

THE LEGAL BASES OF PHILIPPINE COLONIAL SOVEREIGNTY: AN INQUIRY*

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Introduction

The Republic of the Philippines is in crisis. Environmental and demographic trends ensure by themselves that the nation's future will be, at best, troubled. A persistent, if not still growing, armed insurgency is another ominous portent. The insurgency reflects the angst of peoples long mired in poverty and injustice. Its adherents have no faith in the Republic's capacity to effect peaceful and democratic change. Most insurgents belong to the large, and remarkably resilient, majority of Philippine citizens who live in poverty and endure the many indignities which accompany it. The current administrators of the Republic, meanwhile, profess their democratic commitments, yet prove largely unable, if not unwilling, to promote substantive democratic change on behalf of the impoverished majority.

Nowhere is the inertia and regression more evident than in the recognition and allocation of legal rights to natural resources. As of mid-year 1989, the laws and bureaucracies of the Philippine Republic were more hostile to the natural resource-rights and aspirations of the rural poor than was ever true during the colonial regimes. This fact may startle, and perhaps even anger, some people. But those surprised will not be able to make an informed rebuttal. Their incapacity is not innate; rather, it arises out of a serious lack of Philippine legal scholarship.¹

Little effort has been invested in the study of Philippine legal history, or in Philippine legal anthropology and sociology.² Virtually nothing has been done in the field of Philippine law and economics or law and politics. One

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²For an annotated listing of some research into these disciplines as of December 1983 see Lynch, *The Philippine Indigenous Law Collection: An Introduction and Preliminary Bibliography*, 58 PHIL. L. J. 457-534 (1983). See also C. CUNNINGHAM, *THE AUDIENCIA IN THE SPANISH COLONIES AS ILLUSTRATED BY THE AUDIENCIA OF MANILA* (1979). (reprint of the 1919 edition).

inevitable outcome of this dearth is that the origins, evolution, and effects of many contemporary laws and legal concepts are not known or understood by lawyers or other policy makers. More troubling, many existing laws and prevailing legal perspectives effectively disenfranchise large sectors of the Philippine citizenry.

It is no exaggeration to characterize the Philippine legal profession as permeated by a political economy of ignorance. The ignorance often appears to be countenanced by design. It enables the profession to overlook the conservative and elitist nature of the national legal system. It precludes any serious debate as to why many existing laws emanate from the colonial era and have become even more undemocratic during the past four decades. In a more profound sense, ignorance blinds people to the need for a broad-based inquiry as to whether the colonially constructed Republic of the Philippines can ever possess the conceptual and structural capacity, as well as the grandness of vision, to encompass the nation's indigenous heritages and the rights and aspirations of its impoverished majority.

The political economy of ignorance which permeates the Philippine legal profession is reinforced by educational processes which focus obsessively on unitary interpretations of codes and statutes and virtually ignore their impact on local levels. There is usually little, if any, discussion of contrary interpretations or perspectives. This approach reflects the code-traditions of the Spanish colonists. It is justified as being necessary to ensure that law school graduates are successful on the bar examinations. But the effect is often to stifle critical inquiry.

The usually unarticulated premise is that Spanish laws extended to the Philippine colony were essentially value neutral updates of universal legal truths first discovered by the Greeks and Romans. Laws enacted by the U.S. regime likewise undergo little serious scrutiny, especially insofar as they pertain to legal relations between Filipino citizens, or between citizens and the Philippine Republic. The prevailing, and largely untested, premise is that these laws also reflect universal insights into law and society as refined by the Anglo-American common law tradition.

Meanwhile, twentieth century advances in legal thought which expose the policy implications behind legal norms and processes largely escape the serious attention of the Philippine profession. The relatively small number of law students enrolled in courses on legal theory and legal philosophy spend an inordinate amount of time examining the works of those who tend to view law as an *a priori*, universal reality which need only be discerned and logically extended. And even in this context, concrete applications to the array of problems confronting Philippine society are rarely, if ever, made.

The following article, and three others which will follow in succeeding issues of the *Philippine Law Journal*, explore, among other things, the accuracy of these perceptions. This article examines the legal bases and rationales for the sovereign impositions made during the Spanish and U.S. regimes. The second article will describe and analyze the legal framework in

which the documented property regime emerged during the Spanish era, as well as the responses made by Filipino forebears to the expanding, and illegal, patterns of ancestral domain-usurpation. The third and fourth will examine how and why the U.S. regime during the Taft Era (1900-1913) built on the Spanish framework and recreated legal and bureaucratic processes for recognizing and allocating natural resource rights.

THE SPANISH FOUNDATION

Declaration of Alexander VI

The legal origins of the embryonic Philippine Republic can be traced back over 500 years. By the onset of the fifteenth century, Portugal had achieved political definition. Soon after, in 1415, it initiated European colonial expansion when the Muslim port-city of Cueta on the African side of the Gibraltar Straits was seized.³ In 1456 Pope Calixto III gave papal blessing to previous and prospective Portuguese acquisitions "of islands and ports down the African coast as far as the Indies' (*usque ad Indos*)—that is, Asia." Christian monarchs who challenged the papal edict were threatened with excommunication.⁴

Thirty six years later, in 1492, Christopher Columbus entered into a commercial contract with the Spanish king and queen, Ferdinand and Isabela. Columbus drove a hard bargain. He was eager to ensure that he would profit from any discoveries which might be made as a result of his pending journey across the Atlantic Ocean. Significantly, the contract said "nothing . . . about any missionary motives nor did the expedition carry a chaplain."⁵

The contract also gave no heed to the prior understandings between Portugal and the pope. Unlike the Portuguese, Spain could only invoke a

³The embryonic Spanish Crown, by contrast, was not forged until 1469 when the Crowns of Castille and Aragon were united. E. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* 110, 112, 129 (1982).

⁴W. Scott, *Dymythologizing the Papal Bull 'Inter Caetera,'* 35 *PHILIPPINE STUDIES* 348-56, 349-50 (1987). Scott's article relies extensively on the "meticulous study" of Manuel Gimenez Fernandez, *Nuevas consideraciones sobre la historia y sentido de las letras alejandrinas de 1493 referentes de las Indias*, 1 *ANUARIO DE ESTADOS AMERICANOS (SEVILLA)*, 171-430 (1944). Additional support for Portuguese expansion was provided in the papal bulls *Dum Diversas* of June 18, 1452; *Romanus Pontifex* of January 8, 1454; and *Eterni Regis* of June 21, 1481. The latter bull reaffirmed the 1479 Treaty of Alcocobas between Portugal and Spain which was ratified after Spain tried and failed to undermine its rival's naval hegemony. It "granted . . . Portuguese occupation of Atlantic islands . . . and sanctioned all future discoveries 'in the Ocean Seas' (*in mari oceano*), the waters believed to surround the Eurasian land mass." Scott, *id.*, at 350. See also E. BLAIR, & J. ROBERTSON, 1 *THE PHILIPPINE ISLANDS, 1493-1898* at 136-7 (1973). (hereinafter referred to as B&R); B. Tuchman, *Depravity: Alexander VI, MARCH OF FOLLY: FROM TROY TO VIETNAM* (1984); N. Joaquin, *Bulls and Geography, Culture and History* (1988); H. Vander Linden, *Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-1494*, 22 *AMERICAN HISTORICAL REVIEW* 1-20 (1916); O. Dickason, *Old World Law, New World Peoples, and Concepts of Sovereignty* *ESSAYS ON THE HISTORY OF NORTH AMERICAN DISCOVERY* (1988).

⁵W. Scott, *id.* at 350.

domestic law to legitimize its colonial claims. It vested legal rights over new-found territories in the first inhabitants.⁶ This provision was relied on by Columbus during his inaugural voyage when he laid claim to islands in the Caribbean which were already inhabited.

When Columbus returned on March 4, 1493, he first anchored off Lisbon and was promptly informed by the Portuguese king, John II, that the discoveries belonged to Portugal. Columbus reported this demand to the Spanish monarchs and King Ferdinand hastened to respond. He was worried that the Portuguese might decide to occupy the islands forcibly "on the grounds that numerous papal briefs . . . had given them sole right."⁷ Ferdinand instructed his emissaries in Rome "to start working for papal favors to remove the threat of excommunication . . . and recognize Spain's rights to the new territories, whatever and wherever they might be."⁸

The Spanish Crown enjoyed considerable leverage at the Vatican in 1493. The current pope, Alexander VI, was "said to have gained the [papal] tiara by a pact with the devil at the price of his soul."⁹ He was Spanish-born and was already beholden to Spain for the appointment of his sixteen-year-old son as archbishop of Valencia. Alexander was also eager to obtain Ferdinand's neutrality in a complicated annulment proceeding involving relatives of both men.¹⁰ The pope, therefore, responded favorably to the Spanish demand by issuing a series of papal bulls which are cumulatively referred to as the Declaration of Alexander VI. The bulls were addressed to "Ferdinand, King, and . . . Isabella, Queen, of Castile and Leon, Aragon, Sicily, and Granada." In them, Alexander claimed to have acted on his "own accord, not at your [Ferdinand's and Isabella's] instance nor the request of anyone else in your regard."

In the first bull, *Inter Caetera*, issued on May 3, the pontiff cited "the authority of almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ which we hold on earth." He then purported to "give, grant and assign forever . . . all and singular the countries and islands thus unknown and hitherto discovered" by Spanish envoys, provided that "they at no time have been in the actual temporal possession of any Christian owner, together with all their dominions, cities, camps, places, and towns as well as all rights, jurisdictions, and appurtenances of the same wherever they may be found."

⁶J. Aragon, *The Controversy over Justification of Spanish Rule in the Philippines* in *STUDIES IN PHILIPPINE CHURCH HISTORY*, G. ANDERSON (ed.), 3-21, 3, citing Law 29, Title XXVIII, of *Partida III* in the *Codigo de las Siete Partidas*.

⁷M. NOONE, *THE DISCOVERY AND CONQUEST OF THE PHILIPPINES (1521-1581)* 12 (1986).

⁸W. Scott, *op cit.*, note 4 at 351.

⁹B. Tuchman, *op. cit.*, note 4 at 89.

¹⁰W. Scott, *op. cit.*, note 4 at 351. It appears that there were at least five bulls. The quoted sections are taken from an English translation in 1 B&R 97-111. The original *Inter Caetera* was unknown until 1892. *Id.*, at 355. B&R, meanwhile, contains no reference to *Piis Fidelium*.

Ferdinand was not satisfied. The document was a private communication which had not been issued publicly. Furthermore, it failed to delimit Portuguese authority or to define the territory to which Spain could lay claim with papal sanction.¹¹ The pope moved quickly to assuage these royal concerns. Another bull, *Eximiae Devotionis*, was issued the following July but fictitiously backdated to May 3. It closed loopholes in the first bull and granted the Spanish Crown the same "graces, privileges, exemptions, liberties, faculties, immunities, letters, and indulgences that have been granted to the kings of Portugal."¹²

The grant was not gratuitous. It was accompanied by a papal command that the monarchs "in virtue of holy obedience" send "worthy, God-fearing, learned, skilled, and experienced men in order to instruct the inhabitants and dwellers therein in the Catholic faith, and train them in good morals." The duty imposed, however, was not overly burdensome. Instead, it reflected the "masterful hyperbole about Ferdinand's missionary zeal." In order to generate the most favorable political conditions and inducements for securing papal sanction of Spanish colonialism, the Spanish King realized that he needed to shroud his imperial designs. On June 8, therefore, Ferdinand "dispatched the Latin outline of what would become the third papal bull, *Piis Fidelium*," of June 25. The bull licensed missionaries and empowered Ferdinand to select them.¹³

The king was still not satisfied and another bull, retrospectively dated May 4, was promulgated in late July 1493. Also named *Inter Caetera*, it laid the foundation for the Treaty of Tordesillas which was signed the following year by representatives of the Spanish and Portuguese monarchs.¹⁴ The bull attempted to delineate the respective spheres of Iberian influence by drawing an imaginary line between the Arctic and Antarctic poles one hundred leagues west of the Cape Verde Islands and continuing across the other side of the planet. (The line was moved 270 leagues further west by the treaty.) In the words of a contemporary, the world was "sliced in two like an orange."¹⁵ The Spanish zone of exploration was west of the Atlantic line, the Portuguese zone was east. No agreement on the precise location of the Pacific line was ever reached.¹⁶ Nevertheless, once ratified under oath, the treaty provided that

¹¹*Id.*, at 354.

¹²M. NOONE, *op. cit.*, note 7 at 13.

¹³W. SCOTT, *op. cit.*, note 4 at 354-5.

¹⁴The treaty and related documents can be found at 1 B&R 115-29, 130-5. See also M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 124 (1926).

¹⁵M. NOONE, *op. cit.*, note 7 at 12 citing a letter of Alfonso de Zuazo to the Spanish king, Charles I, dated January, 1518.

¹⁶N. CUSHNER, *SPAIN IN THE PHILIPPINES: FROM CONQUEST TO REVOLUTION* 9, 21 (1971). Unsuccessful negotiations between Spain and Portugal to determine the whereabouts of the Pacific line were held in 1524. Pursuant to the 1529 Treaty of Zaragoza, Spain ceded to Portugal its rights to the spice-rich Moluccas for 350,000 ducats. N. CUSHNER, *Id.*, at 29.

neither party would seek "absolution or relaxation from our very holy Father, or from any other Legate or Prelate who could give it, nor to make use of it if they give it of their own volition."¹⁷

The Spanish monarchy ratified the Tordesillas treaty in the belief that it ensured control over a direct route to the fabled Orient. Columbus, after all, believed up to his death that he had reached islands off the eastern coast of Asia. But it soon became apparent that the islands claimed were not adjacent to Asia. Rather, they abutted a previously unknown continental land mass. Pope Alexander and the Spanish monarchs, therefore, contrived once more to undermine Portuguese claims and shore up Spanish ones. Their efforts culminated in yet another bull, *Dudum Siquidem*, which was dated October 1493. It officially interpreted *Inter Caetera* as empowering the Spaniards to claim lands beyond the treaty line provided they were discovered by sailing west.¹⁸

The Portuguese, meanwhile, bided their time on the papal front and continued to expand their naval explorations. The Cape of Good Hope had been rounded for the first time in 1487. This navigational feat opened the way to India and the Spice Islands. It was only a matter of time until Alexander died and a successor more congenial to Portuguese interests became pope. The Portuguese *coup de grace* came on November 3, 1514 when Pope Leo X issued the bull *Praecelsae*. It granted the Portuguese king an exclusive right to claim all lands which could be reached by sailing east.¹⁹ As a result, the Portuguese believed that Spanish hopes of profiting from the coveted spice trade and the imaginary treasure house on the Asian mainland had been dashed.

