

# California Law Review

Volume XXXI

DECEMBER, 1943

Number 5

## Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii

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THE DUTY rests upon the courts, says the Chief Justice, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."<sup>1</sup> It might also be added that a duty rests upon the bar to keep the profession informed of executive action affecting civil liberties not only to the end that the courts may better discharge their historic function in this field but also to the end that the executive may re-appraise and possibly modify existing procedures having an eye to what the courts may do in specific cases which compel their judgment.

Last year an attempt was made in this Review<sup>2</sup> to state some of the facts and legal problems that were raised by acts done in Hawaii in the name of martial law; later events perhaps have made another chapter on that subject of interest. A summary of the situation prior to 1943 will afford a setting for a better understanding of the present status of the law in Hawaii.

### MARTIAL LAW DECLARED, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS SUSPENDED AND A MILITARY GOVERNMENT ERECTED

On December 7, 1941, the Governor of Hawaii issued a proclamation<sup>3</sup> turning over all the functions of government, territorial and county, including the functions of judicial officers, to Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, who on the same day proclaimed<sup>4</sup> that he had "assumed" the role of "Military

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<sup>1</sup> *Ex parte Quirin* (1942) 317 U.S. 1, 19.

<sup>2</sup> Anthony, *Martial Law in Hawaii* (1942) 30 CALIF. L. REV. 371; King, *The Legality of Martial Law in Hawaii* (1942) 30 *ibid.* 599; see also, Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253.

<sup>3</sup> Appendix I.

<sup>4</sup> Appendix II.

Governor"—a title that hitherto in American history had been reserved for conquered nations or rebellious territory.<sup>5</sup>

This the Governor purported to do under Section 67 of the Hawaiian Organic Act which gave him no such power. He was authorized to do no more than military necessity required.

Section 67 of the Hawaiian Organic Act provides:

"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 commitatus, 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."<sup>6</sup>

On the day of the proclamation, the Governor sent the following cable to the President:

"I have today declared martial law throughout the Territory of Hawaii and have suspended the privilege of the writ of habeas corpus. Your attention is called to Section 67 of the Hawaiian Organic Act for your decision on my action."

On December 9 the President cabled the Governor as follows:

"Your telegram of December seventh received and your action in suspending the writ of habeas corpus and placing the Territory of Hawaii under martial law in accordance with U.S.C. Title 48, Section 532 has my approval."

Neither the Governor's proclamation nor the General's proclamation was ever submitted to the President for his approval. This fact is important since it is sometimes obliquely intimated that the President approved<sup>7</sup> the proclamation of December 7, which pur-

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<sup>5</sup> For a collection of prior instances of military government in American history, see BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1920), c. IX; see also Gabriel, *American Experience with Military Government* (1943) 37 AM. POL. SC. REV. 417.

<sup>6</sup> 31 STAT. (1900) 153, 48 U. S. C. (1940) §532.

<sup>7</sup> Fairman, *op. cit. supra* note 2, at 1290, quotes from a newspaper that the proclamation "received the full approval of President Roosevelt." The news item is inaccurate.

ported to give the government of Hawaii to the Army and the assumption of the role of "Military Governor". The President did none of these things nor does he possess the power to do so under the Hawaiian Organic Act; whether under any other factual situation, an emergency, short of actual invasion, might become so great as to warrant such action in the exercise of the war powers<sup>8</sup> under the Constitution either by the President with Congress, or the President alone as Commander-in-Chief is irrelevant since neither the President with Congress, nor the President alone, have authorized a military government for Hawaii.

General Short and his successor, General Delos C. Emmons, continued to exercise increasingly stringent control over the civil population. Thus a military government, concentrating all power, executive, legislative and judicial, in the "Military Governor" was erected on American soil without the sanction of Congress or the President. The form of government of Hawaii was changed, almost over night. A rigid censorship was imposed over the press, radio and mails.

The control over the civil population took the form of orders issued from the "Office of the Military Governor," or as it is known in Hawaii, the OMG,<sup>9</sup> an office amply staffed with officers, enlisted men and civilian employees. Similar offices were established on the Islands of Hawaii, Maui and Kauai. The orders of the "Military Governor" covered almost the entire range of government from the trial of civilians for felonies under territorial law down to the smallest detail of municipal affairs such as the numbering of houses, rent control, and the trial of civilians for using marked cards or loaded dice—as Col. Fairman puts it, "every civil activity had military significance."<sup>10</sup>

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rate. In the sentence following the erroneous news item, the author says, "Martial rule has been expressly recognized in an Executive Order." The reference to 6 Fed. Reg. 6675 is the Executive Order establishing Honolulu, Defensive Sea Area, one sentence of which reads, "This order shall not be construed as modifying in any way the proclamation of the Governor of the Territory of Hawaii, placing the Territory of Hawaii under martial law."

<sup>8</sup> "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, *supra* note 1, at 25, 26.

<sup>9</sup> The fact that Hawaii's OMG was the forerunner of Sicily's AMGOT or AGM seems to have escaped the attention of the press; *cf.* Motherwell, *Military Occupation and Then What?*, HARPERS, October, 1943.

