

California Law Review

Volume XXX

SEPTEMBER, 1942

Number 6

The Legality of Martial Law in Hawaii

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IN THE *California Law Review* for May 1942, Mr. Garner Anthony has written an interesting and able article on *Martial Law in Hawaii*. Though he does not say so in so many words, it is to be inferred that Mr. Anthony considers the institution of martial law on the afternoon of December 7, 1941, the day of the Japanese attack upon Hawaii, its subsequent continuance to the present time, and many of the things done by the military authorities under the supposed justification of martial law to be of highly doubtful legality, if not definitely illegal. In his opening paragraph, Mr. Anthony says,¹

"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."

The writer of the present article shares Mr. Anthony's hope "... that the all-important business of winning the war can be conducted in combat areas with dispatch and intelligence *under a reign of law*." I concur fully in the last phrase, which I, and not Mr. Anthony, have italicized. Though I have not had the advantage, which he enjoys, of being in Hawaii and observing the operation of martial

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¹ (1942) 30 CALIF. L. REV. 371.

law there, and will not undertake to say that every act performed in its name is fully justifiable in law; yet I have some knowledge of what has been done there and it is my opinion that the institution and in general the operation of martial law in Hawaii have been in strict accord with the Constitution and laws of the United States. I therefore accept Mr. Anthony's courteous invitation to "a free trade in ideas", and submit my own on the subject. I shall, however, limit my discussion to the legality and constitutionality of what has been done. To discuss the wisdom and advisability of all the acts done by the military government would require more knowledge of local conditions than I possess, and to suppose that every such act has been advisable and prudent would be to impute to the officers in charge of that government not merely super-military but super-human wisdom.

Hawaii was a kingdom until 1893, when it became a republic, both wholly independent of the United States. The islands were annexed to the United States by a joint resolution of the Congress of the United States July 7, 1898,² called the Newlands resolution. That resolution began with a declaration of the acceptance of all rights of sovereignty and a statement that the Hawaiian Islands "... are hereby annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof. . . ." The resolution said nothing about the extension of the Constitution or laws of the United States over Hawaii and at least two of its provisions seem inconsistent therewith, one directing that the civil, judicial and military powers exercised by the officers of the existing government in said islands "... shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct . . .", and the other providing that "... the existing customs regulations of the Hawaiian Islands with the United States and other countries shall remain unchanged."

As far back as 1828, in *American Insurance Co. v. Canter*,³ the Supreme Court held, through Chief Justice Marshall, that the annexation of foreign territory to the United States did not *ipso facto* extend all the provisions of the Constitution and laws of the United States to the territory so annexed. The leading case so holding is *Downes v. Bidwell*.⁴ Other cases to the same effect are *Dorr v. United*

² 30 STAT. 750, 40 U. S. C. (1940) §661.

³ (1828) 26 U. S. (1 Pet.) 511.

⁴ (1901) 182 U. S. 244.

*States*⁵ and *Balzac v. Porto Rico*.⁶ The doctrine was specifically applied to Hawaii in *Hawaii v. Mankichi*,⁷ in which it was held that the Newlands resolution above mentioned did not extend to those islands the provisions of the Constitution requiring presentment or indictment by a grand jury⁸ and trial by a petit jury.⁹ Such was the situation from July 7, 1898, date of the annexation, until April 12, 1900, when Congress passed the Hawaiian Organic Act, sometimes called the Foraker Act.¹⁰ That act, as Mr. Anthony correctly says,¹¹ creates a territorial government of the traditional American pattern embodying the doctrine of the separation of legislative, executive and judicial powers. Two sections of it, material to the present discussion, are here set out in full:

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided*, That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii."¹²

"SEC. 67. That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory 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."¹³

The only amendments made to the above sections since their enactment are the insertion in section 5 of the phrase "including laws carrying general appropriations",¹⁴ and certain additional ex-

⁵ (1904) 195 U. S. 138.

⁶ (1922) 258 U. S. 298.

⁷ (1903) 190 U. S. 197.

⁸ AMEND. V.

⁹ AMEND. VI, Art. III, §2.

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

¹¹ *Op. cit. supra* note 1, at 373.

¹² 31 STAT. (1900) 141.

¹³ *Ibid.* at 153, 48 U. S. C. (1940) §532.

¹⁴ 36 STAT. (1910) 443, 48 U. S. C. (1940) §495.

ceptions in the proviso to the same section, none of which pertains to the present inquiry.

Section 67 of the Organic Act, quoted above, is of capital importance in determining the legality of what has been done in Hawaii. It makes irrelevant (unless the section be unconstitutional) many cases relied upon by Mr. Anthony which arose in the continental United States, where no such provision is in force. Nor was this important section something forced upon unwilling Hawaiians by a Congress in which they had no vote, depriving them without their consent of rights which they would otherwise have enjoyed, and therefore if possible to be ignored, construed away, or evaded. On the contrary, those clauses of section 67 dealing with the extraordinary powers of the governor are a literal copy of section 31 of the Constitution of the Republic of Hawaii,¹⁵ delegating the same extraordinary powers to the president or one of the cabinet ministers of that republic. The only additions in section 67 with respect to such powers are the authorization for the governor of the territory to call upon the commanders of the military and naval forces of the United States (who of course were not present in Hawaii when the Constitution of the Republic was drawn), and the requirement of confirmation of the governor's action by the President of the United States. The Congress of the United States therefore did no more than to confer upon the governor, who must be a citizen and resident of Hawaii of at least three years' standing,¹⁶ the same powers previously delegated by the Hawaiians, when they were an independent people, to their own President, and to add, as an additional guaranty, that the exercise of those extraordinary powers should be subject to confirmation or disallowance by the President of the United States. In the light of what has now happened, the action of the framers of the Constitution of the Republic of Hawaii and of the Congress which enacted the Organic Act shows amazing prescience.

Such was the legal and constitutional situation which existed on December 7, 1941. I propose to consider, first, whether the proclamations, orders, and important acts of the territorial governor and the commanding general on and since December 7, 1941, have been in accord with section 67 of the Organic Act; and, second, whether that section is constitutional. If both of those questions be answered

¹⁵ Penal Laws of the Hawaiian Islands 1897, p. 12.

¹⁶ 31 STAT. (1900) 153, §66, as amended by 42 STAT. (1921) 116, 48 U. S. C. (1940) §531.

in the affirmative, those proclamations, orders, and acts were lawful; if either of them be answered in the negative, they were unlawful.

Let me first briefly summarize what was done in respect of local government in Hawaii following the Japanese attack on Oahu in the early morning of December 7, 1941. At 11:30 a.m. that day, Mr. Poindexter, the governor of the Territory of Hawaii, issued a proclamation declaring a "defense period"¹⁷ under the Hawaii Defense Act of the territorial legislature, approved October 3, 1941.¹⁸ At 3:30 p.m. he issued another and more important proclamation, as follows:

"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 thereon, 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]

The same afternoon, and presumably after the issue of both of the governor's proclamations, Lieutenant General Short, commanding the Hawaiian Department, issued his proclamation.¹⁹ After re-

¹⁷ The text to this proclamation is set forth in Anthony, *op. cit. supra* note 1, at 392, app. I.

¹⁸ Special Session Laws of Hawaii 1941, act 24. This is discussed *infra*.

¹⁹ Anthony, *op. cit. supra* note 1, at 393, app. III.

citing the Japanese attack upon Hawaii and Governor Poindexter's proclamation pursuant to section 67 of the Organic Act, General Short continued,

"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 . . ."

When, on December 17, General Short was succeeded by Lieutenant General Emmons as Commanding General, Hawaiian Department, the former published a proclamation relinquishing the position of military governor and the latter one assuming that position.

