

California Law Review

Volume XXX

MAY, 1942

Number 4

Martial Law in Hawaii

*Garner Anthony**

THE declaration of martial law in the Territory of Hawaii as a result of the Japanese raid on Pearl Harbor presents profound problems not only to the legal profession but to all persons in Hawaii, military and civilian alike. The current tension on the west coast, coupled with suggestions of applying martial law in certain mainland areas, makes an inquiry into that ill-charted field a matter of national concern. It is the writer's purpose to attempt an analysis of the legal problems involved, with the hope that it may evoke a free trade in ideas, to the end that a solution may be reached whereby the armed forces will be helped, not hindered, and that the all-important business of winning the war can be conducted in combat areas with dispatch and intelligence under a reign of law.

MARTIAL LAW PROCLAIMED

On Sunday, December 7, 1941, shortly after the Japanese raid on Pearl Harbor had subsided, J. B. Poindexter, Governor of the Territory of Hawaii, by proclamation, invoked the powers granted him under the Hawaiian M-Day Bill.¹ On the afternoon of the same day the Governor issued a second proclamation calling upon the Commanding General of the Hawaiian Department to prevent the invasion, suspending the privilege of the writ of habeas corpus, and requesting and authorizing the Commanding General

“ . . . during the present emergency, and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor . . . and . . . to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties

*Practicing attorney, Honolulu, Hawaii; A.B., Swathmore College, 1923; LL.B., Harvard University, 1926.

¹ Appendix I.

and cities therein, and such other and further powers as the emergency may require"²

Immediately following this proclamation Lieutenant General Walter C. Short, Commanding General, Hawaiian Department, U. S. Army, issued a proclamation³ to the people of Hawaii, in which he said,

" . . . I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense. . . . I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function."

The proclamation of martial law was immediately communicated to the President of the United States pursuant to section 67 of the Hawaiian Organic Act,⁴ who promptly approved the action of the Governor in suspending the privilege of the writ of habeas corpus and placing the Territory of Hawaii under martial law. The day following the proclamation, the Territorial courts were closed by order of the Commanding General, and the Chief Justice of the Supreme Court of Hawaii signed an order which was posted at the entrance of the Judiciary Building announcing the closing of all Territorial courts.⁵ No statute authorizes the Chief Justice to close the courts,

² Appendix II.

³ Appendix III.

⁴ This section authorizes the Governor to ". . . call upon the commanders of the military and naval forces of the United States . . . to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." 31 STAT. (1900) 153, 48 U. S. C. (1940) § 532.

⁵ The text of the order is as follows:

"Under the direction of the commanding general, Hawaiian Department, all courts of the Territory of Hawaii will be closed until further notice.

"Without prejudice to the generality of the foregoing, all time for performing any act under the process of the Territory will be enlarged until after the courts are authorized to resume their normal functions."

nor is there any authority in the Organic Act for the complete delegation of power by the Governor and the appointment of a Military Governor.

When Lieutenant General Walter C. Short was relieved of his command on December 17, 1941, he issued a proclamation⁶ stating that he had relinquished command of the Hawaiian Department in accordance with a radiogram of the War Department, and that he relinquished his position as Military Governor of the Territory of Hawaii. This proclamation was simultaneous with the proclamation of Lieutenant General Delos C. Emmons, who recited the change of command pursuant to the War Department radiogram, and announced

“ . . . that I have this day assumed the position of the Military Governor of the Territory of Hawaii, and as such Military Governor I adopt and confirm the instructions contained in the fifth to ninth paragraphs, inclusive, of the proclamation of the Military Governor of the Territory of Hawaii dated December 7, 1941, and the general orders and other actions taken pursuant thereto.”⁷

The transfer of the office of Military Governor of the Territory of Hawaii from Lieutenant General Short to Lieutenant General Emmons was accomplished without any action on the part of Governor Poindexter, this undoubtedly upon the theory that Governor Poindexter had appointed as Military Governor of Hawaii not an individual as such, but the individual holding the position of Commanding General, Hawaiian Department, U. S. Army.

HAWAII IS AN ORGANIZED TERRITORY

The Territory of Hawaii has a government created under an act of Congress, the Hawaiian Organic Act,⁸ which in the traditional American pattern embodies the doctrine of the separation of powers into legislative, executive and judicial. The legislature consists of an elective senate and a house of representatives. The judicial power of the Territory is vested in one supreme court, circuit courts and inferior courts established by the legislature. In addition to the territorial courts, there is a United States district court for Hawaii, which in general has the same jurisdiction as the district courts of the United States. The territorial courts, including the United States

⁶ Honolulu Star-Bulletin, Dec. 19, 1941, at 9.

⁷ *Ibid.*

⁸ 31 STAT. (1900) 141, 48 U. S. C. (1940) § 491.

district court for Hawaii, are not constitutional courts created under Article III of the Constitution.⁹ The Governor of the Territory of Hawaii, judges of the territorial courts of record (the supreme court and circuit courts), and the judges of the United States district court for the Territory are appointed by the President of the United States by and with the advice and consent of the Senate, and hold office at the will of the President.

The powers of Congress over territories are plenary, subject only to applicable provisions of the Constitution. It may either legislate directly as to local affairs or delegate the power to a legislature elected by the citizens.¹⁰ The latter course was chosen for Hawaii.

The Act creating the Territory of Hawaii formally extended the Constitution and laws of the United States to the Territory of Hawaii.¹¹ While it is true that the political rights enjoyed by the inhabitants of a territory are privileges held in the discretion of Congress,¹² personal and civil rights of the inhabitants are secured to them irrevocably by the Federal Constitution.¹³ The only restraint upon either Congress or the territorial legislature in respect to the affairs of the Territory, is the Federal Constitution.

THE GENERAL ORDERS OF THE MILITARY GOVERNOR

The commands of the Military Governor are made known to the community through the issuance of general orders which are published in the daily press. These are promulgated by his office through a subordinate "executive".

It will be observed that the orders of the Military Governor proceed upon the theory that as a result of the declaration of martial law and the appointment of the Commanding General as Military Governor of the Territory, all of the executive, legislative and judi-

⁹ *Mookini v. United States* (1938) 303 U. S. 201, 205.

¹⁰ *Mormon Church v. United States* (1889) 136 U. S. 1, 43; *Binns v. United States* (1904) 194 U. S. 486, 491; *Inter-Island Co. v. Hawaii* (1938) 305 U. S. 306, 314.

