://www.civil-taiwan.org/prin-conq.htm>

The True Legal Relationship between Taiwan and the USA.

<https://www.taiwanbasic.com/ebooks/trelation/tcg-taiwanese-sky.doc>

Northwest Territory's at-large congressional district

https://wikimili.com/en/Northwest_Territory's_at-large_congressional_district

Northwest Territory https://en.wikipedia.org/wiki/Territory_Northwest_of_the_River_Ohio

Franklin Pierce and Formosa

<https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-0400788>

<https://kansaspres.ku.edu/978-0-7006-0494-4.html>

<https://www.jstor.org/stable/24436590?seq=1>

Trump is the executive that the founding fathers

<https://www.tigerdroppings.com/rant/politics/trump-is-the-executive-that-the-founding-fathers-anticipated/84474580/>

1788–89 United States presidential election – WikiVisually

https://wikivisually.com/wiki/1788%E2%80%9389_United_States_presidential_election

Organized incorporated territories of the United States

https://en.wikipedia.org/wiki/Organized_incorporated_territory_of_the_United_States

Unincorporated territories of the United States

https://en.wikipedia.org/wiki/Unincorporated_territory_of_the_United_States

Convention between the United States and Denmark for cession of the Danish West Indies

https://www.taiwanbasic.com/treaties/39Stat_1706.htm

Taiwanese Human Rights: Laws of War Part 4 <https://www.twclarify.com/issues/low/lowP4.html>

Full text of "Mil Gov Mar Law Burkheimer.pdf" https://archive.org/stream/pdfy-XJzlyQ74AYu9Cpik/Mil%20Gov%20Mar%20Law%20Burkheimer_djvu.txt

<https://www.civil-taiwan.org/mil-gov.htm>

Military Government <https://www.civil-taiwan.org/mil-gov.htm>

Military Government and Martial Law <https://www.taiwanbasic.com/military/birkhimer01w.htm>

National Guard Bureau - WikiMili, The Free Encyclopedia.

https://wikimili.com/en/National_Guard_Bureau

Treaty of the Danish West Indies https://en.wikipedia.org/wiki/Treaty_of_the_Danish_West_Indies

IC 5-16-8 Chapter 8. Steel Procurement for Public Works IC

<https://statecodesfiles.justia.com/indiana/2015/title-5/article-16/chapter-8/chapter-8.pdf>

The Taiwan Question: Historic Mismanagement by the US

<http://www.taiwanbasic.com/main/draft/TVseries-final.doc>

Military Jurisdiction Law and Legal Definition | USLegal, Inc..

<https://definitions.uslegal.com/m/military-jurisdiction/>
Military Jurisdiction <https://www.taiwanbasic.com/key/milgovexref.htm>
Organic act https://en.wikipedia.org/wiki/Organic_Act
Commonwealth <https://en.wikipedia.org/wiki/Commonwealth>
Commonwealth (U.S. insular area)
[https://en.wikipedia.org/wiki/Commonwealth_\(U.S._insular_area\)](https://en.wikipedia.org/wiki/Commonwealth_(U.S._insular_area))
Protectorate <https://en.wikipedia.org/wiki/Protectorate>
“Palestine : Israeli Settlers Close Nablus-Tulkarm Main Roads.” MENA Report, Albawaba (London) Ltd., Mar. 2017, p. n/a.
Cross v. Harrison, 57 U.S. 164 (1853)
<https://supreme.justia.com/cases/federal/us/57/164/>