Since December 7 the commanding general, at first General Short and later General Emmons, though he has not displaced all local officials, has exercised such control of the government of Hawaii as he has thought proper, has issued general orders controlling the conduct of the people in many respects, such as the sale and possession of liquor, gasoline, firearms, explosives, radio sets, photographic materials, narcotics, medicines, the control of newspapers and telephones, circulation of motor vehicles, conduct of enemy aliens, wages, places of amusement, and other matters. He has designated an army officer as executive, by whom the details of military governments are administered. He suspended the sessions of the civil courts and established military commissions and provost courts.²⁰ Later he authorized the civil courts to transact certain classes of business only, but not to hold sessions of the grand jury or trials by petit jury.²¹

I proceed first to consider whether the proclamations, orders, and actions mentioned above were in accordance with section 67 of the Organic Act. A detailed examination of that section and of Governor Poindexter's proclamation will show:

a. That every event required by section 67 to exist as a condition precedent to action under that section had in fact occurred;

b. That Governor Poindexter's proclamation recites the occurrence of every such event, and his own determination of the existence of the necessary conditions precedent; and

c. That the first three powers exercised by Governor Poindexter in his proclamation (call upon the commanding general to prevent invasion, suspension of the privilege of the writ of habeas corpus,

²⁰ *Ibid.* at 394, app. IV, General Order 4, Office of the Military Governor, Dec. 7, 1941.

²¹ *Ibid.* at 395, 396, apps. V, VI, General Orders 29 and 57, Office of the Military Governor, Dec. 16, 1941, and Jan. 27, 1942, respectively.

and declaration of martial law) are expressly authorized by section 67.

That leaves for consideration the legality of the last three powers which Governor Poindexter assumed to exercise by his proclamation, namely, authorization for the commanding general to exercise the powers normally exercised by the governor, authorization for the commanding general and subordinate military personnel to exercise the powers normally exercised by judicial officers and employees and such other and further powers as the emergency might require, and the requirement that all good citizens obey the orders of the commanding general. These, it is true, are not powers expressly mentioned in section 67, but that section does authorize the declaration of martial law, and these things are the essence of martial law. To deny that is to deprive the term "martial law" of substantial content and meaning, to pretend to give the commanding general the power necessary to deal with the emergency and to refuse it to him in reality, and to make section 67 of the Organic Act and the action taken thereunder a mockery.

What is meant by the term "martial law" used in the statute? The classic definition in American jurisprudence is found in Chief Justice Chase's opinion in *Ex parte Milligan*.²² The Chief Justice said,

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil

²² (1866) 71 U. S. (4 Wall.) 2, 141.

or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

It will be observed that the present situation falls within the third kind of military jurisdiction mentioned, martial law proper; but the definition is not very helpful or definite as to what powers may be exercised by the military in a martial law situation. The definition of a former Judge Advocate General is similar.

"Martial law at home, or as a domestic fact; by which is meant military power exercised in time of war, insurrection, or rebellion, in parts of the country retaining allegiance, and over persons and things not ordinarily subject to it."²³

More helpful is the definition given by Fairman, a recognized authority on the subject.

"Martial rule may be said to exist in a domestic community when the military rises superior to the civil power in the exercise of some or all of the functions of government."²⁴

Wiener, another authority, is to the same effect.

". . . martial law is the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies."²⁵

Unsatisfactory as are the definitions of Chief Justice Chase and General Lieber, even they sustain the last of the clauses of Governor Poindexter's proclamation, in which he requires the people to obey the regulations and orders which the commanding general may issue during the present emergency. The essence of military procedure is the giving of orders and prompt and complete obedience to them. To institute martial law, as the statute authorizes, or, to use General Lieber's phrase, to exercise military power, clearly implies just that. Fairman's definition speaks of the military rising superior to the civil power, and Wiener's of a supersession of some or all civil agencies. "Rising superior" to the civil power, or a "supersession" of it, clearly implies the giving of orders, even orders which the civil power could not lawfully give. Indeed it is impossible to conceive of "martial law" unless those exercising it have the power to give and enforce appropriate orders. To tell a commanding general that he may and

²³ LIEBER, *THE JUSTIFICATION OF MARTIAL LAW* (1898) 3.

²⁴ *Martial Rule and the Suppression of Insurrection* (1929) 23 ILL. L. REV. 766, 775.

²⁵ A PRACTICAL MANUAL OF MARTIAL LAW (1940) 10.

indeed must exercise martial law powers and yet to deny him the right to give orders or to oblige the people to obey them, is to make him a sorry and ridiculous figure in the face of a great emergency. That does not mean, of course, that every possible order which he may issue is a lawful one.

I next pass to another of the clauses of Governor Poindexter's proclamations not expressly authorized by section 67 of the Organic Act, namely, that in which he authorizes and requests the commanding general, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by Mr. Poindexter as governor. Mr. Anthony objects particularly to the supersession of the civil by the military governor, and says that there is no authority in the Organic Act for the complete delegation of power by the civil governor and the appointment of a military governor.²⁶ It may be admitted there is no express authority for doing so, but there is express authority for the governor to call upon the commanding general to prevent invasion and to declare martial law. As has been said, Wiener defines martial law as a supersession of some or all civil agencies by the military, and it is impossible to imagine martial law without such supersession. What Governor Poindexter's proclamation authorized in the clause under consideration, and what actually occurred in Hawaii, is just such a supersession as Wiener correctly considers the essence of martial law. In such a crisis as that which existed in Hawaii on December 7, 1941, a general exercising martial law powers who does not possess at least as great authority as a civil governor would be weak indeed, and wholly unable to discharge the heavy responsibilities placed upon him by the statute and the civil governor's call upon him.

It is true that in several instances of disorder arising from labor disputes state governors have declared martial law, but have remained in the discharge of their functions as governor and have given orders to and controlled the troops. It may therefore be argued that Governor Poindexter ought as a matter of law to have continued to exercise his functions and to have given orders to the troops. The argument overlooks important factual and legal differences between the two situations. In that which has arisen at various times on the mainland, the governor concerned was the governor, not of a territory, but of a state; and in most instances the troops involved

²⁶ *Op. cit. supra* note 1, at 373.

were state militia of which the state constitution made him the commander-in-chief. The emergency condition existed in a part of the state only, and elsewhere the ordinary machinery of civil government revolved in its usual manner. The governor was authorized—indeed required by the exigencies of the situation—to retain and exercise his functions as commander-in-chief and to perform his usual duties with respect to that part of the state in which no disorder existed. Though the Governor of Hawaii is commander-in-chief of the militia of that territory when they are not in federal service,²⁷ he is without authority to give them orders when in federal service, as they were prior to and on December 7, 1941,²⁸ or to give orders at any time to troops of the regular army or of other components of the Army of the United States. Furthermore, though Oahu was in fact the only one of the Hawaiian Islands attacked on December 7, the others were even more open to the like attack because there were then few troops upon them. The emergency, the danger of invasion, and consequently the need for martial law, extended to the entire archipelago. Necessity required that the commanding general's powers extend so far, and that they be at least as great as those of the civil governor. Whether the commanding general be called military governor or not is a mere matter of form. In no accurate legal sense did Governor Poindexter "appoint" General Short military governor. There is no such office to which any one may appoint any one else. Pursuant to the statute, Governor Poindexter called upon General Short to prevent invasion, and declared martial law; and "military governor" is a brief and apt description of the powers with which General Short thereupon became vested.

In a martial law situation, which agencies and officials are superseded and which are allowed to remain in the performance of their duties? Wiener thus answers the question:

"Fundamental Principle of Martial Law.—Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or

²⁷ Organic Act §66, 42 STAT. (1900) 116, 48 U.S.C. (1940) §531.

²⁸ CODE FED. REG. (1940) 226, pursuant to Executive Order 8551, Sept. 25, 1940, the 298th and 299th Infantry, constituting the whole of the Hawaiian National Guard, were inducted into federal service October 15, 1940, and have remained in such service continuously since that time.

public calamity. What constitutes necessity is a question of fact in each case."²⁹

The Supreme Court of the United States said with respect to an order of a commanding general in South Carolina at the close of the Civil War,

"It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires."³⁰

In *Commonwealth v. Shortall*³¹ the Supreme Court of Pennsylvania said,

"The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander."

