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A HISTORY OF MILITARY GOVERNMENT IN NEWLY ACQUIRED TERRITORY OF THE UNITED STATES

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A HISTORY

OF

MILITARY GOVERNMENT

IN NEWLY ACQUIRED

TERRITORY OF THE UNITED STATES

BY

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Sunt et belli, sicut pacis jura.—LIVY

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To

My Mother

AND TO THE MEMORY OF MY SISTER

Mary Virginia

PREFACE

WHEN the Constitution of the United States was drafted and adopted no specific provision was made for expansion. In consequence of this, some have doubted whether we had the power to acquire new territory, and especially to incorporate it with the old. In spite of this, however, we have acquired a domain much larger than that comprised within the boundaries of the original thirteen States. The government of such territory before its incorporation has presented some interesting problems.

The framers of the Constitution probably thought that they had subordinated the military to the civil power in almost all cases, but a century has seen a remarkable growth in the scope of the former. It would be absurd to think of a civil power in hostile territory superior to the military power occupying the country; but upon the transfer of sovereignty the territory ceases to be hostile, unless a serious insurrection is raised, yet the military continues to administer affairs until Congress provides some form of government. Even in territory acquired by treaties of purchase in times of peace the military, or at least the Executive prerogative, which is generally based upon military authority, has played a more or less important part until such action by Congress. For that reason the governments of Louisiana and Florida in the transition stage have been included in this study, though there may be some doubt as to whether they were strictly military. At any rate they were so regarded by some at the time, and perhaps they were more military than civil.

The legal status of new territory, and the legal basis for military government and its various administrative activities, must receive much attention in this book, but those topics are not all that is included in the purpose of the work. It is designed to present also an account of the actual management of new acquisitions from the time of occupation until the organization of territorial or state governments. As to Louisiana, Florida, New Mexico, and California, this plan involves practically a political history of those regions during that period. In the case of Texas, there was no transition stage, strictly speaking. In the case of Alaska, Hawaii, Porto Rico, the Philippines, and Samoa it has seemed unnecessary, not to say improper, to go into details upon the same scale. The treatment accorded to them is intended to show the development in military government since the Mexican War, or its application under modern conditions; also to show how the constitutional questions involved were met, that the reader may compare recent action in this matter with earlier cases. What has been the character of these later governments, what they have accomplished for good or evil, is left, for the most part, to the reader's memory of partisan accounts, or to the researches of a later historian, when the air shall have cleared and the evidence shall be complete and accessible. Cuba is not included because not yet a part of the United States, though she has felt the arm of our military power.

Despite the fact that military government is coming to be circumscribed more and more by rules and regulations, the prejudice against it seems to be as strong to-day as ever. This is true not only in the South, where the military governments are remembered chiefly for the evil they wrought, but throughout the country in general. The author is unconscious of having started out with any pre-

conceived notions or prejudices one way or the other regarding the subject here treated. He has endeavored to set forth in their proper relations the facts as found, that they might tell their own story. What has been the character of military governments over occupied hostile territory and over new cessions, except our latest, he hopes the reader may be able to gather from a perusal of the following pages.

In making acknowledgments, the author cannot fail to mention Professor Frederick W. Moore, Ph. D., of the Vanderbilt University, who first suggested this field as a good one for investigation. The Hon. M. A. Otero, Governor of New Mexico, and the Hon. L. B. Prince, President of the New Mexican Historical Society, have been very courteous in answering letters of inquiry. The officials of the War and Treasury Departments at Washington also, especially the Hon. Charles E. Magoon, of the Bureau of Insular Affairs, have been very kind in supplying information by letter and through their official publications. Professor J. B. Moore, LL. D., of Columbia University, has piloted the author past several rocky shoals in the sea of international law, and has rendered invaluable assistance in seeing the book through the press. But thanks are due first of all to Professor Wm. A. Dunning, Ph. D., of Columbia University, who has taken an interest in the book from its inception, has read the manuscript, and has made many valuable suggestions. To him also, as well as to Dr. Alvin S. Johnson, of Columbia University, the author is indebted for assistance in reading the proof.

