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Donald C. Cutter

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THE LEGACY OF THE TREATY OF GUADALUPE HIDALGO

DONALD C. CUTTER

IS THE TREATY OF GUADALUPE HIDALGO a milestone or a millstone in the cultural history of the Southwest? This very important treaty in American diplomatic and military history has been much discussed and frequently cussed.

At Guadalupe Hidalgo the Mexican War ended, and conflict between Mexico and the United States ceased. The war concluded at that conference table must be considered by any standards a rather easy conflict—the end was clearly a “victor’s peace.” By standards of most wars this had been almost too easy and resulted in bringing the Mexican government to its knees and the Mexican army to utter defeat. As a result, some people thought that the Treaty of Guadalupe Hidalgo, which ended the war, had been formulated at a moment’s notice and therefore ought not to be taken too seriously.

Some people have felt otherwise. Our friend Reies López Tijerina, for example, feels that the treaty was a Magna Carta, a bill of rights for the Mexican people, formerly the Spanish people of the Southwest. Clearly the Treaty of Guadalupe Hidalgo does have the status of constitutional law as a document of constitutional stature under article VI, clause 2 which states that “All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land.” Therefore by the United States Constitution, the Treaty of Guadalupe Hidalgo, whether some people like it or not, is the supreme law of the land. It was the end product of the war started in 1846 and consummated by treaty in February two years later.

The strategy of the war was very simple. The United States felt that it had a grievance against Mexico over the supposed invasion

of that area which subsequently became a part of the United States as part of the Texas annexation treaty. As the result of a misunderstanding of the national boundary lines, the United States and Mexico went to war during the administration of President Polk. The war aim was simple—start an invasion of those areas desired by the United States—New Mexico and California. A physical invasion was begun by the United States Military Department of the West and the United States Navy cooperating in occupation of the target areas. An occupation of northern Mexico was mounted under the leadership of General Zachary Taylor, and when things had been pretty well put into gear, the United States war strategy required a duplication of the feat of Hernán Cortés, with the conquest of Veracruz, a march overland to Mexico City, and the final reveling in the Halls of Montezuma.

The war plan was implemented fairly well. But one strange thing occurred, for along with the invasion force of the United States Army marched the United States peace commissioner. He was an executive agent, really a plenipotentiary of the government of the United States. What a show of confidence it was to send the peace envoy with the invading army! It was a hitherto unknown move. Nicholas Trist, much belittled by various historians of the past, and at times called a “mere clerk of the State Department,” was actually a man of importance. He was really chief clerk of the department, the highest civil service appointment in the State Department. He was not a second-rater. Furthermore, he was bilingual and was chosen for the job in part because of his linguistic facility. He had served earlier as United States consul in Havana. As Trist emerges as a person, it is clear that he was a sincere and well-prepared human being rather than some sort of a martinet being sent to Mexico to carry out the wishes of the expansionist president of the United States, James K. Polk. There can be no doubt that this strange system of sending him with the invading expeditionary force under “Old Fuss and Feathers” Winfield Scott was something other than normal protocol or regular procedure.¹

After a while in Mexico, Trist could find no one with whom to sign a treaty, and he finally was recalled by the President, but refused to acknowledge the order. In response to the message

which recalled him, Trist wrote a thirty-two-page memorandum showing why he should not be recalled at that particular time. He continued to negotiate a treaty with whomever he could find who could sign a treaty although it was hard to find any real government in Mexico at this time with whom to treat.

President Polk branded Trist an impudent and unqualified scoundrel, and indeed by administrative evaluation perhaps he was just that. Contemporary Whig opinion, that of the opposition party, said that after Trist finally had found someone capable of signing a treaty with him that:

The Treaty of Guadalupe Hidalgo . . . negotiated by an unauthorized agent with an unacknowledged government, submitted by an accidental president to a dissatisfied senate has notwithstanding these objections in form, been confirmed.²

It was hardly a highly popular treaty under those circumstances, for there had grown up in the interval between the invasion of Mexico and the actual consummation of military hostilities there, two diametrically opposed movements in the United States. One was the all-Mexico movement, the idea being to incorporate all of that defeated nation into the United States as a result of the outcome of the war, and this was growing in intensity. But far away in New England there was a countermovement occurring at the same time, which touted the war as being a Southern conspiracy to get more slave territory in order that the institution could expand to the West.