¹¹ Hawaiian Organic Act § 5. "The Constitution and . . . all the laws of the United States . . . not locally inapplicable, shall have the same force and effect within said Territory of Hawaii as elsewhere in the United States . . ." 31 STAT. (1900) 141, 36 STAT. (1910) 443, 48 U. S. C. (1940) § 495.

¹² *Dorr v. United States* (1904) 195 U. S. 138, 149; *Balzac v. Puerto Rico* (1922) 258 U. S. 298.

¹³ *Murphy v. Ramsay* (1885) 114 U. S. 15, 44; *Hawaii v. Mankichi* (1903) 190 U. S. 197; *Rasmussen v. United States* (1905) 197 U. S. 516; *Farrington v. Tokushige* (1927) 273 U. S. 284, 299. Cf. *Balzac v. Puerto Rico*, *supra* note 12, as to the status of an unincorporated territory.

cial power is vested in the Military Governor; that he is not bound by the laws of the Territory or the provisions of the Federal Constitution, or, in the alternative, they are suspended by the existence of martial law.

The general orders of the Military Governor cover a wide range of subjects, the jurisdiction and powers of all civil courts, the creation of military tribunals for the trial of civilians, regulation of traffic, firearms, gasoline, liquor, food stuffs and feed, the possession of radios, the censorship of the press, communications by wireless, cable and wireless telephone, the freezing of wages for all persons employed on the Island of Oahu, and the regulation of the possession of currency.

General Order No. 4 erects military tribunals for the trial of all civilians for offenses against “. . . the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities.”¹⁴ These tribunals are guided by but “. . . are not bound by the limits of punishment prescribed in said laws . . .” Lesser offenses are tried before provost courts who may impose sentence up to five years imprisonment and five thousand dollars fine. Major offenses are tried before military commissions who may give sentences “. . . commensurate with the offense committed and may adjudge the death penalty in appropriate cases.” The order provides that the record and procedure in the provost courts should follow substantially that of a summary court-martial, and in the military commissions, that of a special court-martial.¹⁵ There is no appeal from the sentence of either tribunal, but sentences of military commissions must have the approval of the military governor before becoming effective. The accused is not entitled as a matter of right to the rights and privileges of an accused in a court-martial. As has been recently pointed out, these are not negligible.¹⁶

It should be noted that Order No. 4, coupled with General Orders Nos. 29 and 57,¹⁷ prohibiting the civil courts from exercising their statutory criminal jurisdiction, places the entire administration of criminal law in the hands of military tribunals. The substantive

¹⁴ Appendix IV.

¹⁵ The maximum punishment that can be adjudged by a summary court-martial is confinement for one month, restriction to limits three months, and forfeiture of two-thirds of one month's pay. Article of War 14, 41 STAT. (1920) 789, 10 U. S. C. (1940) § 1485.

¹⁶ Gullion, *How the Court-Martial Works Today* (1941) 27 A. B. A. J. 765.

¹⁷ Appendices V and VI.

crimes for which persons are tried before military tribunals are offenses against the federal and territorial statutes, and offenses against ". . . the rules, regulations, orders or policies of the military authorities." From this it would seem that any violation of a general order issued by the Military Governor would carry with it criminal sanctions. Moreover, in sentencing offenders, the statutes of the United States, the Territory of Hawaii, the District of Columbia, and the Courts-Martial Manual, are merely guides for the imposition of sentence. The military tribunals are not bound by the penalties prescribed in any written law.

The problem thus is presented whether martial law can lawfully continue in the Territory of Hawaii, and whether there exists any warrant for the trial of civilians by military tribunals. The answer to these questions must be found in the Constitution, the statutes enacted in pursuance thereof, and the whole body of the common law applied to the existing facts.

THE CONSTITUTION AND TRIAL OF CIVILIANS
BY MILITARY TRIBUNALS

As has been pointed out recently by Mr. Chafee, "The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war."¹⁸ This point cannot be overemphasized, particularly in view of the fact that some well-meaning but overzealous persons are bound to resort to the view that a state of war suspends the Constitution. This view discloses a lack of knowledge of American history. The framers of the Constitution and the Bill of Rights were not "summer soldiers" or "sunshine patriots"; they built a frame of government intended for all exigencies, not simply a fair-weather ship of state.

Article III, Section 1 of the Constitution provides,

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ."

Article III, Section 2, provides,

". . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."

¹⁸ CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 30.

The Fifth Amendment says,

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”

and the Sixth that,

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”

It should be noted that the Fifth Amendment says that

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury”

and the only exceptions are cases arising in the armed forces. This unequivocal language cannot be explained on the score of inadvertence.

There has been a real invasion of Hawaii, brief though the attack was. It is safe to assume that hostile craft (surface, submarine and aircraft) are, or may from time to time be, present in the immediate vicinity of Hawaii. There of course exists no insurrection or hostile occupation of the Islands. The civil authorities have not been deposed by any invader from without, or rebel from within. The courts would have opened for business in their free and unobstructed scope on the Monday following the attack but for the order of the Military Governor. The general orders creating the military commission and provost courts were confined to the trial of criminal cases. No order has been issued empowering military tribunals to conduct the civil business of the Territory. On December 16, 1941, the civil courts were permitted to open to a limited extent for the trial of civil cases.¹⁹

The latest order of the Military Governor relating to civil courts is General Order No. 57, which permits the courts of the Territory “as agents of the Military Governor” to operate to a limited extent, prohibiting the summoning of the grand jury, trial of criminal cases, trial by jury, compulsory attendance of witnesses, and the maintenance of any action against any member of the armed forces or other

¹⁹ Appendix V.

persons employed under direction of the Military Governor or engaged in defense work, for any act done in the course and scope of their employment.²⁰ The limitations thus imposed by the Military Governor upon the civil courts, for all practical purposes, render them powerless, except in cases where no jury has been demanded, or in equity and probate cases where the compulsory attendance of witnesses is not necessary. Any party wishing to avoid trial in a law case may do so by the simple expedient of demanding a jury. It is doubtful whether any equity judge would allow a matter to proceed to decree over objection of a party that he had pertinent evidence, the production of which was denied him because of the inability to have a subpoena issued. This limitation, however, does not apply to cases on appeal to the Supreme Court of the Territory. The jurisdiction of that court is left virtually intact.