<sup>10</sup> Fairman, *op. cit. supra* note 2, at 1292. It would seem difficult to relate such items to military necessity, *cf.* FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943) 47: "Martial rule depends for its justification upon this public necessity. It is not a thing absolute in its nature, a matter of all or nothing. On the contrary it is measured by the needs of the occasion."

One curious thing about the erection of the military government over Hawai'i is that it is directly contrary to the official and unofficial views of the service. The first page of the manual says that military government "is exercised by a belligerent in occupying an enemy's territory,"<sup>11</sup> as distinguished from martial law which is said to be, "A government temporarily governing the civil population of a locality through its military forces without the authority of written law as necessity may require."<sup>12</sup> The writers<sup>13</sup> on the subject of military jurisdiction draw a sharp distinction between a belligerent's occupation of enemy territory and martial law as a domestic fact. As was said by one author from the service, "This distinction is a clear cut one and entirely familiar to the American service."<sup>14</sup> It was noted by Attorney General Caleb Cushing<sup>15</sup> as early as 1857, stated by Chief Justice Chase<sup>16</sup> in 1866 and may be regarded as settled. The present Judge Advocate General appreciates the accurate use of the term military government.<sup>17</sup>

The distinction between the two kinds of military jurisdiction would seem to be axiomatic. When General Mark Clark invades Italy, he recognizes no municipal law of the enemy state, in fact his mission is to destroy all resistance. His will is law subject only to the application of the laws of war in such cases. On the other hand when our own military authorities, acting under martial law, exercise extraordinary powers over our own people, they do so in subordination to the civil power. Their function is not to conquer and govern but to defend and sustain the civil power.

The military government took over the District Courts in Honolulu and throughout the Territory to house the provost courts; certain other territorial and county buildings such as schools, hospitals and administrative buildings were taken over for OMG or military pur-

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<sup>11</sup> A MANUAL FOR COURTS MARTIAL, U. S. ARMY (1928) 1.

<sup>12</sup> *Ibid.*

<sup>13</sup> BIRKHEIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* (3d ed. 1892) 1; BRES, *MILITARY AID TO THE CIVIL POWER* (1925) 54, 55; LIEBER, *THE JUSTIFICATION OF MARTIAL LAW* (1898) 3; WINTHROP, *ABRIDGMENT OF MILITARY LAW* (2d ed.) 322.

<sup>14</sup> WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 7.

<sup>15</sup> 8 Ops. Atty's. Gen. 365.

<sup>16</sup> *Ex parte Milligan* (1866) 4 Wall. 2, 132; see also, 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 1592.

<sup>17</sup> "Martial law arises from a situation in which, during insurrection or foreign invasion, the normal civil processes fail so that the government must take emergency action by substituting the military arm as a temporary agency to maintain order at home. Military government is established on hostile soil under war conditions, superseding local law." Cramer, (1943) 29 A. B. A. J. 368.

poses. Trial by jury and indictment by grand jury were abolished and courts forbidden to exercise most of their normal functions. The scope of the military orders had no relation to any real or apparent military necessity.

It would serve no useful purpose at this time to review the shortcomings, excesses or claimed efficiency of the provost courts since their jurisdiction today has been greatly curtailed. Lawyers, of all people, should not fall into the error of thinking that news items or editorials furnish a fair, accurate or complete appraisal of these tribunals. Although they may impose prison terms up to five years and fines up to \$5000 or both, they keep no record (other than the charge and sentence) of their proceedings. The absence of record, the existence of censorship and the frailty of news items of legal proceedings generally, must all be considered if this type of information is to be brought into focus.<sup>18</sup>

The OMG collected in Hawaii during the period December 7, 1941 to August 31, 1942 the sum of \$789,417.08 from the operations of the provost courts and the issuance of liquor permits. Of this, \$562,674.67 constitute fines and forfeitures and \$226,742.41, liquor permit fees; the War Department has agreed to the return of most of this to the Territory and it is reported that the Comptroller has approved the distribution.<sup>19</sup>

The military government was financed largely out of the appropriation of \$15,000,000 which was allotted by the President to the Secretary of the Interior and the Governor of Hawaii shortly after the outbreak of war, "for the protection, care and relief of the civil population in the Territory of Hawaii."<sup>20</sup>

While the entire civil population accepted the taking over by the Army immediately after December 7, there was never any apparent need for the complete submergence of civil government. The Army, while feverishly repairing the results of the disaster of December 7, took on the added burden of the administration of the minutiae of civil government.

The Hawaii Defense Act<sup>21</sup> (passed at the request of the Hawaiian Department) deposited plenary power in the Governor to cope with

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<sup>18</sup> Cf. Fairman, *op. cit. supra* note 2, at 1291 *et seq.*

<sup>19</sup> Honolulu Star Bulletin, November 11, 1943.

<sup>20</sup> Allotted by letter of January 12, 1942, pursuant to the "Independent Offices Appropriation Act 1942." (55 Stat. 94.)