Who is to determine whether necessity requires the institution of martial law, and what may be done under it? A reading of section 67, the applicable statute, shows that in the first place the governor of the territory is to determine whether martial law is necessary. He may, however, do so only if some one of the conditions precedent mentioned in the statute has occurred. One of those, invasion, occurred on the morning of December 7th, for the hostile incursion of submarines into the territorial waters and of airplanes into the airspace over Oahu was in law just as much an invasion as though a Japanese army had landed. The condition precedent had happened, and the governor on the afternoon of the same day decided it to be necessary to proclaim martial law, did so, and reported his action to the President. It then became the duty of the President to decide whether he should confirm or disallow the action of the governor in declaring martial law. He confirmed that action. Since the essence of martial law is the supremacy of the military so far as may be necessary, the supersession of the civil by the military authority in greater or less degree, it was next incumbent upon the commanding general to determine what civil officers it was necessary for him to replace, and what other measures it was necessary for him to take in order to carry out the all-important mission assigned to him both by Congress

²⁹ *Op. cit. supra* note 25, at 16.

³⁰ *Raymond v. Thomas* (1875) 91 U. S. 712, 716.

³¹ (1903) 206 Pa. 165, 172, 55 Atl. 952, 955.

in section 67 of the Organic Act and by the President as his commander-in-chief. Both the governor of the territory and the commanding general, as shown by their proclamations, decided it to be necessary for the latter to supersede the former in the exercise of his official functions.

The only remaining clause of the governor's proclamation invoking powers not expressly conferred by section 67 of the Organic Act is that authorizing and requesting the commanding general and subordinate military personnel to whom he may delegate such authority, during the existing emergency and until the danger of invasion shall be removed, to exercise the powers normally exercised by judicial officers and employees of the territory, and such other and further powers as the emergency may require. Pursuant to the foregoing request and authorization, the commanding general suspended the operation of the civil courts and established military commissions and provost courts. Later, the civil courts were authorized to function with respect to certain classes of cases only.

Again, though he does not say so in so many words, it is to be inferred that Mr. Anthony considers those orders unlawful. He says 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. . . ." ³² Passing over for the moment any other criticisms of the statement, I believe the use of the word "expressly" to be unjustified. In *United States v. Babbitt* ³³ the Supreme Court said,

"What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed."

In *Stewart v. Kahn* ³⁴ the Court said,

"What is clearly implied in a written instrument, is as effectual as what is expressed."

I feel justified by the foregoing authorities and many others which might be cited in saying that, if authority is granted by clear implication, it is as validly conferred as if in express terms. It is true that neither section 67 of the Organic Act nor any other act of Congress in so many words authorizes the establishment of military tri-

³² *Op. cit. supra* note 1, at 385.

³³ (1861) 66 U. S. (1 Black) 55, 61.

³⁴ (1870) 78 U. S. (11 Wall.) 493, 507.

bunals in Hawaii; but section 67, upon the occurrence of certain conditions precedent, authorizes the governor to declare martial law. Those conditions precedent have happened and he has made such a declaration. Both logically and historically, trial by a military tribunal is an incident and consequence of martial law, and it follows that authority for such trial is clearly implied in the authority for the declaration of martial law.

Military procedure, as has been stated, involves as its most important characteristic the giving of orders and prompt obedience to them. It also necessarily involved speedily and adequate punishment for disobedience of orders. It is as abhorrent to an American soldier as to an American lawyer to punish anybody, even in time of war and under martial law, without a hearing. Logically, therefore, such a trial is, as has been said, a necessary incident and consequence of martial law. Nor is it any answer to this argument to say that military commissions and provost courts have tried defendants in Hawaii, not only for violations of proclamations, regulations, and orders of the military government, but also for various crimes of the sort ordinarily handled in the criminal courts of the territory or the district court. Even if valid, this contention does not touch the lawfulness of the existence of military commissions and provost courts or their jurisdiction over civilians, but only their right to try a certain class of cases. However, the contention is invalid even in that limited aspect. It is of course a most important task of the military government to repress or punish those who violate its own proclamations and orders, but many offenses are both violations of the common or statutory criminal law and military offenses directly impeding the war effort. Among such are sabotage, correspondence with the enemy, and spying. It may be indispensable to the safety of the islands to have these punished by the more speedily military tribunals. Though I do not know that such is the fact in Hawaii, situations have occurred and may occur again when reliance cannot be placed upon civil courts and juries to punish such offenses adequately. Furthermore, in the theater of military operations, and especially in a large city such as Honolulu situated in or closely adjacent to the scene of such operations, the commission by civilians even of felonies and misdemeanors not directly touching the military effort tends seriously to hamper and impede that effort. An army engaged in battle or liable at any moment to be required to do so must not be distracted

by disorder and crime around it. It may even be desirable from the military standpoint to defer the hearing of civil suits, lest the energies of those involved be drawn away from the war effort. If martial law is validly in force at all in Hawaii, and I have pointed out that it was declared in strict accord with an act of Congress, the decision of these questions, as I shall try later to show in detail, is vested in the commanding general, and his decision is, as a matter of law as well as fact, final and conclusive, at least unless arbitrarily and capriciously made.

It is true that there is no statute expressly authorizing the appointment of military commissions and provost courts or defining their jurisdiction and powers; but that does not mean that they are unknown to the law. Mr. Anthony quotes two of the Articles of War which mention military commissions.³⁵ They are in fact mentioned in twelve articles.³⁶ Other statutes mentioning military commissions are Revised Statutes section 1199,³⁷ and the acts of August 24, 1912,³⁸ and August 25, 1937.³⁹ Also, for many years past the annual appropriation acts for the support of the army have contained an item in the following language:

"For expenses of courts martial, courts of inquiry, *military commissions*, retiring boards, and compensation of reporters and witnesses attending same, contract stenographic reporting services, and expenses of taking depositions and securing other evidence for use before the same, \$175,000."⁴⁰

The mention in so many statutes of military commissions, without definite statement of their composition, jurisdiction, or powers, constitutes a repeated legislative recognition and sanction of a tribunal which had previously come into existence without such authority. But Article of War 15 goes much further. It reads,

"ART. 15. *Jurisdiction not Exclusive.*—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

³⁵ *Op. cit. supra* note 1, at 379.

³⁶ Nos. 15, 23-27, 38, 46, 80-82, and 115, 41 STAT. (1920) 790, 791, 792, 794, 796, 804, 810, 10 U.S.C. (1940) §§1486, 1494-1498, 1509, 1517, 1552-1554, 1587.

³⁷ 18 STAT. (1874) 244, 10 U.S.C. (1940) §62.

³⁸ 37 STAT. (1912) 569, 10 U.S.C. (1940) §644.

³⁹ 50 STAT. (1937) 805, 10 U.S.C. (1940) §699.

⁴⁰ 55 STAT. (1941) 371. (Italics added.)

or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals.”⁴¹

Here is not merely an inferential but an express recognition by Congress of the lawful existence and jurisdiction of military commissions and provost courts. Congress recognizes that their jurisdiction exists in part “by statute”. This is presumably a reference to Articles 80, 81, and 82,⁴² which expressly confer upon military commissions jurisdiction of the offenses of dealing in captured or abandoned property, aiding or corresponding with the enemy, and spying. It is also to be observed that the 81st and 82nd Articles of War, instead of beginning, as do the other punitive articles, with the words, “Any person subject to military law”, begin with the all-inclusive, “Whosoever” and “Any person”, respectively, thereby clearly showing that Congress contemplated the trial of civilians by military commissions.