It is difficult to see how a judge holding a commission from the President of the United States, who has taken an oath of office to discharge faithfully and impartially the duties of his office and "to support and defend the Constitution and laws of the United States" can act as an "agent for the Military Governor" or as an agent for anyone else. The concept of agency probably was evolved to preserve a logical consistency with the theory that upon the declaration of martial law, the appointment of a Military Governor and the closing of the courts by order of the Commanding General, no residue of judicial power was left in the courts, and that the source of the power which they now exercise is the Military Governor.

One possible reason for not permitting the courts to resume their normal functions is the possibility that the summoning of jurors and of witnesses might interfere with defense work. This problem might well be left to the sound discretion of trial judges in particular cases, who by rule of court could require a satisfactory showing before the issuance of a subpoena.

The Constitution does not contain the term "martial law". Nor is that expression used in any existing federal statute which has come to the author's attention, other than the Organic Acts governing Hawaii,²¹ the Philippines²² and Puerto Rico.²³ The legislative basis for military tribunals erected for the trial of civilians is, as might be expected, rather slender.

²⁰ Appendix VI.

²¹ 31 STAT. (1900) 133, 48 U. S. C. (1940) § 532.

²² 39 STAT. (1916) 553, 48 U. S. C. (1940) § 1111.

²³ 31 STAT. (1900) 81, 39 STAT. (1917) 995, 48 U. S. C. (1940) § 771.

The first chapter of *A Manual for Courts-Martial, U. S. Army*, issued by executive order of President Coolidge, sets forth the sources of military jurisdiction.

"1. The sources of military jurisdiction include the Constitution and international law, the specific provisions of the Constitution relating to such jurisdiction being found in the powers granted to Congress, in the authority vested in the President, and in a provision of the fifth Amendment.

"2. Military jurisdiction is exercised . . . by a government temporarily governing the civilian population of a locality through its military forces, without the authority of written law, as necessity may require (martial law) . . ." ²⁴

Two sections of the Articles of War bear upon this subject.

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." ²⁵

"Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof suffer death." ²⁶

The Espionage Act of 1917 ²⁷ inferentially at least contemplates the possibility of the trial of civilians by military tribunals under the Articles of War and the Articles of Government of the Navy.

The leading American case on the subject of martial law is *Ex parte Milligan*, ²⁸ hence it will be examined at some length. Milligan, a resident and citizen of Indiana, was tried by a military commission on the charge of conspiracy against the United States, found guilty and sentenced to be hanged on May 10, 1865. He was not a prisoner of war, or a member of the armed forces. On May 10th he filed a petition for a writ of habeas corpus in the circuit court of the United States sitting at Indiana. The court, unable to agree on the disposition of the petition, certified the case to the Supreme Court.

²⁴ (1928) 1.

²⁵ Article of War 15, 41 STAT. (1920) 790, 10 U. S. C. (1940) § 1486.

²⁶ Article of War 82, 41 STAT. (1920) 804, 10 U. S. C. (1940) § 1554.

²⁷ 40 STAT. 219, 50 U. S. C. (1940) § 38.

²⁸ (1866) 71 U. S. (4 Wall.) 2.

It was conceded that in the actual theatre of operations the ordinary rights of citizens must yield to paramount military necessity, but it was contended that since Indiana was not the actual scene of military operations the military commission was without jurisdiction. The Court was unanimous in the opinion that under the act of Congress the military commission had no jurisdiction of the case. This ruling was sufficient to dispose of the litigation. The majority of the Court, however, went beyond the question necessary to dispose of the case and held that Congress was without power to provide for the trial of citizens by military commissions except in the locality of active hostilities and when access could not be had to the courts. Justice Davis, the appointee and personal friend of President Lincoln, wrote the opinion maintaining the inviolability of the Fifth and Sixth Amendments during time of war.

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."²⁹

Rejecting the claim that,

"... in a time of war the commander of an armed force . . . has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will* . . ."³⁰

the Court emphatically said,

"Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . ."³¹

The power of the military commander to make arrests and to hold persons in custody was conceded, but the Court adds,

"The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of common law . . ."³²

The Court held that martial law could exist only on the actual scene of military operations, and the fact that Indiana had been once invaded and was threatened with a recurrence could not justify the continuance of martial law.

²⁹ *Ibid.* at 120.

³⁰ *Ibid.* at 124.

³¹ *Ibid.*

³² *Ibid.* at 126.

"Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."³³

"Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."³⁴

The minority opinion by Chief Justice Chase agreed that under the act of Congress the military commission was without jurisdiction and that the writ should be granted, but dissented from the view that Congress was without power to authorize the creation of a military commission for the trial of civilians.

"We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana."³⁵

". . . it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."³⁶

The arguments in the *Milligan* case were concluded on March 18, 1866, and the conclusion of the Court announced April 3, 1866. The opinion, however, was not filed until December 17, 1866. It has been

". . . so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public."³⁷

Charles Evans Hughes, in commenting on the opinion of the majority, has said,

"The great importance of the ruling of the majority in maintaining the reasonable freedom of the citizen and his right to normal judicial procedure in time of war is apparent."³⁸

Later, as Chief Justice, he had occasion to quote the *Milligan* case with approval, in rejecting the assertion that the acts of the Governor of Texas were beyond review by the courts upon a charge that

³³ *Ibid.* at 127.

³⁴ *Ibid.*

³⁵ *Ibid.* at 137.

³⁶ *Ibid.* at 140.

³⁷ 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1928) 427.

³⁸ HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 109.

a right guaranteed by the Federal Constitution had been invaded. The Court said,

"Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution."³⁹

This is not the first instance of martial law in Hawaii. A previous incident found its way into the local courts.⁴⁰ In 1895 an enterprising group in Honolulu entered into a conspiracy to overthrow the newly formed Republic and to restore the monarchy. The day following the outbreak President Dole, pursuant to article 31 of the constitution, suspended the privilege of the writ of habeas corpus and placed the Island of Oahu under martial law, to continue until further notice. His proclamation, however, permitted the courts to conduct ordinary business. Article 31 of the constitution authorized the president

"... In case of rebellion or invasion, or imminent danger of rebellion or invasion, when the public safety requires it, [to] suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law."⁴¹

A military commission was appointed by President Dole to try the offenders. Among those tried and convicted by the military commission was Jonah Kalaniana'ole, a nephew of the queen dowager Kapiolani. He was sentenced to a year imprisonment and a fine of \$1,000. Kalaniana'ole filed a petition for a writ of habeas corpus in the Supreme Court of Hawaii, contending that since the courts of the Republic were in session the military commission was without jurisdiction. The petition for a writ of habeas corpus was denied.