Chapter 9

Colonial history of the United States
https://en.wikipedia.org/wiki/Colonial_history_of_the_United_States_of_America
United Nations Security Council Resolution 242 - WikiMili
https://wikimili.com/en/United_Nations_Security_Council_Resolution_242
History of Guam - Infogalactic: the planetary knowledge core
https://infogalactic.com/info/History_of_Guam
History of Guam https://en.wikipedia.org/wiki/History_of_Guam
The Kingdom of Lapania | The Future Of Europes Wiki
https://thefutureofeuropes.fandom.com/wiki/The_Kingdom_of_Lapania
History of Cuba https://en.wikipedia.org/wiki/History_of_Cuba
History of Puerto Rico https://en.wikipedia.org/wiki/History_of_Puerto_Rico
History of the Philippines (1521–1898)
https://en.wikipedia.org/wiki/Spanish_colonization_of_the_Philippines
Spanish–American War https://en.wikipedia.org/wiki/Spanish%E2%80%93American_War
Taiwan's International Legal Status - Frequently Asked Questions
<https://www.twclarify.com/faq/faq04.html>
1977 Protocols to the Geneva Conventions
<https://ihl-databases.icrc.org/ihl/INTRO/470>
Mayflower Compact
<https://www.history.com/topics/colonial-america/mayflower-compact>
Points of Confusion over the Cuba Question and Cuba Sovereignty
<https://www.taiwanadvice.com/csovtrust.htm>
Research on Taiwan’s Position as a US Insular Area <https://www.taiwanadvice.com/research.htm>
US Insular Areas – The Taiwan Connection
<https://www.taiwanadvice.com/>
Harry S. Truman https://en.wikipedia.org/wiki/Harry_S._Truman
‘general close of military operations leading to the occupation’, 99 AJIL 102 (2005) 106
<https://tinyurl.com/yxq4nhp6>
Essays on the International Legal Status of Taiwan

<https://www.taiwanbasic.com/const/taiwanstat7a.doc>

John Locke https://en.wikipedia.org/wiki/John_Locke

Federal voting rights in Puerto Rico - WikiMili, The Free
https://wikimili.com/en/Federal_voting_rights_in_Puerto_Rico

The True Legal Relationship between Taiwan and the USA.
<https://www.taiwanbasic.com/ebooks/trelation/tcg-taiwanese-sky.doc>

Ethics and the Laws of War <https://tinyurl.com/y23tw25s>

Quote by Thomas Paine: "In the early ages of the world
<https://www.goodreads.com/quotes/406585-in-the-early-ages-of-the-world-according-to-the>

Quote by Thomas Paine: "As the exalting one man so greatly
<https://www.goodreads.com/quotes/638960-as-the-exalting-one-man-so-greatly-above-the-rest>

When we are planning for posterity, we ought to remember
<https://kosmicdebris.blogspot.com/2013/02/when-we-are-planning-for-posterity-we.html>

Introduction < Thomas Paine - Common Sense (1776) < 1776
<http://www.let.rug.nl/usa/documents/1776-1785/thomas-paine-common-sense/introduction.php>

A Year to Begin the World Over Again | The Nation. <https://www.thenation.com/article/year-begin-world-over-again/>

Tom Paine on the "birthday of a new world" (1776) - Online <https://oll.libertyfund.org/quote/381>

Natural rights and legal rights https://en.wikipedia.org/wiki/Natural_Rights_theory

Unalienable vs. Inalienable - What's the difference? | Ask
<https://www.askdifference.com/unalienable-vs-inalienable/>

Two Treatises of Government https://en.wikipedia.org/wiki/Second_Treatise_on_Civil_Government

Last Night's Cafe: Ethics and the Laws of War – Cardiff
<http://philosophycafe.org.uk/index.php/2017/09/20/last-nights-cafe-ethics-and-the-laws-of-war/>

Taiwan Perspectives (3): Lessons from the War of 1812
<https://www.twclarify.com/taiwan/pages/sov3/>

Principle of Conquest. <https://www.civil-taiwan.org/prin-conq.htm>

Enlightenment Thinkers | Boundless World History. <https://courses.lumenlearning.com/boundless-worldhistory/chapter/enlightenment-thinkers/>

American Insurance Company vs. Carter [1828]
<https://www.historycentral.com/documents/AmericanInsurance.html>

US Insular Areas: the Taiwan Connection. <https://taiwanadvice.com/>

US Insular Areas: Application of the US Constitution <https://www.gao.gov> › archive

Chapter 10, Chapter 11, Chapter 11: Appendix A

Ryukyus and Taiwan. <https://www.taiwanbasic.com/key/>

Chiang Kai-shek's Ryukyu Island Policy
<https://www.tandfonline.com/doi/abs/> <https://tinyurl.com/snylsc5>

