Profiling Martial Law Rule in Idaho

Disclaimer: This report is not intended to cast aspersions on the motives of Idaho's military personnel and officers of public safety who have made a professional commitment to place themselves in harm's way to serve and protect the general public. Their service provides an important constitutional function to protect a free society for which we all must be grateful.

*****

Introduction

As the title of this document suggests, this report is a survey of a significant change in the form of government for the State of Idaho. The customary "republican" form of government based upon the consent of the people has been changed to a "command and control" process which is characteristic of government by decree.

Unlike other forms of government – such as a monarchy which justifies its existence upon the "crown rights" of its civic head – martial law professes to be the guardian of the public safety and peace. Ironically, it often acts against the people in the name of the people.

What is Martial Law?

Martial law. *Temporary rule by military authorities of a designated area in time of emergency when the civil authorities are deemed unable to function. The legal effects of a declaration of martial law differ in various jurisdictions, but they generally involve suspension of normal civil rights and the extension to the civilian population of summary military justice or of military law. Although temporary in theory, a state of martial law may in fact continue indefinitely. . . The regular civil courts, furthermore, do not review the decisions of tribunals set up by the military authorities and the question of remedies against abuse of powers by the military is one on which there is very [little] authority . . . [and] are of little significance in view of the modern practice of taking emergency or special powers by statute.*

(*New Encyclopedia Britannica*, Vol. 7, Micropedia, 15th Edition, 1989)

The American Historical Background of Martial Law

The American people have had numerous experiences with "martial law" in the nation's history. It is a well-developed jurisprudence. Prior, during, and immediately after its War for Independence, armies from both sides occupied various municipalities, regions, and even states in which the occupying army provided the government for day-to-day civic functions.

Likewise, the American Civil War brought numerous other conditions in which occupation forces were required to manage civilian populations.

In subsequent wars of conquest such as the Indian Wars of the Great Plains and then later post-war American occupations of foreign countries, martial law was necessary to

subjugate, pacify, and govern conquered peoples.

A well developed body of martial law jurisprudence was created during the American occupation of Hawaii, for example, as found in Colonel Charles Fairman's *The Law of Martial Rule* (1943) which provided the logistical underpinnings for the American post-World War II occupation of the liberated islands of the South Pacific and in turn of Japan (cf. *Martial Law in Hawaii*, J. Garner Anthony, Vol. 31, *California Law Review*, 477, 498: 1943).

Americans are also familiar with "emergencies" and the restrictions which accompany such states of emergency during and after natural disasters. Americans are aware of conditions of martial law which might arise during periods of social unrest involving riots, terrorist attacks, or pandemics.

The Difference Between Martial Law & Martial Law Rule

While these all are considered the temporary exigencies of war or natural disaster, "martial law rule" is different in that it seeks to impose a permanent change upon the conquered people.

Unlike "martial law" which uses military officers for the day-to-day civic functions to replace former officers of civilian government, "martial law rule" allows civilian personnel to continue to administer government services, while the troops remain in barracks. Martial law rule is resorted to by occupying armies to provide the appearance of normalcy for the comfort of the civilian population. As long as the civilian population responds with sufficient compliance to the wishes and decrees of the occupying force – a term described as "pacification" - then officers of civilian government may continue with their normal duties. If, however, unacceptable levels of civilian resistance should occur, the occupying army will call its troops from barracks to take a more visible and deadly role in the enforcement of its decrees.

In the case of post-World War II Germany, American military rule became "martial law rule" when a new civil service was successfully recruited from the German population which had not been members of the Nazi Party.

This Report: Non-Political

The scope of this report is neither political nor ideological. It will not answer the questions as to whether government decrees are just or if they make good sense. We will not ask if a decree from the Idaho Department of Water Management to shut-off irrigation to a half-million acres of farmland is justified or prudent. We will not ask whether the Idaho Power Commission should implement rolling "black-outs" of electrical power to reduce the risk of "wildfires." We only want to ask, "Do such agencies have the power to do so without the consent of the people they govern?"

The short answer is "yes, they do" because these agencies, as will be shown, are now acting under the authority of "martial law" pursuant of an emergency decree from the Governor.

Unlike the normal process of identifying an emergency and then responding to the unfolding crisis, Idaho has chosen a path characteristic of its more radical neighbors: Washington, Oregon, and California. Idaho has empowered its administrative

agencies with emergency police powers for "all hazard prevention." The normal activities of the civilian population are now under the purview and scrutiny of state and local agencies which have been tasked with "preventing" disasters.

Such prevention will be based upon the inner wisdom and scientific expertise of the regulators which will be enforced with a martial law power. More below.