In the 15th Article, Congress also expressly recognizes that the jurisdiction of military commissions exists “by the law of war”. The use of this phrase, following and in contrast to “by statute”, is an express recognition of the unwritten or customary law of war, which is also recognized by Congress in Article 19,⁴³ where, in the oath required to be taken by members of a court-martial, there is reference to “the custom of war in like cases”.⁴⁴

To ascertain what is the unwritten military law as to military commissions, I turn to their history. As I have already said, trial by military commission is historically as well as logically an incident and consequence of martial law or military government. Winthrop wrote,

“The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name; he may style it a ‘court-martial,’ and, though not a court-martial proper, it will still be

⁴¹ 41 STAT. (1920) 790, 10 U. S. C. (1940) §1486.

⁴² 41 STAT. (1920) 804, 10 U. S. C. (1940) §§1552, 1553, 1554.

⁴³ 41 STAT. (1920) 790, 10 U. S. C. (1940) §1490.

⁴⁴ For a discussion of the unwritten military law, see 1 WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896), c. 4.

a legal body under the laws of war. But to employ the same name for the two kinds of court could scarcely but result in confusion and in questions as to jurisdiction and power of punishment. Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court, which also, as will hereafter be illustrated, is essentially a distinct tribunal from the court-martial of the Articles of war."⁴⁵

In the pages following the above quotation, Winthrop goes on to show that in our early history there were several trials of civilians by military tribunals, among them that of Joshua Hett Smith, the accomplice of Arnold and André in the former's treason in 1780, and those of Arbuthnot and Ambrister by General Jackson in Florida in 1818. Those tribunals were the forerunners of our present military commissions, though not then called by that name, which first came into use in the Mexican War. During the Civil War and the reconstruction period over two thousand cases were tried by military commission.⁴⁶ In 1870, the Supreme Court of Tennessee said with respect to a military commission which had sat in that state during the Civil War,

"A Military Commission is a tribunal now as well known and recognized in the laws of the United States, as a court-martial."⁴⁷

There have also been military commissions convened during our Indian wars.⁴⁸ At the close of the war with Spain, military commissions and provost courts sat in the islands ceded by Spain.⁴⁹ The sentence of a military commission sitting in Puerto Rico between the close of hostilities and the ratification of the treaty of peace was upheld in *Ex parte Ortiz*.⁵⁰ During our brief occupation of Vera Cruz in 1914 military commissions and provost courts sat there.⁵¹ During

⁴⁵ 2 *ibid.* at 1296.

⁴⁶ 2 *ibid.* at 1302.

⁴⁷ *State v. Stillman* (1870) 47 Tenn. (7 Cold.) 341, 352.

⁴⁸ 2 WINTHROP, *op. cit. supra* note 44, at 1302.

⁴⁹ As to the Philippine Islands see Annual Report of Major General Elwell S. Otis, U.S.V., Commanding the Department of the Pacific and Eighth Army Corps (Aug. 31, 1899) pp. 19, 20, 60, 245; G. O. 46, Office of the Military Governor of the Philippine Islands (Oct. 5, 1899); 2 Report of Major General Arthur MacArthur, U.S.V., Commanding Division of the Philippines (Oct. 1, 1900) app. UU, Reports of Superior and Inferior Provost Courts, pp. 442, 443.

⁵⁰ (C. C. A. 3d, 1900) 100 Fed. 955.

⁵¹ General Order 2, Hdqts. U. S. Expeditionary Forces, Vera Cruz, Mexico (April 30, 1914); Final Report of Major General Frederick Funston (in files of the Adjutant General's Office, War Dept.) p. 55.

the World War there was in the United States one case of trial of a spy by a military commission of the Army.⁵² The jurisdiction of a naval general court-martial to try a spy was upheld in *United States v. McDonald*.⁵³ A naval general court-martial, in dealing with such a case, is as a matter of law the same kind of a tribunal as a military commission. During our occupation of the Coblenz sector of the Rhineland in Germany from December 1918 to 1923, there were a few cases tried by military commissions and many by provost courts.⁵⁴ During labor or other troubles in various states, governors have proclaimed martial law and convened military commissions and provost courts. Their sentences have generally been upheld.⁵⁵

As has already been pointed out, those portions of section 67 of the Organic Act of the Territory of Hawaii dealing with martial law and the action to be taken in case of emergency are a literal copy of section 31 of the Constitution of the Republic of Hawaii. That section was construed by the Supreme Court of the republic in *In re Kalanianaʻole*.⁵⁶ That was an application for habeas corpus by a civilian tried, convicted of misprision of treason, and sentenced to imprisonment by a military commission which sat during a rebellion against that republic and after the suspension of the privilege of the writ of habeas corpus and a declaration of martial law by the president of the republic pursuant to section 31 of its constitution. The supreme court of the republic issued the writ. After argument, it wrote a learned opinion discussing the whole subject of martial law in great detail, and remanded the petitioner to custody to serve the sentence imposed by the military commission. In that case the court specifically asked itself the question whether the declaration of martial law justified the trial by military commission of a civilian for a civil offense, and answered that question in the affirmative. The case is, therefore, a decision of the highest court of Hawaii, rendered when the archipelago was an independent republic, holding that a declaration by the executive of martial law, pursuant to the provision

⁵² CM 119966, Waberski, files of the Judge Advocate General's Office, War Dept.; WIENER, *op. cit. supra* note 25, §133.

⁵³ (E. D. N. Y. 1920) 265 Fed. 754.

⁵⁴ American Military Government in Occupied Germany, unpublished report in files of A. G. O., c. V, p. 118 *et seq.*

⁵⁵ *United States v. Wolters* (S. D. Tex. 1920) 268 Fed. 69; *United States v. Fischer* (D. Neb. 1922) 280 Fed. 208; *State v. Brown* (1912) 71 W. Va. 519, 77 S. E. 243. *Contra: Ex parte McDonald* (1914) 49 Mont. 454, 143 Pac. 947.

⁵⁶ (1895) 10 Hawaii 29.

which was formerly section 31 of the constitution of the republic and is now section 67 of the Organic Act, authorizes the trial and punishment of a civilian by military commission for a civil offense, which is precisely the position taken in the present paper.

In view of all the foregoing, it is submitted that the actions of the governor in requesting the commanding general and subordinate military personnel to exercise the powers normally exercised by judicial officers and of the commanding general in suspending the sessions of the civil courts and creating military commissions and provost courts were lawful.

Governor Poindexter's proclamation contains five "whereas" clauses, followed by six other clauses announcing affirmative action. As I have pointed out, the "whereas" clauses recite the conditions precedent set forth in section 67 of the Organic Act and state that those conditions have happened, and the first three affirmative clauses announce the taking of action expressly authorized by the same section. The other three affirmative clauses announce action which is not expressly authorized by section 67, but which, as I have endeavored to show, is so authorized by clear implication from the express authorizations contained in that section.

Mr. Anthony intimates, though he does not state so expressly, that some of these decisions and orders were unwise. He is entitled to his opinion, and perhaps he is right; but whose decision is to govern, that of high officers of the United States and of the territory, charged by statute with deciding and acting, or that of someone else? That question was put to and answered by the Supreme Court of the United States over a century ago in a case arising during another war, *Martin v. Mott*.⁵⁷ The question presented was the legality and conclusiveness of an order of the President calling into the service of the United States a member of the New York militia during the war of 1812. The statute then under construction bore a close resemblance to that with which we are now concerned. It was section 1 of the act of February 28, 1795, as follows:

"That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to

⁵⁷ (1827) 25 U. S. (12 Wheat.) 19.

repel such invasion, and to issue his order for that purpose, to such officer or officers of the militia, as he shall think proper"⁵⁸

The Supreme Court, speaking through Justice Story, said,

"The power thus confided by congress to the president, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service, is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the president are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons The service is a military service, and the command, of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished, without the means of resistance He [the President] is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."⁵⁹

Attention is particularly invited to the last sentence of the last quotation. With respect to each of the several decisions made by the governor, the President and the commanding general, the statute gave a discretionary power to a particular officer and he exercised it upon his own opinion of those facts. His decision is therefore conclusive.