Ryukyu Islands, Republic of China?
<http://www.novabbs.com/index.php?t=msg&th=236033&goto=1348782&>

United Nations Charter - fsmLaw.org. <http://fsmLaw.org/miscdocs/uncharter.htm>
<https://www.un.org/en/charter-united-nations/>

Dulles - on the Status of Okinawa (Residual Sovereignty) <http://ryukyu-okinawa.net/pages/archive/dulles.html>

Untying the Knot, by Richard C. Bush, Brookings Institution Press, Washington, D.C. (2005)

The Principle of One China and the Legal Status of Taiwan
<https://www.jstor.org/stable/44288637?seq=1>

Okinawa, Taiwan, and the Senkaku/Diaoyu Islands in United States–Japan–China Relations
<https://apjif.org/2015/13/28/Kimie-Hara/4341.html>

Formosa Air Battle
https://en.wikipedia.org/wiki/Formosa_Air_Battle
http://www.historyofwar.org/articles/battles_formosa.html

The Battle of Okinawa, 1945: Final Turning Point in the Pacific
<https://www.jstor.org/stable/3054378?seq=1>

United States Army in World War II, War in the Pacific: Okinawa, The Last Battle
<https://books.google.com.tw/> <https://tinyurl.com/rcmx5mu>

The San Francisco Peace Treaty
<https://www.twclarify.com/taiwan/pages/sfpt/>

Treaty of San Francisco https://en.wikipedia.org/wiki/San_Francisco_Treaty

Constitution of Japan https://en.wikipedia.org/wiki/Constitution_of_Japan

Treaty of Taipei https://en.wikipedia.org/wiki/Treaty_of_Taipei

Military Government <https://www.civil-taiwan.org/mil-gov.htm>

Who Owns Taiwan https://www.taiwanbasic.com/lawjrn/who_owns_tai4.htm

Title - definition of title by The Free Dictionary. <https://www.thefreedictionary.com/title>

Title - definition of title by The Free Dictionary. <https://www.thefreedictionary.com/title>

Acquisition of sovereignty https://en.wikipedia.org/wiki/Acquisition_of_sovereignty

Article Two of the United States Constitution
https://en.wikipedia.org/wiki/Article_Two_of_the_United_States_Constitution

Greenberger, David. "Does The Federal Arbitration Act Preempt State Laws Banning The Mandatory Arbitration Of Sexual Harassment Claims?" *Dispute Resolution Journal*, vol. 73, no. 3, American Arbitration Association, Jan. 2018, p. 47.

Equating Test Scores (without IRT). <https://www.ets.org/Media/Research/pdf/LIVINGSTON.pdf>

Chapter 12

Svalbard Treaty https://en.wikipedia.org/wiki/Svalbard_Treaty

Battle of Britain — Google Arts & Culture
<https://artsandculture.google.com/entity/m0fwxz?categoryId=event>

Battle of Britain https://en.wikipedia.org/wiki/Battle_of_Britain

The Blitz https://en.wikipedia.org/wiki/The_Blitz

Military history of the United States during World War II
https://en.wikipedia.org/wiki/Military_history_of_the_United_States_during_World_War_II

History of Iceland https://en.wikipedia.org/wiki/History_of_Iceland

Lend-Lease <https://en.wikipedia.org/wiki/Lend-Lease>

United States Navy in World War II
https://en.wikipedia.org/wiki/United_States_Navy_in_World_War_II

Category: Allies. <https://wwii.ultimateflags.com/product-category/allies/>

Pearl Harbor Attack Photos And Stories That Capture <https://allthatsinteresting.com/pearl-harbor-attack-pictures>

Chapter 13

History of the Ryukyu Islands https://en.wikipedia.org/wiki/History_of_the_Ryukyu_Islands