The Portuguese were soon to learn that Spanish hopes had actually been rekindled a year earlier when Vasco Nuñez de Balboa, while exploring the Panamanian isthmus, had "discovered" the Pacific Ocean and claimed it on behalf of the Spanish Crown. Balboa's success renewed interest in the search for a westward sea passage. Eight years later, during an epic voyage to Asia, the straits at the southern tip of the Americas were successfully traversed by, and eventually named after, Ferdinand Magellan.

Magellan and the Islas de San Lazaro

Magellan was an experienced Portuguese mariner. In 1518 he secured the patronage of the Spanish king, Charles I, for a daring effort ostensibly to reach the Moluccas from the west by sailing around the southern tip of the New World. On September 20, 1519, Magellan's fleet of five ships and 241 men plunged into the Atlantic and headed southwest. After an array of problems, including a mutiny, three ships entered the Pacific Ocean on November 20, 1520. When Magellan reached the Pacific equator, however,

¹⁷Quoted in W. Scott, *op. cit.*, note 4 at 356.

¹⁸M. NOONE, *op. cit.*, note 7 at 13.

¹⁹N. CUSHNER, *op. cit.*, note 16 at 9-10. Excerpts of the bull, *Praecelsae*, can be found in B&R 137-8.

"he strangely did not veer west in search of the Moluccas he knew to be on that line, rather he changed course when he reached the latitude of Luzon and headed straight for the Philippines."²⁰ The change in course was no accident.

Reports concerning East Asian topography had been filtering back to Europe for several decades prior to Magellan's historic trip. The conduits were often Spanish-speaking, Muslim trading merchants whose forebears had been driven out of Spain during the fifteenth-century Christian reconquest. These merchants "interacted with, among others, natives from the still 'undiscovered' Philippine Islands."²¹ They also conversed with Portuguese sailors and merchants who, in turn, relayed the information back home. As a result,

Portuguese cartographers were quickly able to indicate Asian points which Portuguese explorers had not yet seen. An unsigned chart, presumably by Pedro Reinal (who supplied Magellan with maps before he left Seville), drawn before Borneo and the Philippines were reached, shows in addition to known parts along the Indonesian archipelago from Sumatra to the Moluccas, the sketchy outlines of the Chinese coast and, to the east, a group of islands south of the Tropic of Cancer and a larger one just north of it. The Tropic of Cancer actually passes through the large island of Taiwan, and the Philippines, of course, lies to the south of it.²²

On March 17, 1521, the ocean-weary fleet reached the shores of Samar Island. Magellan and his men referred to the still relatively unexplored archipelago as the Islas de San Lazaro.²³ (The island of Samar was first referred to as Felipinas, in honor of Philip, the crown prince, during the ill-fated expedition of Ruy Lopez de Villabos in 1543. Only later was the name used to include the entire archipelago.²⁴) On Easter Sunday, March 31, the first mass was held in the archipelago on the island of Limasawa at the southern tip of Leyte. That afternoon, a large wooden cross was planted atop a nearby hill.

The planting of a wooden cross symbolized the papal right to proselytize. The nature and extent of this right would not be determined until the end of the century. Contrary to the prevailing twentieth century perspective known as the Regalian Doctrine, however, neither the pope, the Spanish king, nor Magellan purported to usurp unilaterally all of the customary property rights, or even the sovereign rights, of the natives. This fact was highlighted

²⁰J. Scott, *The Spanish-Speaking Slave: A Note on the Mediterranean Connection*, 37 PHILIPPINE STUDIES, typed manuscript, 14 (forthcoming 1989).

²¹*Id.*, at 5.

²²*Id.*, at 8 citing A. CORTESAO & A. TEIXERA DE MOTA 1 PORTUGALIAE MONUMENTA CARTOGRAPHICE, plate 10: Anonymous—Pedro Reinal chart of ca. 1517.

²³A. PIGAFFETA 33 B&R 109. See generally 33 B&R 25-366; 34 B&R 39-180. For a more contemporary translation see A. PIGAFFETA, *MAGELLAN'S VOYAGE ROUND THE WORLD*, C.E. Nowell, (ed.) (1962). Lazarus figures prominently in the gospel during the fifth week of Lent, which was when Magellan and his men first arrived. N. CUSHNER, *op. cit.*, note 16 at 17.

²⁴*Id.*, at 35.

during the first week of April when Magellan and his men arrived in Cebu. The local chief asked Magellan's emissaries, including the fleet's lawyer, if the natives were expected to pay tribute to the Spanish Crown. The lawyer replied that there was no such demand; Magellan merely wanted exclusive trade rights.²⁵

The diplomatic riposté notwithstanding, it was evident that Magellan and his men wanted, and needed, more. Throughout the sixteenth century Spanish soldiers received no pay.²⁶ Fortunately for Magellan, many of the native peoples he encountered wished to become Spanish vassals, particularly after they saw the power of the king's cannons. But not everyone was so easily cowed. Magellan learned this the hard way when he lost his life on the north shore of Mactan Island on April 27 during a fight with native warriors. Shortly thereafter, the remaining crew members departed the archipelago.

Sovereignty and the Alexandrian Declaration

Nearly thirty years lapsed between the "discovery" of the Americas and Magellan's arrival in the Pacific archipelago. Forty-four more years passed before a permanent Spanish occupation force was established. By the time Miguel de Legazpi and his entourage arrived in 1565, Spain had already garnered a considerable degree of experience in the management and exploitation of its overseas empire. It had also enacted an elaborate legal framework for administering the vast Spanish empire and for justifying sovereign claims based on discovery.²⁷ The experience and framework provided the empirical and theoretical bases by which Spain would attempt to administer the Philippine colony from Madrid. But the theory invoked by the Crown for extending its sovereignty over the Philippine archipelago would be unique.

King Philip II sat on the throne in 1565. He wanted to prevent any repeat of the brutal conquests of Mexico and Peru which had done much to belie Spanish attempts to legitimate the colonial enterprise in the name of Jesus Christ. At the same time, the friars were eager to secure more control over the Philippine colonial enterprise than they had in the Americas.

The Dominican theologian and renowned humanist, Francisco de Vitoria (1483/6-1546), provided powerful arguments in their favor. Vitoria "was an incorrigible anti-imperialist."²⁸ His positions were largely inspired by

²⁵A. PIGAFETTA, *op. cit.*, note 23 at 141. See also M. NOONE, *op. cit.*, note 7 at 69.

²⁶Interview with William H. Scott in Sagada, Mountain Province, November 19, 1988.

²⁷Spanish laws pertaining to discovery are located in the LAWS OF THE INDIES, BOOK 4, TITLES 1, 2, 3 and 6. Laws regarding conquest *qua* pacification of the natives are compiled in BOOK 4, TITLES 4 AND 6.

²⁸H. MUÑOZ, *VITORIA AND THE CONQUEST OF AMERICA* 43 (1938). For additional background into the life and theories of Vitoria see also J. SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* (1934); J. PARRY, *THE SPANISH THEORY OF EMPIRE IN THE SIXTEENTH CENTURY* (1940); B. HAMILTON, *POLITICAL THOUGHT IN SIXTEENTH CENTURY SPAIN: A STUDY OF THE POLITICAL IDEAS OF VITORIA* (1963).

the thirteenth-century scholar, Thomas Aquinas.²⁹ Aquinas believed that temporal rule emanates from nature and that the dictates of nature are universal. In Aquinas's opinion, non-Christian leaders were legitimate and, provided they did not violate natural law, must be obeyed by their subjects, including Christians.³⁰

Building on Aquinas' premise, Vitoria in 1539 delivered a lecture, "*De Indis Prior et De Indis Posterior*," at the University of Salamanca. During the lecture, Vitoria examined various legal issues pertaining to the Spanish conquests in the Americas. He concluded that rights enjoyed by virtue of natural law must be recognized by a Christian sovereign aspiring to spread the faith. He also argued strenuously that there was no legal basis for unilaterally usurping the sovereignty and property rights of non-Christian natives.³¹

Vitoria's perspective clashed with the views of other royal advisors. As a result, legal justification "of their king's authority over the Indies remained a burning issue. . . virtually throughout the sixteenth century."³² Much of the controversy revolved around conflicting interpretations of the Alexandrian Declaration.³³ Secular supporters of the Crown did not want to concede that the sole basis for colonial sovereignty rested on papal grants. "[T]his would base Spain's claims to the islands upon a concession emanating from a source outside of Spain. This would confer on the pope or his representative powers that might in the future erode the king's."³⁴ Spanish secularists stressed the right of prior discovery. Their foremost exponent was Juan de Solorazano Pereira. "Although virtually compelled to concede some importance to the papal concession, Solorazano argued that the Spaniards were entitled to occupy the Indies without the Pope's sanction."³⁵

Those sympathetic to papal prerogatives were led by Vitoria. They interpreted the bulls as being preeminently spiritual in nature. Since the pope is not temporal sovereign of the world, Vitoria reasoned, he enjoys no authority over non-Christian peoples. The papal bulls, therefore, could not have entailed any grant of political dominion, let alone ownership, over inhabited

²⁹J. PHELAN, *THE HISPANIZATION OF THE PHILIPPINES: SPANISH AIMS AND FILIPINO RESPONSES, 1565-1700* 8-9 (1959).

³⁰SUMMA THEOLOGIAE II-II, Q.10, Art. 10.

³¹For a discussion of *De Indis* and Vitoria's other major lecture pertaining to Spanish sovereignty over the Americas, *DE JURE BELLI* (1539), see H. Munoz, *op. cit.*, note 28 at 44-203.

³²J. Aragon, *op. cit.*, note 6 at 4.

³³H. de la Costa, *The Legal Basis of Spanish Imperial Sovereignty*, 1 *PHILIPPINE STUDIES*, 155-62, opined at 160 that "Perhaps it is impossible, in the present state of our knowledge, to tell exactly what the Pope or the papal curia thought the Holy See could grant or was actually granting to the Crown of Castille."

³⁴R. CONSTANTINO, *THE PHILIPPINES: A PAST REVISITED* 23 (1975).

³⁵J. Phelan, *Some Ideological Aspects of the Conquest of the Philippines* 13 *THE AMERICAS: A QUARTERLY REVIEW OF INTER-AMERICAN CULTURAL HISTORY* 221-39, 229 (1957).

territories.³⁶ In addition, the Crown could not base its title on discovery of areas already inhabited. In Vitoria's opinion, efforts to invoke the just war theory were also mistaken, especially in places where the natives tended to welcome the colonizers and fight against them only when provoked.³⁷

The perspectives of Vitoria and his allies gained wide acceptance. King Philip was also sympathetic. The comparatively late establishment of a permanent occupation force in the Pacific islands provided him with an opportunity to apply Vitoria's theory.³⁸ In 1564, Philip dispatched Legazpi and ordered him to pacify the Philippine archipelago bloodlessly. Philip also ordered that the indigenes be informed that there were no designs on their persons or property.³⁹

The Manila Synod of 1582

The first phase of the Spanish occupation, from the arrival of Legazpi until 1581, was notable for the harsh treatment inflicted by soldiers and colonial officials on indigenous peoples, and the complaints by the friars which ensued.⁴⁰ The most serious abuses were caused by *encomenderos*. Augustinian priests led a vocal opposition to the abuses. The *encomenderos* were defended by the secular regime. *Encomiendas*, after all, were "the principal means by which a few hundred Spaniards in the course of twenty-five years pacified a large portion of the northern and the central Philippines."⁴¹

Indigenes who initially came in contact with the Spaniards were likely bewildered by the colonial endeavor. Many paid what was demanded of them. Others carried on the tradition of Lapu-Lapu and rose to defend themselves during *entradas* (expeditions in search of entry points) by roving bands of soldiers based in Manila and Cebu. The Spanish marauders "would provoke incidents and thus provide themselves with an excuse for making a 'just war.'" Superior firepower usually ensured a Spanish victory and thereby enlarged the number of tribute-paying vassals.⁴²

³⁶H. MUÑOZ, *op. cit.*, note 28 at 60-3, 75-9.

³⁷J. Aragon, *op. cit.*, note 6 at 7-8. See J. Phelan, *op. cit.*, note 35 at 226-30; H. de la Costa, *op. cit.*, note 33 at 158-60. See also the 1574 *Opinion of Fray Martin Rada on Tribute from the Indians* 3 B&R 354-9. Self-defense, however, was permitted. *Royal Communications to and Concerning Legazpi: King's Reply of August 6, 1569* 34 B&R 235.

³⁸Legazpi's arrival was preceded by three unsuccessful attempts in 1525-6, 1527-9, and 1542-3 to establish a permanent occupation force. See 2 B&R 11-73; M. NOONE, *op. cit.*, note 7 at 109-257; N. CUSHNER, *op. cit.*, note 16 at 21-39.

³⁹An account of Legazpi's expedition and years in the colony can be found in M. NOONE, *op. cit.*, note 7 at 261-439; N. CUSHNER, *op. cit.*, note 16 at 39-73. See also 2 B&R 77-335, 34 B&R 236-52.

