

STATUS OF INHABITANTS OF TERRITORY AC-  
QUIRED BY DISCOVERY, PURCHASE, CES-  
SION, OR CONQUEST, ACCORDING TO THE  
USAGE OF THE UNITED STATES.

From an early period in American history two principal theories were entertained and insisted upon by their respective advocates in reference to the power to acquire territory. These theories were conflicting, and were influenced by the opposing interpretations which the national and states rights schools placed upon the powers of Congress under constitutional grants. The states rights school at first denied that the United States had power under the Constitution to acquire new territory; the national school insisted that the power existed and was necessarily inherent in the government as an attribute of sovereignty. Notwithstanding the doubt and denial of the extreme state rights school, Louisiana and Florida were acquired by purchase, Texas by annexation, and an extensive territory was acquired by treaty with Mexico. The annexation of the Hawaiian Islands was effected by joint resolution of Congress. The Northwestern territory, acquired previous to the adoption of the Federal Constitution, by cession from Virginia, was regulated by "An ordinance for the government of the territory of the United States northwest of the River Ohio," adopted by the Old Congress, July 13, 1787. Territorial governments have from time to time been organized out of the other territories of the United States. The recent act of Congress organizing the territory of Hawaii prescribes specifically what classes of the inhabitants shall be deemed citizens of the United States.

The character and extent of the power of Congress over the territories have been the subject of repeated and excited discussion in and out of Congress. The National School have insisted that, under the Constitution, Congress have absolute and despotic power over the territories; that whatever they have the power to do, they have the right to do, if in their judgment it will conduce to the "general welfare." And they

construe the power "to dispose of and make all needful regulations respecting the territory or other property belonging to the United States," as the same in effect as the "power to exercise legislation in all cases whatsoever."

The states rights school have held that the clause in the Constitution about the territories relates to them only as property, and gives no right to Congress to govern them: that their right to government springs from their acquisition of them by cession, and is not therefore absolute. Territory acquired under the right to declare war and make treaties belongs to the states as states, and Congress can only legislate in conformity to the principles of the Constitution. They have the authority to maintain peace and order, and to establish tribunals for the administration of criminal and civil justice according to the law of the land as it existed at the time of the cession; but they can no more change the law of the land in a territory than they can in a state. They cannot regulate private property or interfere with private rights. In short, the law of the ceded territory on all subjects not within the delegated powers of Congress in the states must continue until changed by the only legitimate authority, when the people of such territory, with the authority of Congress, form a sovereign state. To state briefly the essence of these conflicting theories in respect of the character and extent of the constitutional power of Congress, as has just been done in the language of an eminent American jurist, is to suggest the relative soundness and infirmity of the respective doctrines. Meanwhile the usage in respect to the government of territories has followed the inclination of the National School; occasionally this course has been modified and qualified as the result of judicial interpretation. The trend of federal decisions, however, has been in support of the doctrines of the National School.

It is to be observed that there are two separate and distinct subjects to be kept in mind in any discussion that aims at an intelligent, practical conclusion; first, the territory, pure and simple, as property; second, the inhabitants, as distinct from, yet occupying, the territory. The law and usage which govern territory as property of the sovereign are one thing; the

people over whose lives, liberty and property the new sovereign claims to exercise dominion and government is quite another thing; and some of the confusion which characterizes much discussion in this regard will be avoided if this distinction is considered. As to the territory, meaning the public land and public property, the power of the new sovereign is absolute: but in respect to the inhabitants,—the people, being freemen,—the power of the new sovereign is, to a certain extent, correspondent to that of the former sovereign, and may be further qualified by public law, usage, treaty stipulations and by the fundamental principles recognized and immemorially proclaimed by the state of the new sovereign. "But it is not easy to distinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered."<sup>1</sup> As between the new government and the citizen, protection and allegiance are reciprocal; but this relation does not by any means imply that political privileges and franchises are included in the recognition of the property and personal rights of the inhabitants. Political franchises are presumably granted on grounds of expediency, having in view the safety of the state and the best interest of the community. The immediate property which is possessed by individuals is therefore to be distinguished from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. As a member of the family of nations, the United States recognizes and is bound by principles of public law as its rule of action in all matters having an international character; but when it is question of municipal administration in matters not affecting the international relation, it looks alone to the Constitution, its municipal law and the usage of civilized states for guidance and direction.

The general usage sanctioned by treaty stipulations has been to constitute the inhabitants of acquired territory citizens of the United States under conditions and with exceptions specially indicated; they belong to that class of individuals who, in matters of personal and civil rights, are under the protection

<sup>1</sup> Halleck, *International Law* (Baker's edition), p. 482.

