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THE MISSION OF GOV. TAFT TO THE VATICAN.

The mission of Gov. Taft to the Vatican, last Summer, is, to students of constitutional or international law, one of the most interesting incidents of the state of things which has grown out of our treaty of 1899 with Spain.

The diplomatic relations of the United States are under the control of the President. Whoever represents them before a foreign government bears a commission from him, and receives his instructions through the Department of State. The President, as to our foreign relations, stands for the sovereignty of the United States.

As the depository of this sovereign power, he addresses himself only to sovereigns. The mission of Gov. Taft was to one not recognized by the President as a sovereign, yet who claims a place as such, and whose claims are recognized by several of the powers of Europe. The Pope, be he a temporal sovereign or not, holds a position of supreme authority over the most ancient and widely extended of Christian churches. The question which the situation in the Philippines called upon us to face was one as to which an expression of the Pope's pleasure would be likely to be final, as regards any interests opposed to those of the United States. It was deemed by the civil authorities in the Philippines highly desirable to obtain his approval of such measures as might best tend to the removal of the friars from the islands and the relinquishment of their vast landed possessions. How was he to be approached?

For the President to direct our ambassador at the Court of Rome to open communication with the Vatican was plainly inadmissible. It would be, to say the least, a discourtesy to the Italian government, to which he was accredited.

For the President to send a special envoy to the Pope would have been not less objectionable. It would have been, or would be assumed to have been, a recognition of his political sovereignty. If an Act of Congress had been recommended to authorize it, whatever legislation might have been had could hardly be satisfactory to Catholics on the one hand and Protestants on the other. Had he acted without authority of Congress, grave questions as to his right to do so would have arisen.

But the President is not only the first civil officer but the first military officer of the United States. A military officer, holding military occupation of territory where war is flagrant, has powers that are almost unlimited. By such a title, President Lincoln, during the civil war, established civil courts in Louisiana; laid a duty on cotton brought out of the Southern States under his trading licenses; and finally emancipated the slave. By such a title, fortified by the Spooner amendment to the army appropriation bill of March 2, 1901, President Roosevelt, through the Philippine Commission, has been making laws for the Filipino; setting up courts for him; and, in a word, governing him at will. In this line of executive action he speaks, and properly speaks, through the Secretary of War.

The head of the War Department was fortunately an able and well-read lawyer. There was nothing to prevent his authorizing the officials acting under him at the Philippines from communicating with whom they would, so far as might seem necessary to make peace or to preserve it.

They had recommended the purchase of the friars' lands by the United States. Their head, Gov. Taft, was urging it at Washington, last Spring. The time had come for his return to Manila, and nothing had been concluded. It was felt that nothing could be, until the attitude of the Roman Catholic church as to the matter was more definitely ascertained. It was under these circumstances that the Secretary of War, on May 9, sent out Gov. Taft for purposes of foreign intercourse as a representative at Rome, not of the United States, but of the Secretary of War; not before the Court of Rome, but the Court of the Vatican.

But how would such an envoy be regarded by the Pope? Here, if we may trust unofficial reports, much tact was exercised, on both

sides. President Roosevelt availed himself of the opportunity of Gov. Taft's visit to Rome, to send to the Pope a friendly letter of a personal nature, asking his acceptance of a set of the President's works. An American bishop of the Roman Catholic church arranged for an audience of the distinguished messenger who bore the gift. The messenger, however, carried no official credentials from the Department of State, or from the President. His commission was a letter of instructions from "Elihu Root, Secretary of War," addressed to "Hon. William H. Taft, Civil Governor of the Philippines," dated May 9, 1902.* In this it was stated that in view of the apparent impossibility of disposing of the matter of purchasing the friars' lands by negotiation with them, "the President does not feel at liberty to lose the opportunity for effective action afforded by your presence in the West. He wishes you to take the subject up tentatively with the ecclesiastical superiors who must ultimately determine the friars' course of conduct, and endeavor to reach at least a basis of negotiation along lines which will be satisfactory to them and to the Philippine Government, accompanied by a full understanding on both sides of the facts and of the views and purposes of the parties to the negotiation; so that, when Congress shall have acted, the business may proceed to a conclusion without delay. You are accordingly authorized, in the course of your return journey to Manila, to visit Rome, and there ascertain what church authorities have the power to negotiate for and determine upon a sale of the lands of the religious orders in the Philippine Islands, and if you find, as we are informed, that the officers of the church at Rome have such power and authority you will endeavor to attain the results above indicated. Any negotiations which you may enter upon are always subject to granting of power by Congress to follow the negotiations by binding action."