HENDRIX COLLEGE, ARKANSAS, *May 1, 1904.*

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INTRODUCTION

THE United States have acquired new territory in several different ways: by treaties of purchase, by conquest followed by treaties of cession, and by occupation and partition. In practically all important acquisitions of territory, except in the case of Texas and Hawaii, there was a transition stage, during which the new territory was held and governed in a manner not expressly provided for in the Constitution. In most cases the transition stage has ended in some form of territorial government; in one case it ended in a state government. During the transition stage the new territory was held under what is commonly called military government. This fact necessitates at the very beginning of this study an examination of what is meant by military government.

Chief Justice Chase has attempted to define three kinds of military jurisprudence: military law, military government, and martial law proper. The first consists of the rules and articles of war as used for the regulation of armies in the field. His definitions of the other two are almost too vague for formulation, but he makes the second apply to occupied hostile territory, the third to domestic territory in time of invasion or special danger.[1]

It is only within the last century that the distinction between military law and martial law has been clearly drawn in England and America. The difference has been well

[1] Dissenting opinion, *Ex parte* Milligan, 4 Wall., 141 *et seq.*

stated by Chief Justice Chase, and it is hardly necessary to add anything here to what he has said on the subject. But the vagueness of his distinction between military government and what he styles martial law proper renders doubtful the propriety of his divisions. Indeed, it can be shown that what the learned judge has endeavored to set off into two distinct classes are but different manifestations of one and the same thing. With military law we shall have no further concern.

Neither the Constitution nor the statutes of the United States give us much help in the definition of martial law, for it is not mentioned in either, at least in a definitive way. "According to every definition of martial law," said Attorney-General Cushing, "it suspends, for the time being, all the laws of the land, and substitutes in their place no law—that is, the mere will of the commander." [1] Such was the old view, probably based on a similar statement by the Duke of Wellington. Such is practically the view to-day also; but of late there has been a tendency to move away from the bald statement that martial law is the mere will of the military commander, and to justify it by "the common law of acts done by necessity for the defense of the commonwealth where there is war within the realm." [2] Martial law is the basis of military government, and necessarily applies in occupied hostile or foreign territory. It may be applied to domestic territory under certain conditions, but its application in the one case differs materially from that in the other. The latest authoritative declaration of what is allowable in the former may be found in the second convention of the Hague Conference, where it is said that "the occupant shall take all steps in his power to re-establish and insure,

[1] Opinions of Attorneys-General (Cushing), viii, 374.

[2] Pollock in *London Times*, March 10, 1902.

as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." [1]

This simply means that the machinery of government falls into the hands of the military occupant, who may permit it to continue in operation, or alter it, or abolish it altogether. If the local laws remain and the native officials continue in office, it is only by his direction, or on sufferance. It is true that only extreme necessity, the welfare and safety of the army of occupation, will justify violent changes, but the occupant is practically the judge of the necessity. In any case, the responsibility for the management of the government devolves upon the commanding general. The last century has seen a decided tendency to limit his powers, and this has found expression in the quotation from the Hague Convention. While he is still left rather free under the law of necessity, he must be able to substantiate the necessity under the laws of nations. The course of this study will show that measures have been taken by military occupants within the last century which could not be justified under this rule. In addition to these limitations, the general may be, but commonly is not, limited by special laws enacted by the legislature of the country to which his army belongs. Such a system we call military government. After the acquisition of conquered territory, the military government continues *de facto* until altered by the new sovereignty.