<sup>21</sup> Act 24, Sp. S. L. of Hawaii 1941, approved October 9, 1941; Lt. Gen. Walter C. Short, in support of the bill, testified:

any emergency. These powers were never effectively exercised for the reason that the "Military Governor" took unto himself unlimited powers unrestrained by federal or territorial law or the Constitution itself.

#### RESTORATION OF CIVIL AUTHORITY

On February 8, 1943, proclamations which took effect March 10, 1943 were issued concurrently by the Governor<sup>22</sup> and the Commanding General<sup>23</sup> substantially restoring civil authority; territorial and federal functions which theretofore had been under complete military control were restored to the appropriate civil agencies who were directed to resume "their respective jurisdictions, functions and powers according to law." Trial by jury and indictment by grand jury in the civil courts replaced the provost courts and military commissions for violations of territorial and federal law. The OPA, which previously was an "advisor to the Military Governor" exercised its statutory powers in its own right as did other territorial and federal agencies.

Among the matters enumerated in the proclamation were three main exceptions to a complete restoration of civil authority: (a) immunity<sup>24</sup> of members of the armed forces from criminal and civil proceedings under certain conditions; (b) criminal prosecution for violation of military orders; and (c) the control over labor working for the services or working on Army and Navy projects, stevedores, dock workers, and employees of public utilities.

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"Many of these things can be done better by the civil authorities than by the military authorities, even after we possess the necessary powers to execute them. Many of them even after the declaration of martial law. . . . Proper action at this time might do much to delay or even render unnecessary a declaration of martial law.

". . . to provide this protection is entirely a function of the government and legislature. The Military authorities have no place in such action . . . we would be invading the public affairs of the civil authorities.

". . . I believe it absolutely essential . . . to give the Governor the broadest possible powers. . . . This, in all probability, will do away with the necessity for the declaration of martial law. . . ." Minutes Sen. Com. of the Whole, Sept. 17, 1941.

<sup>22</sup> Appendix III.

<sup>23</sup> Appendix IV.

<sup>24</sup> Not to be confused with the Soldiers and Sailors Civil Relief Act of 1940 (54 Stat. 1178, 50 U. S. C. 501). This clause purports to grant a general immunity to members of the armed forces; it would seem that this is a judicial question the answer to which would depend upon the facts in the specific case presented; it is doubtful whether the result can be accomplished by executive fiat.

The restoration of civil authority required the disposal of one hundred and eighty-one general orders<sup>25</sup> covering all manner of civilian affairs which were issued in Honolulu since December 7, 1941. These were revoked and the subject matters regulated by them were turned over to the appropriate civil agencies. Regulations were promulgated by the Governor under the Hawaii Defense Act which replaced the rescinded military orders.

Some of the Defense Act regulations such as restrictions on inter-island travel, freezing of certain essential workers, control over importation and distribution of food, may to the mainland observer appear strict, but it should not be overlooked that they replaced the control that theretofore existed under military orders enforceable in the provost courts. The Defense Act regulations were designed to afford due process of law to affected persons and to establish reasonable standards for the administrators. They become effective immediately upon publication (in the press or in time of emergency by radio broadcast or posting).<sup>26</sup> Violations of the regulations are made misdemeanors punishable by imprisonment not to exceed one year or a fine not to exceed \$5000 or both.<sup>27</sup> The regulations, of course, are enforced and may be challenged in the civil courts.

The territorial legislature, which convened February 17, 1943, in regular session, promptly amended<sup>28</sup> this Act granting additional powers to the Governor to cope with any emergency and to make certain that no dearth of power would afford an excuse for the resumption of military control. New military orders<sup>29</sup> were issued on March 10, 1943, designed to cover the few subjects left to military control under the proclamation. The title "Military Governor" and the OMG were retained.

#### SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

Since the outbreak of war there have been but three habeas corpus cases in Hawaii. In the first,<sup>30</sup> the petition alleged that one Zimmer-

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<sup>25</sup> In addition there were a large number of orders issued by the commanding officers on the islands of Hawaii, Maui and Kauai.

<sup>26</sup> *Supra* note 21, §18.

<sup>27</sup> *Ibid.* §22.

<sup>28</sup> Act 5, S. L. 1943, approved March 8, 1943.

<sup>29</sup> Honolulu Advertiser, March 10, 1943.

<sup>30</sup> *Zimmerman v. Walker* (1942) 132 F. (2d) 442, *cert. den.* "on the ground that the cause is moot, it appearing that Hans Zimmerman on whose behalf the petition is filed has been released from the respondent's custody." (1943) 63 Sup. Ct. 1027, 87 L. Ed. Adv. Ops. 928.

man, a citizen of the United States, was unlawfully imprisoned by color of authority of the United States, that the "cause or pretext" of his detention was an order made by a board of officers and civilians appointed by the authority of the United States for the purpose of inquiring into the activities of residents to ascertain whether such activities are subversive to the best interests of the United States and to recommend detention or parole; that the Army was about to remove the prisoner beyond the jurisdiction of the court; that the order was predicated upon hearsay statements of persons unknown to the prisoner who neither saw nor heard his accusers; that he was not permitted to examine witnesses against him; was denied access to the statements submitted to the board concerning him and was denied access to its proceedings and was advised by respondent that the advice of counsel was neither necessary nor desirable. The petition further charged that the detention was in violation of the Federal Constitution and concluded with the prayer that the writ issue directing respondent to produce the body of the prisoner before the court and certify the reasons for his detention and the order of removal.