The Recent Crisis in Idaho Government Operations

For many years, Idaho practiced "sunset" legislation, in which a government agency or service was given a specific number of years to operate which would then automatically expire unless renewed by the Idaho Legislature.

In 2018, the Idaho Legislature failed to provide renewed authority to a wide range of state and local functions and services. This created a crisis in Idaho government. A summary of the situation can be found in an internal document published by the Idaho Department of Health & Welfare, August 15, 2021 as it affected that agency. Entitled "Idaho Rulemaking: Twists and Turns" by Trinette Middlebrook and Frank Powell, it alleges that the last "normal" rulemaking year in Idaho was 2018 (p. 2). In 2019, the Legislature did not reauthorize the Idaho Administrative Code (p. 6) (see Appendix B).

In response, the Office of the Governor began to operate by executive orders to keep "the doors open" for numerous government services. A five-year plan was devised to reduce regulatory burden (Executive Order 2020-01) by the year 2026.

Immediately after this initiative in 2020, the "Covid Pandemic" suddenly struck which paralyzed the nation, including state and local governments.

These combined factors created a "perfect storm" involving the pandemic crisis itself in addition to the political haggling for regulatory reform between the State Legislature and the Office of the Governor.

In Idaho, the pandemic response required the limitation of constitutional rights and aroused the fear among government workers that they would be exposed to lawsuits and personal liability for enforcing those limitations. The general response by the Attorney General's Office and other government attorneys was that if the respective governing body had issued a "state of emergency" decree, then government officials would be freed of that risk of liability (see Appendix C).

The Office of the Governor eventually formalized these executive actions with an all-encompassing emergency decree in the form of **Executive Order 2022-04** (see Appendix D). The Legislature responded in kind with "emergency clauses" to all of its legislative enactments in 2024, thus ratifying and normalizing the Governor's decree.

There was a feeble attempt by the Idaho Senate in a 2021 Resolution to challenge the Governor's emergency powers. But he pushed back forcefully and with his allies in the Legislature made his actions veto-proof. Since his allies enjoy a super-majority in both houses, the Legislature has effectively offered no check or balance on the Governor's Office.

From the Administrative State to Martial Law Rule

"Ground-zero" of this push for martial law rule can be found in the Idaho Office of Emergency Management (OEM) which prepared a 503 page operations manual to implement EO2022-04 (see Appendix E). It lists government agencies which have been brought under its purview. The reader must appreciate that the OEM is classified under the "military division" of the Governor acting as Commander-in- Chief. All government agencies have effectively been brought out from under civilian control and placed within this military venue of the OEM. Even though state and local branches will continue to be staffed by civilian personnel and appear to be "normal," all policies and practices must be reviewed and cleared by the OEM.

Whatever was categorically known before as "administrative government" in terms of providing government services, it has now been militarized under this new command structure.

The term "military" is not used here lightly or with hyperbole. By strict legal definition, the normal civilian-based administration of Idaho government has been formally brought under the military command structure. **The Governor's Adjutant General is now in charge of the state.**

Constitutional Rights Suspended?

It is not clear what Constitutional protections remain for the citizen. Until the 2024 legislative session, bills contained a severability clause. This clause in legislation was customarily included to protect legislation from judicial activism, which might overturn an entire statute because of a "minor" defect. With a severability clause, instead of striking down an entire statute, a judge was required to leave in place whatever portions might be construed to still be constitutional and strike out the offending language only.

That changed in 2024. In all legislation passed in 2024 which contained a "state of emergency" declaration – over 300 bills affecting virtually all state institutions - no severability clauses were included. We must infer, therefore, that the legislature does *not* expect that the courts will challenge this new crop of legislation. This is consistent with conditions of martial law in which habeas corpus is suspended and judicial review of statutory enforcement is precluded.

Likewise, the constitutional independence of other executive officers might be in jeopardy. Unlike the executive branch of the federal government in which all executive officers are under the President and serve at the pleasure of the President (e.g. Secretary of State, Attorney General, etc.), in Idaho, such positions enjoy a separate and independent status provided by the state constitution.

The Attorney General, for example, is elected by the people and has powers independent of the Governor and even of the Legislature.

But under martial law rule in which the Governor now operates as Commander-in-Chief, state operations which have been consolidated into the Office of Emergency Management may preclude or usurp other constitutional officers, such as the Attorney General

just mentioned. A crisis over conflicting jurisdictions may materialize.

For example, the Office of the Attorney General has been empowered by the Legislature in House Bill 465 to form a taskforce and enforce a new state code of sexual offenses, including surveillance and prosecution. Yet, that very bill contains a "state of emergency clause," which under normal legal interpretation should bring it under the military venue.