The Ryukyu Islands <https://www.jstor.org/stable/1951006>

Hugo Grotius https://en.wikipedia.org/wiki/Hugo_Grotius

History of Aviation https://en.wikipedia.org/wiki/History_of_aviation

Law of Agency https://en.wikipedia.org/wiki/Law_of_agency

Law of Agency <https://www.lawteacher.net/free-law-essays/commercial-law/the-law-of-agency-commercial-law-essay.php>

Law of Agency <https://www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-15-law-of-agency>

Agency Law <https://definitions.uslegal.com/a/agency/>

Agency Law <https://www.ucalgary.ca/biztechlaw/node/208>

Agency <https://legal-dictionary.thefreedictionary.com/agency>

Principles of the Law of Agency <https://www.bloomsburyprofessional.com/uk/principles-of-the-law-of-agency-9781782252481/>

Allied Kommandatura https://en.wikipedia.org/wiki/Allied_Kommandatura

Allied Kommandatura <https://discovery.nationalarchives.gov.uk/details/r/C15437>

Allied Control Council https://en.wikipedia.org/wiki/Allied_Control_Council

Allied Control Council http://ghdi.ghi-dc.org/sub_document.cfm?document_id=2298

Allied Control Council

<https://www.cambridge.org/core/journals/international-organization/article/allied-control-council-for-germany/D1CC875F3D96F5DA8E086A5EE0BE1238>

Condominium <https://en.wikipedia.org/wiki/Condominium>

Condominium <https://dictionary.cambridge.org/dictionary/english/condominium>

Condominium <https://www.merriam-webster.com/dictionary/condominium>

Terra Nullius https://en.wikipedia.org/wiki/Terra_nullius

Terra Nullius

<http://homepages.gac.edu/~lwren/AmericanIdentitiesArt%20folder/AmericanIdentitiesArt/Terra%20Nullius.html>

Chapter 14, and Chapter 14: Appendix A, Appendix B

UNITED STATES, as the United States Element, Allied INGRID <http://webcast-law.uchicago.edu/tribunals/docs/USvTiede.pdf>

Taiwan and Occupied West Berlin <https://www.taiwanadvice.com/westberlint.htm>

United States v. Tiede, 1979 <https://www.taiwanbasic.com/wash/USvTiede.doc>

United States v. Tiede <http://www.uniset.ca/other/cs4/86FRD227.html>

Treaty of San Francisco – Wikisource https://en.wikisource.org/wiki/Treaty_of_San_Francisco

Taiwan as a US Overseas Territory https://www.taiwanbasic.com/key/dc/tw_insul6.htm

The Principle of Conquest
<https://www.civil-taiwan.org/prin-conq.htm>

Chapter 15

The Successor Government Theory and the One China Policy
https://www.taiwanadvice.com/1china_wwii.htm

History of the People's Republic of China (1949–1976) https://en.wikipedia.org/wiki/Maoist_China

Justiciability – WikiMili <https://wikimili.com/en/Justiciability>

Justiciability <https://en.wikipedia.org/wiki/Justiciability>

Separation of Powers, the Political Branches, and the Limits of Judicial Review
https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1366&context=faculty_publications

Baker v. Carr, 369 U.S. 186 (1962) <https://supreme.justia.com/cases/federal/us/369/186/>

The Relationship between Judicial and Political Branches of Government
https://link.springer.com/chapter/10.1007%2F978-3-322-96982-8_2

Sovereign immunity https://en.wikipedia.org/wiki/Sovereign_immunity

Sovereign immunity in the United States
https://en.wikipedia.org/wiki/Sovereign_immunity_in_the_United_States

Tort | Wex | US Law | LII / Legal Information Institute. <https://www.law.cornell.edu/wex/tort>

1943 Cairo Declaration https://en.wikipedia.org/wiki/1943_Cairo_Declaration

Togo, Kazuhiko. “Japan-China-US Relations and the Senkaku/Diaoyu Islands Dispute: Perspectives from International Relations Theory.” Asian Perspective, vol. 38, no. 2, Kyungnam University, Institute for Far Eastern Studies, Apr. 2014

Japanese Instrument of Surrender - Wikisource, the free
https://en.wikisource.org/wiki/Japanese_Instrument_of_Surrender