⁴⁰J. ARAGON, *IDEAS JURIDICO-TEOLOGICAS DE LOS RELIGIOSOS DE FILIPINAS SOBRE LA CONQUISTA DE LAS ISLAS* 13-52 (1950). Aragon was a Spanish Augustinian priest who served as the UST archivist during the 1950s. Aragon's book provides a scholarly background on the juridical and theological perspectives of the friars which pertained to the Spanish acquisition of the archipelago. Any critical perspective concerning the role of the friars, however, was notably absent.

⁴¹J. Phelan, *op. cit.*, note 35 at 230.

⁴²N. CUSHNER, *LANDED ESTATES IN THE PHILIPPINES* 101-2 (1976).

The second phase of the occupation (1581-86) was heralded by the arrival of the first Bishop of Manila, Domingo de Salazar O.P.⁴³ Salazar came into conflict with the *encomenderos* soon after he disembarked. Significantly, however, Salazar did not object to the exaction of tribute. He viewed the *encomienda* as a "just and necessary" institution. "What he objected to was the *scale* of the tribute as levied on Christian and non-Christian, on 'pacified' and 'unpacified' natives."⁴⁴

In 1582 an ecclesiastical synod was convened in Manila under the leadership of Bishop Salazar to address the problem of tribute collection and, even more important, to formulate a novel theory upon which Spain would stake its legal claim to sovereignty over the archipelago. The issue was "by no means purely academic. North and south of the Spanish city of Manila lay extensive tracts of unconquered territory, including whole islands."⁴⁵

The synod began its deliberations on the issue of sovereignty by declaring that the Castilian monarchs "do not occupy the Philippines by right of inheritance or through a just war." Instead, it "repeated the principle that Castilian sovereignty in the Indies flowed from the commitment to preach the Gospel to the infidels and to provide military protection of converts against their pagan neighbors."⁴⁶

The synod also stressed that "the natives could not be deprived of the property or their individual rights founded in natural law and the law of nations unless they positively interfered with the preaching of the Gospel."⁴⁷ Unlike Vitoria, however, the synod participants were willing to justify the Spanish usurpation on the basis of the indigenes' supposed cultural inferiority. Their ethno-centrism became "one of the well-springs of the friars' defense of the natives against harsh exploitation." The friars harbored "the conviction that they were dealing with peoples culturally inferior to the Spaniards who were unable to defend their rights."⁴⁸

The synod concluded that the sole right possessed by the Castilian sovereign and its agents "was that of preaching the gospel and not dispossessing

⁴³J. ARAGON, *op. cit.*, note 40 at 53-81, 84-114.

⁴⁴H. de la Costa, *op. cit.*, note 33 at 55-6. De la Costa stressed at 156-7 and 160 that the bishop's position was a product of the previous decades of Spanish colonial experience. For a description and discussion of the Synod's deliberations see J. ARAGON, *op. cit.*, note 40 at 59-96; H. DE LA COSTA, *JESUITS IN THE PHILIPPINES* 15-36 (1961); *Church and State in the Philippines during the Administration of Bishop Salazar, 1581-1594*, 30 *HISPANIC AMERICAN HISTORICAL REVIEW* 314-35 (1950).

⁴⁵H. de la Costa, *op. cit.*, note 33 at 158. Most historians and lawyers in the Philippines seem to assume that, at least for legal purposes, there was an almost instant and widespread conquest. L. BAUZON, *DEFICIT GOVERNMENT: MEXICO AND THE PHILIPPINES SITUADO, 1608-1804* (1981) at 19, for example, stated that "while the Spanish conquest of the Philippines in 1565 touched off a crisis of conscience among Spaniards, the legality of that conquest as a *fait accompli* was in itself not disputed."

⁴⁶J. Aragon, *op. cit.*, note 6 at 10.

⁴⁷J. Phelan, *op. cit.*, note 35 at 222-3.

⁴⁸*Id.*, at 223.

any man of what was his."⁴⁹ The council fathers agreed, however, that the Crown held a certain "quasi-imperial" authority over the indigenes by virtue of the supposed "higher spiritual goal" which motivated the colonial endeavor. Through baptism, the natives were deemed to become subjects of the pope's spiritual sovereignty while remaining subjects of their own local leaders. The pope delegated his sovereign powers to the Crown by the bull and the *patronato real*. As a result, the Crown was legally empowered to promulgate laws necessary for the protection and exercise of the spiritual rights of the native Christians.

Although it may have "had no effect on history"⁵⁰ the Synod "defined provisionally the juridical basis of Castilian sovereignty in the island."⁵¹ This was in large measure because its conclusions were received favorably by King Philip.⁵² By 1597, however, controversy over the legal basis of Castilian sovereignty was raging once more. The catalyst was ostensibly the decades-old dispute between the *encomenderos* and the Philippine church over the collection of the tribute. The real issue, however, concerned power and which institutions, religious or secular, would dominate the colonial enterprise.

Sovereignty and Consent

Philip decided in favor of the clergy. He decreed on February 8, 1597, that the consent of the natives to Castilian sovereignty should be secured. His instructions were contained in a royal cedula dated July 12, 1599.⁵³ Soon after, large delegations of native chieftains from Ilocos, Laguna de Bay, Pangasinan and the Manila provinces were assembled in the presence of colonial officials and priests.⁵⁴ In the first plebiscites ever held in the archipelago, these precocious native collaborators "voluntarily" and "solemnly" chose the king as their sovereign and natural lord.⁵⁵ According to Spanish accounts, "The results were overwhelmingly favorable, even if in some instances reservations and conditions were attached."⁵⁶

They based their voluntary submission on the contractual promise that the king and his subjects render each other certain services. In these documents the con-

⁴⁹J. Aragon, *op. cit.*, note 6 at 10.

⁵⁰Interview with William H. Scott in Sagada, Mountain Province, November 19, 1988.

⁵¹J. Phelan, *op. cit.*, note 35 at 232. J. ARAGON, *op. cit.*, note 40 at 149 portrayed the third phase of the Spanish occupation as lasting between 1587 and 1600. He characterized the period in contradictory terms as "*luchas por la libre aceptacion del dominio espanol*" (struggle for the free acceptance of Spanish dominion).

⁵²N. CUSHNER, *op. cit.*, note 16 at 102 citing a royal cedula issued on April 1, 1586.

⁵³10 B&R 243-72, 253-5.

⁵⁴William H. Scott cautioned during an interview in Sagada on November 19, 1988 that not much is known of these meetings except for the one held in Laguna de Bay. He added that apparently few meetings were ever held and they only included native leaders who occupied government positions, usually as tax collectors. In other words, the meetings were held "only in areas already conquered."

⁵⁵J. Phelan, *op. cit.*, note 29 at 35; J. Aragon, *op. cit.*, note 6 at 19.

⁵⁶J. Aragon, *op. cit.*, note 6 at 19.

quest was interpreted as a "liberation." In overthrowing the pagan cults the Spaniards were said to have liberated the Filipinos from the enslavement of the devil as well as freed them from the oppressive and tyrannical government of their rulers. The positive benefits that the king promised to render were religious instructions, the administration of justice, and protection against their enemies.⁵⁷

The plebiscite participants, of course, did not speak for everyone. In many parts of the islands resistance to the colonial imposition was widespread, enduring, and occasionally successful. In addition, the "great land masses of the archipelago never really came under Spanish control." Instead, "except for the great central plain of Luzon, few Spaniards in 1800 resided more than 15 kilometers from the sea coast." Census figures, meanwhile, "represented not the entire population but only those who were willing to be counted."⁵⁸ As a result, little is known, statistically or otherwise, about those who lived beyond the Spanish pale.

Despite these limitations, it was estimated that by 1670 less than a half-million *indios* were paying tribute while twice as many were believed to live outside the colonial realm.⁵⁹ In 1825 one Spaniard lamented that only the coastal populations of Luzon and the Visayas had been Christianized.⁶⁰ At the end of the Spanish regime, one-fifth of the population of Luzon and one-fourth in the Visayas were estimated to be living independently outside of the colonial framework.⁶¹

An even higher percentage of indigenes in Mindanao, Mindoro, Palawan, Samar, the Sulu Archipelago, the mountains of northern Luzon, and even parts of Panay, eluded the colonial grip.⁶² Besides the shortage of Spanish

⁵⁷J. Phelan, *op. cit.*, note 35 at 238. Governor Tello's interpretation of his instructions from the King raised doubts as to the "voluntariness" of the submission. In Tello's words, he was ordered "by the best and most gentle methods possible, to compel the natives to render submission (this ceremony having been neglected at first), so that the tributes which they paid could be collected with more justice." Pursuant to this interpretation, Tello reported that "Instructions and directions have been sent to all the alcaldes-mayor and to the religious in all the provinces, that by the gracious methods which your Majesty directs, submission shall be rendered." Tello also reported that the natives in Laguna had "not so easily yielded; for the natives there asked a year's time in which to answer." See *Letter from Governor Tello to the King dated July 12, 1599, Part 9, 10 B&R 253-5; The Collection of Tribute in Filipinas Islands 7 B&R 268-318; 8 B&R 25-69.*

⁵⁸W. SCOTT, *History of the Inarticulate, CRACKS IN THE PARCHMENT CURTAIN AND OTHER ESSAYS IN PHILIPPINE HISTORY* 18-27, 22-3 (1982).

⁵⁹J. Phelan, *op. cit.*, note 29 at 108; H. DE LA COSTA, *op. cit.*, note 44 at 89.

⁶⁰E. ROBLES, *THE PHILIPPINES IN THE NINETEENTH CENTURY* 12 (1969).

⁶¹J. FOREMAN *THE PHILIPPINE ISLANDS: A POLITICAL, GEOGRAPHICAL, ETHNOGRAPHICAL, SOCIAL, AND COMMERCIAL HISTORY OF THE PHILIPPINE ARCHIPELAGO: EMBRACING THE WHOLE PERIOD OF SPANISH RULE WITH AN ACCOUNT OF THE SUCCEEDING AMERICAN INSULAR GOVERNMENT* 129 (1892); D. ROTH, *THE FRIAR ESTATES OF THE PHILIPPINES* 98-9 (1977). In the 1906 (third edition), Foreman at 120 deleted this estimate and cited the 1903 Census of the Philippine Islands which identified "uncivilized" people as comprising 8.5% of the colony's population.

⁶²W. SCOTT, *op. cit.*, note 58 at 23, noted that "As late as 1881 more than one-third of the population of Samar was listed as independent, and when the central government pushed a plan to resettle all unconverted Filipinos in registered barrios in the early 1890's, Antique led the list with 154 such rancherias."

personnel, rugged terrain and geo-physical isolation contributed to the maintenance of local sovereignty, as did warrior traditions among Islamicized peoples and those living among the Gran Cordilleras of northern Luzon and the interiors of Mindanao.

After a brief foray in 1880 to northern Luzon, the governor-general waxed indignant about the situation in a *memoria* to the overseas minister in Madrid.

It is certainly humiliating for Spain and her government at home and abroad to realize that thousands of human beings, some at the portals of the capital of the archipelago and many others within sight of Christian towns with resident civil, military, and ecclesiastical authorities, not only live in pre-Conquest [sic] backwardness but commit crimes and depredations, carrying their audacity to the extent of demanding and collecting tribute from Christian towns without receiving castigation for their troubles and without any authority having been bold enough to impose upon them⁶³

The Spanish use of force to secure the consent of the natives to the colonial imposition intensified after the introduction of vastly superior weapons. The "consent" of the Yakans of Basilan was secured during 1845.⁶⁴ The Maguindanao Sultanate was subjugated in 1860, while Jolo fell for the first time only in 1876.⁶⁵ Igorot resistance proved to be so frustrating to the Spaniards that in 1881 the governor-general issued a decree devoid of any democratic pretenses.⁶⁶ He appealed "to all the Filipino Igorots to accept the rule of the Spaniards, under pain of being forcibly subdued." Predictably, many Igorots refused and once again another expedition was sent against them. The expedition ended when orders telegraphed from Madrid compelled the governor-general to desist.⁶⁷

The legal implications arising from successful resistance to the colonial imposition, as well as Spain's official domestic viewpoint were clear: Spain technically never acquired full sovereignty over the entire archipelago. Conversely, regions inhabited by unconsenting peoples retained their sovereign rights.

Spanish Sovereignty and International Law

Centuries-old, domestic legal technicalities debated within the Spanish government, however, had no impact on nineteenth century international law

⁶³Quoted in W. SCOTT, *THE DISCOVERY OF THE IGOROTS: SPANISH CONTACTS WITH THE PAGANS OF NORTHERN LUZON* 267-8 (1977).

⁶⁴J. Aragon, *op. cit.*, note 6 at 20.

⁶⁵P. GOWING, *MANDATE IN MOROLAND: THE AMERICAN GOVERNMENT OF MUSLIM FILIPINOS, 1899-1920* 12 (1983). See also C. MAJUL, *MUSLIMS IN THE PHILIPPINES* (1978).

⁶⁶W. SCOTT, *op. cit.*, note 63 at 26-7 implied that in the minds of Spanish priests and officials, Igorot resistance, including an impressive "list of wrongs inflicted by Igorots on Spanish subjects," theoretically legitimated military efforts to conquer the Cordilleran indigenes.

⁶⁷J. Aragon, *op. cit.*, note 6 at 20-1. For a discussion of the telegram from Madrid and the governor-general's response see W. SCOTT, *Id.*, at 267-73.

perspectives, at least insofar as Anglo-American legal scholars were concerned. At the time Spain ceded its Philippine rights to the United States in 1898 the prevailing international law theory was that an area inhabited by people not "permanently united for political action was deemed *territorium nullius* [empty territory]." ⁶⁸ This was an ambiguous term which "could mean lands totally vacant of people or merely not inhabited by peoples possessing those religions and customs that Europeans recognized as equal to their own." ⁶⁹

A claim grounded on *territorium nullius* was binding over other foreign powers. If the acknowledged colonial power maintained its presence in the archipelago, it would be recognized as holding sovereignty over the entire island group, ⁷⁰ except perhaps for territory belonging to the Sulu Sultanate. ⁷¹ The consent of the native inhabitants did not matter, especially if they were not politically organized in a territorially expansive manner.