The Hawaiian court made an exhaustive review of the subject of martial law, one of the most comprehensive since *Ex parte Milligan*. After noting that the statement in the *Milligan* case, that "martial law cannot arise from a threatened invasion" was uncalled for by the facts of that case, the court points out that the Constitution of Hawaii

"... places this question beyond doubt by expressly providing that

³⁹ *Sterling v. Constantin* (1932) 287 U. S. 378, 398.

⁴⁰ *In re Kalaniana'ole* (1895) 10 Hawaii 29.

⁴¹ This section was the predecessor of section 67 of the Hawaiian Organic Act, 31 STAT. (1900) 153, 48 U. S. C. (1940) § 532.

imminent danger of, as well as actual rebellion or invasion, is sufficient to justify the enforcement of martial law"⁴²

The court then says that under a proper construction of article 31, the president is made the sole judge of the exigencies of the case (citing *Martin v. Mott*⁴³ and *Luther v. Borden*⁴⁴), and concludes that

" . . . it is obvious that by the same reasoning, the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance."⁴⁵

The offense of which Kalaniana'ole was found guilty was misprision of treason, and the specifications of the charge were cast in the words of the penal code in force at the time the offense was committed.⁴⁶ The court in its opinion refers to the Hawaiian statute⁴⁷ disclosing that the petitioner was tried by the military commission under the existing penal law. This fact is important upon the question as to what law is in force upon the declaration of martial law. It is evident that the court was of the view that duly enacted statutes of Hawaii were in force and that the petitioner was convicted of a violation of the Hawaiian statute on misprision of treason.

Unfortunately, the court was not obliged to deal with the problem as to the authority of the president to appoint a military commission for the trial of civilians in the absence of legislative sanction, for the reason that there was in force at the time complete legislative authority⁴⁸ authorizing the creation of military tribunals and the trial of civilians, and ratifying the acts of the president from the date martial law was proclaimed. Having passed upon the propriety of the declaration of martial law, the court then endeavors to define its scope.

⁴² *Supra* note 40, at 50.

⁴³ (1827) 25 U.S. (12 Wheat.) 19.

⁴⁴ (1849) 48 U.S. (7 How.) 1.

⁴⁵ *Supra* note 40, at 53.

⁴⁶ Acts of the Provisional Government of the Hawaiian Island 1893, act 3, § 4.

⁴⁷ *Supra* note 40, at 60.

⁴⁸ Acts of the Executive and Advisory Councils of the Republic of Hawaii 1894-95, relating to military commissions and martial law, act 18, approved Feb. 8, 1895, authorizing the marshal to execute the sentences of military commissions; act 20, approved March 15, 1895, relating to martial law, trial by military commission and approving the acts of the President from Jan. 6, 1895; the foregoing legislation was enacted by the Executive and Advisory Council of the Republic of Hawaii, which was vested with all executive and legislative power pursuant to article 100 of the constitution of 1894 until the convening of the first legislature of the Republic of Hawaii.

"In a state of war, civil rights and remedies are extinguished or suspended so far as necessary or proper to accomplish the purpose of military rule, which is the restoration of the normal state of peace. What may be necessary or proper in any particular case is determined largely by usage or the common law of war. . . . There is no fixed code of martial law. An infinite variety of conditions that cannot be foreseen or provided for must be met without delay in a corresponding infinite variety of ways. The predominant power, the military, is the judge of what is necessary or appropriate in any particular exigency, the judgment being conclusive, and subject to review by the civil courts only in case of abuse of power, in which case the military may be said to be acting outside of its jurisdiction."⁴⁹

As a statement of the scope of martial law, the remarks of the court are not particularly helpful. We are told that civil rights are "extinguished" or "suspended" as far as necessary to accomplish the military rule; that what is "necessary" depends upon the circumstances of the particular case, "determined largely by usage or the common law of war"; that the judgment of the military commander is conclusive, subject to review only in case of abuse. Remarks of this kind may read well enough, but as a practical rule of government during the continuance of war, they are of little assistance. If the judgment of the military commander is final as to what is necessary, and is subject only to review by the courts for an abuse of power, what is there to stop a military commander from closing the courts by a military order and thus depriving the courts of an opportunity to determine whether or not he has been guilty of an abuse of that power? The only use to which the remarks of the court could be put would be in litigation in the civil courts after the restoration of peace. As an attempt to define the limits of martial law or the rights of the individual in time of war, they are of little or no value.

The judicial committee of the Privy Council in a case arising out of the Boer War has held that the absence of civil strife and the continued sitting of the courts does not preclude the existence of martial law. In that case petitioner was arrested under instructions of the military authorities and placed in custody. He petitioned the supreme court in Capetown for his discharge. His application was refused upon the ground that martial law had been proclaimed in the district in which he had been arrested. Petitioner then applied to the Privy Council for special leave to appeal. This was denied. The court said,

⁴⁹ *Supra* note 40, at 56.

"Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging

"The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities."⁵⁰

This case provoked considerable comment among the leaders of the English bar.⁵¹ From the opinion of the court, it would appear that the military commander did no more than hold petitioner in custody. There is no doubt, however, but that the court would not have reviewed a conviction by a military tribunal.⁵²

WHAT IS MARTIAL LAW?⁵³

Whatever may be the law of England today, there seems to be little doubt but that in this country there can be no trial of a civilian by military tribunals in time of war unless such a trial has been expressly authorized by statute, and if such a statute has been enacted the second problem must be resolved, and that is the validity of a statute authorizing the trial of civilians in a manner other than in accordance with the Federal Constitution.⁵⁴

The term "martial law" is, as has been long observed by the legal profession, inaccurate and misleading, this despite the exposition of the subject by Chief Justice Chase in his dissenting opinion in the *Milligan* case, and other lawyers who have explored the field. Some of the confusion, undoubtedly, is historical. The term originally applied to the discipline of the army and was administered in the court

⁵⁰ *Ex parte* D. F. Marais [1902] A. C. 109, 114, 115.

⁵¹ Dodd, *The Case of Marais* (1902) 18 L. Q. REV. 143; Holdsworth, *Martial Law Historically Considered* (1902) 18 L. Q. REV. 117; Pollock, *What is Martial Law?* (1902) 18 L. Q. REV. 152. See also Ballantine, *Martial Law* (1912) 12 COL. L. REV. 529; Note (1902) 15 HARV. L. REV. 850.