Certain rules were then laid down to guide his action, and the letter concludes thus:

"Your errand will not be in any sense or degree diplomatic in its nature, but will be purely a business matter of negotiation by you as Governor of the Philippines for the purchase of property from the owners thereof, and the settlement of land titles, in such a manner as to contribute to the best interests of the people of the islands.

* For a copy of this document, and of some others to which reference is subsequently made, I am indebted to the courtesy of Col. Clarence R. Edwards, U.S.A., Chief of the Bureau of Insular Affairs in the War Department.

Any assistance which you may desire, whether on the part of officers of the civil government, or of military officers, to enable you to perform the duties above described in a manner satisfactory to yourself, will be afforded; but the business is left entirely in your hands, subject to such action as may be taken pursuant to law upon your report."

Gov. Taft availed himself of this permission to call to his assistance such other officers as might best aid him, by adding to his suite Judge James S. Smith, a member of the Supreme Court of the Philippines and a Roman Catholic, who has been since placed upon the Philippine Commission, and Major Porter of the Judge Advocate's bureau in the United States army.

The Pope gave him a courteous audience, and he was soon in communication with Cardinal Rampolla, the Papal Secretary of State, Major Porter acting as his bearer of dispatches. Each step taken was reported to the Secretary of War, and made the subject of fresh instructions from him. Mr. Root was careful, in despatching Gov. Taft to Rome, to speak for himself, and not in the name of the President, and to make no formal reference to the Court of the Vatican. In the original commission of May 9th, the Pope was not mentioned, there being only vague references to "church authorities" and "the officers of the church at Rome." In his dispatch of July 14, 1902, the term "Holy See" appears, which is one of the appropriate designations of the Court of the Vatican (*Saint Siége*), used in diplomatic intercourse, but it is employed as convertible with "the ecclesiastical authorities in Rome" and "the authorities of the church." Gov. Taft, in his closing note, addressed to the Papal Secretary of State two days later, if we may trust the newspaper report of it, quotes from or summarizes a dispatch "just received," and presumably later than that of July 14, in which the Secretary of War had advised him with reference to the counter-suggestions with which Cardinal Rampolla had met our proposal of purchase. This quotation or summary began thus: "Secretary Root says he is glad to see by the two notes received from the Vatican that the Holy See is animated by the best intentions to come to an understanding with Washington about the relations between Church and State in the Philippines; that his Eminence has declared the Vatican to be disposed to give clear and precise instructions to the friars to occupy themselves with religion only, abstaining entirely from politics, and that the Holy See proposes to introduce, little by little, ecclesiastics of other nationalities, especially American." Here the Vatican seems to be quite fully recognized as the party treated with. Gov. Taft's

own note of July 16 is in the same tone. "Now," he wrote, "that the Vatican does not see its way clear to make a definite withdrawal, the American Government has deemed it wise to recur to the methods of settlement of the various questions at issue suggested by Cardinal Rampolla's first communication of June 21."

So far as concerns Mr. Root's speaking in his own name as Secretary of War, it may be observed that whatever the head of a department says, officially, the President says.

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."* "The acts of heads of departments, within the scope of their powers, are in law the acts of the President."**

The President, however, for the same reasons, spoke through Mr. Root only as the commander-in-chief of the army of the United States. He did not speak as a depository of the treaty-making power nor as the representative of the United States in diplomatic intercourse.

Cardinal Rampolla may be pardoned for not always noting—perhaps for not always caring to note—these subtle distinctions, belonging to the American system of constitutional government, with its formal division of sovereign powers. He, in his first memorandum, of June 22, spoke in the name of the "Holy See" and of its disposition to furnish the new Apostolic Delegate to be sent to the Philippines such instructions as would enable him to treat amicably with "the American Government."

The difficulties of the situation were somewhat enhanced by the Act of Congress of July 1, 1902, passed during Gov. Taft's stay at Rome. This declared the inhabitants of the Philippines "citizens of the Philippine Islands and as such entitled to the protection of the United States." In the treaty of cession, it had been stipulated that "the civil rights and political *status* of the native inhabitants of the territories hereby annexed to the United States shall be determined by the Congress." The Act of July 1 made this determination, and formally brought them within the civil protection of the United States. A protectorate was not exactly established, because there was no government to be protected. We were dealing with individuals only. The Act, however, provided for a census of the inhabitants of the islands as soon as a "condition of general and complete peace shall have been established therein," and proclaimed by the President of the United States, and a sub-

* Wilcox v. Jackson, 13 Pet., 498, 513.