Spanish sovereignty over the archipelago was ceded to the U.S. in 1898. The domestic theory of consent appears to never have been raised during the transfer. The U.S. relied on the international character of the cession and claimed sovereignty over the entire archipelago, including southern territories which fell under the jurisdiction of Muslim sultans and principalities. Had the need arisen, the theory of *territorium nullius* was available. Widespread resistance in many parts of the colony amply demonstrated the lack of native consent. Subsequent victories by the U.S. military laid the foundation for another internationally recognized legal title based on conquest. But once Spain ceded the archipelago, there was never any need to invoke these alternative theories. It was simply assumed, without question, that the Spanish cession was valid and that it applied to all parts of the colony.

Meanwhile, in December 1902, Pope Leo XII promulgated the apostolic constitution *Quae Mari Sinico*. ⁷² The constitution terminated any remaining privileges still enjoyed by the Spanish friars who remained in the colony after 1898. It enjoined members of the Catholic clergy to focus their energies on religious, as opposed to worldly, pursuits. It also rescinded the Declaration of Alexander and thereby formally extinguished the last legal remnant of Spanish sovereignty in the Philippines.

⁶⁸M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD PEOPLE IN INTERNATIONAL LAW* 80 (1926); G. BENNET, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* 5 (1978).

⁶⁹R. BERKHOFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 120 (1979). Political sovereignty and title to uninhabited land could be claimed on the grounds of *vacuum domicilium*.

⁷⁰See e.g. *Island of Las Palmas Case* (United States v. Netherlands). 2 UNITED NATIONS REPORTS INTERNATIONAL ARBITRATION AWARDS 829 (1928). Portions reprinted in *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE*, M. MCDUGAL AND W. REISMAN (eds.) 620-5.

⁷¹International recognition of Spanish sovereignty over the Sulu Sultanate was problematical insofar as the British and German governments were concerned. See e.g. C. MAJUL, *op. cit.*, note 65 at 290-308.

⁷²For an English translation see 28 *THE AMERICAN CATHOLIC QUARTERLY REVIEW* 372-9 (1903).

THE TRANSITION: COLONIALISM AND THE U.S. CONSTITUTION

Colonial Preludes

On April 25, 1898, the United States Government declared war against Spain. Ostensibly a response to Spanish abuses being inflicted on the Cuban people, the declaration of war soon spurred developments in the Philippine colony. During the morning of May 1, U.S. Commodore George Dewey led his fleet into Manila Bay. By 12:30 P.M. the Spanish had surrendered and the United States was poised to establish and secure a sovereign claim over the Philippine archipelago.⁷³

After learning of Dewey's success, U.S. President William McKinley was quoted as saying during a "well-authenticated interview at the White House" that he "didn't want the Philippines, and when they came to us, as a gift from the gods, I did not know what to do with them." McKinley claimed that his decision to acquire the colony came only after he got down on his knees for "more than one night" and prayed to "Almighty God for light and guidance."⁷⁴

Contrary to a "tenacious myth, created and nurtured by two generations of historians,"⁷⁵ Dewey's alacrity was no coincidence. Nor was President McKinley telling the truth. "The order to attack Manila was . . . sanctioned by the President at a conference in the White House on Sunday, April 24, 1898."⁷⁶

McKinley's duplicity served an important political purpose. It enabled him to hide his imperial ambitions until U.S. public opinion could be molded in favor of acquiring the Philippine Islands. The President felt confident that the tide of history, as well as important Republican constituencies, would work hard to generate approval for the nation's metamorphosis into a colonial power.⁷⁷

⁷³C. DEWEY, AUTOBIOGRAPHY OF GEORGE DEWEY, ADMIRAL OF THE NAVY 222 (1913). See generally 197-233. The death of 264 U.S. sailors following the February 15, 1898 explosion on the U.S. battleship Maine while anchored off Havana enhanced the prospects of War but did not, in itself, cause war to break out. Responsibility for the explosion has never been authoritatively established, but in terms of U.S. public opinion, Spain or its agents were responsible.

⁷⁴Quoted in C. OLCOTT, LIFE OF WILLIAM MCKINLEY 109-11 (1916).

⁷⁵S. MILLER, "BENEVOLENT ASSIMILATION" THE AMERICAN CONQUEST OF THE PHILIPPINES 13 (1982). See also G. GRUNDER & W. LIVEZY, THE PHILIPPINES AND THE UNITED STATES 18 (1951); W. POMEROY, AMERICAN NEO-COLONIALISM: ITS EMERGENCE IN THE PHILIPPINES AND ASIA 13-5 (1970).

⁷⁶J. GRENVILLE & G. YOUNG, POLITICS, STRATEGY AND AMERICAN DIPLOMACY 267-96 (1966).

⁷⁷For an account of McKinley's actions during this crucial period see W. MORGAN, WILLIAM MCKINLEY AND HIS AMERICA 387-92 (1963). For more general background, see E. MAY, IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER 112-77 (1961); W. LAFEVER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSIONISM, 1860-1898 326-406 (1963). For general perspectives on U.S. politics at the turn of the century, see C. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1918 (1963); M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE-NINETEENTH CENTURY AMERICA (1977).

The renowned U.S. historian and former naval officer, Alfred T. Mahan, published several works in the 1890s which aggressively promoted expansionism. Mahan's premise was that the growth of U.S. naval power, including the power to control sea lanes and acquire new territories, was vital to national strength and survival.⁷⁸

Mahan's thesis found favor with many influential people, including Henry Cabot Lodge and Theodore Roosevelt,⁷⁹ who became Under-Secretary of the Navy during President McKinley's first term.⁸⁰ Planning for an attack on Spain's Pacific fleet, however, began prior to Roosevelt's appointment. In fact, "Neither Roosevelt nor Lodge played any part in its formulation."⁸¹ The plan was drafted by a naval intelligence officer who had been monitoring the fleet since late 1896.⁸² Its main purpose "was not to strengthen America's commerce in the Far East but to weaken Spain by depriving it of the revenues derived from the islands."⁸³ Knowledge of these preparations was confined to a small group of which only a few, if any, realized the ultimate outcome: the United States was about to become a colonial sovereign.

European immigrants and their progeny had steadily moved westward during the first two centuries of the North American republic. The movement towards Manifest Destiny did not end along the eastern shores of the Pacific Ocean. U.S. businesses had been actively involved in Philippine trade for over two centuries,⁸⁴ and for their part, naval and merchant sectors within the United States had been agitating for an expansionist policy in the Pacific ever since Commodore Matthew Perry forced open Japanese ports in 1855.⁸⁵

⁷⁸See e.g. THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783 (1892); THE INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE, 1793-1812 (1892); "Hawaii and Our Future Sea Power," 15 FORUM 1-11 (1893); THE INTERESTS OF AMERICA IN SEA POWER, PRESENT AND FUTURE (1897).

⁷⁹F. MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY 235-7 (1966). According to W. POMEROY, *op. cit.*, note 75 at 30-1 "Roosevelt and Lodge formed a team that came close to being conspiratorial, organizing within the government the steps toward the seizure of colonial possessions."

⁸⁰McKinley initially resisted making Roosevelt's appointment. McKinley reportedly believed "that once Roosevelt came to Washington he would seek to involve the U.S. in war." E. MORRIS, THE RISE OF THEODORE ROOSEVELT 560 (1979).

⁸¹J. GRENVILLE & G. YOUNG, *op. cit.*, note 76 at 269.

⁸²W. LAFFEBAR, *op. cit.*, note 77 at 360; J. GRENVILLE & G. YOUNG, *op. cit.*, note 76 at 270.

⁸³J. GRENVILLE & G. YOUNG, *id.*, at 272. The authors added at 273 that "lacking guidance about the objective of American policy in the event of war, the officers who drew up the war plan made their own political assumptions. In 1896, they simply took for granted that the United States did not desire any of Spain's possessions for itself."

⁸⁴T. MCHALE & M. MCHALE, EARLY AMERICAN-PHILIPPINE TRADE: THE JOURNAL OF NATHANIEL BOWDITCH IN MANILA, 1796 (1962). By the mid-nineteenth century most Philippine exports of sugar and hemp (abaca) went to Great Britain and the United States. The commercial economy of the Bikol region was almost entirely dependent on the hemp export. N. OWEN, PROSPERITY WITHOUT PROGRESS: MANILA HEMP AND MATERIAL LIFE IN THE COLONIAL PHILIPPINES 44-7, 59-62 (1984). See also J. FAST & J. RICHARDSON, ROOTS OF DEPENDENCY: POLITICAL AND ECONOMIC REVOLUTION IN 19TH CENTURY PHILIPPINES 13-8 (1979).

⁸⁵W. POMEROY, *op. cit.*, note 75 at 13-26.

China loomed large in the national psyche,⁸⁶ and the Philippines was an important way station.⁸⁷ U.S. commercial interests saw potential in the colony for a coaling station. Manila was an entrepot to the vast Chinese market, and a potentially profitable Philippine one.⁸⁸ On the domestic front, Protestant missionaries and their supporters pined for access to Spanish possessions and, even more exotic, for a gateway to China. Their dream was, literally, to "evangelize the world in a single generation."⁸⁹ The U.S. Catholic episcopate was eager to mediate between the Vatican and the U.S. Government, and to acquire control over the church's extensive Philippine holdings.⁹⁰

The travails of Spain's Pacific colony were well known in Washington, D.C. and other capital cities.⁹¹ The collapse of the colonial regime was becoming ever more likely, and if the United States waited to stake an imperial claim until after the regime fell, Germany, Britain, or perhaps even Russia or Japan might have preempted an American response.⁹²

⁸⁶J. THOMPSON, P. STANLEY & J. PERRY, *SENTIMENTAL IMPERIALISTS: THE AMERICAN EXPERIENCE IN EAST ASIA 16-19*, 31-43, 121-33 (1981); W. POMEROY, *op. cit.*, note 75 at 27-9.

⁸⁷S. JENKINS, *AMERICAN ECONOMIC POLICY TOWARDS THE PHILIPPINES* 31 (1954). S. NEARING & J. FREEMAN, *DOLLAR DIPLOMACY: A STUDY IN AMERICAN IMPERIALISM* 253 (1925); R. CONSTANTINO, *op. cit.*, note 34 at 289-90; W. POMEROY, *op. cit.*, note 75 at 29-30. But see W. POMEROY, *id.*, at 151-7.

⁸⁸G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 7; P. STANLEY, *A NATION IN THE MAKING: THE PHILIPPINES AND THE UNITED STATES, 1899-1921* 106-7 (1974); W. POMEROY, *op. cit.*, note 75 at 47.

⁸⁹K. Clymer, *Protestant Missionaries and American Colonialism in the Philippines, 1899-1916: Attitudes, Perceptions, Involvement*, *REAPPRAISING AN EMPIRE: NEW PERSPECTIVES ON PHILIPPINE-AMERICAN HISTORY*, P. STANLEY (ed.) 143-70, 145 (1984); See also K. CLYMER, *PROTESTANT MISSIONARIES IN THE PHILIPPINES, 1898-1916* (1988); G. Anderson, *Providence and Politics Behind Protestant Missionary Beginnings in the Philippines*, *STUDIES IN PHILIPPINE CHURCH HISTORY*, G. Anderson (ed.) 279-99 (1969); S. MILLER, *op. cit.*, note 75 at 17-9; W. POMEROY, *op. cit.*, note 75 at 47. See generally E. TUVESON, *REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE* (1968).

⁹⁰S. MILLER, *op. cit.*, note 75 at 138-40; W. POMEROY, *op. cit.*, note 75 at 49-50. See F. REUTER, *CATHOLIC INFLUENCE ON AMERICAN COLONIAL POLICIES, 1898-1904*, chapters 2-4-7 (1987); J. PRATT, *EXPANSIONISTS OF 1898* 292 (1956).

⁹¹W. POMEROY, *op. cit.*, note 75 at 38-42, 48-50. S. MILLER, *op. cit.*, note 75 at 13, noted that "Once the Philippine Insurrection began in 1896 . . . there was a dramatic increase in the press' coverage of the Philippines."

⁹²By mid-May 1898, the Germans had assembled a superior naval force, including a naval transport with fourteen hundred armed men, in Manila Bay. Two British ships and one from France and Japan were also anchored in the Bay. G. DEWEY, *op. cit.*; note 73 at 254-67. See also J. LEROY, *THE AMERICANS IN THE PHILIPPINES: A HISTORY OF THE CONQUEST AND FIRST YEARS OF OCCUPATION* 210-7 (1914). The British, by contrast, preferred a friendly U.S. naval presence in the region. W. POMEROY, *op. cit.*, note 75 at 48. For an insight into German preferences see H. Villanueva, *Diplomacy of the Spanish-American War*, 15 *PHILIPPINE SOCIAL SCIENCES AND HUMANITIES REVIEW*, 143-59 (1950). For an overview of international intrigues which involved the Philippines during the Taft era see W. POMEROY, *id.*, at 150-71.

The Sugar Trust and Tariffs

The McKinley administration was markedly conservative. Its prime constituency was big business; and few big businesses at the time had more clout than the U.S. sugarcane industry. It was eager to secure the annexation of Cuba, which was well-suited for growing sugarcane. Cuba had long been coveted by one of President McKinley's most influential supporters, Henry O. Havermeyer, president of the American Sugar Refining Co. Havermeyer and his allies believed that if the United States were to acquire sovereignty over Cuba, Cuban sugarcane could be imported tariff free. This would have given the Sugar Trust an important advantage over domestic sugar producers.⁹³

The expansionists' Cuban strategy was foiled by the U.S. Congress less than two weeks before Commodore Dewey's arrival in Manila Bay. On April 20, 1898 Congress attached the Teller Amendment to a pro-administration resolution demanding that Spain withdraw and relinquish its claim to Cuba.⁹⁴ Senator Henry Teller was an advocate of Cuban independence and an ardent supporter of the U.S. domestic sugar beet industry. As originally proposed, the administration's resolution made no reference to prospective relationships between the United States and its Caribbean neighbor. Teller's amendment, by contrast, required the U.S. government to disclaim any "intention to exercise sovereignty, jurisdiction or control of said island except for the pacification thereof." It also required that the United States "asserts its determination when [pacification] is accomplished to leave the government and control of the island to its people."⁹⁵

The Teller amendment was not drafted with the interests of the Cuban people foremost in mind. It was meant to prevent Cuba from being incorporated within the U.S. tariff umbrella. Ever since the U.S. Civil War, tariffs had been "the dominant economic issue in the U.S."