The nearest approach which the Constitution makes to a mention of martial law is in that clause which authorizes

[1] Article xliii. Holls, *The Peace Conference at The Hague*, 447. A more elaborate statement may be found in the "Instructions for the Government of the United States Armies in the Field," issued April 24, 1863. Offic. Rec. (Reb.), Serial no. 124, pp. 148 *et seq.*

the suspension of the privilege of the writ of *habeas corpus* when in cases of rebellion or invasion the public safety may require it. Such a suspension does not bring about a complete state of martial law. On the other hand, the proclamation of martial law suspends the writ, whether any mention is made of the suspension or not; for the will of the commander can never be supreme so long as the writ may be used against him. These facts might produce some doubts as to whether it was intended that martial law should ever be proclaimed on domestic territory. When any part of the country has, by insurrection or rebellion, defied and thrown off the home government, such region is, for the time being, no longer domestic territory, but has, to all intents and purposes, become hostile or foreign. The enforcement of martial law over such a district, when conquered, until the civil power can be re-established, cannot be questioned. But martial law is often proclaimed over territory confessedly domestic. Such must inevitably be the case where an insurrection covers the entire area of a state. In this instance the proclamation is but the announcement that the civil authorities are insufficient to cope with the disorders, and must be supported by the military. Again, martial law has been proclaimed in territory not in insurrection at all, but threatened by foreign invasion, as at New Orleans by General Jackson. Finally it has been enforced, at least certain features of it, where there was neither insurrection nor danger of invasion, as in the Northern States during the Civil War, and in the Southern States long after the insurrection was declared at an end. In all these cases the ostensible purpose was to uphold the *de jure* government.

And herein lies the distinction between military government and martial law on domestic territory. The former supplants the existing government, whether it be *de jure*

or *de facto;* the latter professedly supports the *de jure* government. In giving this support the military commander rises superior to the laws of ordinary times. He may arrest and detain individuals not connected with his army, and even punish them; he may interfere with the established courts; he has even gone so far as to disperse a state legislature; but he does not formally assume the management of civil affairs. These go on as before, except in the particular cases in which he interferes. But his will is supreme wherever he sees fit to make it so. Such a condition in France is known as the "state of war," and is recognized in the French law.[1] That it has no distinctive name in American and English jurisprudence is the fault of our nomenclature—or of our jurists.

While recognizing the fact that, in England and America, martial law on domestic territory is, and can be, regulated by no constitutional or statutory law, commentators say that it must be exercised with due moderation and justice, in accordance with the "paramount necessity" which alone calls it into being, and with the general rules of public law as applied to the state of war. It cannot, therefore, they say, be despotically or arbitrarily exercised any more than any other belligerent right; and in case of abuses redress may be had in civil courts, or by impeachment, after the restoration of the civil law.[2] It is spoken of as the "dominant military rule exercised under ultimate military and civil responsibility."

That there is some possibility of redress is evidenced by the fact that the legislatures of the United States and

[1] The three conditions are: E'tat de paix, état de guerre, et état de siège. Block, *Dictionnaire de l'Administration Française* (1898), pp. 1109 *et seq.*

[2] Halleck, *International Law* (London, 1893), ii, 544; Birkhimer, *Mil. Govt. and Mar. Law,* 338.

Great Britain have passed bills of indemnity, after the exercise of martial law, in order to protect officers from prosecution for acts done by virtue of their extraordinary powers. Though generally very sweeping in its terms, this indemnity legislation has not always been construed by the courts to cover every conceivable act. In a few cases subordinates have had to suffer for unwarranted acts, in spite of bills of indemnity.[1]

But all this qualification of the commander's power depends upon the return of the previously existing civil conditions. Happily such has always been the case in England and the United States, but, theoretically at least, the fact remains that the military commander, in the United States, the President, can rise superior to all laws, except possibly the law of humanity. Unusual cruelty might provoke foreign intervention. If he is the judge of the necessity of proclaiming martial law, he is likewise the judge of the time for withdrawing it. During the reign of martial law he might think that the public safety—or his own subsequently—required the abolition of the old system and the installation of himself as a king or a permanent dictator. In that event his work could be undone only by a counter revolution. In practice the commander usually is guided by motives based on the highest patriotism, but a bad man might be restrained only by fear, or by the extent of the obedience he could command in his army.