The petition was served upon the United States Attorney who appeared stating that he did not oppose any action by the court but was of the view that the existing military orders prohibited the issuance of the writ.

The judicial code provides:

"The court, or justice, or judge, to whom such application is made, shall forthwith award a writ of habeas corpus unless it appears from the petition itself that the party is not entitled thereto."<sup>31</sup>

The petition, needless to say, having been prepared by counsel employed to secure the prisoner's release did not disclose on its face any reason why the writ should not issue. In these circumstances the clear duty of the court was to issue the writ or an order to show cause.<sup>32</sup> Whether the prisoner was entitled to his discharge was a different matter.

Federal Judge Delbert E. Metzger, before whom the application was made, entertained no doubt of the duty of the court under the judicial code but denied the writ on the ground that General Orders 57<sup>33</sup> forbade its issuance, adding:

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<sup>31</sup> R. S. 755, U. S. C. Title 28, §455.

<sup>32</sup> Walker v. Johnson (1941) 312 U. S. 275, 282.

<sup>33</sup> This military order forbade, under heavy penalty, trial by jury and the issuance



"I feel that the court is under duress by reason of the order and not free to carry on the function of the court in a manner in which the court conceives to be its duty."

The compulsion which the District Court thought it was under certainly did not extend to the Circuit Court of Appeals sitting in San Francisco. The minimum requirements of due process and orderly judicial procedure would seem to have required a return setting forth the suspension of the privilege of the writ, the reasons for the prisoner's detention, and the allegation that the public safety required such action. Whether the petition and such a return would have raised issues for judicial determination could only be known after the writ (or an order to show cause) issued and the return was filed. The issuance of the writ, or an order to show cause, would not have concluded the question of the prisoner's right to be discharged.

The Circuit Court of Appeals, without any pleading, other than the petition, or evidence, concluded that the privilege of the writ was validly suspended on December 7, 1941, that the "petition and facts of which the court was required to take judicial cognizance were together to be considered as constituting the application"<sup>34</sup> and that since the petition disclosed that the detention was "after an inquiry related in some way to the public safety"<sup>35</sup> in an area where the privilege of habeas corpus had been lawfully suspended concluded "the futility of further inquiry was apparent on the face of the petition."<sup>36</sup>

One of the facts of which the Court of Appeals took judicial notice as constituting (together with the petition) the application, was that the "Hawaiian Islands, owing to their position and the inclusion in their population of so large an element presumptively alien in sympathy, are peculiarly exposed to fifth column activities."<sup>37</sup>

A vigorous dissent was filed by the late Judge Haney who, after reviewing the history of the writ, concluded that the petition was sufficient on its face to challenge the validity of the appointment of

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of the writ of habeas corpus; the full text of the order may be found in 30 CALIF. L. REV. 371, 396.

<sup>34</sup> *Supra* note 30, at 445, 446.

<sup>35</sup> *Ibid.* at 446.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* How the court allowed unfounded rumor to creep into its opinion is puzzling in view of official statements to the contrary by the Attorney General and the highest military and naval authorities months before in the final Tolan Committee report (H.R. No. 2124, 77th Cong. 2d Sess.). The court was entitled to take judicial notice of such a report, *Tempel v. United States* (1918) 248 U.S. 121.

the Board and that the court should have issued the writ or an order to show cause and passed upon the issue whether military necessity required the prisoner's detention. The dissent unfortunately confuses martial law with military government.<sup>38</sup>

A petition for certiorari was filed in the Supreme Court. The Solicitor General filed a memorandum with the Supreme Court suggesting that the case had become moot by reason of action of the War Department removing Zimmerman from Hawaii and releasing him unconditionally the day before certiorari was applied for. Upon this showing the Supreme Court denied the petition noting in the memorandum decision "that Hans Zimmerman, on whose behalf the petition is filed, has been released from the respondent's custody."<sup>39</sup>

There can be no doubt but that the facts warranted the original declaration of martial law and the suspension of the privilege of the writ of habeas corpus. It may also be conceded that for a period following the outbreak of war martial law was lawfully in effect, and the privilege of the writ of habeas corpus was lawfully suspended. The Circuit Court of Appeals, however, proceeded upon the view that once it found the original declaration valid the duty of the court to look further was discharged. This might be termed a "blanket view" of martial law. In other words, a declaration once made is a permanent seal over cases that later arise, thus preventing judicial inquiry concerning them. This view does not square with any accepted principle of martial law. The lawful existence of a state of martial law is a matter of fact, not a matter of proclamation; the validity of any act done in the name of martial law rests not upon the presence or absence of a proclamation but the existence of a military necessity justifying the act in question.

The high prerogative writ remained unused in Hawaii until July 30, 1943, when two naturalized Germans filed petitions for writs. Their cases<sup>40</sup> later made the headlines from Maine to California. The petitioners alleged they were citizens of the United States held in custody by military authority (one since December 1941, the other since December 1942); that no charges have been made against

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<sup>38</sup> *Ibid.* at 449, 450.