Tariff debates became a battle ground between increasingly antagonistic interests in American society, reflecting the wrenching changes introduced by the industrialization process. Broadly speaking, the tariff was a sectional issue pitting Eastern manufacturers, who wanted high protective rates, against the agrarian interests of the South and West, who chafed at the resulting high prices.⁹⁶

⁹³Leading biographies of McKinley make no mention of the Sugar Trust or Havermeyer. See e.g. M. LEECH, *IN THE DAYS OF MCKINLEY*; W. MORGAN, *op. cit.*, note 77; G. OLCOTT, *op. cit.*, note 74. Reasons for the omission may include the fact that the Trust "kept no books or records save a certificate book and a transfer book. It maintained no office, it never actually handled any money, and it had no fixed time or place for meetings." As for Havermeyer, "in spite of [his] spectacular business career, he is probably best remembered today because of his avocation — art collecting." L. FRANCISCO & J. FAST, *CONSPIRACY FOR EMPIRE: BIG BUSINESS, CORRUPTION AND THE POLITICS OF IMPERIALISM IN AMERICA, 1878-1907* 31, 34 (1985).

⁹⁴30 U.S. Statutes 738-9. See also L. FRANCISCO & J. FAST, *op. cit.*, at 150-7.

⁹⁵U.S. Congressional Record (hereinafter cited as CR), 55th Congress, 2d Session, 3988.

⁹⁶L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 13.

The U.S. Congress had first imposed a tariff on imported sugar in 1789. Over the years, the sugar tariff became a major revenue-earner, at times providing as much as one-fifth of total receipts in the pre-income tax Treasury Department.⁹⁷ By 1880, sugarcane was the leading U.S. import. Twenty years later, raw cane-sugar was by far the largest commodity being imported into the United States. In 1900, sugar valued at more than \$100 million comprised twelve percent of the overall import total.⁹⁸

Congressional battles over the sugar tariff had been intermittently waged since the 1860s. During the 1880, 1884, and 1888 presidential elections, the sugar tariff had emerged as a leading political issue.⁹⁹ The 1888 election, for the first time in over a decade, resulted in Republican control of the White House and both houses of Congress. Two years later, in 1890, Congress enacted the McKinley Tariff (named after its chief sponsor Ohio representative William McKinley). The McKinley Tariff eliminated the duty on sugarcane imports and provided, for the first time ever, a U.S. Government-paid bounty, or price support, on domestically produced sugar.

An unstated purpose of the McKinley Tariff was to undermine the Hawaiian Reciprocity Treaty of 1876. The Hawaiian treaty had provided Havermeyer's main rival, the California-based Spreckels Refinery, with an important cost advantage. The treaty enabled Spreckels to import Hawaiian sugar duty-free.¹⁰⁰ After passage of the McKinley Tariff, Havermeyer and his Sugar Trust could do likewise from Cuba.¹⁰¹

Nearly seventy-five percent of all sugarcane imports passed through the Port of New York. Eastern refiners, led by Havermeyer, considered the tariff on sugar to be of "transcendent importance. . . because it determined to a substantial degree the profit levels in the industry."¹⁰² In November 1887 Havermeyer consolidated his control over almost all major domestic refiners. That month marked the corporate birth of the Sugar Trust, otherwise known as the Sugar Refineries Company (renamed in 1891 as the American Sugar Refining Co.).¹⁰³ Within five years of the Trust's formation, Havermeyer controlled the refinement of ninety-eight percent of all sugar consumed in the

⁹⁷Wolf, *Sugar, Excise Taxes, Tariffs, Quotas and Program Payments* 25 SOUTHERN ECONOMIC JOURNAL 416.

⁹⁸L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 232 citing "Merchandise Imports, 1900," 58th Congress, 3rd Session, *House Document* 13, vol. 1, 166.

⁹⁹*Id.*, at 43.

¹⁰⁰For a discussion of the Hawaiian Reciprocity Treaty, see *id.*, at 1-7, 49. See generally S. STEVENS, *AMERICAN EXPANSION IN HAWAII, 1842-1898* (1945).

¹⁰¹Passage of the McKinley Tariff prompted Spreckels secretly to sell Havermeyer's controlling interest in his refineries. L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 50. Ironically, however, the Sherman Anti-Trust Act had also been enacted in 1890 as "an effort to answer critics who charged that the Republican Party fostered monopolies." *Id.*, at 52.

¹⁰²*Id.*, at 14, 16.

¹⁰³*Id.*, at 30-1. See generally 26-35.

United States. It was "the closest approximation to a pure monopoly ever achieved in a major American industry."¹⁰⁴

By 1898, the political clout of the Sugar Trust was ebbing. Anti-monopoly sentiment was growing and much of the ire focused on the Trust; it was too visible and its officials too arrogant. If supporters of the sugar beet industry joined forces with anti-imperialists, the Trust was vulnerable in Congress, a fact confirmed by passage of the Teller Amendment.

McKinley had little alternative but to sign the resolution, with Teller's amendment, into law. He was determined to make Spain appear the aggressor once war broke out, and a presidential veto would, among other things, expose his close ties to the Trust and make him appear to hold imperial ambitions. On April 20, therefore, McKinley signed the resolution, which was tantamount to a declaration of war. Formal declarations followed: by Spain on the twenty-fourth and the U.S. Congress the following day.

The passage of the Teller Amendment immediately prompted McKinley and his advisors to reevaluate their war objectives.

The annexation of Cuba, not the Philippines, was the administration's prime objective, but the passage of the Teller Amendment suddenly forced McKinley to regard the Pacific colony with a new sense of urgency. If Cuba was going to be denied to the U.S.; the case for acquiring another cane-producing colony became all the more pressing.¹⁰⁵

Admiral Dewey's victory in Manila Bay paved the way for acquisition of the world's third largest sugarcane supplier after Cuba and Java.¹⁰⁶ Dewey and his men, however, were only to defeat the Spanish fleet in Manila Bay and establish a military presence in the city. The first contingent of U.S. Army forces arrived over a month later, on June 30, and initially they also made no move to occupy any other part of the colony. International law formalities would have to be observed in order for any U.S. colonial acquisition to be recognized and binding on other nations.

¹⁰⁴*Id.*, at 50.

¹⁰⁵*Id.*, at 159. Curiously, no similar restraint was imposed on Spain's sugar-producing Pacific colony. Apparently the anti-imperialists and the sugar beet industry failed to realize the global implications of the amendment until after it had become law. W. POMEROY, *op. cit.*, note 75 at 36 conjectured that the absence of any congressional declaration "in regard to the status of the Filipino people, as was done by the Teller Amendment in the case of the Cubans who were similarly engaged in a revolution against Spain, was obviously due less to an uncertainty of attitude than to intention to deceive."

¹⁰⁶L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 159. Political annexation of the comparatively smaller Hawaiian land mass in 1897 failed to state the Trust's appetite for land; Hawaii had been economically integrated after passage of the 1876 Hawaiian Reciprocity Treaty and the 1890 McKinley Tariff. See *id.*, at 1-7, 49-50, 167-74. The authors asserted at 171 that the decision to annex Hawaii had a profound effect on the subsequent colonial expansions. "Participants on both sides of the [Congressional] debate agreed that the issue was not about Hawaii, it was about expansion. Defeat for the Administration on the Hawaii question would have demonstrated that sufficient support for the annexation of the Philippines or Puerto Rico or Cuba did not exist either."

On August 12 a protocol between Spain and the U.S. was signed in Washington. Article III entitled the United States "to occupy and . . . hold the city, bay and harbor of Manila pending the conclusion of a treaty of peace." More importantly, in Article V Spain committed herself to meet with the United States in Paris by October 1 in order "to determine the control, disposition and government of the Philippines."¹⁰⁷ On August 13, unaware of the Washington protocol, Spanish and U.S. officials carried out the *pro forma* capitulation of the Spanish army within Intramuros, the well-fortified, bay-side Manila enclave.¹⁰⁸

The Treaty of Paris: Negotiations

Much of the initial public debate within the McKinley administration over the Philippines focused on how much of the archipelago should be claimed. Domestic political considerations made it necessary for McKinley not to appear eager to extend a claim over the colony. The August protocol provided a temporary means to defer any politically costly resolution of the issue. Pursuant to the protocol, McKinley appointed five commissioners to represent the United States at the Paris negotiations. Three appointees, Republican senators Cushman Davis of Minnesota and William P. Frye of Maine, and publisher Whitelaw Reid, were enthusiastic imperialists.¹⁰⁹ The other two, former Secretary of State William R. Day and Democratic senator George Gray of Delaware, had reservations.

McKinley first met with the commissioners in September and assured them that the "dictates of humanity" prompted U.S. military action in the Philippines. The United States, McKinley claimed, "had no design to aggrandizement and no ambitions of conquest."¹¹⁰ McKinley's instructions to the commissioners, however, indicated otherwise.¹¹¹ They declared that the

¹⁰⁷A copy of the Protocol of Agreement between the United States and Spain signed in Washington, D.C. on August 12, and the Articles of Capitulation of the City of Manila dated August 14, can be found in C. FORBES, 2 *THE PHILIPPINE ISLANDS* 425-8 (1928). Article 7 of the Capitulation provided that within Manila "private property of all descriptions are placed under the special safeguard of the faith and honor of the American army."

¹⁰⁸D. Barrows, *The Governors-General of the Philippines under Spain and United States*, *THE PACIFIC OCEAN IN HISTORY: PAPERS AND ADDRESSES PRESENTED AT THE PANAMA-PACIFIC HISTORICAL CONGRESS HELD AT SAN FRANCISCO, BERKLEY, AND PALO ALTO, CALIFORNIA, JULY 19-23, 1915*, M. STEPHENS AND H. BOLTON (eds.) at 251 cited August 14, 1898 and opined "From this date American government in the Philippines begins." For brief descriptions of the "mock battle" see R. CONSTANTINO, *op. cit.*, note 34 at 214-5; S. MILLER, *op. cit.*, note 75 at 36-8.

¹⁰⁹L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 184.

¹¹⁰CR, 56th Congress, 2nd Session, 3021.

¹¹¹For a detailed discussion of the Paris negotiations and the differences between President McKinley's private and public positions, see H. Villanueva, *The Paris Conference: Disposition of the Philippines* 15 *PHILIPPINE SOCIAL SCIENCES AND HUMANITIES REVIEW* 103-62. The article completes the second of three parts of what was originally envisioned as a book entitled *Diplomacy of the Spanish American War*. The other installments were published in volumes 14 and 16. See also LeRoy, *op. cit.*, note 92 at 354-77; L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 181-92; W. POMEROY, *op. cit.*, note 75 at 50-4.

"success of our arms at Manila imposes upon us obligations which we cannot disregard." The bottom line of these obligations, one which could find favor with Commissioner Day, was that the "United States cannot accept less than the cession in full right and sovereignty of the island of Luzon."¹¹²

The negotiations officially commenced on October 1st. After one week, Spain, pursuant to its commitments in the August 12 protocol, acceded to all U.S. demands regarding Cuba, Puerto Rico and the Ladrões (Guam). The Philippines presented the only obstacle to a final agreement. Spain insisted that, according to previously unchallenged principles of international law, the protocol implied no change in the political status of the archipelago, other than recognition of a temporary U.S. military presence in Manila. As for the August 13 capitulation by Spanish forces in Manila, Spain averred that it was

a principle of international usage, consecrated by practice and by the concurrence of jurists, that captures made after the moment fixed for termination of hostilities, though made in ignorance of the true state of relations, must be restored.¹¹³

McKinley and most of his advisors felt otherwise. They had concluded that the colony should not be split up.¹¹⁴ They also knew that U.S. public opinion, including the anti-imperialists, were united against any suggestion that Spanish rule be continued. On October 12 instructions were cabled to the commissioners in Paris that all of the Philippines should be taken.¹¹⁵

McKinley was not ready to reveal this position publicly. Public opinion was still deeply divided as to whether or not the United States should extend its sovereignty over the colony. Domestic sugar producers, anti-imperialists and others opposed to the colonial expansion were striking a responsive chord in Congress and among many U.S. citizens. An openly imperial strategy might alienate even more potential voters. On October 26, 1898, therefore, Secretary of State John Hay, under orders from McKinley, secretly sent another wire to the commissioners. In Hay's words, "the cession must be of the whole archipelago or none." Three days later, he wired the commissioners about McKinley's opinion concerning the legal grounds for the acquisition. The colony, Hay wrote, "can be justly claimed by conquest."¹¹⁶

Caught between McKinley's increasingly expansive demands and the legitimacy of the Spanish position, the U.S. commissioners advanced a new argument. They asserted that Article III of the August protocol entailed the relinquishment of Spanish sovereignty in the Philippines. The Spanish side responded that Article III made no mention of sovereignty. An impasse

¹¹²H. Villanueva, *op. cit.*, note 92 at 107. See Senate Document 62, pt. 3, 55th Congress, 3rd Session for a duplicate of the map used in Paris.

¹¹³H. Villanueva, *op. cit.*, note 111, at 105-6, 125.

¹¹⁴M. LEECH, IN THE DAYS OF MCKINLEY 327 (1959) wrote that the "fundamental problem" for McKinley and his military advisors, especially naval officers, was that the islands "were so crowded together that any one of them would need a large force for defense, if others were in enemy possession." See W. MORGAN, *op. cit.*, note 77 at 388-413.