The Treaty of Guadalupe Hidalgo, probably the most important single document in Southwestern history, confirmed the United States claims to Texas, which previously had never been acknowledged by any Mexican government. It also confirmed the United States conquest of New Mexico carried out by Stephen W. Kearny and the occupation of California carried out by Kearny, Sloat, Stockton, and various other members of the United States Navy in the Pacific. For some \$15 million in indemnity and \$3¼ million in claims that had been laid against the Mexicans by various United States citizens, the war came to a close. It stopped the all-Mexico drive; it even stopped the discontent in New England.

If the Treaty of Guadalupe Hidalgo is a cornerstone to the history—particularly the legal history—of the area of the Southwest, how did it come into being? Was Trist totally responsible for its creation? Or did he follow orders or precedents? A recent study by Lieutenant Colonel Ralph A. Rowley indicates that the latter is true.³

Trist followed very closely the instructions given to him when he left for Mexico in the first place, instructions based on precedents already well established. There is hardly an original thought or phrase in the Treaty of Guadalupe Hidalgo; quite to the contrary, it is based very clearly on existing precedents, including the Northwest Ordinance, the Treaty of Louisiana, and the Treaty of Florida—parts of which were copied out verbatim in the case of the Mexican War treaty, without anything by way of novel approach. Trist did not contribute a single idea that went into the treaty. Rather, he utilized a draft treaty that he carried along with him. This draft treaty had several alternate clauses or wordings, but by-and-large Trist was not an original thinker in the writing of the treaty. The treaty is not “Trist’s Treaty,” but really the treaty of the State Department of the United States based on legal precedents which already existed, namely Article III of the Treaty of Louisiana, which indicates that the inhabitants of the ceded territory would

be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and religion which they profess.⁴

Many problems were created. In all fairness, however, this was the first time that a large group of non-Anglo-speaking people, non-Anglo culture people, were accessioned into the United States. Granted, Louisiana had been acquired earlier, but there were only a handful of people in all of Louisiana. The United States had acquired Florida long after it had reached its zenith and was well into its decline. There were few if any real inhabitants of the area.

It was a first, and for the United States, a unique situation to which it could not become accustomed. The assimilation into the body politic of people who were not of the same political, social, religious, and even economic background as the people of the United States, was a novelty. It is no wonder that culture conflict ensued as a result of the great differences of bringing together two distinctly different systems of life, systems of law, systems of existence. The cultural conflict that exists in the Southwest as a result of the Treaty of Guadalupe Hidalgo is a culture conflict on almost every level. The acquisition of new people for the United States brought to the surface many tensions. The first of these related to the problem of Indians who might raid across the border from one country to the other. For example, Mexico thought that the United States might arm the Apaches and have them sweep south of the Gila River boundary between the two countries as a result of the terms of the Treaty of Guadalupe Hidalgo. This would enable the Indians to plunder and loot the people of northern Sonora, thereby serving as a diversion for Americans who were moving into the area to the north of the Gila River boundary. This problem was solved five years and a few million dollars later by the Gadsden Purchase, which bought the area and did away with the source of concern.

The second of the problems pertained to the boundary line of the Gila River. The Gila was specified as the boundary between the United States and Mexico, such boundary to follow the principal course of that stream. Which, indeed, was the principal course of the Gila? Was it the south fork, the central fork, or the north fork? The Americans knew that it was the south fork; the Mexicans were certain that it was the north fork, while all geographers know that it is the central fork. But neither Mexico nor the United States was willing to give up its extreme stand. When they began to negotiate, they never looked to historians for the answer, but rather looked for the most favorable possible interpretation of their nation's position in the matter.

In an effort to locate the boundary line, there was a mistake made on the longitude and latitude of El Paso. Somehow the negotiators' El Paso drifted much farther north, thereby precluding any logical calculation which might be made concerning the boundary.

It soon became apparent that the United States needed a new boundary line to accommodate its desires for a southern railroad route to the Pacific. Consequently, the United States eventually sent a railroad man to Mexico to negotiate a treaty in 1853, the Gadsden Treaty or Treaty of Mesilla, as it is sometimes called, which added that area to round out the physiographic destiny of the United States in the area of the Southwest. But did it really accomplish its goal? No; somehow a mistake was made. The negotiators did not realize that the traditional boundary between Upper and Lower California was considerably farther south than the one established. If they had known where it was, they could have rounded off the area and included the mouth of the Colorado River within the United States and averted many future problems of the division of waters called for in the Treaty of Guadalupe Hidalgo and under international law. The boundary line controversy, however, was largely solved by the Gadsden Purchase and the American checkbook.