⁵⁸ 1 STAT. 424.

⁵⁹ *Supra* note 57, at 28-30.

To the same effect is *Luther v. Borden*,⁶⁰ a case growing out of the Dorr rebellion in Rhode Island in the middle of the last century. Another case closely in point is *Barcelon v. Baker*.⁶¹ In that case also the statute involved was similar to that with which we are here concerned. It read,

"That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."⁶²

In an opinion encyclopaedic in fulness of citation, the Supreme Court of the Philippine Island held that the decision of the Governor General, with the approval of the Philippine Commission, suspending the writ of *habeas corpus* in the provinces of Cavite and Batangas, was final and conclusive upon the judicial department of the government as to the existence of the necessary conditions precedent. Some of the language of the opinion, written in 1905, seems prophetic.⁶³

In the *Kalaniana'ole* case the Supreme Court of the Republic of Hawaii held,

"First, by the proper construction of Article 31 [of the Constitution of the Republic of Hawaii] the President is made the sole judge of the exigencies of the case"⁶⁴

"Thus, as we have seen, where there is an express grant or recognition of power, the person upon whom it is conferred is sole judge of the necessity of exercising it. And 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."⁶⁵

The powers then exercised by the president of Hawaii under article 31 of the constitution of the republic are now exercisable by the governor of the territory, subject to confirmation by the President of the United States, pursuant to section 67 of the Organic Act. We have here an adjudication of the Supreme Court of the Republic of Hawaii holding that the decision and action of the executive, pur-

⁶⁰ (1849) 48 U. S. (7 How.) 1, 43 *et seq.*

⁶¹ (1905) 5 Phil. 87.

⁶² 32 STAT. (1902) 692, §5.

⁶³ *Barcelon v. Baker*, *supra* note 61, at 94.

⁶⁴ *Supra* note 56, at 50.

⁶⁵ *Ibid.* at 53.

suant to the emergency provisions formerly in the constitution of Hawaii and now in the Organic Act, are final and conclusive.

There are many other examples of the application of the same principle. The leading case is *Decatur v. Paulding*,⁶⁶ in which the plaintiff was the widow of a national hero, in whose favor the court might have been expected to stretch the law a bit. Nevertheless, in that case the Supreme Court held that the decision of the Secretary of the Navy, in construing a naval pension law and denying Mrs. Decatur a pension, involved discretion which he might exercise freely without control by it. The Court said,⁶⁷

"The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."⁶⁸

Many of the cases cited in the last few paragraphs and in the footnotes have not arisen in time of or been connected with war, martial law, or domestic disturbance; but the principles enunciated in those cases apply to declarations of martial law and acts done pursuant thereto. During labor troubles in Colorado, the governor of that state declared a county in insurrection, called out the National Guard, arrested Moyer, President of the Western Federation of Miners, and held him in military custody. Moyer applied for the writ of habeas corpus, which was denied on the very ground stated here, that the governor's determination of the existence of facts justifying his action was conclusive.⁶⁹ Later Moyer sued the governor and others for false imprisonment, and the case went to the Supreme Court of the United States, which decided in favor of the governor on the same ground.⁷⁰ Justice Holmes said,

⁶⁶ (1840) 39 U. S. (14 Pet.) 497.

⁶⁷ *Ibid.* at 515.

⁶⁸ Many years later the Supreme Court held to the same effect in *Work v. Rives* (1925) 267 U. S. 175, 183. *Accord*: *McCarl v. Walters* (App. D. C. 1930) 38 F. (2d) 942, 943; *McCarl v. Rogers* (App. D. C. 1931) 48 F. (2d) 1023. Other cases, in which a discretion was reposed in military or other officers and action taken by them in the exercise of such discretion was held conclusive, are *Martin v. Mott* (1827) 25 U. S. (12 Wheat.) 19, 35; *Wilkes v. Dinsman* (1849) 48 U. S. (7 How.) 88, 128; *Dinsman v. Wilkes* (1851) 53 U. S. (12 How.) 390; *Adams v. Nagle* (1938) 303 U. S. 532, 540; *United States v. Bush & Co.* (1940) 310 U. S. 371, 380; *Potts v. Kaplan* (1934) 264 N. Y. 110, 190 N. E. 201.

⁶⁹ *In re Moyer* (1904) 35 Colo. 154, 85 Pac. 190.

⁷⁰ *Moyer v. Peahody* (1909) 212 U. S. 78, 83, 85.

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact . . . Public danger warrants the substitution of executive process for judicial process."

There are many other cases to the same effect.⁷¹

In *Work v. Rives*, *McCarl v. Walters*,⁷² and *Cox v. McNutt*⁷³ and in many other cases, the courts have said that the decision and action of officers vested by statute with the exercise of discretion are final and conclusive, unless arbitrary or capricious. Were the decisions and actions of the several officers mentioned, that is, the governor of the territory, the President of the United States, and the commanding general, in whom the statute (section 67 of the Organic Act) vested a discretion, immediately following the Japanese attack upon Oahu, arbitrary and capricious? "Arbitrary" has been judicially defined as "without adequate determining principle, not done according to reason";⁷⁴ "capricious" as "freakish, whimsical, fickle, changeable, unsteady";⁷⁵ "changing apparently without regard to any laws".⁷⁶

Who will have the temerity to say that, tested by these definitions, the decisions and action of the governor, the commanding general, and the President were arbitrary and capricious? If such a person there be, let him imagine himself successively in the positions occupied by those three officers. Let him consider the situation presented to them at the close of the Japanese attack on December 7th. It was obvious that another invasion of the same sort was entirely possible. Perhaps the attack was merely the precursor of an invasion in force by troops of all arms of the enemy. Important naval vessels and many Army and Navy airplanes had been destroyed. Over 2500 members of the armed forces had been killed and many more wounded. That an insurrection was by no means impossible, perhaps timed to coincide with an invasion, is shown by the fact that there are in Hawaii 35,000 Japanese nationals and 125,000 American citizens of

⁷¹ *United States v. Wolters* (S. D. Tex. 1920) 268 Fed. 69; *Powers Mercantile Co. v. Olson* (D. Minn. 1934) 7 Fed. Supp. 865; *Cox v. McNutt* (S. D. Ind. 1935) 12 Fed. Supp. 355; *In re Boyle* (1899) 6 Idaho 609, 57 Pac. 706; *State v. Brown* (1912) 71 W. Va. 519, 77 S. E. 243; *Hatfield v. Graham* (1914) 73 W. Va. 759, 81 S. E. 533.

⁷² Both *supra* note 68.

⁷³ *Supra* note 71.

⁷⁴ *Eureka Bldg. & Loan Ass'n v. Myers* (1938) 147 Kan. 609, 78 P. (2d) 68; *Baisden v. Floyd County Board of Ed.* (1937) 270 Ky. 839, 110 S. W. (2d) 671.

⁷⁵ *Texas Liquor Control Board v. Floyd* (Tex. Civ. App. 1938) 117 S. W. (2d) 530.

⁷⁶ *Eureka Bldg. & Loan Ass'n v. Myers*, *supra* note 74.

Japanese descent, together more than a third of the entire population.⁷⁷ Though I have no doubt of the loyalty to the United States of the great majority of the latter and many of the former, the damage which even a small number of them might do by way of spying and sabotage, not to mention actual fighting if they had or could obtain arms, is appalling. That the commanding general so believed is shown by the following passages in his proclamation:

"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."⁷⁸

Having in mind all the above facts and the existence of an act of Congress intended to operate in just such an emergency, will any reasonable man contend that the decisions and actions of the governor, the President, and the commanding general were arbitrary and capricious? On the contrary, patriotic public officers, charged with responsibility for the safety of the Hawaiian Islands, could have done no less.