¹¹⁵H. Villanueva, *op. cit.*, note 111 at 115.

¹¹⁶CR, 56th Congress, 2nd Session, 3021. See also H. Villanueva, *op. cit.*, note 111 at 120-1.

ensued. The main stumbling block concerned the issue of debts incurred by Spain in its efforts to quell the Cuban revolution. Spain had floated a bond for this purpose in 1897. The bond had been purchased by various European nations and Cuban resources had been used as security. The United States was willing to pay for debts incurred to make internal Cuban improvements but it refused to assume any responsibility for the suppression-debt.

The Roman Catholic Church attempted to break the deadlock. The church wanted to ensure that any transfer of sovereignty over the Philippines would be by purchase and not conquest. Purchase of sovereignty would be accompanied by an implied duty to respect property rights which had been recognized and documented by the previous sovereign. Purchase, therefore, would better safeguard legal titles to the friar estates and other church holdings. To smooth the way, the Vatican observer to the conference, U.S. archbishop Placido L. Chapelle, mediated between the opposing parties. His success was apparent by mid-November.¹¹⁷

With congressional elections over, the U.S. panel presented its "final proposition." Spain should cede the Philippines to the United States in exchange for U.S. \$20 million. The U.S. proposition was accompanied by a November 28 deadline. Unless an agreement was reached by that date, the Spanish commissioners were informed, the United States would resume armed hostilities.

Spain responded by proposing that the United States pay U.S. \$100 million, an amount which more accurately reflected the colony's estimated value. To the consternation of Archbishop Chapelle, the Spanish commissioners also indicated that their government might agree to relinquish its claims to Luzon and some of the northernmost islands. These proposals were forwarded to Washington and immediately rejected outright.¹¹⁸ Faced with a renewed outbreak of hostilities, and lacking sufficient military strength to resist effectively, Spain agreed to the U.S. demands on the day of the deadline. The treaty was signed in Paris on December 10, 1898 and submitted to the U.S. Senate on January 4 for ratification.

The Treaty of Paris: Ratification.

It was by no means certain that the Senate would ratify the proposed treaty.¹¹⁹ Opposition, particularly to those portions relating to the Philippines, was mounting. A Republican, George Frisbie Hoar of Massachusetts, delivered what was considered probably "the outstanding

¹¹⁷W. POMEROY, *op. cit.*, note 75 at 53.

¹¹⁸U.S. Senate Document 62, 2:222. 55th Congress, 3rd Session.

¹¹⁹For a detailed discussion of the Senate debate and vote, see H. Villanueva, *op. cit.*, note 111 at 305-31. See also G. GRUNDER AND W. LIVEZY, *op. cit.*, note 75 at 38-48; W. POMEROY, *op. cit.*, note 75 at 56-63.

speech in the Senate in opposition to the acquisition of the Philippines."¹²⁰ Hoar claimed that

under the Declaration of Independence you cannot govern a foreign territory, a foreign people, another people than your own, that you cannot subjugate them or govern them against their will, because you think it is for their good when they do not; because you think you are going to give them the blessings of liberty.¹²¹

Prior to the Senate vote on ratification, several amendments were proposed and defeated. On December 6, 1898, four days before the Treaty of Paris was signed, Senator George G. Vest of Missouri proposed an amendment which would have provided for relinquishment of Spanish sovereignty, rather than cession to the United States, and declared "that under the Constitution of the United States no power is given to the Federal Government to acquire territory to be held and governed permanently as colonies."¹²²

In the midst of the treaty debate, the leader of the Democratic Party, William Jennings Bryan urged his surprised colleagues in the Senate to vote for ratification. Bryan's motivations for endorsing the treaty remain a puzzle. He publicly justified his position by insisting that ratification "instead of committing the United States to a colonial policy, really clears the way for recognition of a Philippine Republic."¹²³ Recognition, in Bryan's view, would follow the voter's repudiation of McKinley's colonial policy in the 1900 elections and Bryan's accession to the presidency.¹²⁴

The decisive day was February 6, two days after fighting erupted in Manila between Filipino and U.S. forces. Vest's amendment and others were considered as a unit and failed by a thirty to fifty-three vote.¹²⁵ The unamended treaty was then ratified fifty-seven to twenty-seven, one vote more than the two-thirds needed.¹²⁶ Twenty-two out of twenty-nine Demo-

¹²⁰G. GRUNDER & W. LIVEZY, *id.*, at 40.

¹²¹CR, 55th Congress, 3rd Session, 493-503. See generally 439-503. A similar sentiment was reflected in an amendment introduced by Illinois Senator William E. Mason. He wanted the Senate to resolve that "Whereas all just powers of government are derived from the consent of the governed" the U.S. Government would "not attempt to govern the people of any other country in the world without the consent of the people themselves, or subject them by force to our dominion against their will." W. POMEROY, *op. cit.*, note 75 at 59.

¹²²CR, 55th Congress, 3rd Session 20. For Vest's introductory remarks, see 93-6.

¹²³M. KALAW, *THE DEVELOPMENT OF PHILIPPINE POLITICS* 236 (1926) citing remarks delivered on February 14 at a Democratic party banquet. See generally 232-9; M. STOREY & M. LICHAUCO, *THE CONQUEST OF THE PHILIPPINES* 76-87 (1926). Regardless of their precise nature, W. POMEROY, *op. cit.*, note 75 at 57 correctly observed that Bryan's motivations were based "on the effect of holding colonies on the American people and not on the people to be subjugated."

¹²⁴H. Villanueva, *op. cit.*, note 111 at 326-8.

¹²⁵*Ibid.*

¹²⁶*Id.*, at 319, G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 45. The treaty was signed by President McKinley on the same day. The Spanish Cortes refused to ratify it but the Queen Regent, pursuant to Article 54 of the Spanish Constitution, ratified it on March 19. Official exchange of the ratifications was effected on April 11. H. Villanueva, *op. cit.*, note 111 at 329.

cratic senators voted against ratification, as did two Republicans, two Populists and one Silverite.

Technically the treaty "went no further than to give its consent to the acquisition of the Philippines. This action did not necessarily imply any commitment to hold the Islands permanently."¹²⁷ To clear up the ambiguity concerning official U.S. intentions, the Senate proceeded to consider two resolutions. The first, proposed by Senator Samuel D. McEnery of Louisiana was designed to win moderate votes. It was indefinite as to the potential duration of the colonial enterprise. But it was specific in denying Filipinos any status as U.S. citizens. The pertinent provision read:

Resolved, That by ratification . . . it is not intended to incorporate the inhabitants of said Islands into citizenship of the United States, nor is it intended to permanently [sic] annex said Islands as an integral part of the territory of the United States.

An amendment proposed by Senator Augustus O. Bacon of Georgia was more definite as to the nature and extent of U.S. sovereignty. In the spirit of the Teller Amendment, he proposed:

That the United States hereby disclaims any disposition or intention to exercise permanent sovereignty, jurisdiction or control over said islands, and assert their determination, when a stable and independent government shall have been erected therein entitled in the judgment of the Government of the United States to recognition as such, to transfer to said government, upon terms which shall be reasonable and just, all rights secured under the cession of Spain, and to thereupon leave the government and control of the islands to their people.

The McEnery resolution was approved twenty-six to twenty-two with forty-two senators not voting. The Bacon amendment failed twenty-nine to thirty on the tie-breaking vote of the vice-president, Garret Hobart.¹²⁸

The Treaty of Paris is "generally regarded as establishing the foundation of the constitutional system" of the Philippine Republic.¹²⁹ Once the treaty was ratified, the "opportunity for preventing imperial expansion certainly had passed."¹³⁰

¹²⁷G. GRUNDER & W. LIVEZY, *id.*, at 70.

¹²⁸*Id.*, at 45-6. In *Pepke v. United States*, 183 US 176 (1901) the Supreme Court upheld the substance of McEnery's resolution. But the court also played down the amendment's legal significance. "The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it . . . and if any implication from the action referred to could properly be indulged, it would seem that the two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated."

¹²⁹V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM 2 (1978).

¹³⁰G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 48.

The U.S. Presidential Election of 1900

Although the colonial enterprise had been ratified by the Senate, other avenues for channeling opposition to U.S. colonialism remained open. The Supreme Court offered some hope of relief. But before it would render an opinion, the 1900 presidential campaign and election intervened. The election presented the U.S. public with an opportunity to repudiate or uphold the colonial endeavor by voting for or against President McKinley and his congressional allies.

The Democratic presidential candidate was Senator Bryan, a charismatic orator who had gained national attention in an 1890 congressional race. Bryan had defeated his opponent in a solidly Republican farm-belt district by delivering over eighty speeches in opposition to tariffs, particularly the one named after then representative William McKinley.¹³¹ Although it benefited importers of sugarcane, the McKinley Tariff had an adverse effect on consumers and small, Midwestern sugar beet farmers.¹³² Bryan's position was popular, therefore, and once elected, he continued to champion tariff reform in the House of Representatives.

Bryan received his first Democratic nomination for the presidency in 1896. He ran on a platform which called for tariff reform and a return to silver coinage. His opponent, William McKinley, received unprecedented support from large corporate backers, many of whom threatened their employees with massive layoffs in the event of a Bryan victory.¹³³ Despite a large disparity in campaign funds which favored the Republicans, Bryan lost narrowly.

During their 1900 rematch, Bryan declared that the "paramount issue" was imperialism. For its part, the Democratic Party platform denounced the government's Philippine policy. The rationale behind the anti-imperialism plank, however, was not only based on concerns about the incompatibility between democracy and colonialism. It was also patently racist, and stated that "The Filipinos cannot be citizens without endangering our civilization." As such, the Democrats' Philippine plank recommended that

as we are not willing to surrender our civilization or to convert the Republic into an Empire, we favor an immediate declaration of the nation's purpose to give to the Filipinos, first a stable form of government; second, independence; and third, protection from outside interference, such as has been given for nearly a century to the Republics of Central and South America.

Curiously, the platform omitted any mention of Puerto Rico and Guam. In addition, for all of the campaign hullabaloo about anti-imperialism, the

¹³¹L. FRANCISCO AND J. FAST, *op. cit.*, note 93 at 61, 103.

¹³²For a discussion of the McKinley Tariff's enactment and impact, see *id.*, at 45-51.

¹³³*Id.*, at 103-6. See generally S. JONES, *THE PRESIDENTIAL ELECTION OF 1896* (1964); W. POMEROY, *op. cit.*, note 75 at 111-7; G. GRUNDER AND W. LIVEZY, *op. cit.*, note 75 at 76-8.

Philippine plank was much like its GOP counterpart. The Republican platform pledged to grant Filipinos the "largest measure of self-government consistent with their welfare and our duties."¹³⁴

During the Republican convention President McKinley was renominated without difficulty. In his letter of acceptance, McKinley claimed that the Democrats were expecting the citizenry to yield the sovereignty of the United States in the Philippines to a small fraction of the population, a single tribe out of the eighty or more inhabiting the archipelago. He averred that the U.S. Government was being "asked to protect this minority in establishing a government, and to this end repress all opposition of the majority."¹³⁵

Despite the early campaign rhetoric, however, colonialism was not emphasized during McKinley's reelection bid. Instead, domestic issues, and in particular the benefits accruing to the U.S. public by way of the ongoing economic expansion, were given priority. McKinley's campaign slogan was capsulized in the phrase "a full dinner pail." As the campaign unfolded, Bryan also layed increasing stress on issues other than imperialism. After July, he "simply ignored the Philippine issue."¹³⁶ When imperialism was brought up, the Republican vice-presidential candidate, Theodore Roosevelt, often used the Democrats' words against them by recalling his first hand experience with U.S. military heroism in Cuba. Reports that a group of anti-imperialists supporting Bryan had entered into negotiations with the Philippine leader, General Emilio Aguinaldo, who allegedly agreed to stop the fighting if Bryan was elected, further weakened the Democratic ticket.¹³⁷

In November, the magnitude of the Democrats' muddled campaigning, and another well-financed Republican juggernaut, became apparent. The election returns provided the greatest Republican electoral victory since 1872. McKinley won every state he had captured four years earlier, and added Wyoming, South Dakota, Washington, Kansas, and even Bryan's home state of Nebraska. Although Bryan garnered forty-six percent of the popular vote, opposition to the colonial expansion apparently generated few votes on his behalf.

¹³⁴The Philippine planks in the Republican and Democratic platforms between 1900 and 1928 are quoted in C. FORBES, *op. cit.*, note 107 at 2:566-70.

¹³⁵M. KALAW, *op. cit.*, note 123 at 253. Theodore Roosevelt's letter accepting the Republican vice-presidential nomination averred that a grant of self-government to the leaders of the Philippine revolutionary forces "would be like granting self-government to an Apache Reservation under some local chief." Throughout the campaign Roosevelt compared the leader of the Philippine forces, General Emilio Aguinaldo, to Sitting Bull. *Ibid.*

¹³⁶S. MILLER, *op. cit.*, note 75 at 140. See generally 129-49.

¹³⁷The election was watched with great interest in the colony. The president of the second Philippine Commission, William H. Taft, cabled the Secretary of War, Elihu Root, on August 21, 1900, and opined that "until it is settled that McKinley is to be re-elected, the radical insurgent leaders... will resort to every expedient to give the American voters the impression that the task of settling the country is hopeless. They have no doubt that if Bryan is elected he will let the Islands go at once." Taft Papers, U.S. Library of Congress, Series 3, Box 63.

The Spooner Amendment

With the elections over, the U.S. Congress resumed its deliberations on colonial issues. The general consensus was that the president's power as commander in chief "did not go beyond the use of the necessary and proper means to carry out the aim of the military operations, which was pacification of the islands."¹³⁸ Allocating legal rights to natural resources or granting permanent franchises, therefore, "could not be said to be within the scope of the President's military power, inasmuch as that power would of itself be extinguished with the disappearance of the conditions which called for its exercise."¹³⁹ In response to this predicament, Congress on March 2, 1901 passed an amendment to an army appropriations bill which had been proposed by Wisconsin senator John C. Spooner.