China–United States relations https://en.wikipedia.org/wiki/Sino-American_relations

Treaty of Taipei https://en.wikipedia.org/wiki/Sino-Japanese_Peace_Treaty

The Avalon Project : First Instrument of Surrender. <https://avalon.law.yale.edu/wwii/j4.asp>

ROC Government in Exile. <https://www.civil-taiwan.org/roc-exile.htm>

Republic of China on Taiwan. <https://www.taiwanbasic.com/civil/histdev.htm>

Treaty of Taipei <https://www.taiwandocuments.net/taipei01.htm>

WOT: Mutual Defense Treaty https://www.taiwanbasic.com/lawjrn/who_owns_tai4.htm

Historical and Legal Aspects of the International Status
<https://www.taiwanbasic.com/lawjrn/historical-legal2.htm>
<https://www.taiwanbasic.com/lawjrn/historical-legal2c.htm>

Who Owns Taiwan? https://www.taiwanbasic.com/lawjrn/who_owns_tai.htm

Resolving Cross-Strait Relations
<https://www.taiwanbasic.com/lawjrn/res-cs2.htm>

One China Policy and Taiwan <https://www.taiwanbasic.com/lawjrn/onechina-tai.htm>
<https://www.taiwanbasic.com/lawjrn/onechina-tai5.htm>

Acknowledgements

Over the past several years, much invaluable research assistance has been provided by the following two individuals

Jeffrey Geer, JD Las Vegas, Nevada, USA	Dr. Paul Maas Risenhoover, Esq., J.D. Executive Director Robin Hood International Human Rights Legal Defense Fund Tainan, Taiwan
--	--

In debating Taiwan's international situation, these gentlemen have provided many important viewpoints. However, after deep reflection, in many cases the author has found it necessary to expand upon their research, analysis, and commentary, and/or make separate evaluations of whether certain "historical data" or "legal opinions" continue to be relevant in the current day. Hence, the opinions and conclusions expressed in this volume are those of the author.

Pen Name

The author has written this volume under the pen name of **Radford W. Hetterswift**.

Pronunciation Guide

Pronunciations for two difficult words which appear numerous times in this volume are given below. For each of these, the accent is on the first syllable.

Ryukyu	RU - ku <i>which is</i> “RU” as in ruby “ku” as in kudo
Czyzak	SIZE - ak

Notes and References

The Notes and References section, as given beginning on p. 309, has been condensed. For a more complete listing, please see –

<https://www.twdefense.info/references.htm>

Contact Information

The Taiwan Autonomy Foundation may be contacted by email or FAX. See --
<https://www.twdefense.info/contact.htm>

"Our policy is clear. There is only one China. Taiwan is not independent. It does not enjoy sovereignty as a nation, and that remains our policy, our firm policy."

-- statement by U.S. Secretary of State Colin Powell, October 25, 2004

"Taiwan, or the Republic of China, is not at this point a state in the international community. The position of the United States government is that the ROC -- Republic of China -- is an issue undecided, and it has been left undecided, as you know, for many, many years."

-- statement by Senior Director for Asian Affairs, National Security Council, Dennis Wilder, August 30, 2007

U.S. arms sales to Taiwan need to be based on the premise that Taiwan's Ministry of National Defense (MND) is legally established, but the statements of Powell and Wilder strongly appear to deny this premise.

Considering that Taiwan was not awarded to the Republic of China in the post-war San Francisco Peace Treaty of 1952, then

* Why do U.S. Customs officials (USCBP) accept Republic of China passports as being issued by a "competent authority" under INA 101 (a)(30)?

* Why has the Republic of China established an MND on Taiwan soil with an annual budget averaging US\$ 10 billion?

* Why haven't any U.S. government officials commented on the fact that the Supreme Court has previously ruled that military conscription policies must be based on national sovereignty?

Our Foundation's researchers have looked at these and all related issues in detail, and now conclude that the time has come for a complete re-evaluation of the military component of the Taiwan – USA relationship.

Taiwan Autonomy Foundation
Los Angeles, California