of the new sovereign, though they are not yet clothed with political status or the privilege of suffrage. In the absence of treaty stipulations in regard to national character, the inhabitants of conquered territory are subject to military dominion and protection, and remain so subject until the new sovereign provides a civil government in substitution of the military authority. In the American system of government the power to change this condition and situation from military domination to civil government is resident in Congress. Until this change is authorized by the appropriate legislative authority, the President, however, as commander-in-chief of the army, would be clothed with absolute power in this regard, were not the lives, liberty and property of the inhabitants guaranteed and safeguarded by public law, and the municipal law locally in force. The usual and wise practice is the recognition of the municipal laws by the military authority and the establishment of a provisional quasi-civil administration until Congress legislates. The conquered territory while in this transition state is not a part of the United States within constitutional and legislative provision and enactment, unless expressly included in terms, although in international relations it may be so treated and considered. In the case of a guano island the Supreme Court considered it "as appertaining to the United States."<sup>1</sup> This is doubtless an anomalous position, but it is one which appears to follow unavoidably as the result of peculiar and exceptional conditions. So long as it continues, much hardship may be entailed upon the innocent inhabitants, which would appeal forcibly for relief to the legislative power and to executive discretion; but these considerations do not alter the accidental, provisional status of the territory or of its native inhabitants. The reason assigned for this exclusion of the island inhabitants from American citizenship, appears to be that our Insular possessions *have not yet been admitted into the Union, although the territory in which they reside is presently under the military jurisdiction and avowedly the property of the United States.* Under the American system of civil government, the inhabitants who are citizens are naturally divided into two general classes: First, all the

<sup>1</sup> Jones v. U. S., 137 U. S., p. 202-212.

inhabitants who are secured by the fundamental law in their civil, personal and property rights; second, a limited and privileged class, who are clothed with political franchise and privileges. The inhabitants of conquered territory are within the first division, but they are not within the second and privileged division unless embraced in treaty stipulations, or until Congress acts and ordains the conditions upon which they may be admitted to the various grades of citizenship. Judicial sanction in support of this position may be found in numerous decisions of the Supreme Court of the United States. It was said, in the case of *Ramsay v. Murphy* (114 U. S. 44), by the Supreme Court of the United States recently, that: "The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, *subject only to such restrictions as are expressed in the Constitution*, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power over its members, that it is not absolute and unlimited." This language in reference to constitutional restrictions it is to be observed, was used in the case of a claim to vote by certain inhibited classes *in an organized civil territorial government*, and *not* the case of *inhabitants* of territory under military dominion. In the same case it was said: "The personal and civil rights of the inhabitants of the territories are secured to them, *as to other citizens*, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." In the *Dred Scott* case, Ch. J. Taney declared that the citizens of our territories were entitled to all the privileges and immunities guaranteed by the bill of rights. The attention of the court, however, was not drawn to any distinction between provisions for the people of the United States and provisions for persons generally without reference to their political relations or allegiance. And Simeon E. Baldwin adds: "It is a

subtle distinction, but I am inclined to think that it is a real one, which would be found of substantial service should the Senate ratify the Spanish treaty as it stands.”<sup>1</sup>

In 1853, in a case arising out of the imposition of a war tariff by military authority at San Francisco, while such occupation continued the same court said:

“The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease, as a matter of course, or as a consequence of the restoration of peace; and was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” *Cross v. Harrison*, 16 Howard, U. S., p. 164.

When the Peace Commissioners at Paris reached a point in their deliberations when it was determined to provide for the future status of Spanish subjects, natives of the Peninsula, residing in the territory over which Spain relinquished or ceded her sovereignty, as well as for the native inhabitants, they formulated their conclusions in Article IX. In its first clause, it provided for the right of election of national character by Spanish subjects therein residing, to be exercised within a year from the ratification of the treaty. The second clause was in the words following: “The civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by the Congress.” This language is peculiar, and differs from the corresponding stipulations in respect to the guarantees extended to the native inhabitants, found in the treaty for the Louisiana purchase, the Florida Treaty, and the Joint Resolution for the annexation of Texas. In the Philippines archipelago the attitude of the United States is unique. We purchased and paid Spain for the archipelago; but her sovereignty had been long contested, was contested at date of purchase, and she was not able to deliver the territory and its accompanying

<sup>1</sup> “The People of the United States,” Yale Law Journal, January, 1899.

public property, and the United States has been constrained to insist upon her title by act of war and conquest, which is not yet complete.

This clause referring the determination of the civil rights and political status of the native inhabitants to Congress was, no doubt, inserted in view of the antecedent history of territorial acquisitions by the United States, recent American history, and with particular reference to racial conditons existing in these ceded territories. Being a provision in a treaty ratified by the United States, it is, and until abrogated by a law of Congress, will remain the supreme law of the land.

The conclusion is, that so long as the ceded territories remain under military dominion of the United States, the President, in the exercise of the belligerent right of conquest, unless restrained by public law, treaty stipulations or usage, possesses almost absolute power over the territory and its inhabitants; and this authority is paramount until Congress shall legislate in respect thereto. What Congress may do under constitutional grant or in the exercise of legislative sovereign power is one thing; what Congress should do in the contingencies presently arising in our insular possessions and under the stress of public opinion is quite another matter. From a political standpoint merely, it is a question of expediency rather than a question of the extent and character of the power to be exercised, wherever lodged. Addressed to administrative party government, it may be a question of policy; addressed to the moral sentiment of the community, it is a question of justice, equity, accommodation and fair dealing.

“In case the government of the new State is a constitutional government of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory. after the cessation of war, and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases.” (Halleck, Int. Law, Baker’s ed., p. 482. *American*

*Institute Co v. Canter*, 1 Peters, 511, 541; *Mormon Church v. U. S.*, 136 U. S. 42; *Jones v. U. S.*, 137 U. S. 202, 212.)

Many of these are questions to be determined primarily by the political branch of the government, and its decision will be followed by the judiciary. The acquisition of new territory by war or treaty, is political, not judicial. And the ascertainment as a fact, belongs to the executive and legislative departments and not to the judicial departments.

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