Passage of the Spooner Amendment made the Philippine Government "really civil in nature, deriving its power from Congress and not from the President."¹⁴⁰ The amendment, however, did not provide for the establishment of a colonial government. It merely ratified actions already taken by the president and his subordinates.

The Amendment also provided that

all military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property and religion.¹⁴¹

Senator Spooner had introduced an identical provision the previous year in the form of a bill.¹⁴² The powers he wanted Congress to delegate included the authority to alienate and otherwise dispose of forests, minerals, and "public" lands, i.e. lands not covered by authoritative Spanish documentation. This fact generated opposition to the bill from the sugar beet industry, domestic sugar cane and rice growers, and anti-imperialists. The Spooner Bill confirmed their fears about the administration's subservience to big business, and in particular

¹³⁸J. REYES, *LEGISLATIVE HISTORY OF AMERICA'S ECONOMIC POLICY TOWARD THE PHILIPPINES* 137 (1967). For additional background on the debate, see *id.*, 137-44; J. FAST AND L. FRANCISCO, *op. cit.*, note 93 at 220-3, 225-6, 235-7; G. GRUNDER AND W. LIVEZY, *op. cit.*, note 75 at 73-4; W. POMEROY, *op. cit.*, note 75 at 118-21; P. STANLEY, *op. cit.*, note 86 at 87-8.

¹³⁹REYES, *op. cit.*, note 138 at 137-8. Senator Daniel of Virginia explained that the legitimate exercise of military power "ceases with the necessity, and any franchise or any privilege or any extraordinary power exercised under the necessity of military law would die of itself with the conditions that created it." CR, 56th Congress, 2nd Session, 2960.

¹⁴⁰G. MALCOLM & M. KALAW, *PHILIPPINE GOVERNMENT: ITS DEVELOPMENT, ORGANIZATION AND FUNCTIONS* 82 (1932).

¹⁴¹31 U.S. Statutes 910. For a complete copy of the Spooner Amendment, see also C. FORBES, *op. cit.*, note 107 at 448, Appendix IX.

¹⁴²CR, 56th Congress, 1st Session, 763.

the Sugar Trust. A campaign against the bill was launched and Senate allies of the opposition waged a filibuster on the Senate floor for over two months.¹⁴³ As a result, Spooner's original bill never reached the Senate floor.

As 1901 commenced, Spooner's proposal was attached to a Military Appropriations Bill. Senators opposed asserted that the sole reason for the amendment was to enable the executive branch to grant permanent franchises and dispose of lands and mines since "those are the only objects to be accomplished by the passage of this amendment which cannot be accomplished now by the President of the United States as Commander in Chief of our armies."¹⁴⁴ Defenders of the amendment argued for the need to rely on the judgment of the president's men in the field and to provide economic incentives for the development and pacification of the islands.¹⁴⁵ Not surprisingly, among the foremost exponents of this view were the would-be wielders of the delegated powers, i.e. the members of the newly established Philippine (Taft) Commission.¹⁴⁶

The prevailing sentiment in the Senate, however, was not favorably disposed to the amendment as originally proposed. Once the administration realized this, the secretary of war, Elihu Root, offered crucial concessions.¹⁴⁷ The proviso for the establishment of a civil government could be made transitory pending final action by Congress. Another concession placed a severe limit on the granting of franchises. Most significantly, a blanket prohibition on the disposition of "public" lands, including "the timber thereon or the mining rights therein," was appended. Agreement was thus reached and the appropriations bill was amended and enacted into law on March 2, 1901.

The language in the Spooner Amendment pertaining to natural resource alienation was clear. Nevertheless, the president of the Philippine Commission, cabled Root on March 7 and inquired "Is cutting public timber prohibited? Request opinion."¹⁴⁸ A lawyer in the department, Charles E. Magoon, was charged with formulating the administration's response.

¹⁴³J. FAST & L. FRANCISCO, *op. cit.*, note 93 at 235.

¹⁴⁴CR, 56th Congress, 2nd Session, 3067. For the Congressional debate over the proposed amendment, see CR, 56th Congress, 2nd Session, 2955-72, 3064-8, 3103-5, 3331-84.

¹⁴⁵CR, 56th Congress, 2nd Session 2963.

¹⁴⁶REPORT OF THE U.S.-PHILIPPINE COMMISSION (hereinafter cited as RPC) 1900 (November 30) 5-6, 34. Reprinted in the 1904 edition of RPC (1900-1903) at 27. The commissioners cabled a dispatch to the secretary of war on January 24th which claimed "Sale of public lands and allowances of mining claims impossible under Spooner Bill. Hundreds of American miners on ground awaiting law to perfect claims. More coming. Good element in pacification. Urgently recommend amendment Spooner bill."

¹⁴⁷P. JESSUP, 1 ELIHU ROOT, 358-60. P. STANLEY, *op. cit.*, note 88 at 88 opined that "the administration had more limited desires than Taft or Spooner."

¹⁴⁸Reprinted in C. Magoon, *Construction to be Given to Congressional Enactment approved March 2, 1901, Relating to Public Land and Timber in the Philippines*, REPORTS OF THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES, 604-14, 604 (1903).

Reflecting a mistaken appreciation of the Manila-based regime's actual influence, and an ignorance of Philippine local level dynamics, Magoon's report was released on March 15. It was his opinion that

If a construction is given this Congressional enactment which cuts off the inhabitants of the islands in their hour of need from the natural supply of timber to which they have had recourse for centuries, they will be at the mercy of the owners of the small amount of timber land subject to private ownership, who will possess a monopoly capable of being more oppressive than any one of the exclusive concessions granted by the Crown of Spain.

Magoon's desire to circumvent the congressional restrictions, ostensibly on behalf of the natives, was apparent. It was also shared by his superior, Secretary of War Root. But the Spooner amendment was explicit: "no sale or lease or other disposition of the public lands or the timber thereon or the mining rights therein shall be made."¹⁴⁹ On March 30, therefore, Root cabled an ambiguous reply: "Do not interfere with established forestry regulations provided for by Spanish law, as modified by the military governor, Order 92, dated 27, 1900."¹⁵⁰ The order Root cited prohibited all cutting or harvesting of the products of the public forest "without license" as well as the "Unauthorized clearing of public lands" for farming purposes. But it had also established a licensing procedure.¹⁵¹

Incredibly, the commission interpreted the secretary's telegram as providing authorization—contrary to the explicit language of Congress—to continue issuing timber licenses. Between July 1, 1901 and June 30, 1902, therefore, 1,304 licenses were issued. Of these, 662 were timber licenses, including ten for companies authorized to cut up to 100 thousand cubic feet.¹⁵² The secretary of war may have been kept officially ignorant of these illegal machinations. He informed the House Committee on Military Affairs that the "Philippine government has no power to alienate an acre of [the 'public' domain], and is expressly prohibited. . . from leasing an acre of it."¹⁵³

The Constitution and Colonialism

The commission's successful and undetected defiance of Congress would embolden it in future disputes over land allocation policies. The commission could gain additional leverage if it was not obliged to operate within the restrictions on governmental powers imposed by the U.S. Constitution.

¹⁴⁹*Id.*, at 611.

¹⁵⁰*Ibid.*

¹⁵¹General Order No. 92, Articles 73-4.

¹⁵²RPC, *op. cit.*, (1902) note 146 at 463.

¹⁵³E. ROOT, THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS, ROBERT BACON AND JAMES B. SCOTT, [compilers and eds. 304 (1914, 1970 edition)]. Statement made before the House Committee on Military Affairs on January 9, 1902.

Article IX of the Treaty of Paris provided that in Puerto Rico and the Philippines "the civil rights of the native inhabitants... shall be determined by the Congress of the United States." Although it appeared unambiguous, the provision begged several questions. The most basic was whether the United States could constitutionally acquire sovereignty over people without first securing the consent of at least a majority of the affected constituency. In popular parlance, the question was "Does the Constitution follow the Flag?"

The Northwest Ordinance of 1787 had established the pattern for the organization of U.S. territories. It provided that all territories organized under it would eventually be divided into states and admitted into the union with full congressional representation. The historic position of the government was clear. Chief Justice Roger B. Taney described it best in the infamous *Dred Scott* decision of 1857. As Taney explained

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way except by admission of new States.¹⁵⁴

This perspective still prevailed in 1898.¹⁵⁵ But, except for the annexation of Alaska in 1867 and Hawaii in 1897, all previous territorial acquisitions had been contiguous and a majority of their inhabitants were Caucasian migrants or their successors.

It was Magoon's task to conceptualize the position of the Executive Branch. Magoon had been appointed as Solicitor (soon after renamed Law Officer) of the War Department's newly reorganized Division of Customs and Insular Affairs (DCIA) on January 1, 1899.¹⁵⁶ Six weeks later, he submitted to the secretary of war a REPORT ON THE LEGAL STATUS OF THE TERRITORY AND INHABITANTS OF THE ISLANDS ACQUIRED BY THE UNITED STATES DURING THE WAR WITH SPAIN, CONSIDERED WITH REFERENCE TO THE TERRITORIAL BOUNDARIES, THE CONSTITUTION AND THE LAWS OF THE UNITED STATES.¹⁵⁷ It was "the most lasting, the most significant of his reports" primarily because it "anticipated the decisions of the Supreme Court in the Insular cases."¹⁵⁸

¹⁵⁴*Dred Scott v. Sanford*, 60 U.S. 393, 446 (1857).

¹⁵⁵See e.g. C. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291-315 (1898); P. JESSUP, *op. cit.*, note 147 at 1:332-3.

¹⁵⁶R. CRUZ, *AMERICA'S COLONIAL DESK AND THE PHILIPPINES, 1898-1943* 34 (1974). For background on Magoon's career see D. LOCKMILLER, *MAGOON IN CUBA: A HISTORY OF THE SECOND INTERVENTION, 1906-1909* (1969).

¹⁵⁷1900 Washington, D.C.: Government Printing Office.

¹⁵⁸R. CRUZ, *op. cit.*, note 156 at 119.

Magoon considered it "incontrovertible that the unorganized territory of the United States is not bound and benefited by the Constitution and the laws of the United States until Congress has made appropriate provision therefor." He based his assertion on Article IX of the Treaty of Paris. He bolstered it with reference to the McEnery Resolution, which the Senate had passed upon ratification of the treaty. The resolution officially declared that the U.S. Government did not intend to extend U.S. citizenship to the Filipino people or to annex the archipelago permanently into the United States. As a result, Magoon averred that the Constitution did not follow the flag. He hastened to add that U.S. sovereignty did.¹⁵⁹

To mitigate the harsh sounding implications of his position, Magoon also attempted to articulate a theoretical basis by which the insular populations would not be completely bereft of legal recourse should the U.S. regime prove unduly harsh. He began by asking rhetorically, "If these islands and their inhabitants are without the aegis of the Constitution, what are their protections from an oppressive government and unjust laws?" Magoon insisted that the answer was "plain."

Such protection is found in the character and enlightenment of the new sovereign within whose jurisdiction they now are. . . . They are a charge upon the conscience of that sovereign, and the 'inalienable rights' of a people are safe in that custody even when not guaranteed by the letter of the Constitution, for they are protected by laws higher than the Constitution, being the laws of American civilization, the moral sentiment of the nation from which even the Constitution derives its force.¹⁶⁰

Other than its duty to safeguard these unspecified "inalienable rights," Magoon concluded by asserting that Congress possessed general plenary power over non-contiguous territories and their peoples. In less arcane language, Magoon believed that Congress could do as it pleased unless an unlikely political uproar among the U.S. electorate over a distant colony inhabited by Asians forced a reconsideration.

¹⁵⁹C. MAGOON, *op. cit.*, note 157 at 16-7. Although he was not mentioned by name, Magoon's theory received emphatic support from the Philippine (Schurman) Commission. RPC, *op. cit.*, note 146 at 111-2.

¹⁶⁰*Id.*, at 26. Before his appointment to the Philippine Commission, Bernard C. Moses, proffered a more unrestrained and undemocratic rationale:

As regards our principles, the [Spanish-American] War has affected a revolution so fundamental that as yet we are unwilling to acknowledge it. We are not willing to say that it has set aside in our minds the doctrine that governments derive their just powers from the consent of the governed. At the same time, when we raise the problems of controlling certain populations that have been brought under our authority, we are fully resolved to set up a government whether the governed consent or not; and by this we are changing in some measure, the basis of our political philosophy. We are coming to recognize that if a government secures the well-being of the governed, in the most perfectly attainable form, it has in fact the ground and justification of its existence. This is the basis on which will rest the government we shall set up in the West Indies and the Philippines.

Oakland Enquirer, May 2, 1889. B. MOSES COLLECTION, Univ. of California at Berkeley, carton 2, folder 6.

Once again, Root agreed with his subordinate's innovative theory. He reported to President McKinley that

The people of the ceded islands have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution, and which are the essential safeguards of every individual against the powers of government, not because these provisions were enacted for them, but because there are essential limitations inherent in the very existence of the American government.¹⁶¹

The first Philippine (Schurman) Commission also gave Magoon's theory a strong endorsement.¹⁶² Like Magoon and Root, the commissioners opted to overlook the theory's fundamental contradiction. If officially adopted, the U.S. government would be arbitrarily empowered to determine which rights millions of people who, involuntarily, found themselves within the territorial jurisdiction of the United States—because of arbitrary actions taken by the United States—could invoke vis-a-vis the U.S. government. This was precisely what the United States Constitution, especially its Bill of Rights, was intended to prevent.