<sup>39</sup> *Ibid.* Zimmerman v. Walker, *supra* note 30, 87 L. Ed. 928. For Zimmerman's story of his internment on Sand Island, Hawaii, on December 8, 1941, his removal to Camp McCoy, Wisconsin, his return to Sand Island, the second removal from Hawaii and his final release, see Chicago Daily Tribune, August 20, 1943.

<sup>40</sup> *Ex parte* Seifert, U. S. D. C. (Haw.) No. 296; *Ex parte* Glockner, U. S. D. C. (Haw.) No. 295.

them; that they violated no law of the United States, the Territory, or any executive or military order but were confined in a military internment camp on the Island of Oahu and were restrained of their liberty by Lt. Gen. Robert C. Richardson, Commanding General, Hawaiian Department. The petitions concluded with the prayers that a writ or order to show cause issue.

The United States Attorney appeared for the respondent, filed motions to dismiss, alleging that Hawaii was under martial law by proclamation of the Governor and that the privilege of the writ of habeas corpus was suspended. The motion challenged the jurisdiction of the court over the persons of the petitioners and respondents and prayed that the petitions be dismissed.

The court overruled the motions upon two grounds: first, that under the Governor's proclamation of February 8, 1943, the privilege of the writ of habeas corpus was restored; and second, that although a state of war exists, there was no showing that the Territory was in "imminent danger" of invasion and concluded that the petitions on their face were sufficient and ordered the writ to issue. The writ, in the usual form, was handed to the marshal for service upon the General whose office is across the street from the Federal Court. A deputy marshal called at the office and upon being told that the General was in conference, waited outside. The deputy endeavored to serve the papers as the General left his office, but was man-handled by military police who prevented service.<sup>41</sup>

The court upon being advised of this instructed the marshal to continue his efforts to serve the General. On August 18 the marshal returned the writ as unserved for the reason that the General "evaded service". Time for service was extended until August 21, on which date the cause came on for hearing. The marshal's return disclosed that the General had been served with the writ on August 20. The United States Attorney requested ten days to file returns to the writs upon the ground that the petitioners were detained more than 20 miles distance from the court house.<sup>42</sup> The court asked for

<sup>41</sup> See Transcript of August 16, 1943, in *Glockner and Siefert cases*, *supra* note 40.

<sup>42</sup> The judicial code provides: "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days." Rev. Stat. 756, U. S. C. Title 28, §456. The time of return and distances were no doubt taken from the Habeas Corpus Act of 1679, 31 Charles II, c. 2; the writ is discussed at some length by Chancellor Kent; 2 COMMENTARIES ON AMERICAN LAW (14th ed.) 26 *et seq.*

evidence of the distance of the internment camp from the court house. Upon investigation the United States Attorney reported the distance to be 19½ miles. The court then fixed the time for the return of the writ and the production of the bodies.

On the return day, August 24, the United States Attorney advised the court that the bodies of the petitioners would not be produced<sup>43</sup> and offered to read a statement from the General. The court declined to entertain the statement and instructed the United States Attorney to prepare a citation for contempt. A citation was prepared and served on August 24. On the following day the contempt proceedings<sup>44</sup> were heard, the court reviewed the habeas corpus cases, found the General in "open and notorious defiance of the mandate of the court" and sentenced him to pay a fine of \$5,000. On the same day the General issued the famous General Orders No. 31.<sup>45</sup>

The end sought by the order was the prohibition of all pending and future habeas corpus proceedings in Hawaii and to provide penalties for its infraction—a simple task.

The order is divided into six sections of sixteen paragraphs. The declared purpose (1.01) was to prevent "interference with military operations"; officers of the District Court were prohibited (2.01) from filing petitions or issuing process in habeas corpus; the judges (2.02) were similarly enjoined; the injunction was reiterated in the next two paragraphs (2.03, 2.04); the public generally and attorneys in particular were similarly enjoined (2.05) as was the United States Marshal (2.06); judges of the District Court were directed to discontinue pending habeas corpus proceedings (2.07); Judge Metzger was ordered (2.08) to refrain from proceeding in *Ex parte Glockner* and a companion order (2.09) was inserted in regard to *Ex parte Seifert*; officers of the Federal Court were ordered to refrain (3.01) from opposing any orders of the General or the Military Governor "regardless of whether or not such order or orders are published in the newspapers"; the order in its entirety was made applicable (4.01) to pending and future cases in the United States courts or any other<sup>46</sup> court of the Territory of Hawaii; lest the foregoing paragraphs be thought to leave any loophole, 4.01 added a rule of construction that

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<sup>43</sup> The judicial code provides: "The person making the return shall at the same time bring the body of the party before the judge granting the writ." U. S. C. Title 28, §458.

<sup>44</sup> *United States v. Richardson*, U. S. D. C. (Haw.) Misc. No. 139.

<sup>45</sup> Appendix V. See Honolulu Advertiser, August 26, 1943.