⁵² *Attorney General v. Van Reenan* [1904] A. C. 114.

⁵³ Sir Frederick Pollock has dissected this problem with his usual clarity and concludes that it is "...an unlucky name for the justification by the common law of acts done for the defense of the Commonwealth when there is war within the realm." *Op. cit. supra* note 51, at 156. See also FAIRMAN, *THE LAW OF MARTIAL RULE* (1930).

⁵⁴ *Ex parte* Milligan, *supra* note 28; *In re* Egan (C. C. N. D. N. Y. 1866) Fed. Cas. No. 4,303; *Johnson v. Duncan* (La. 1815) 3 Martin L. R. (O. S.) 530, 6 Am. Dec. 675; *McConnell v. Hampton* (N. Y. Sup. Ct. 1815) 12 Johns. 234; *Smith v. Shaw* (N. Y. Sup. Ct. 1815) 12 Johns. 258; and see 65 L. R. A. 200 *et seq.* See also Ballantine, *op. cit. supra* note 51; Ballantine, *Unconstitutional Claims of Military Authority* (1914) 24 YALE L. J. 189.

of the marshal and constable.⁵⁵ It has been applied to the rule by an invading general over a conquered country. No argument should be necessary to distinguish between the powers of an invading general on foreign soil and the powers of our own forces over our own people. Nevertheless, a recent book on the subject perpetuates the confusion that had to a large measure been dissipated by the Civil War cases.⁵⁶

It is important to distinguish between the concept of martial law in civil law countries and in those where the common law obtains.⁵⁷ Under Anglo-American law, a soldier is not only subjected to special liabilities in his military capacity, but he is also subject to all of the liabilities of an ordinary citizen, and a soldier cannot "... plead the command of a superior, were it the order of the Crown itself, in defense of conduct otherwise not justified by law."⁵⁸ Mr. Dicey points out that two all-important considerations are necessary to an analysis of what is meant by martial law. The first is the equality of all before the law "... which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary Courts" and second, the personal responsibility of wrong-doers "... which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors."⁵⁹

WHAT IS THE LAW OF HAWAII?

The question arises, what is the law of Hawaii today? A variety of views are current among the members of the legal profession of this Territory. One view is that the proclamation of martial law suspends all existing law, and indeed all provisions of the Constitution itself. This would mean that not only the territorial statutes, but also the acts of Congress would not be in force in the Territory during martial law. This obviously cannot be true. We surely are obliged to pay our taxes, comply with the Selective Service Act, obey the customs laws, refrain from violating territorial and federal statutes, live up to contractual obligations and respond in damages for torts.

⁵⁵ 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1922) 573; 6 *ibid.* 226.

⁵⁶ RANKIN, *WHEN CIVIL LAW FAILS* (1939). For an able review of this book, see Book Review (1939) 53 HARV. L. REV. 356.

⁵⁷ Cf. Ballantine, *Qualified Martial Law* (1915) 14 MICH. L. REV. 102, 203, 204.

⁵⁸ DICEY, *LAW OF THE CONSTITUTION* (8th ed. 1915) 282.

⁵⁹ *Ibid.* This generalization finds support in the decisions of the Supreme Court. The *Flying Fish* (1804) 6 U. S. (2 Cr.) 170; *Mitchell v. Harmony* (1851) 54 U. S. (13 How.) 115; *Sterling v. Constantin*, *supra* note 39, at 401. But like all generalizations this one may be false. Cf. *TORTS RESTATEMENT* (Am. L. Inst. 1934) § 146; Note (1942) 55 HARV. L. REV. 651.

Enforceable rights under contracts and for trespasses are arising every day. The existence of martial law cannot put an end to or suspend all existing jural relationships, nor can it prevent the creation of new ones.

Another view is that the entire body of the common law, together with the federal and territorial statutes, is the law of Hawaii today in so far as permitted and except as expressly superseded by orders of the Military Governor. It has been suggested that the confirmation by the President of the Governor's proclamation of martial law has the effect of making the orders of the Military Governor considered the orders of the Commander-in-Chief, the President of the United States. This would seem rather tenuous, however, since the President has not in fact issued a proclamation authorizing the establishment of military commissions or the suspension of all existing law. The President did approve the action of Governor Poindexter in suspending the privilege of the writ of habeas corpus and placing the Territory under martial law. Moreover, there is no legislative authority given to the President that authorizes him to erect military tribunals for the trial of citizens.

Perhaps one of the reasons of the reluctance of the Military Governor to reopen the courts to their normal functions is that if this were once done the whole framework of the present military government and martial law would fall under the majority opinion in *Ex parte Milligan*. Not even the minority in the *Milligan* case ever thought or suggested that the President alone could erect military commissions in localities where the courts were open. They insisted that ". . . it is within the power of Congress to determine in what states or districts such great and imminent danger exists as justifies the authorization of military tribunals for the trial of crimes . . ." ⁶⁰

The minority insisted that Congress could constitutionally provide for the suspension of certain civil rights, notwithstanding the fact that the district in question was not the immediate battlefield and that the courts of the locality were open. This is far from saying that the President or the Governor of Hawaii could exercise that power in the absence of congressional authority. It has already been noticed that the President has not authorized the erection of military tribunals for the trial of civilians in Hawaii.

While it is true that Congress has authorized the suspension of

⁶⁰ *Supra* note 28, at 140.

the privilege of the writ of habeas corpus and has said that the Governor may declare martial law in the case of a "threatened invasion", from which it may follow⁶¹ that the Governor has congressional authority to continue the state of martial law, this nevertheless does not authorize the Governor either to rule directly by decree or delegate such power to a military governor unrestrained by the Fifth and Sixth Amendments. To assert the contrary would be equivalent to saying that Congress, by the enactment of section 67 of the Hawaiian Organic Act, authorized the Governor under the facts here presented to suspend all territorial and federal law, and the Constitution itself. If Congress had any such intention, it is certainly not disclosed by the language employed. In short, while Congress has authorized in Hawaii the declaration of martial law in case of a threatened invasion, it has not said what martial law is and has given no content to that elusive expression.

The true view would seem to be that the law of Hawaii today consists of the federal and territorial statutes, the common law except as modified by judicial precedent, and the orders of the Military Governor which may be justified in accordance with principles of the common law as to military necessity in the ordinary courts.