The Insular Decisions

The last hope for preventing, or somehow mitigating, the nation's transition into a colonial power rested with the Supreme Court. On May 21, 1901, less than three months after passage of the Spooner Amendment, it rendered the first in a series of opinions concerning legal issues arising from the colonial acquisitions.¹⁶³ The civil rights of the peoples within the colonies, however,

¹⁶¹ANNUAL REPORT OF THE SECRETARY OF WAR 24 (1899).

¹⁶²RPC, *op. cit.*, note 146 at 111-2.

¹⁶³By the end of Taft's term as U.S. president there had been at least twenty four appeals to the U.S. Supreme Court from decisions of the Philippine Supreme Court. *Kepner v. US*, 195 U.S. 114 (1904) (double jeopardy); *Dorr v. O'Brien*, 195 U.S. 138 (1904) (libel); *Mendezona v. US*, 195 U.S. 158 (1904) (double jeopardy); *Calvo v. Gutierrez*, 208 U.S. 443 (1908) (construction of a family settlement); *Carifio v. Insular Government*, 212 U.S. 449 (1909) (native title); *Santos v. Roman Catholic Church*, 212 U.S. 463 (1909) (Philippine Church is a legal personality with capacity to hold property); *Strong v. Repide*, 213 U.S. 417 (1909) (stock fraud/concealment); *Reavis v. Fianza*, 215 U.S. 16 (1909) (adverse possession of mining claim); *Tiglaio v. Insular Government*, 215 U.S. 410 (1910) (void Spanish land grant); *Pendleton v. US*, 216 U.S. 305 (1910) (criminal self-incrimination); *Freeman v. US*, 218 U.S. 272 (1910) (embezzlement/imprisonment for debt); *Ong v. US*, 218 U.S. 272 (1910) (affirmance of conviction under statute since repealed); *Ling v. US*, 218 U.S. 476 (1910) (due process/exportation of Philippine coin); *Chantango v. Abaroa*, 218 U.S. 476 (1910) (criminal judgment as bar to civil action); *Roura v. Insular Government*, 218 U.S. 272 (1910) (judicial review); *Atlantic Gulf & Pacific Co. v. Insular Government*, 219 U.S. 17 (1910) (public contracts/ liability for damage to incomplete structure); *Martinez v. International Banking Co.*, 220 U.S. 214 (1910) (amount in appeal/consolidated suits); *Cavies v. U.S.*, 220 U.S. 338 (1911) (double jeopardy); *Costas v. Insular Government*, 221 U.S. 623 (1911) (Spanish grant of tidal lands); *Harty v. Municipality of Victoria*, 226 U.S. 12 (1912) (appeals/amount in dispute); *Uveda v. Zialcita*, 226 U.S. 452 (1913) (trademarks/treaty rights). Pursuant to a resolution of the Philippine Supreme Court dated August 15, 1918, most of these decisions were also published in an Appendix to volumes 40 and 41 of PHILIPPINE REPORTS.

The opinion of the lower court was sustained in all but three of the decisions: *Kepner*, *Mendezona* and *Carifio*. The *Kepner* decision is briefly discussed *infra* in footnote 175. The *Carifio* decision will be discussed in the fourth installment of this four-part series.

were of peripheral concern. Most of the Court's decisions concerned commercial interests affected by the legal realignment which followed the colonial expansion.

The initial controversy involved an interpretation of Article One, Section 8 of the U.S. Constitution. It mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States." The case, *De Lima v. Bidwell*, involved an action to recover back duties exacted and paid under protest to the port of New York by an importer of Puerto Rican sugar. The exaction had been made during the autumn of 1899, after Puerto Rico's cession to the United States but prior to the enactment on March 24, 1900, of the Puerto Rican Bill which reduced the duty on sugar imports.¹⁶⁴ The challenge raised "the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws."¹⁶⁵ On May 27, 1901, the Court held that the answer was no. In the Court's opinion, Puerto Rico ceased to be a foreign country upon ratification of the Treaty of Paris. Instead it became a territory of the United States. The tariff duties were, therefore, deemed to have been illegally exacted from the importer and they were ordered to be returned.

In a judicial sleight of hand, other decisions released on the same day saw the Court fall back on the arguments advanced by Magoon. These cases involved the importation of merchandise after Congress had passed legislation providing for a Puerto Rican tariff.¹⁶⁶ In the leading case *Downes v. Bidwell*, the issue was "whether merchandise brought in to the port of New York from Porto Rico since the passage [by Congress of a Puerto Rican tariff] is exempt from duty."¹⁶⁷ By a five to four majority, the Court concluded that "the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution." The tariff, therefore, was held to be constitutional.

For more than six months it remained uncertain whether these decisions applied to the Philippines.¹⁶⁸ On December 2, 1901, the U.S. Supreme Court made it official that they did. The decision came in *Fourteen Diamond Rings, Pepke v. U.S.*¹⁶⁹ The case involved a discharged U.S. veteran who, subsequent to the ratification and proclamation of the Treaty of Paris, had acquired fourteen diamond rings in the Philippines. The rings were brought with him on his return to the United States on September 25, 1899, but no declaration

¹⁶⁴31 U.S. Statutes 51.

¹⁶⁵*De Lima v. Bidwell*, 182 U.S. 174 (1900).

¹⁶⁶*Goetze v. U.S.*, 182 U.S. 221; *Dooley v. U.S.*, 182 U.S. 222; *Armstrong v. U.S.*, 182 U.S. 243; *Downes v. Bidwell*, 182 U.S. 244; and *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392.

¹⁶⁷182 U.S. 247 (1900).

¹⁶⁸The secretary of war expressed doubt in this regard in a letter to Senator John T. Morgan of Alabama dated June 5, 1901. P. Abelarde, *American Tariff Policy in the Philippines*, 12 PHILIPPINE SOCIAL SCIENCE REVIEW 315-49, 324.

¹⁶⁹183 U.S. 176.

was made at the port of entry. In May 1900 the rings were seized by a U.S. customs officer on the ground of illegal importation. The issue was whether the rings were imported from a foreign country. The court, relying on the reasons articulated in the Puerto Rican cases, held that the answer was no.

The implication of these decisions for the civil rights of the insular inhabitants was ominous. They confirmed that the Filipino peoples had become the "rarest of phenomena under the republican form of government, subjects."¹⁷⁰ They implied that if Congress, despite the constitutional mandate regarding uniform duties, could impose tariffs on Puerto Rican merchandise, then perhaps the Bill of Rights could likewise be abrogated within the colonial possessions. The Court took its cue from Magoon's treatise and made a tepid response.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants . . . it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject of arbitrary control of Congress.¹⁷¹

The Insular Decisions evoked a variety of reactions. Domestic Agricultural producers were delighted. An *amicus curiae* "Brief on Behalf of Industrial Interests in the States" had warned that if the tariffs were not upheld domestic producers of tobacco, hemp (abaca), rice, sugar and fruits could "not compete on the unequal terms which would be forced upon them with like products grown in the ceded (tropical) possessions."¹⁷²

Not all sugar producers, however, were pleased. The decisions were a "severe blow" to the sugar cane industry, in particular the American Sugar Refining Co.¹⁷³ Duty free importation of sugar cane from the newly acquired colonies was no longer certain; tariff fees would have to be fought out in Congress. Sugar beet growers were delighted by the prospect. The sugar beet

¹⁷⁰J. THOMPSON, P. STANLEY & J. PERRY, *op. cit.*, note 86 at 106.

¹⁷¹*Downes v. Bidwell*, *op. cit.*, note 166 at 282-3. By contrast, two years earlier in the 1899 decision, *Stephens v. Cherokee Nation*, the Supreme Court had found that although Congress had "plenary power of legislation" in regard to U.S. Indian Tribes, the power was "subject" to the Constitution. 147 U.S. 445, 478. For additional background on the Insular decisions, see THE INSULAR CASES: COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900 IN THE U.S. SUPREME COURT OF THE UNITED STATES INCLUDING APPENDICES THERETO (1901); G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 78-9, 106-7, 117-7; W. POMEROY, *op. cit.*, note 75 at 121-4; L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 242-3; L. Rowel, *The Supreme Court and the Insular Decision*, 18 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 226-50; Courdet, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. L.R. 801-64.

¹⁷²THE INSULAR CASES, *id.*, at 239.

¹⁷³L. FRANCISCO & J. FAST, *op. cit.*, note 93 at 242.

lobby was waxing strong and confident in Congress. Farmers reported a sharp increase in the amount of land planted with sugar beets in the summer of 1901, and this was soon followed by a 140 percent increase in production.¹⁷⁴

Civil libertarians and anti-imperialists in the United States were outraged. The newspaper columnist and noted anti-imperialist, Finley Peter Dunne (more popularly known as Mister Dooley), remarked that "whether the Constitution followed the flag or not, the Supreme Court followed the election returns."¹⁷⁵ Among Filipino elites, however, there was little, if any, reaction. Neither they nor the masses of Philippine peoples were involved in the debates concerning the colony's future. Nor were they apparently even aware of the implications.

The newly-appointed Philippine commissioners, led by William H. Taft, were not so ignorant. Although the Commissioners kept a discreet silence, their reaction was likely one of mixed emotions. Despite the potential trouble which the decisions might cause for the sugarcane industry, the Commissioners were already engaged in the surreptitious defiance of Congressional restrictions imposed on them only two months earlier in the Spooner Amendment. Henceforth, they would also consider themselves less constrained by Constitutional jurisprudence.

Portions of the Bill of Rights were replicated in McKinley's April 1900 Instructions to the Philippine Commission and the U.S. Congress' 1902 Organic Act. But these laws did not emanate directly from the U.S. Constitution. In some important instances, therefore, their impact was substantially circumscribed, diluted, and even ignored by the Philippine Commission. Perhaps the most egregious variation concerned the writ of *habeas corpus*. The right to the writ was guaranteed in McKinley's Instructions and the Organic Act. But

¹⁷⁴G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 79.

¹⁷⁵The first test of these relaxed constitutional standards to reach the U.S. Supreme Court concerned a case of double jeopardy. *Kepner v. U.S.*, 195 U.S. 100 (1904). Under the Spanish regime, the government could appeal an acquittal in a criminal case to the *Audiencia*, and the U.S. regime attempted to continue the practice. A U.S. attorney practicing in Manila had been charged with, and acquitted of, embezzlement (*estafa*) in a Court of First Instance. The colonial government appealed and the attorney was convicted in the Philippine Supreme Court. In the U.S. Supreme Court, the Philippine attorney-general averred that "a law permitting an appeal from the part of the State from a judgment of acquittal in the trial court... is not in derogation of any fundamental doctrine of common law... or of the Constitution." *Id.*, at 110. The High Court disagreed by five to four and the conviction was overturned on May 31, 1904. Justice Day, the *ex ponente*, asked rhetorically, "How can it be successfully maintained that these expressions of fundamental rights [found in the U.S. and Philippine Bill of Rights]... could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?" Another decision released on the same day, however, made it clear that constitutional standards adhered to in the U.S. were not automatically applicable in the colonies. In *Dorr v. O'Brien*, 195 U.S. 138, the Court held eight to one that in the absence of a *statute* of Congress conferring the right to trial by jury, the Constitution does not "of its own force carry such right to the territory situated." *Id.*, at 149. In his dissent, Justice Harlan averred at 156 that "the suggestion that [the appellant] may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of power that the government may exercise at any time or at any place, is utterly revolting to my mind and can never receive any sanction." See also *Gavieres v. U.S.*, 220 U.S. 338 (1911) (double jeopardy/offenses distinguished).

even though the colony had been largely subdued, except for Muslim Mindanao, by the end of 1904, there continued to be "men confined in prisons throughout the archipelago arrested without warrant and entirely ignorant why they have been detained."¹⁷⁶

Secretary Root took no notice. In September 1902 he averred that "The policy of the Republican Administration has been . . . to give the people of the Islands all the blessings of civil and religious liberty, of just and equal laws, of good and honest administration."¹⁷⁷ Fifty years later, two respected U.S. scholars of Philippine-American political history, who rendered a generally favorable view of the colonial endeavor, proffered an alternative perspective. Summing up the rationale behind the Insular Decisions, they opined that

From a constitutional viewpoint, it is not altogether easy to understand how Congress, which is established under the Constitution and derives its powers from that document, could totally disregard the Constitution in governing the newly acquired territory. From practical viewpoints, however, the decisions were more rational. What advantages were there in an expanding imperialism if the Constitution and its guarantees and protections were to apply to the new territory?¹⁷⁸

¹⁷⁶H. WILLIS, OUR PHILIPPINE PROBLEM 95 (1905). The detentions were justified under Act No. 190, Section 528 of August 7, 1901. A "costly and unwieldy" process for securing the writ was subsequently established by Act No. 754 of March 3, 1903. But it was only those who had "money to pay a lawyer that can secure their freedom when thus unjustly imprisoned."

Two other laws were never tested in the U.S. Supreme Court but raised serious First Amendment concerns regarding their vagueness and overbreadth. Act No. 292 of March 4, 1901, made it a criminal offense to, among other things, "utter seditious words or speeches . . . which tend to stir up the people against the lawful authorities, or which tend to disturb the peace of the community or the safety or order of the Government, or who shall knowingly conceal such evil practices from the constituted authorities." Act No. 1696 of August 23, 1907, made it illegal to display or even permit to be displayed, "any flag, banner, emblem, or other device used or adopted at any time" by the *Katipuneros* or other revolutionaries during the Philippine-American War.

The regime's variance from jurisprudence pertaining to land rights and the due process and just compensation provisions of the U.S. Bill of Rights will be discussed in the last part of this four part series.

¹⁷⁷E. ROOT, *op. cit.*, note 153 at 70.

¹⁷⁸G. GRUNDER & W. LIVEZY, *op. cit.*, note 75 at 79. A variant interpretation of the Insular Decisions was that some provisions of the U.S. Constitution, such as the Thirteenth Amendment which proscribes slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction" [emphasis supplied] still applied to the Philippines. G. MALCOLM & M. KALAW, *op. cit.*, note 140 at 99 citing unspecified "competent authorities."