Such are the distinctions between military government and martial law on domestic territory. With the latter we shall not be much concerned in this study, though it may be necessary to notice it now and then.

[1] *N. Y. World,* Oct. 5, 1865; *Appleton's Ann. Cyc. 1863,* p. 487 *et seq.*

BOOK I

LOUISIANA AND FLORIDA IN TRANSITION

CHAPTER I

LOUISIANA

I. Taking Possession

By the treaty of San Ildefonso, concluded October 1, 1800, Spain agreed to retrocede the province of Louisiana, which had been given to her by the secret convention of 1762, to the French Republic. In 1803 Napoleon agreed, in consideration of fifteen million dollars, to cede the province, not yet in the possession of France, to the United States. The treaty of cession was concluded April 30, and proclaimed October 21, 1803. The third article of the treaty stipulated that the inhabitants of the ceded territory should be incorporated into the Union and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and that in the meantime they should be maintained and protected in the free enjoyment of their liberty, property, and the religion which they professed. The seventh article granted, for twelve years, to the ships of France and Spain such privileges as were accorded to those of the United States in all ports of Louisiana. Possession was to be given and evacuation effected as soon as possible.[1]

In his message[2] transmitting the treaty to the Senate, President Jefferson said: "With the wisdom of Congress it will rest to take those measures which may be necessary

[1] *Treaties and Conventions* (*U. S.*), 276 *et seq.*

[2] October 17, 1803.

for the immediate occupation and temporary government of the country." In response to this suggestion, a bill of two sections was passed and became a law October 31. The first section authorized the President to employ the army and navy, and so much of the militia as he might deem necessary, to effect occupation and to maintain the authority of the United States in the new territory. The necessary funds were appropriated, to be applied under the President's direction. The second section read:

> Until the expiration of the present session of Congress or unless provision be sooner made for the temporary government of the said territories, all the military, civil and judicial powers exercised by the officers of the existing government of the same, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the full enjoyment of their liberty, property and religion.

February 24, 1804, an act was passed, to take effect in thirty days, extending to Louisiana several laws of the United States, among them those relating to revenue and coinage. March 26, the President approved an act dividing the territory and creating a territorial government for the lower portion, to take effect October 1, 1804. Until that time the powers conferred in the first act mentioned above were to be exercised by the Executive. A law provided funds to meet the expenses of this temporary government.

Mr. W. C. C. Claiborne, then governor of the Mississippi Territory, and General Wilkinson, of the army, were commissioned to take possession of Louisiana for the United States. As opposition was apprehended, they were authorized to use force, and the army and militia were ordered to be in readiness to move. However, no opposition was

encountered, and the formal transfer of sovereignty was effected at the Cabildo, with some attempt at *éclat,* on December 20, 1803. Our commissioners reported that the American flag was raised in New Orleans "amidst the acclamations of the inhabitants." [1]

The same day Governor Claiborne issued a proclamation, reciting that the President had commissioned him to exercise the powers of government in Louisiana to the extent and purpose for which they were conferred in the act quoted above. All laws and municipal regulations then in force would be continued; all civil officers, except those whose duties were vested in him, and the collectors of the revenue, would continue in office during the pleasure of the governor. The inhabitants were exhorted to show true allegiance to the United States and obedience to their laws and authorities, and were assured of protection from violence from within and without. In a separate address to the citizens of Louisiana he promised them protection, and exhorted them to seek political information, to guide the rising generation in the paths of republican virtue and economy, without which their descendants could not know the true worth of the government transmitted to them.[2]

II. Social and Political Condition of Louisiana

The geographical limits of the Louisiana Territory were but vaguely defined in all the treaties of cession and retrocession, but the extent of the country actually acquired by the United States in 1803, as finally defined in the Spanish treaty of 1819, is familiar to all students of American history, and may be seen at a glance by reference to historical maps. As soon as it was known that the treaty of cession had been concluded, Mr. Jefferson sought detailed infor-

[1] Ann. 8 Cong., 2 Sess., 1230. [2] *Ibid.,* 1232 *et seq.*

mation respecting the territory. This information had not been obtained when the act of October 31 was passed, but it was secured before possession was effected.