In contrast, the military division also has a "Sexual Assault Prevention and Response Command" (SARC), which also enjoys surveillance and prosecutorial powers. One might rightly wonder whether a confusion of roles and jurisdiction will soon emerge.

Who Are the Enemy Combatants?

It is reasonable to expect that no use of the courts by citizens will be fruitful to contest this martial law rule. The very purpose of an emergency declaration is to assume powers for the government which it would not have without it. Per our quote earlier,

The legal effects of a declaration of martial law . . . generally involve suspension of normal civil rights and the extension to the civilian population of summary military justice or of military law.

There is no judicial remedy:

The regular civil courts, furthermore, do not review the decisions of tribunals set up by the military authorities . . .

While it is possible that the Office of the Governor can be shamed by the public in an election year to back down on this draconian grasp of power, it must be recognized that under conditions of martial law, there is no remedy to the situation using the normal protections of government. The "checks and balances" do not work under conditions of martial law because a state of martial law is a declaration of war. But without proofs of an invasion or the devastation of a natural disaster, we are left in the dark as to who or what the "enemy combatant" might be.

During conditions of martial law rule under the occupation of an alien power, the conquered people themselves are presumed to be enemy combatants. Their normal activities are considered to be potential acts of sabotage or terrorism or war against the structure of command and control.

For example, if the citizen should decide to build a chicken coop without a building permit or whatever land use permit which might be required by the occupying government, the citizen's actions might be interpreted as an act of rebellion for which he could be summarily arrested and incarcerated, or worse.

Martial law tends to criminalize the trivial. Jews in Nazi Germany were summarily executed for failing to wear their yellow "Star of David" armbands.

In our "chicken coop" infraction cited above, the hapless citizen might get lucky and be brought before a judge. Unfortunately, that judge would not be exercising the *judicial power* of the state which can judge upon the constitutionality of the rule which he might have broken. The magistrate's court is stripped of that power under martial law, and is instead reduced to merely an administrative tribunal which can only judge the facts of the case, not the validity of the law.

Extra-Constitutional Remedies

While this report does not offer any suggested legal course of action, it is worthwhile to note what has occurred historically. Short of force of arms, American citizens have in the past used "extra" constitutional remedies to rectify conditions of martial law. There is a strong undercurrent of common law institutions retained by local officials, such as the county sheriff, through which actions of nullification can be achieved. While over the years, the sheriff has been laden with numerous state and federal duties and restrictions, the office still remains fundamentally a common law institution with plenary and unmitigated power to organize the county's citizenry to its own purposes. None of these common law powers have been explicitly abrogated by any constitutional provision or statute because these primary governing documents acknowledge that political power is derived from the people and that the people have the inherent right to reassume that power in a different form when it suits them.

The county sheriff derives authority from that tradition with the right to order a federal or state agent to "stand down" when attempting to act unconstitutionally within the county of his jurisdiction.

County sheriffs can sue in court and always have standing to do so.

With this authority, it is theoretically possible for Idaho sheriffs to organize citizen grand juries which can restore the judicial power to the local magistrate in defiance of a martial law decree. Such a magistrate could in turn issue the Great Writs of Prohibition, Mandamus and Habeas Corpus.

Sheriffs can deputize all able-bodied men of the county to enforce the constitution.

If necessary, county sheriffs can assemble in a statewide gathering as a "congress of the shires" in which the actions of the Office of the Governor might be reviewed as to their constitutionality.

Remembering "Butch" Otter

Many years ago, former Governor "Butch" Otter was known to have publicly and privately declared, on numerous occasions, that the county sheriff was the highest and most powerful constitutional officer in the state. This author heard him declare this publicly and then affirm it again privately in a personal conversation which was witnessed by others – statements made while he was still serving as Governor.

While some may dismiss his statements as campaign rhetoric, if he were asked today, he would probably reiterate this belief.

This story is recited to counter any accusation which might be insinuated that the above suggested "extra" constitutional remedies represent a novel or peculiar opinion. Sentiments coming from a sitting Governor can hardly be regarded as dangerous or seditious.

Conclusion

It must not be forgotten that both the federal and state constitutions which govern us guarantee to the people a "republican form of government" which consists in a government derived from the "consent of the governed" and in recognition of "unalienable rights" which cannot be abolished by any agent or agency of government.

The imposition of martial law rule under a blanket "declaration of emergency" - when no emergency can be named except what might be conjured in the imagination of a petty bureaucrat - cannot under any circumstances be considered lawful or a binding standard upon a free people.

* * * * *

Appendices and Exhibits published at https://savebenewahcounty.com