<sup>46</sup> The draftsman was either unaware of or not satisfied with the holding in *Tarble's Case* (1871) 13 Wall. 397, giving the federal courts exclusive jurisdiction in such cases.

the order "shall be liberally construed"; the penal provisions made the punishment fit the crime, any person who violated the order or aided and abetted its violation upon conviction in a provost court was subject to five years imprisonment or \$5,000 fine or both, or if convicted by a military commission,<sup>47</sup> was subject to such punishment as the military commission imposed; the order concludes with the recital that its issuance was by the General in his capacity as Military Governor and Military Commander and in the exercise of his martial law powers. A copy of the order was served in person by the provost marshal under arms upon the two Federal judges.

The manual gives concise instructions on what to do with a writ of habeas corpus issued from a Federal court:

"The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued and a return made setting forth the reasons for his restraint."<sup>48</sup>

The instructions do not say they apply only in time of peace or when the privilege of the writ has not been suspended, nor do they state the contrary, but assuming the latter was intended, the Commanding General must be guided by counsel as to how he should proceed. It is difficult to see how counsel could have advised either the use of force to prevent service or the issuance of General Orders No. 31; neither was necessary to maintain the General's position. Had the ruling of the district court been adverse, an appeal could be taken to the Circuit Court of Appeals and probably the Supreme Court of the United States would have entertained the cause on certiorari before judgment in the Circuit Court of Appeals. If the refusal to produce the body of the prisoner at the time of filing the return be considered essential to the Army's position, that issue could have been appealed and finally determined before a hearing on the merits of the petition.

As might be expected the issuance of this order caused a breach between the court and the General. The court was powerless to act in face of the order and the General, unfortunately was placed in the position of refusing to obey the process of a federal court, countenancing the physical abuse of a United States Marshal, and finally by written order threatening the public in general and Judge Metzger

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<sup>47</sup> Existing General Orders No. 2 (3.01) authorize the imposition of any sentence including the death penalty by military commissions: Honolulu Advertiser, March 10, 1943.

<sup>48</sup> *Supra* note 11, at 193.

in particular with the provost court if they had any part in a habeas corpus proceeding. This may sound like a comic opera, but the collision between two arms of the federal government in the form of a federal judge and a commanding general both held in high regard in the community, was anything but humorous.

The cause engaged the attention of the Departments of War, Interior and Justice in Washington. A special assistant to the Attorney General was dispatched to Hawaii together with a representative from the War Department to get the case back on the track.

The final chapter of these cases, so far as the District Court of Hawaii is concerned, was written on October 21, 1943. At this time motions to dismiss the two habeas corpus cases were presented upon the ground that they had become moot by reason of the removal<sup>49</sup> of Siefert and Glockner from the jurisdiction, who by order of the Commanding General were set free upon their departure from the Territory. At the same time a motion was filed on behalf of the General to vacate the finding of contempt theretofore entered. At the hearing it appeared that General Orders No. 31 was rescinded<sup>50</sup> by General Orders No. 38 on October 14.

Two grounds were urged in support of the motion. The first, addressed to the discretion of the court, that is, that the General was not in contempt since in failing to produce the bodies of the petitioners he was acting under instructions from his superior officer General George C. Marshall, Chief of Staff, and the second that where the executive has attempted to suspend the privilege of the writ of habeas corpus, as a matter of law the bodies need not be produced.

Judge Metzger in his decision rendered at the close of the hearing concluded that the removal of the petitioners from the jurisdiction was no affront to the court since petitioners requested it and were set free (which was all that any court could have done for them in habeas corpus had they been successful). He then called attention to the fact that it was unfortunate that the General was made to say in his return filed with the newspapers<sup>51</sup> (not the court) that the petitioners were dangerous to the "public peace and safety of the United States if released from his custody and internment and allowed to remain at large."

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<sup>49</sup> Pursuant to 56 Stat. (1942) 173; 18 U. S. C. 97a.

<sup>50</sup> General Orders No. 38, although in terms effective October 14, was not published until a week later: Honolulu Advertiser, October 22, 1943. This is not unusual; frequently orders are issued effective forthwith but published at a later date. The order reads: "General Orders No. 31, this office, 25, August 1943, hereby is rescinded."

<sup>51</sup> Honolulu Advertiser, August 26, 1943.

The court next observed that General Orders No. 31 directed to the judge of the court by name and all other persons in Hawaii, was rescinded but concluded that the motion to vacate the court's finding of contempt should be denied and finally that in view of the fact that the General was acting under orders from his superior officers, the fine of \$5,000 should be reduced to \$100. The court stated:

"It now appears that the aspects of the circumstance that brought about the heavy fine imposed on General Richardson did not fully portray all the surrounding facts. At the time he was cited for contempt he had a mitigating defense, but it was not presented to the court because it appears that his advisors were bent on following a different course.

"... While I cannot wholly absolve him for following the views of General Marshall or others in disregard of federal law concerning civilian rights before a court when to follow such course was clearly known to him to be an obstruction to the administration of justice, I feel that the sentence of fine heretofore imposed should be modified. . . ." <sup>52</sup>

The removal of Messrs. Glockner and Seifert from Hawaii, thus rendering their cases moot, prevented a final determination on the status of the writ. Had the case gone to final judgment, in all likelihood it would have been appealed and perhaps it would have been passed on by the Supreme Court.