The situation in Hawaii presents one of the most profound problems which has confronted American democracy since the Civil War. On the one hand, no obstacle can be placed in the path of the military commander lest all be lost, and at the same time a practical reign of law must be devised for a civil community of some 400,000 inhabitants.⁶² Lincoln's remarks to the serenaders are apposite.

"Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"

It will not be asserted that the ordinary civil courts are unable to perform their normal functions. As a matter of fact, they are actually in operation today curtailed only by the limitations placed upon them by the Military Governor pursuant to General Orders Nos. 29 and 57. Under the majority opinion in the *Milligan* case, the continuance of martial law and the erection of military tribunals for the trial of civilians is invalid. Likewise, under the majority opinion

⁶¹ *In re Kalaniana'ole*, *supra* note 40.

⁶² The presence of a large number of persons of Japanese descent cannot be safely ignored. The population of Hawaii as of July 1, 1941 (board of health estimate) was 465,339, of which 124,351 were American citizens of Japanese ancestry, and 35,183 Japanese aliens.

the section of the Organic Act which permits the declaration of martial law in case of "a threatened invasion" would fall.

As has been pointed out already, the majority went beyond what was necessary to the decision of that case to hold that under any circumstance it was beyond the power of Congress to provide for the trial of civilians by military commissions in localities where the ordinary civil courts were open. The present situation in Hawaii now puts the majority opinion to a critical test. Possibly it cannot stand the impact of the grim reality that now confronts us. This conclusion is reached with full cognizance that it is based upon the doctrine of necessity found to be so abhorrent to constitutional government in the *Milligan* case. The United States must have and exercise every power necessary to the successful prosecution of the war, and where the exercise of that power infringes the ordinary rights of the individual, the latter must be sacrificed to the paramount end, and at the same time the curtailment of the rights of the individual should and must be done under a reign of law with the substance of the Bill of Rights preserved.⁶³

LEGISLATION IS THE REMEDY FOR THE PRESENT SITUATION

Since the term "martial law" has resulted in such confusion it should be abandoned in future legislation. To the military commander it means the rule of a community by his arbitrary will.⁶⁴ To most American lawyers it probably means the exercise of extraordinary powers by the military commander within the framework of existing law and constitutional limitations, with the acts of the commander reviewable by the courts when peace is restored, or even during the existence of a state of war if the ordinary courts have not been deposed by invasion from without or insurrection from within. The fallacy of thinking that a declaration of martial law extinguishes or suspends all existing law has already been exposed.

Legislation is necessary to afford a solid legal basis for accom-

⁶³ Ballantine, *Constitutional Limitations on the War Power* (1918) 6 CALIF. L. REV. 134, 135; Ballantine, *The Effect of War on Constitutional Liberty* (1917) 24 CASE & COMMENT 3.

⁶⁴ This view is not confined to military men. See Hatcher, *Martial Law and Habeas Corpus: Extent of War Power in Emergency* (1939) 25 A. B. A. J. 375, 379. "Wherefore, not only upon the actual theater of war, but wherever an emergency of war arises, the violation of every civil constitutional right impeding the war power is justified, if necessary. At peace, civil law should be absolute; at war, martial rule, wherever necessary, must be absolute."

plishing the ends desired by the military commander. Whether or not one agrees with the conclusions of the author of this article, it will be conceded that legislation should be enacted to clarify the present status of the government of this Territory. In drafting such legislation, the following considerations would seem to be of first importance: first, granting or confirming to the military commander every reasonable power necessary for the successful prosecution of the war; second, recognition of the fact that there are tasks vital to the war effort and the administration of civil life in combat areas that can be efficiently handled by civilians which will release military personnel for actual combat service; and third, preserving so far as possible the liberties of the individual, bearing in mind that we must not establish by law within our own borders the very tyranny that we are now pledged to destroy.⁶⁵

Arbitrary or extra-legal action with respect to property rights is by no means as harmful (either to the individual or the nation) as is arbitrary or extra-legal action with respect to the liberty of the individual or his freedom of expression. The former can always be adjusted, though perhaps only through years of litigation long after peace is restored, but wrongs inflicted in the latter field are irreparable to the individual and constitute a positive danger to the security of the nation. If a military commander should seize the property of *X* without authority, *X* (or his executors or administrators) can later recover just compensation. On the other hand, if a military commander should wrongfully intern *X* for the duration, the injury to *X* would be irreparable. More important than this is the very real possibility that by the detention of *X* or the suppression of free discussion on such issues as the conduct of the war, the state of readiness in a particular combat area, or the administration of civilian affairs, the true situation in any given area may be withheld from the nation during a period when there is yet time to rectify it. A blackout upon the free exchange of ideas may end in disaster.

With these fundamentals in mind, the following legislative program is suggested under what might be called "The Combat Area War Powers Act":

(1) Authorize the President by proclamation to define combat areas in the United States, and to exercise extraordinary powers in combat areas upon a finding by him that such areas have been at-

⁶⁵ Ballantine, *Military Dictatorship in California and West Virginia* (1913) 1 CALIF. L. REV. 413, 422-425.

tacked by the enemy, with authority in the President to delegate such powers to the military commander of the combat area;⁶⁸

(2) Authorize the President or the military commander of the combat area to promulgate rules, regulations and orders within the combat area which will have the force and effect of law. The substantive scope of such rules, regulations and orders should be sufficiently broad to clothe the military commander with every needed power, and probably should include the following fields: police and traffic regulations, regulations governing public utilities and common carriers, the safety of the armed forces and military establishments, transportation and blackout regulations, the sale, distribution and consumption of intoxicating liquor, food stuffs, liquid fuel and other essential materials, and the requisitioning of real and personal property, with provision for summary review in the federal courts of any rule, regulation or order in excess of the authority granted by Congress;

(3) A declaration by Congress that all law in the combat area, federal, state, territorial, or municipal, shall remain in full force and effect, except as modified by rules, regulations or orders within the field in which Congress has authorized the President to act;

(4) Wartime censorship should be administered by the censorship bureau created by Congress under statutes of general application;

(5) Authorize the President to suspend the privilege of the writ of habeas corpus as to all aliens and dual citizens of the United States and an enemy country. As to citizens of the United States, the privilege of the writ of habeas corpus to be suspended upon the following terms:

(a) That lists of all persons apprehended and detained by either

⁶⁸ The letter of an able student of American government to Senator Overman on a bill to divide the country into military districts during the first World War should not be overlooked.