The population in 1803, according to a statement made up from the latest documents obtainable, amounted to 41,275, of whom about 16,000 were slaves and 1,303 free people of color. The census of New Orleans in 1803 gave it a population of 8,056. But these figures were believed to be too low. The Spanish governor was fully persuaded that the entire population of Louisiana was considerably in excess of 50,000. Upper Louisiana, included in the above figures, with settlements from St. Louis to New Madrid, contained 6,028 souls, of whom 883 were slaves and 197 free negroes. Figures for about 16,000 Indians were given, but their real number was unknown.

The white inhabitants were chiefly descended from the French and Canadians. There were a few German settlements, and a considerable number of English and Americans resided at New Orleans. In the Baton Rouge district, east of the Mississippi river, the Americans were greatly in the majority; in Upper Louisiana they were believed to constitute at least two-fifths of the whole. There were no colleges in the country. New Orleans had one public school, and a few private schools for children. Not more than half the [white?] inhabitants were supposed to be able to read and write, of whom, perhaps, not more than two hundred could do it well. They were said not to be litigious, and crimes of great atrocity were rare. In religion they were Catholics.

The chief industry was agriculture, but some manufacturing was carried on. The trade of the country was considerable. Of two hundred and sixty-eight vessels which entered the Mississippi in 1802, one hundred and seventy were American, ninety-seven Spanish, and only one French.

The imports from the United States had declined about half since 1799, but the exports to the United States had increased in the same ratio.

The province had been so long in the hands of Spain that all the French regulations had disappeared, and the machinery of government had become entirely Spanish, administering Spanish laws and ordinances made expressly for the colony. The French held actual possession in 1803 only about three weeks, and this possession was taken merely to effect the formal transfer to the United States. But in that brief time the prefect issued several decrees relating to the political organization. One of these declared the code given to the province by Louis XV. to be in force, excepting such parts as were inconsistent with the Constitution and laws of the United States. His authority to do this might very reasonably be questioned. One change was actually effected by the appointment of a mayor and council for New Orleans. The chief object of these changes was confessed by the French prefect to be to add some dignity and respectability to his position by a show of authority, and so to prevent his taking possession from being a ridiculous farce.[1]

The governor was at the head of the military and judicial departments, and was vested with some legislative powers. He could not levy new taxes without the consent of the inhabitants, but how that consent was secured is not stated. Presumably it was through the Cabildo, or Provincial Council, over which the governor presided. This body was composed of twelve members, said to be of the most wealthy and respectable, who secured their offices by purchase. The intendant, who looked after matters pertaining to the revenue, admiralty, and the granting of land, was entirely

[1] Martin, *Hist. La.*, ii, 197; Gayarré, *Hist. La.*, ii, 606 *et seq.*

independent of the governor. The lieutenant-governor superintended the administration of Upper Louisiana, in which he was practically supreme in everything, except that his decisions were subject to appeal. The several districts were placed in charge of commandants, generally military men, who were supposed to look after almost everything of which a government takes cognizance. The procurer-general had, among other things, to indicate the punishment provided by law for any particular crime. Besides these, there were numerous other officers not necessary to mention, all of whom, except those whose salaries were less than thirty dollars per month, were appointed by the king. Not a single officer was chosen by the people.