It is understandable that the local press, puzzled by the turn in events, first announced that the privilege of the writ of habeas corpus was restored. This, no doubt, was because of the rescission of General Orders No. 31 by General Orders No. 38. If the writ was lawfully suspended by virtue of the proclamation of February 8 and the factual situation existing at the time its suspension was challenged in court, no military order could affect its legal status. In other words, neither of these orders had any legal effect upon the status of the writ of habeas corpus; the former had the practical effect of deterring the courts from action by force so long as it was outstanding, while the latter served only to confuse the public when it rescinded General Orders No. 31.

A statement to the press<sup>53</sup> by Mr. Edward J. Ennis, Special Assistant Attorney General, who represented General Richardson, clarified the situation by pointing out that the recent proceedings

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<sup>52</sup> Transcript, *United States v. Richardson*, *supra* note 44.

<sup>53</sup> Honolulu Star Bulletin, October 22, 1943; Honolulu Advertiser, October 23, 1943.

did not conclude the issue and that the "position" of the Department of Justice was that the writ was lawfully suspended in cases of detention for military reasons. This was a departure from the previous view<sup>54</sup> of the Office of the Military Governor that the writ was suspended in all cases whether related or unrelated to military security. It would seem clear that, although the proclamation of December 7 suspended the privilege of the writ in general terms, it would be rather absurd to include cases involving custody of minors or others not held under military authority.

Martial law correctly understood, applied in time of war, is nothing more nor less than an exercise of the war powers—the national right of self defense—the particular exercise of which in any given case must stand or fall on the presence or absence of military necessity to justify it. Every act then under martial law, whether it be the detention of an individual, the seizure of his property or his trial before a military tribunal, if challenged in the courts, presents for judicial inquiry the justification of the act in question. Some acts are clearly supportable; others may not be defended upon any accepted standard of justification, and between the two extremes lie the situations that cannot be pigeon-holed in advance as lying on either one side or the other side of the line.<sup>55</sup>

The line itself can only be determined by the process of inclusion and exclusion. For example, in the matter of detention of an individual a bright line exists between the case of a person held for reasons of military security and all other cases of detention. Similarly, there is a substantial difference between the detention of an individual for a reasonable period for reasons of military security and the trial and conviction of a civilian before a military tribunal. Within the field of the trials of civilians before military tribunals differences may exist as, for instance, the trial of a person charged with violating the territorial embezzlement statute and the trial of a person charged with violating a military order relating to the entry in the water-front area without a pass.

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<sup>54</sup> Cf. G. O. 57, *supra* note 33, G. O. No. 2, *supra* note 29, and G. O. 31, *supra* note 45.

<sup>55</sup> Willoughby in his able discussion of the Milligan case says: "The better doctrine, then, is, not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption." 3 WILLOUGHBY, *op. cit. supra* note 16, at 1602.



If, in a given case, the Territory is in fact in imminent danger of invasion and the public safety requires the detention of an individual, any court would be loath to substitute its judgment for that of the military commander in the theater of operations; on the other hand, it is somewhat difficult to justify or rationalize the trial of civilians before military tribunals for the violation of territorial or federal laws during a period when the courts of the land are open and ready to perform their judicial functions but are forbidden only by the force of the order of the Commanding General.

As has been pointed out by one who has made important contributions in this field, both on and off the bench, "the test should not be a mere physical one";<sup>56</sup> however, the very fact that the courts of Hawaii have been open and functioning continuously since the early part of 1942 disposing of the business before them is rather convincing proof that no military necessity has required the trial of civilians for the violation of federal or territorial laws before the provost courts. With trained judges and clerks ready, able and paid to discharge the duties of their offices and the total absence of civil strife or disorder, one who would defend the substitution of the provosts for the duly constituted judiciary upon the ground of military necessity has undertaken a heavy burden.

The preliminary ruling of Judge Metzger in the *Glockner* and *Seifert* cases (*supra*) that a writ should issue was based upon two grounds: first, that the proclamation of February 8 restored the privilege of the writ, and second, that the facts existing at the time of the hearing did not warrant the conclusion, in the absence of a showing to the contrary, that Hawaii was in imminent danger of invasion.

Although the concurrent proclamations of February 8, 1943, are substantially identical, the Governor's proclamation refers to the original proclamation of December 7, 1941, placing the Territory under martial law and then recites: "Whereas a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended," the general's proclamation contains no such reference; neither contains an express order continuing a state of martial law and the suspension of the privilege of the writ of habeas corpus. The contemporary expressions<sup>57</sup> of intention by those participating in the restoration of civil authority left no doubt but that it was in-

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<sup>56</sup> Hughes, *War Powers Under the Constitution*, SEN. DOC. 105, 65th Cong. 1st Sess., 12, 42 A. B. A. REP. 232.