"My dear Senator:

"Thank you for your letter of yesterday. I am heartily obliged to you for consulting me about the Court-Martial bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation . . . I think that it is not only unconstitutional, but in its character it would put us upon the level of the very people we are fighting . . . It would be altogether inconsistent with the spirit and practice of America . . . I think it unnecessary and uncalled for . . .

"Woodrow Wilson"

8 BAKER, WOODROW WILSON, LIFE AND LETTERS (1939) 100; see also CHAFEE, *op. cit. supra* note 18, at 38.

civil or military authorities be filed with the clerk of the federal court located in the combat area;

(b) That in combat areas where the civil courts are open and are able to function, detention shall not continue for longer than thirty days, unless within such period an indictment or information shall have been returned in the federal court against the person detained;

(6) Authorize the President to create military tribunals for the trial of all persons within the combat area charged with the violation of any rule, regulation or order of the military commander, the punishment for such offenses not to exceed one (1) year in jail, or a fine of one thousand dollars;

(7) The trial of all felonies committed within the combat area, whether before or after the date of the President's proclamation defining the combat area, to be had in the civil courts, affording a trial by jury if demanded by the accused, and in the event the court shall make a preliminary finding that the summoning of a jury would have any substantial effect in impeding the war effort in the combat area, the trial be without a jury or continued until such time as a jury might be impaneled, with discretion in the trial court to refuse to admit an accused to bail pending trial.

APPENDIX I

Under and by virtue of the powers vested in me by Act 24 of the Special Session Laws of Hawaii 1941, and particularly Section 5 thereof, and under and by virtue of all other powers in me vested by law, I, J. B. POINDEXTER, Governor of the Territory of Hawaii, do hereby find that a state of affairs exists arising out of an attack upon the Territory of Hawaii and that all of the circumstances make it advisable to protect the Territory and its inhabitants as provided in and by said Act 24 of the Special Session Laws of Hawaii 1941, and all other laws relating thereto; and by reason of the foregoing,

I do declare and proclaim a defense period to exist throughout the Territory of Hawaii.

This proclamation shall take effect upon promulgation thereof by official announcement by me by means of radio broadcast which I do further declare to have taken place at 11:30 o'clock A. M. on the date hereof.

DONE at Honolulu, Territory of Hawaii, this 7th day of December, 1941.

JOSEPH B. POINDEXTER,
Governor of the Territory of Hawaii.

APPENDIX II

TERRITORY OF HAWAII—A PROCLAMATION

WHEREAS, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and

WHEREAS, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus and place the territory under martial law; and

WHEREAS, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian islands; and

WHEREAS, it has become necessary to repel such attack and invasion; and
WHEREAS, the public safety requires:

NOW, THEREFORE, I, J. B. POINDEXTER, Governor of the Territory of Hawaii, do hereby announce that pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

And, pursuant to the same section, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

And, pursuant to the same section, I do hereby place the said territory under martial law;

And I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;

And I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

And I do require all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the Commanding General, Hawaiian Department, or his subordinates, may issue during the present emergency.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Territory of Hawaii to be affixed.

DONE at Honolulu, Territory of Hawaii, this 7th day of December, 1941.

J. B. POINDEXTER,
Governor of the Territory of Hawaii.

(SEAL)

By the Governor:
CHARLES M. HITE,
Secretary of Hawaii.

Honolulu Star-Bulletin, Dec. 8, 1941, at 4.

APPENDIX III PROCLAMATION UNITED STATES ARMY

Headquarters, Hawaiian Department
Fort Shafter, 7 December 1941

To the People of Hawaii:

The military and naval forces of the Empire of Japan have attacked and attempted to invade these islands.

Pursuant to section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii has called upon me, as commander of the military forces of the United States in Hawaii, to prevent such invasion; has suspended the privilege of the writ of habeas corpus; has placed the Territory under martial law; has authorized and requested me and my subordinates to exercise the powers normally exercised by the governor and by subordinate civil officers; and has required all persons within the Territory to obey such proclamations, orders, and regulations as I may issue during the present emergency.

I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense.

All persons within the Territory of Hawaii, whether residents thereof or not, whether citizens of the United States or not, of no matter what race or nationality, are warned that by reason of their presence here they owe during their stay at least a temporary duty of obedience to the United States, and that they are bound to refrain from giving, by word or deed, any aid or comfort to the enemies of the United States. Any violation of this duty is treason, and will be punished by the severest penalties.

The troops under my command, in putting down any disorder or rebellion and in preventing any aid to the invader, will act with such firmness and vigor and will use such arms as the accomplishment of their task may require.

The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.

Pending further instructions from this headquarters the Hawaii Defense Act and the Proclamation of the Governor of Hawaii heretofore issued thereunder shall continue in full force and effect.

WALTER C. SHORT
Lieutenant General, U. S. Army,
Commanding.
Military Governor of Hawaii.

Honolulu Star-Bulletin, Dec. 8, 1941, at 4.

APPENDIX IV GENERAL ORDERS NO. 4

7 December 1941

By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commissions and Provost Courts is announced for the information and guidance of all concerned:

1. Military commissions and provost courts shall have power to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities. The jurisdiction thus given does not include the right to try commissioned or enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition.

2. Military commissions and provost courts will adjudge sentences commensurate with the offense committed. Ordinarily, the sentence will not exceed the limit of punishment prescribed for similar offenses by the laws of the United States or the Territory of Hawaii. However, the courts are not bound by the limits of punishment prescribed in said laws and in aggravated cases and in cases of repeated offenses the courts may adjudge an appropriate sentence.

3. The record of trial in cases before military commissions will be substantially similar to that required in a special court martial. The record of trial in cases before provost courts will be substantially similar to that in the case of a Summary Court Martial.

4. The procedure in trials before military commissions and provost courts will follow, so far as it is applicable, the procedure required for Special and Summary Courts Martial respectively.

5. The records of trial in all cases will be forwarded to the Department Judge Advocate. The sentences adjudged by provost courts shall become effective immediately. The sentence adjudged by a military commission shall not become effective until it shall have been approved by the Military Governor.

6. All charges against civilian prisoners shall be preferred by the Department Provost Marshal or one of his assistants.

7. The Provost Marshal is responsible for the prompt trial of all civilian prisoners and for carrying out the sentence adjudged by the court.

