Important Quotations from Downes v. Bidwell, (US Supreme Court, May 27, 1901) regarding the United States' acquirement of territory under the US Constitution and the doctrine of "unincorporated territory":

Introduction:

The Spanish-American War, ignited by the February 1898 explosion of the USS Maine and ending with the December Treaty of Paris (signed Dec. 10, 1898; came into force April 11, 1899), was a short-lived event with dramatic repercussions. By the terms of the treaty ending the war, Spain ceded Puerto Rico, the Philippines, Cuba, and Guam. The United States then found itself in the novel (for Americans) position of becoming a world power with overseas territories, in the tradition of Britain, France, and Spain.

These four island groups were originally under Spanish sovereignty when the United States formally declared war against Spain in late April 1898. Later these areas were occupied by the United States. The form of administration by which an occupying power exercises government authority over occupied territory is called "military government," and in the days leading up to the December 10, 1898, signing of the Treaty of Paris, all four of these island groups had been under United States Military Government (USMG) for some time. The relevant dates for the beginning of USMG are usually given as follows:

Puerto Rico: August 12, 1898
Philippines: August 18, 1898
Cuba: July 17, 1898
Guam: June 21, 1898

Importantly, in each island group, the period of military occupation was followed by a formal announcement by the US government of the end of "United States Military Government" (USMG) in each area. The relevant dates for the end of USMG and the beginning of US government authorized "civil government" are usually given as follows:

Puerto Rico: May 1, 1900
Philippines: July 4, 1901
Cuba: May 20, 1902
Guam: July 1, 1950

As stated above, the Treaty of Paris came into effect on April 11, 1899. The rule that

“The military government of the (principal) occupying power does not end with the coming into force of the peace treaty, but continues until legally supplanted” is thus clearly shown by examining the above dates for the end of USMG in each area.

The status of “unincorporated territory” is derived from the opinion of the Supreme Court Justices in Downes v. Bidwell (May 27, 1901). From the point of view of the fifty states, an unincorporated territory is “foreign in a domestic sense.” The legal reasoning in this Supreme Court case is important when discussing territorial cessions which have been “acquired” under the principle of ***conquest***.

From the majority opinion --
(A) The words of Chief Justice Marshall in Gibbons v. Ogden, (1824) 9 Wheat. 1, 6 L. ed. 23, with respect to the power of Congress to regulate commerce, are pertinent in this connection: 'This power,' said he, 'like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . .

(B) So too, in Johnson v. M'Intosh, (1823) 8 Wheat. 543, 583, 5 L. ed. 681, 691, it was said by him:

> 'The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.

From the concurring opinion of Justices White, Shiras, McKenna --
(C.) The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such [182 U.S. 244, 290] territory of representative government if it is considered just to do so, and to change such local governments at discretion.

(D) In American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242, the court, by Mr. Chief Justice Marshall, said (p. 542, L. ed. p. 255):

> 'The Constitution confers absolutely on the government of the Union the powers

of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.'

(E) In United States v. Huckabee (1872) 16 Wall. 414, 21 L. ed. 457, the court speaking through Mr. Justice Clifford, said (p. 434, L. ed. p. 464):

'Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined ….

(F) In Church of Jesus Christ of L. D. S. v. United States (1889) 136 U.S. 1 , 34 L. ed. 478, 10 Sup. Ct. Rep. 792, Mr. Justice Bradley, announcing the opinion of the court declared (p. 42, L. ed. p. 491, Sup. Ct. Rep. p. 802):

'The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry [182 U.S. 244, 304] on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty.

(G) The treaty concerning Alaska, therefore, adds [182 U.S. 244, 336] cogency to the conception established by every act of the government from the foundation,-that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted.

(H) ... it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion.

(I) The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority

which has at all times been treated as an incident of the right to acquire.

(J) And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and in its prosecution the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was [182 U.S. 244, 308] to necessarily incorporate an alien and hostile people into the United States? Take another illustration. Suppose at the termination of a war the hostile government had been overthrown, and the entire territory or a portion thereof was occupied by the United States, and there was no government to treat with or none willing to cede by treaty, and thus it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States. If holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?

(K) (*speaking of United States Military Government in Cuba, and in reference to Article 1 of the Treaty of Paris*) .... the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this court unanimously held in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so.

(L) It cannot be denied that under the rule clearly settled in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available.

Mr. Justice Gray, concurring:

(M) As Chief Justice Marshall said (in American Ins. Co. v. 356 Bales of Cotton (1828)): 'The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

(N) The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty.

(O) In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of [182 U.S. 244, 346] the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

(P) So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in Fleming v. Page, 9 How. 603, 617, 13 L. ed. 276, 281.

(Q) If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.