In some of the cases involving martial law situations, though the courts have not used the words "arbitrary" or "capricious" as terms limiting the power of the governor or other public officer, they have used language of the same meaning. Thus in *Hatfield v. Graham*,⁷⁹ a case arising out of the declaration of martial law during labor troubles in the coal mines of West Virginia, the supreme court of that state said,

"We do not mean to intimate that a Governor, because of his exalted office, is incapable of doing wrong, or that he would not be liable for wantonly, maliciously, and unnecessarily injuring the person or property of a citizen. We can imagine instances wherein he might so clearly overstep the bounds of his constitutional powers as to make himself personally liable; but such instances are extremely unlikely to occur"⁸⁰

The leading case illustrative of this limitation upon the power of a governor to declare martial law, and the latest pronouncement

⁷⁷ Anthony, *op. cit.* *supra* note 1, at 388, n. 62.

⁷⁸ *Ibid.* at 393, app. III.

⁷⁹ *Supra* note 71.

⁸⁰ *Ibid.* at 766, 81 S. E. at 535.

of the Supreme Court of the United States on the subject, is *Sterling v. Constantin*.⁸¹ The Railroad Commission of Texas issued certain orders limiting the production of oil. The plaintiffs, owners of oil wells, alleging that those orders were arbitrary and illegal and deprived them of their property without due process of law, applied to a federal district court for an injunction against their enforcement. Previously the governor, one of the defendants, had declared certain counties in which plaintiffs' wells were situated to be in a state of insurrection, had declared martial law in those counties, and had directed Brigadier General Wolters of the National Guard to "enforce the law" and act as "commanding officer of the military district". Learning that the enforcement of the Railroad Commission's orders was prevented by the court's restraining order, the governor issued his own orders to General Wolters to the same effect, and for his enforcement of those orders contempt proceedings were brought against the general. The district court found,⁸²

"The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity."

The Supreme Court said,

"There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry."⁸³

The Supreme Court upheld the action of the district court in making the restraining order permanent.

There are other cases, in which the courts refused to sanction martial law because there was no real invasion, insurrection or riot, and the troops were actually called into service for ulterior purposes such as the ouster of a State Highway Commission,⁸⁴ oil proration,⁸⁵

⁸¹ (1932) 287 U. S. 378.

⁸² *Ibid.* at 392.

⁸³ *Ibid.* at 403.

⁸⁴ *Miller v. Rivers* (D. Ga. 1940) 31 Fed. Supp. 540; *Hearon v. Calus* (1935) 178 S. C. 381, 183 S. E. 13.

⁸⁵ *Sterling v. Constantin*, *supra* note 81; *Russell Petroleum Co. v. Walker* (1933) 162 Okla. 216, 19 P. (2d) 582.

enforcement of an unconstitutional segregation ordinance,⁸⁶ control of a primary election,⁸⁷ prevention of the construction of a dam until the state's claim for flooding of roads should be paid.⁸⁸

In *Sterling v. Constantin* and the cases cited in the footnotes to the preceding paragraph, the attempt was made to justify illegal acts by a fictitious condition of war, invasion, or insurrection. The courts properly refused to permit themselves to be blinded by the fiction. Those may be called cases of a "phony" emergency and "phony" martial law. But nobody knows better than those who were in Hawaii at that time that there was nothing fictitious or "phony" about the attack upon Oahu on the morning of December 7, 1941, that the invasion and the emergency were real, and that that attack was war in fact and in law.⁸⁹

It may be argued that, even if the decisions and actions of the governor and the commanding general embodied in their proclamations of December 7, 1941, were wise, necessary, and lawful at that time, the continued supersession to the time of writing of the civil governor and courts by the military authorities is unwise, unnecessary and unlawful. I turn again to section 67 of the Organic Act as the source and measure of the authority for the continuance as well as for the creation of the extraordinary powers exercised by the commanding general. The lawful exercise of those powers is conditioned upon the existence of "rebellion or invasion, or imminent danger thereof". In *Stewart v. Kahn*⁹⁰ the Supreme Court said,

"... the power [the war power of the United States] is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

The foregoing is as true of the extraordinary powers authorized by section 67 of the Organic Act as of the power to suppress the Rebellion. The fact that the invasion of December 7th lasted only a few hours does not mean that the right to invoke section 67 ended as soon as the last Japanese plane flew away. It was proper, necessary and lawful to employ the powers conferred by that section,

⁸⁶ *Allen v. Oklahoma City* (1935) 175 Okla. 421, 52 P. (2d) 1054.

⁸⁷ *Joyner v. Browning* (E. D. Tenn. 1939) 30 Fed. Supp. 512.

⁸⁸ *United States v. Phillips* (N. D. Okla. 1940) 33 Fed. Supp. 261.

⁸⁹ *Prize Cases* (1862) 67 U. S. (2 Black) 635, 668.

⁹⁰ (1870) 78 U. S. (11 Wall.) 493, 507.

in the words of the Supreme Court, "to guard against the immediate renewal of the conflict, and to remedy the evils which had arisen". That would be true for a reasonable time after the invasion even if section 67 mentioned only "invasion" as one of the conditions precedent for its operation. But the statute goes much further. It authorizes the employment of the extraordinary powers mentioned therein "in case of . . . invasion, or imminent danger thereof". Who will be so bold as to deny that Hawaii has been in imminent danger of invasion every hour of every day since December 7, 1941? Another air raid would meet an even warmer reception than met that of December 7, 1941, but can it be denied that such another raid is possible? Since December 7th, Japanese submarines have shelled Santa Barbara, California, Vancouver Island, and the coast of Oregon. Every such shelling was, as a matter of law, an invasion. All the places mentioned are much farther from Japan than Hawaii. Can it be denied that such a shelling of some part of the Hawaiian coast, perhaps followed by a brief landing for purposes of obtaining information or destruction, is possible? In the first week in June a Japanese fleet, which included transports, thereby indicating an intention to capture and occupy land bases, was defeated and driven back by our forces near Midway Island. Can it be denied that, if that fleet had been victorious, it would have occupied Midway Island; and that, using that island as a base, the Japanese forces would next have attempted to extend their invasion to other parts of the Hawaiian Islands? About the same time a Japanese expedition captured and occupied Attu and Kiska, two of the Aleutian Islands. Can it be denied that, if and when it is possible, the Japanese will do the same in the Hawaiian Islands, presumably beginning with those farthest to the west? No one knows more about these matters than Lieutenant General Emmons, who succeeded General Short in command in Hawaii. That he considers an attack upon Hawaii possible or even probable is clearly inferable from the facts that in December he sent army wives to the mainland and in the middle of June he issued orders for the evacuation of all women and children not residents of Hawaii. In view of the foregoing considerations, it cannot be doubted that there has been continuously since December 7th "imminent danger" of hostile invasion of Hawaii. It follows that the continuance of martial law in Hawaii is lawful. The resident of that beautiful archipelago may live in a paradise; but, if he thinks that there is no danger of its being invaded, his is a fool's paradise. And even

if the resident is right and General Emmons wrong, the latter's decision is conclusive unless arbitrary and capricious. No one can contend that it is so.

It is submitted that the foregoing discussion shows that an affirmative answer must be made to the question whether the proclamations, orders and important acts of the territorial governor and the commanding general on and since December 7th have been in accord with section 67 of the Organic Act. If that be so, those proclamations, orders and acts are legal unless section 67 be unconstitutional.

The next question is therefore:—Is section 67 of the Organic Act constitutional? The argument against its constitutionality is based mainly upon the opinion of the majority of the Supreme Court of the United States in *Ex parte Milligan*.⁹¹ That case is ably and fully discussed by Mr. Anthony,⁹² and in the main I agree with what he says about it. In that case all nine of the justices held that a military commission had no right to try a civilian in Indiana in 1864. It was pointed out that Indiana had in fact been invaded by the Confederates in 1863 and was liable to invasion again. The majority of five justices held that even Congress lacked constitutional power to authorize martial law in a state not at the time the theater of active military operations. They said,

"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 . . .