Other problems included filibustering activities. Some Americans, dissatisfied with the terms of the Treaty of Guadalupe Hidalgo, set out from various places north of the international boundary to foment problems in Sonora and Baja California, and even over the line from Texas into Tamaulipas and Nuevo León. The result was certain hard feelings at an international level.

Another of the legacies of the Treaty of 1848 resulted from the transient nature of the boundary line itself—the Rio Grande, separating Mexico and the United States. Rivers, which frequently change course at floodtime, are notoriously poor boundaries. The creation of *bancos* as they are called, banks of earth that shifted from one side to the other of the river sometimes several times within the same decade, caused problems which finally have found settlement and vindication for Mexico in the Chamisal negotiations. This is the recent settlement between the United States and Mexico over the largest of these great accretions of land which shifted sides of the river in historic times. The United States agreed to what was essentially the Mexican position concerning such shifting river beds.

There were also land title fights, creating in the area of the Southwest a need for title insurance to establish quiet title to land,

that same land that was guaranteed to Hispanic residents by treaty. Thus title insurance was born out of the Treaty of Guadalupe Hidalgo and is merely a portion of the land problem. Another factor concerns the value of land still in the hands of Hispanic residents during the territorial period. With suspect title, this land had to pass through the adjudication process, and any sale was at bargain basement prices. This was certainly to the disadvantage of the Hispanic land claimants and in favor of the newly arrived residents.

Disputes over water rights also constitute a part of the legacy of Guadalupe Hidalgo. The water of the Rio Grande watershed belongs to both Mexico and to the United States. The rain that falls and flows into the Río Flórido and the Río Conchos in Mexico has a certain bearing on the total flow of the Rio Grande as does the water that falls into the Rio Pecos or at the headwaters of the Rio Grande proper in Colorado. Mexico has a certain vested interest in those waters, as does the United States, all because of the Treaty of Guadalupe Hidalgo and subsequent agreements based on that document.

Then there is the problem of subsurface mineral rights, another legacy of the 1848 treaty. For example, a deposition for a case involving uranium in the Paguete area just west of Albuquerque was thrown out of court recently on a technicality. The object of the case had been to establish what happened to the subsurface mineral rights in all of the Mexican Cession area. When the last signature was placed on the Treaty of Guadalupe Hidalgo with the exchange of ratifications at Querétaro, how were mineral rights affected? Did they somehow change in form because the land was now part of the United States or were such rights the patrimony of the United States government as being the successor in interest to the subsurface rights of the prior sovereigns?

In recent times we know that Mexico claimed all subsurface mineral wealth and expropriated the oil holdings of many American and some British companies, which was a throwback to the legal system of Spain where sovereignty automatically brought with it such subsurface control. The question might be raised: Didn't the Spaniards as individuals look for gold, silver and other precious commodities? This they did, but they did so under a

system whereby the crown withdrew its interest in such wealth upon payment by the exploiter of one-fifth of the precious metals or commodities that were extracted. This *quinto*, as it was called, permitted individuals to participate with the government in exploitation, but gave government 20% of the value of all production. The United States government won the Mexican war through the expenditure of the common treasure of the United States since it was from the national treasury that the funds came. Did the United States government in the signing of the Treaty of Guadalupe Hidalgo in essence say such rights were granted to all people who did not previously have subsurface mineral rights? Or did the United States as sovereign over the new territory assume the same rights as the nation which transferred the sovereignty? Would it take a specific act of the Congress stating that Congress was now making surface rights and subsurface rights part and parcel of the same ownership pattern, much as the old Anglo concept of ownership in fee simple?

The military governor of California, Richard Barnes Mason, United States Army, attempted to get miners in California to pay the *quinto*. The gold rush, which followed closely on the heels of military victory, had brought military occupation of California, and Mason thought that it was his duty to go into the Sierra Nevada and collect the 20% from any miners found there. He was not successful in this attempt, for it was too impractical for him to try to collect. But he argued, and many legal scholars could argue, that the United States as a result of the war had the same right as the prior sovereign had had over the land; and without any specific congressional authorization to convey the subsurface mineral rights to the owners of the surface, it seems possible that the United States government is still technically the owner of all subsurface mineral rights in all of the area of the Mexican Cession and of the Gadsden Purchase area as well. Obviously this is not a question to be changed by merely addressing it, but it is an unresolved matter.⁵

Another legacy is community property and women's rights in such community property. Women, those frail flowers of Hispanic civilization, were cloaked with extra special protection under Hispanic law. By extension this same special status followed them in

the interpretation of the Treaty of 1848. Each southwestern state interprets community property laws considerably differently from the others. It would take several hours even to broach the subject of these differences from state to state. Suffice it here to say that community property laws are very important in the area of the Southwest and are a property rights legacy of the Treaty of Guadalupe Hidalgo.