Nearly every officer—the governor, intendant, commandants, alcaldes, and others—had some sort of judicial power. In civil cases, small suits were decided in a summary way by the auditor or judge, after hearing both parties in *viva voce* testimony. In more important suits the litigants reduced their testimony to writing, all of which was taken before the keeper of the records of the court. They then had opportunities of making remarks upon the evidence, by way of petition, and of bringing forward opposing proofs. When the auditor thought the cause mature he issued his decree. Appeals were allowed, in some cases to Havana. The proceedings in criminal cases were very similar. Trials were not public, but the accused had every kind of privilege in making his defense, the testimony being written. Trial by jury was unknown. Fees were small.

Such was the judicial system in theory. In practice it was said to be very corrupt. Important suits were rendered expensive by delays. Appeals to Cuba and Madrid were slow and ruinous. The favors of the officials, from the governor to the constable, were subject to purchase.[1]

[1] Gayarré, *ibid.*, 584.

The Catholic Church was a part of the government. Its officials also had certain judicial powers. Some of them were paid from the public treasury.

The expenses of the government, including the pay and support of the troops garrisoning the country, and other items, such as repair of forts and public buildings, salaries, and Indian presents, were far in excess of the revenue. The chief source of income was the six per cent. tariff on all imports and exports, yielding about $120,000 annually. There were a few taxes, for example, on inheritances and legacies, salaries of civil officials, saloons, conveyances of real estate, and there were fees for pilotage, but all these did not yield more than five or six thousand dollars annually. Instead of paying local taxes, each inhabitant was bound to make and repair roads, bridges, and embankments through his own estate. A part of the deficit was met by the importation of about $400,000 in specie from Vera Cruz, but there was still a yearly deficit of about $150,000. At the time of the transfer it had amounted to $450,000. To meet this, certificates, called *liberanzas,* were issued, bearing no interest. They usually passed at a discount of from twenty-five to fifty per cent. This deficit, it was declared, was largely due to the criminal negligence of the officials, who openly countenanced smuggling. The income from the six per cent. duties alone should have produced $279,480, as the imports and exports amounted to $4,658,000.[1]

About the best way to characterize such a government is to say that it was "Spanish colonial." It was spoken of by some historians of Louisiana as more military than civil.

[1] The material for this section has been taken almost wholly from reports prepared for President Jefferson and submitted by him to Congress. They may be found in Ann., 8 Cong., 2 Sess., 1498 *et seq.* A few statements have been taken from Martin, Gayarré, and from Stoddard, *Hist. Sketches of La.*

III. Constitutional Basis of the New Government

When the Louisiana Territory was acquired our Government was in the absolute control of the ultra-constitutional, or strict constructionist party. Their efforts to find a constitutional justification for everything connected with the transfer are interesting, not to say amusing, in view of the fact that they ultimately had to do several things for which there was no direct warrant in the Constitution, but which were not, for that reason, necessarily unconstitutional. Whether any act really did transgress the fundamental law will come up later. The situation seemed to some of the men who had to deal with it somewhat anomalous, the newly acquired country being considered neither entirely domestic, nor yet wholly foreign. This was the view of Mr. Jefferson, who drafted an amendment beginning: "Louisiana, as ceded by France to the United States, is made a part of the United States." [1] However, the domestic theory so far prevailed as to obviate the necessity of an amendment, but some of the measures adopted to carry it out savored somewhat of the opposite theory.

When the act of October 31 [2] came up in the House, Mr. Roger Griswold, of Connecticut, seconded by Mr. Elliott, of Vermont, moved to strike out the second section. The objection brought out by these gentlemen, and those who sided with them, was that the bill proposed to confer on the President all the powers, military, civil, and judicial, then exercised by the existing government in Louisiana. Just what those powers were nobody knew, but they certainly were legislative, executive, and judicial. The union of the three departments of government in one man was repugnant to the Constitution. Nor could the legislature delegate its powers of legislation to the President. Even

[1] *Writings* (Ford), viii, 241. See also p. 262. [2] *Supra*, p. 24.