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."⁹³

The minority agreed that Milligan's trial had been unlawful; but was of opinion that Congress might have authorized military law and trial by military commission in Indiana, though it had not done so. It may be admitted that section 67 of the Organic Act goes further

⁹¹ (1866) 71 U. S. (4 Wall.) 2.

⁹² *Op. cit. supra* note 1, at 379-381.

⁹³ *Supra* note 91, at 127.

than the majority opinion in the *Milligan* case says is constitutionally allowable, in that it authorizes martial law in case of "imminent danger" of invasion. If, therefore, the majority opinion in its full extent is still the law, and if the Constitution extends to Hawaii to the same degree that it does to Indiana, section 67 of the Organic Act is unconstitutional in so far as it authorizes martial law upon imminent danger of invasion. Section 67 is, however, constitutional under the minority view, since it is no more than what that opinion stated to be proper, namely, an authorization by Congress of martial law in the face of a threatened or imminent invasion.

The *Milligan* case has been the subject of vigorous and sometimes bitter debate ever since it was decided. Many eminent lawyers have contended that the minority was right, among others, Colonel Winthrop.⁹⁴ It may be that, if the issue were to be brought before the Supreme Court again, it would reverse that case, either on the ground that the minority was right in the first place or on the ground that changed methods of warfare—and especially the airplane—have extended the theater of operations so as to include more territory than that on which armies are at the moment fighting. A strong argument can be made for such a view.

But I prefer not to base my conclusion upon the hypothesis that the Supreme Court will reverse itself, however plausible that hypothesis may be in the present case.

As has been said in the early part of this article, Hawaii was foreign territory until annexed by a joint resolution of Congress July 7, 1898, and the annexation did not extend the Constitution over it. The Constitution extends to newly acquired territory only when and as Congress so directs.⁹⁵ In section 5 of the Organic Act⁹⁶ Congress directed that "... the Constitution ... shall have the same force and effect within the said territory as elsewhere in the United States..." In the same act of Congress, the Organic Act setting up the territorial government of Hawaii, is found section 67, the section pursuant to and in strict accordance with which martial law has been declared and the other measures under consideration have been taken.

⁹⁴ 2 WINTHROP, *op. cit. supra* note 44, at 1275.

⁹⁵ *American Ins. Co. v. Canter*, *supra* note 3; *Downes v. Bidwell*, *supra* note 4; *Hawaii v. Mankichi*, *supra* note 7; *Dorr v. United States*, *supra* note 5; *Balzac v. Porto Rico*, *supra* note 6.

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

As far back as 1804, in *Pennington v. Coxe*,⁹⁷ the illustrious Chief Justice Marshall, speaking for the Supreme Court, said,

"That a law is the best expositor of itself; that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."

Let the above elementary rules of statutory construction be applied to the present problem. Section 5, extending the Constitution of the United States to Hawaii, is a part of the same statute as section 67, authorizing the declaration of martial law in case of actual or imminent invasion. Both of those sections must "be taken into view, for the purpose of discovering the mind of the legislature". Section 5 may not be construed as though it stood alone—" . . . the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act. . . ." The details of section 67 restrict the extent of the general expressions in section 5. Does this not mean, must it not mean, that if any part of section 67 would otherwise be unconstitutional section 5 must be construed as extending the Constitution to Hawaii subject to the qualifications or limitations contained in section 67? It is submitted that such a construction is unavoidable.

In another case, *United States v. Fisher*,⁹⁸ Chief Justice Marshall, speaking for the Court, said,

"It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole."

If every part of the Organic Act be considered, if the legislative intent be extracted from the whole of the act and not from section 5 only, the same conclusion is inescapable, namely, that in so far as any inconsistency exists between the two sections, Congress intended by section 5 to extend the Constitution to Hawaii subject to the limitations contained in section 67.

⁹⁷ (1804) 6 U. S. (2 Cr.) 33, 52.

⁹⁸ (1804) 6 U. S. (2 Cr.) 358, 386.

Another expression of the same doctrine is found in *United States v. Freeman*,⁹⁹ as follows:

"In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected."

Citations of cases stating and applying the above principle of statutory construction might be multiplied indefinitely.¹⁰⁰

There is another well settled principle of statutory construction applicable to the problem, which principle is stated in the following quotation from opinions of the Supreme Court:

"An interpretation of the statute which would lead to this result, and render different sections inconsistent with each other, cannot be the true one."¹⁰¹

"The true rule is to harmonize the whole code, if possible, and to that end the letter of any particular section may sometimes be disregarded in order to accomplish the plain intention of the legislature. Effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature."¹⁰²

"A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."¹⁰³

How does the foregoing principle apply to the present problem? Section 67 cannot be deemed unconstitutional by virtue of any prior application of the Constitution to Hawaii, for there was none. If section 67 be unconstitutional at all, it is because of its inconsistency with section 5. The inconsistency, if any, lies in the fact that section 5 extends the Constitution to Hawaii, and, as interpreted in the *Milligan* case,¹⁰⁴ the Constitution permits the institution of martial law only in the event of an actual present invasion or rebellion; whereas section 67 allows martial law to be declared if invasion or

⁹⁹ (1845) 44 U. S. (3 How.) 556, 565.

¹⁰⁰ AM. DIG., STATUTES §§282, 283; DEC. DIG., STATUTES §§204, 205; U. S. SUP. CT. DIG., STATUTES §109.

¹⁰¹ *Perrine v. Chesapeake & Delaware Canal Co.* (1850) 50 U. S. (9 How.) 172, 187.

¹⁰² *Iglehart v. Iglehart* (1907) 204 U. S. 478, 484.

¹⁰³ *United States v. Raynor* (1938) 302 U. S. 540, 547. Other instances of the application of this principle may be found in DEC. DIG., STATUTES §207.

¹⁰⁴ *Supra* note 91.

rebellion be imminent. But that inconsistency may and ought to be avoided by construing the two sections as extending the Constitution to Hawaii subject to a limitation or exception permitting martial law upon the occurrence of the conditions precedent stated in section 67.

Another applicable principle of statutory construction is stated in *Rodgers v. United States*.¹⁰⁵ After referring to the canon that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statutes, the Supreme Court said that the same principle is applicable *a fortiori* if the particular and the general provisions are in the same statute.¹⁰⁶ The doctrine of the case cited is directly applicable to the present problem. The general rule in section 5 that the Constitution is extended to Hawaii cannot be understood as repealing the special provisions in section 67 with respect to martial law, which have been followed by the governor and the commanding general in the present emergency.

The same view was thus expressed by the Supreme Court of Kansas, speaking through Justice Brewer, later of the United States Supreme Court, in *Long v. Culp*,¹⁰⁷

"It is also a rule of construction that when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto; not because one section has more force as a legislative enactment than another, but because the legislative mind, having been in the one section directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections, where its attention was turned to other things."¹⁰⁸

In section 67 the mind of Congress was expressly directed to the contingency of invasion, to which from its remote and exposed location Hawaii was and is peculiarly subject; and Congress gave directions as to what might lawfully be done, not only in the event of actual, but of imminent invasion. It is contrary to the principle stated

¹⁰⁵ (1902) 185 U. S. 83.

¹⁰⁶ *Ibid.* at 89.

¹⁰⁷ (1875) 14 Kan. *412, *414.

¹⁰⁸ The principle is also well stated in SUTHERLAND, STATUTORY CONSTRUCTION (1904) 268, "Where a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand." See cases cited *ibid.* §268, n. 52, especially *In re Rouse Hazard & Co.* (C. C. A. 7th, 1899) 91 Fed. 96, 100. See also *Wellsburg & S. L. R. R. v. Panhandle Traction Co.* (1904) 56 W. Va. 18, 48 S. E. 746.

in the preceding quotation to suppose that by the operation of the general language of section 5, plus the *Milligan* decision,¹⁰⁹ Congress meant to take away the authority for prompt and effective action which it gave by section 67.