Finally there is the problem of citizenship, and it is in this area of the treaty that the United States failed most seriously. Those new persons taken into the United States were to be 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. How long did this take in New Mexico? From 1848 until 1912. Anything less than *full* citizenship—that is, being a resident of the Territory of New Mexico—did not fulfill these promises. That same legal recourse accorded other citizens of the United States was not available. Worse than that, the people of New Mexico did not even know about the system of American law that was now being superimposed upon them. The fiduciary responsibility, that responsibility of the guardian to the ward that actually should have existed between these newly-minted Americans and their government, failed to materialize after the signing of the Treaty of Guadalupe Hidalgo.

The western American Indians have made considerable use of this fiduciary non-feasance. While I served as historian for the California Indians in their claims case in the 1950s it became apparent that they utilized the lack of government concern for Indian rights in the Mexican Cession area with telling effectiveness. They asserted that the government's error rested on the fact that the Indians were citizens of Mexico and therefore should have been made citizens of the United States immediately. The United States government's failure has been of great importance to the Indians.

There is potential Hispanic use of the same aspects of the Treaty of Guadalupe Hidalgo since the Hispanic residents of the Mexican Cession were in the case of New Mexico and Arizona not made citizens until 1912. It hardly seems that the government could argue that these people had been "maintained and protected in the

full enjoyment of their property." Lack of any serious attempt to assume a fiduciary responsibility is certainly one of the first charges against the United States. Local New Mexicans lacked understanding of the legal system that was imposed upon them. No one came to explain it to them or to act as their wise counsel. As a matter of fact, even if they had understood, as far as land titles were concerned, all Hispanic residents of New Mexico were thought to be guilty of land fraud until they had proved that they were innocent, rather than vice versa. The cornerstone of American jurisprudence is that one is innocent until proved guilty, but those who claimed land under Mexican and Spanish title were thought to be guilty until proved innocent. They had to prove that they owned the land they utilized rather than the United States government proving that they did not own the land which they occupied at the time of the signing of the treaty. In this regard the United States government was guilty not only of malfeasance, but also of non-feasance of responsibility. There can be no doubt that the United States government, either by acts of commission or acts of omission, did not live up to the obligations which it willingly accepted and wrote into the Treaty of Guadalupe Hidalgo.

The door is ajar. The Treaty of Guadalupe Hidalgo was not fully implemented. Justice has been delayed, but it does not need to suffer total defeat. The Treaty of Guadalupe Hidalgo is a major item of unfinished business on the agenda of sources of cultural conflict throughout the Southwest. But the problem is not insoluble—a Hispanic Land Claims Commission is in order. One patterned after the Indian Claims Commission could prove to be the best answer to an otherwise unsatisfactory situation.

NOTES

1. For biographical sketches of Nicholas P. Trist, see Louis Martin Sears, "Nicholas P. Trist, A Diplomat with Ideals," *Mississippi Valley Historical Review* 11 (1926):85-92; Jack Northrup, "Nicholas Trist's Mission into Mexico: A Reinterpretation," *Southern Historical Quarterly* 71 (1968):321-46; Norman A. Graebner, "Party Politics and the Trist Mission," *Journal of Southern History* 19 (1953):137-56.

2. Bayard Tuckerman, ed., *The Diary of Philip Hone, 1828-1851*, 2 vols. (New York, 1910), 2:347.

3. Ralph A. Rowley, "U.S. Acquisition of the Spanish Borderlands: Problems and Legacy" (Ph.D. diss., University of New Mexico, 1975), has an excellent exposition of these problems.

4. Clive Perry, ed., *The Consolidated Treaty Series*, 155 vols. (New York, 1969); see vol. 57, pp. 27-48, for Treaty for the Cession of Louisiana, and vol. 102, pp. 29-59, for Treaty of Guadalupe Hidalgo.

5. Hubert Howe Bancroft, *History of California, 1848-59*, 7 vols. (San Francisco, 1884-90), 6:400.