8. Charges involving all major offenses shall be referred to a military commission for trial. Other cases of lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of 5 years, and a fine of not to exceed \$5,000.00. **MILITARY COMMISSIONS MAY ADJUDGE PUNISHMENT COMMENSURATE WITH THE OFFENSE COMMITTED AND MAY ADJUDGE THE DEATH PENALTY IN APPROPRIATE CASES.**

9. In adjudging sentences, provost courts and military commissions will be guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.

THOMAS H. GREEN,
Lt. Col., J.A.G.D.
Executive Officer.

Honolulu Star-Bulletin, Dec. 9, 1941, at 3.

APPENDIX V
GENERAL ORDERS NO. 29

16 December 1941

Whereas, pursuant to the proclamation of Martial Law in the Territory of Hawaii the operation of the civil courts in the Territory of Hawaii has been suspended,

Now, therefore, by virtue of the authority vested in me as Military Governor, and for the purpose of more effectively carrying out the duties of such Military Governor, it is hereby ordered that all courts in the Territory of Hawaii are hereby authorized to exercise the following powers normally exercised by them during the existence of civil government:

1. The United States District Court for the Territory of Hawaii is hereby authorized to receive and file all petitions for the condemnation of land in the Territory of Hawaii, under any statutes and laws of the United States authorizing condemnation, needed by the Army or Navy of the United States; to receive and file deposits of checks into the Registry of said court, certificates of the clerk of said court and the Declarations of Taking; to make and enter orders on the Declaration of Taking, and orders of Immediate Possession; and to file and enter notices of pendency of action, with reference to such condemnations.

2. The Supreme Court of the Territory of Hawaii may make and enter all orders necessary for the preservation of the rights of litigants in all pending appeals or appeals which may be perfected to said court, and may hear and determine all such appeals, and make such further orders as may be necessary to carry out or enforce said orders, or any of them.

3. The circuit courts of the Territory of Hawaii and the several divisions thereof are hereby authorized to exercise the following of their normal powers under the civil laws applicable thereto:

Probate: To hear and determine all probate matters, provided, however, that no contested matter may be heard or entertained save by consent of the parties and which does not involve the subpoenaing of witnesses.

Equity: To hear and determine all matters involving trusts, trust accounts, bills of instructions and similar matters, provided, however, that no writs of habeas corpus, prohibition, mandamus, injunction or specific performance shall be issued or granted by any circuit judge, and further provided that no matter shall be heard or entertained which involves the subpoenaing of witnesses.

Actions at Law: To hear and determine all pending matters not involving jury trials where the subpoenaing of witnesses is not required; to hear and determine all appeals heretofore or hereafter perfected from the district courts; to make and enter all orders or judgments necessary to facilitate the immediate taking of land under condemnation proceedings by the Territorial, City and County, or county officers, orders of possession and details required therewith which do not involve the subpoenaing of witnesses or compulsory process.

Division of Domestic Relations and Juvenile Court: To hear and determine all matters either pending or to be brought for the support and maintenance of women and minor children or other dependents; to hear and determine all probate, guardianship and adoption matters as are exclusively under the jurisdiction of the Division of Domestic Relations; to hear all matters properly coming before the Juvenile Court.

Criminal Cases on Appeal: To hear and determine all pending appeals in criminal cases to the circuit courts of the Territory from district magistrates which do not involve jury trials.

Land Court: To hear and determine all pending matters not requiring the subpoenaing of witnesses; all formal matters connected with subdivisions; all normal minor petitions for the purpose of notation of marriage, death, divorce and other matters required to be noted on transfer certificates of title; proceedings for substitution of lost certificates of title; recording of conveyances; issuance of transfer certificates of title; notations of encumbrances; ex parte petitions not involving the subpoenaing of witnesses; and the maintaining of the Office of the Registrar of the Land Court for the purpose of facilitating searching of records and certificates of transfers.

District Courts: Finish all pending matters where the subpoenaing of witnesses is not required.

All Courts: All courts authorized under the civil law to do so may perpetuate testimony or take depositions of witnesses and may make and enter all necessary orders to enable litigants to perfect appeals.

By order of the Military Governor.

THOMAS H. GREEN,
Lt. Col., J.A.G.D., Executive.

APPENDIX VI
GENERAL ORDERS NO. 57

27 January, 1942.

SECTION I. . . .

SECTION II. CIVIL COURTS.—WHEREAS, pursuant to the proclamation of martial law in the Territory of Hawaii the operation of the civil courts in the Territory was suspended; and

WHEREAS, by General Orders No. 29, dated December 16, 1941, the courts in said Territory were authorized to exercise certain of the powers normally exercised by them during the existence of civil government; and

WHEREAS, it is now advisable, that said courts be authorized to exercise certain other of their said powers,

NOW, THEREFORE, the United States District Court for the Territory of Hawaii, the Supreme Court of said Territory, and the justices thereof, the circuit courts, circuit judges at chambers, land court, juvenile court, tax appeal court, and the district magistrates are hereby authorized, as agents of the Military Governor, to exercise their respective functions according to law, as it existed immediately prior to the declaration of martial law, except in the following respects:

1. No trial by jury shall be had, no session of the grand jury shall be held, nor shall any writ of habeas corpus be issued;

2. No circuit court or district magistrate shall exercise criminal jurisdiction except: Subject to the limitations prescribed by Section 4 in respect to the subpoenaing of witnesses, the circuit and district courts may dispose of cases pending on December 7, 1941, either upon plea or by trial whenever the intervention of a jury is not necessary or by order of nolle prosequi or dismissal on proper motion;

3. No suit, action or other proceeding shall be permitted against any member of the armed forces of the United States for any act done in line or or under color of duty; nor shall any suit, action or other proceeding be maintained against any person employed or engaged in any occupation, business or activity under the direction of the Military Governor or essential to the national defense for any act done within the scope of such employment;

4. No judgment by default shall be entered against any party except upon proof by affidavit or otherwise that the party is not engaged in military service nor employed or engaged in any occupation, business or activity under the direction of the Military Governor, or otherwise, essential to the national defense; nor shall any subpoena issue to require the attendance as a witness of any person so engaged or employed.

All prior orders inconsistent herewith are hereby repealed.

By order of the Military Governor:

THOMAS H. GREEN,
Colonel, J.A.G.D., Executive.

Honolulu Star-Bulletin, Jan. 30, 1942, at 8.