Still another elementary principle of statutory construction leads to the same conclusion. That principle was called by Justice Brandeis an "established rule of construction" and thus stated by him in *Carey v. South Dakota*,¹¹⁰

"Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted."¹¹¹

The construction of the Organic Act which has been advocated in this paper makes section 67 constitutional, that which extends the Constitution to Hawaii fully and without limitation makes section 67 of at least doubtful constitutionality because of the provisions allowing martial law in case of the imminence of invasion or rebellion, contrary to the *Milligan* decision.

There is still another principle applicable, thus stated in Sutherland on *Statutory Construction*:¹¹²

"The different sections or provisions of the same statute or code should be so construed as to harmonize and give effect to each, but, if there is an irreconcilable conflict, the later in position prevails."¹¹³

It is true that in *Iglehart v. Iglehart*¹¹⁴ the Supreme Court said that this rule is "very seldom applicable", but that is because conflicts between different parts of a statute can usually be resolved by other rules. In my opinion there is no "irreconcilable conflict" between sections 5 and 67, for they may be harmonized in the manner which has been pointed out; but, if any one finds such a conflict to exist, then, pursuant to this rule, section 67, being the later in position of

¹⁰⁹ *Supra* note 91.

¹¹⁰ (1919) 250 U. S. 118, 122.

¹¹¹ Many other cases to the same effect are collected in U. S. SUP. CT. DIG., STATUTES §§106, 107.

¹¹² *Op. cit. supra* note 108, §268.

¹¹³ Among the federal cases applying this principle are *In re Richards* (C. C. A. 7th, 1899) 96 Fed. 935, 939; *United States v. Jackson* (C. C. A. 9th, 1906) 143 Fed. 783, 787; *In re Tune* (D. Ala. 1902) 115 Fed. 906, 911; *United States v. Updike* (D. Neb. 1928) 25 F. (2d) 746, 767; *Hall v. Equator Mining Co.* (C. C. D. Colo. 1879) Fed. Cas. No. 5931.

¹¹⁴ *Supra* note 102.

the two sections, must govern, and not section 5. Thus by a different route we arrive at the same conclusion, that the Organic Act extended the Constitution to Hawaii subject to a limitation or exception permitting the institution of martial law upon the happening of the conditions precedent mentioned in section 67.

The canons of statutory construction are, after all, nothing more than the crystallization into general principles of the application of common sense in many separate instances to the problem of what statutes mean. Even if there had been no such crystallization and were no such canons, the application of common sense to the present problem of interpretation would lead to the same conclusion. Can it be for a moment supposed that Congress, having with one hand by section 67 expressly granted broad and full powers to deal with actual or even merely imminent invasion or rebellion, meant with the other hand by the general language of section 5 to withdraw those powers in case the invasion or insurrection should be merely imminent? The answer is obvious and certain, that, in so far as concerns the action to be taken in the event of mere imminence of invasion or rebellion, the general language of section 5 must be limited by the specific and definite provisions of section 67. As what was done by the governor and the commanding general on December 7th, and the general course since followed by the military governor, have been in accord with section 67, they have been lawful.

It will not suffice, in answer to the foregoing, to make or even to cite from judicial opinions statements to the effect that the organized territories are fully incorporated in the United States or that their citizens enjoy the civil rights of other citizens of the United States. Section 67 of the Organic Act of Hawaii is in substance copied into the Organic Act of Puerto Rico,¹¹⁵ but of no other organized territory. Therefore such statements in cases arising in other territories have no relevancy. And even such statements, if any there be, in judicial decisions in cases arising in Hawaii are no more than dicta uttered by judges considering other problems and not having war, invasion, or section 67 of the Organic Act in mind, for the extraordinary powers granted by that section were never invoked until December 7, 1941. The constitutional rights and privileges of citizens of Hawaii are to be determined, not by such general statements, but by the language of the act of Congress extending the Constitution to Hawaii—which is the Organic Act of Hawaii of April 30, 1900.

¹¹⁵ 39 STAT. (1917) 955, §12, 48 U. S. C. (1940) §771.

The conclusions of this article may be thus summarized:

a. The orders and proclamations of the Governor of Hawaii and the Commanding General, Hawaiian Department, on December 7, 1941, and the general course of action of the latter since that date in respect of his exercise of martial law powers were authorized by section 67 of the Organic Act of Hawaii.

b. That section is valid legislation. Even if it transcends constitutional limitations applicable in the states, it is nevertheless valid because the combined operation of sections 5 and 67 extends the Constitution to Hawaii subject to the limitations or exceptions with respect to martial law in time of actual or imminent invasion or rebellion contained in section 67.

Mr. Anthony's article closes with a recommendation for certain federal legislation which he considers necessary to legalize arbitrary or extra-legal action in Hawaii.¹¹⁶ If the foregoing conclusions are correct, no legislation is needed for such a purpose. To discuss whether such legislation as he recommends is desirable for other reasons or in other places than Hawaii would be beyond the scope of the present article. It may be observed, however, that the act of March 21, 1942,¹¹⁷ which Mr. Anthony does not mention, probably because it was not passed until after he wrote, covers some of the points raised by him.

On October 3, 1941, at a special session, the legislature of the Territory of Hawaii passed the Hawaii Defense Act, a long and detailed statute declaring a public emergency to exist and conferring upon the governor comprehensive powers to deal with it. In section 5 it provides.

"... Whenever there exists (1) any state of affairs or circumstances arising out of an invasion, attack, insurrection, rebellion, or lawless violence, or any danger or threat thereof, or (2) any state of affairs or circumstances making it advisable to protect the Territory and its inhabitants, of the existence of any of which the Governor shall be the sole judge, the Governor, by proclamation, may declare a defense period to exist. . . ."

By a proclamation issued at 11:30 a.m., December 7, 1941, the Governor has declared a defense period to exist. The act confers upon the Governor the broadest possible powers, among others to prevent

¹¹⁶ *Op. cit. supra* note 1, at 390.

¹¹⁷ PUB. L. No. 503, 77th Cong. 2d Sess. (March 21, 1942).

hoarding,¹¹⁸ to fix prices,¹¹⁹ to requisition property,¹²⁰ to take over public utilities,¹²¹ and even to suspend the laws.¹²² To discuss that act is outside of the scope of the present article, but it may be observed that the passage of such a statute by the elected representatives of the people of Hawaii shows a willingness on their part to give up a large part of their ordinary rights and privileges for the duration of the emergency, in order that prompt and effective action may be taken to protect the islands.

Nevertheless it may be disagreeable to Mr. Anthony and other residents of Hawaii to be told that in consequence of section 67 of the Organic Act their constitutional rights are less than those of their fellow citizens resident in the several states. Also, it may be disagreeable to residents of Hawaii to be obliged to submit to general orders of a military governor in whose selection and in the framing of whose orders they had no voice. They may not like being tried by military commissions and provost courts rather than by judges and juries of their own people. But the law is what the Constitution and statutes say it is and what the courts interpret those as meaning, and not what the persons affected may find agreeable.

However, the residents of Hawaii may derive a large measure of consolation for the deprivation of their constitutional rights to some degree under section 67 of the Organic Act and for the operation of the existing military government from the thought that such deprivation is but temporary; that it is the result of the considered judgment of their own constitution-making body when they were an independent nation, of the Congress of the United States, of their own governor, of the President of the United States, and of the commanding general charged with the defense of their own fair islands; and that it has no other object than the better defense of those islands and of the country of which they form a valued part.

¹¹⁸ Special Session Laws of Hawaii 1941, §§4(8), 9.

¹¹⁹ *Ibid.* §§4(8), 16.

¹²⁰ *Ibid.* §10.

¹²¹ *Ibid.* §5(12).

¹²² *Ibid.* §13.