** Wolsey v. Chapman, 101 U. S., 755, 769.

sequent election of a representative assembly to exercise the legislative powers now vested in the Philippine Commission. On July 4 the proclamation so provided for was made.

All this tended strongly to attenuate the military character in which Gov. Taft had begun his negotiations with the Papal Court. Before they closed, his military superior had announced that a state of peace had been completely established. There must, however, be necessarily a kind of interregnum before the military power could give full place to the civil. Meanwhile Gov. Taft remained what he had been before—a civil Governor in name, and a military Governor in fact.

It would now undoubtedly have been within the power of the President as the civil head of the United States, charged with the care of their foreign relations, to send a political agent to Rome to take up the negotiations, with instructions from the Department of State; but it is a power which no President would willingly exercise. Since the establishment of the kingdom of Italy at Rome, we have never gone further towards official intercourse with the Vatican of a diplomatic nature than to recognize the diplomatic character and rank of its nuncios at foreign courts.*

The practical solution agreed on in July by both parties was, under the circumstances, the best disposition of an awkward question. This was the sending of an Apostolic Delegate to the Philippines, there to treat with the local government. Mgr. Guidi, who was appointed in August to that position, is a Doctor of Laws of the University of Innsbruck, and has been in the diplomatic service of the Vatican at the Courts of Madrid, Lisbon, Munich, and St. Petersburg. He was consecrated as titular archbishop of Stavropoli in September, the better to support the dignity of his position, in the presence of the entire diplomatic *corps* at the Papal Court, and has already put himself in official communication with Gov. Taft.

The Act of Congress of July 1, 1902, gave the Philippine Commission power to buy any lands which on August 13, 1898, were owned "or held" in such large parcels and in such manner as in their opinion "injuriously to affect the peace and welfare of the people of the Philippine Islands." Bonds can be issued to raise the purchase money. Under this authority and with the good understanding established by the negotiations at Rome, it seems probable that an amicable arrangement can soon be effected for the appraisal and purchase of the friars' lands, as well as the ascertainment of what they really own.

* Wharton, Int. Law Dig., I, 546, Sec. 70.

This will amount to a voluntary purchase of private property for public use. It can hardly—so far as the United States are concerned—involve a further communication of a formal nature with the Vatican. The title would naturally be taken to some corporate body representing for the time being the people of the Philippine islands. Thus considered, the affair might be viewed as an “emergency measure,” like our closing of the ports in the Sulu archipelago of which the German ambassador complained to our Secretary of State in 1900; and so nothing that could bring the War Department into a position where its action could be justly deemed an invasion of the powers of the Department of State.*

The whole proceeding which has been the subject of this article will rank in the history of international law as an anomalous one. The agent of the United States bore no credentials addressed to those with whom he was to negotiate. He was charged with certain affairs, but he was not a *Chargé d’Affaires*, for he was not accredited to the Papal Secretary of State, and his commission declared that his errand was in no sense diplomatic in its nature. He was not an agent to smooth the way towards a future treaty, for here, again, his commission declared that any negotiations which he might enter upon would be “subject to granting of power by Congress to follow the negotiations by binding action.” Nor could he properly be regarded as an agent to negotiate a *concordat*. A *concordat*, it is true, is an agreement to which the Pope becomes a party purely as the head of the Roman Catholic church, and not at all in the character of a political sovereign. It is true, also, that agreements of this character may properly extend to the settlement of land titles affecting the interests of religious orders, as in the case of the French *concordat* of July 15, 1801, or that with Spain of March 16, 1851.** But a *concordat* is, in substance, a treaty in which the Pope treats with the treaty-making power of the sovereignty which is the other contracting party. Cardinal Rampolla’s reception of Gov. Taft’s overtures as coming from a political agent of the United States did not amount to recognition of him as a diplomatic agent,† nor was he sent out in that capacity. It was, from first to last, to be classed in form, as a military incident of a temporary state of hostilities; and yet it was, from first to last, at bottom, the attempt of the civil authorities of the United States on the one hand, and the Pope on the other, to make a permanent settlement of a matter essentially pertaining to affairs of civil government.

Simeon E. Baldwin.

* See Magoon’s “Reports on the Law of Civil Government in Territory subject to Military Occupation, etc.,” 316, 321, 336.

** See Calvo, “Droit International,” III, Sec. 1607, 1609.

† See Wharton, “International Law Digest,” I, 549, Sec. 70.