<sup>57</sup> Press release of Governor Stainback and General Emmons, Honolulu Star Bulletin, February 9, 1943.

tended to keep martial law in effect and to continue the suspension of the privilege of the writ. The meaning of the proclamation, like other writings, is to be gathered from the document itself and not by expressions of intention outside of it. It may be doubted whether parol evidence of intention is admissible in construing such an instrument.<sup>58</sup>

The reasoning of the court on first ground was that the Governor proclaimed on February 8, 1943, that thirty days later the courts should resume their "functions and powers, according to law," one of the functions of a federal court was to issue writs of habeas corpus and that the only way to prevent the conclusion that the privilege of the writ of habeas corpus was restored would be by a new executive finding that on February 8, 1943, the Territory was in imminent danger of invasion and that the public safety required a suspension of the privilege of the writ on that day. Since there was no such executive finding or order in the proclamation the court concluded that the privilege of the writ of habeas corpus was restored.

As a matter of construing a written instrument there is a question whether the language of the proclamation continues martial law in effect and suspends the privilege of the writ of habeas corpus. The intention to retain martial law and suspend the privilege of the writ can be gathered from the proclamation itself without resort to parol evidence. The division of civil and military control over certain subject matters is consistent with this and inconsistent with the construction that martial law was lifted and the privilege of the writ restored. What, for example, would be the source of the General's control over certain labor if martial law were intended to cease?

While the fact that most of the functions of government were restored to civil authority may be a compelling argument against the necessity for martial law and the suspension of the privilege of the writ and in the absence of a finding of necessity or imminent danger of invasion (the proclamation contains none) may be evidence of the absence of the ultimate fact which authorizes the exercise and continuance of the extraordinary powers granted the Governor by the Congress under Section 67 of the Hawaiian Organic Act, it is not an argument as to what the proclamation means.

It might be urged that an intention to retain martial law is not inconsistent with an intention to restore the privilege of the writ of

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<sup>58</sup> *The Buena Ventura* (1899) 175 U.S. 384, 389; WIGMORE, *EVIDENCE* (3d ed. 1940) §2427.

habeas corpus since the two are not identical. This, however, loses sight of the fact that the important thing from a military security standpoint, is to assure the right to detain suspected individuals; other matters are comparatively insignificant. Hence it is unlikely that a major item such as the privilege of the writ was intended to be restored while items of lesser importance in the same general field were intended to be assigned to military control.

The second ground for Judge Metzger's decision, that is, that no necessity exists for the suspension of the privilege of the writ of habeas corpus, is not so easily disposed of.

The Federal Constitution, Article I, Section 9 provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>59</sup>

The Hawaiian Organic Act provides that the Governor 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. . . ."<sup>60</sup>

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<sup>59</sup> This clause was the subject of considerable discussion at the Constitutional Convention. Pinckney's original draft would have limited the suspension to a stated period, Rutledge favored no suspension, Wilson doubted the necessity of it but finally it was adopted by vote of seven states to three, 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION (1911) 334, 340, 341, 342. Thomas Jefferson, writing from Paris in 1788 to Madison, rejoiced at the adoption of the new constitution by nine states but protested the absence of a bill of rights and the provision suspending the privilege of the writ of habeas corpus: "It is a good canvass, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. . . . Why suspend the Hab. Corp. in insurrections & rebellions? The parties who may be arrested may be charged instantly with a well defined crime, of course the judge will remand them. If publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken & tried, retaken & retried, while the necessity continues, only giving him redress against the government for damages. Examine the history of England. See how few of the cases of the suspension of the Habeas corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, & the minds of the nation almost prepared to live under its constant suspension." 5 FORD, THE WORKS OF THOMAS JEFFERSON (Fed. ed. 1904) 426.

<sup>60</sup> *Supra* note 6. A basic difficulty with this section is that it was lifted from the Constitution of the Republic of Hawaii, which contemplated further legislation upon the occasion of its use, such as was enacted in the one case arising under the provision. *In re Kalamianaoale* (1895) 10 Hawaii 29 (see 30 CALIF. L. REV. 383, n. 48). Congress

The Constitution requires an actual invasion or rebellion before the privilege of the writ of habeas corpus can be suspended. The Hawaiian Organic Act, on the other hand, says that the Governor may suspend the privilege of the writ of habeas corpus in case of invasion or imminent danger thereof when the public safety requires it.

Probably the Supreme Court today would uphold the suspension of the privilege of the writ if the facts disclosed that we were in "imminent danger" of invasion and "the public safety requires it" for the reason that modern warfare is not subject to the limitations of time and space as was warfare at the time the Constitution was adopted. It would seem clear, however, that the Court would require a showing of these facts before upholding the suspension of the privilege of the writ of habeas corpus at this late date. In determining these facts great weight will be placed upon the executive and military determination but it cannot escape its constitutional duty of an ultimate determination of the law and facts upon which depend the civil liberty of a citizen.

Many high ranking officers of both the Army and Navy openly say that the danger of invasion of Hawaii has long since passed, and that the enemy cannot muster sufficient strength to make an attack in force on Hawaii, although they point to the possibility of future air raids or submarine attacks. In his press release of January 1, 1943, General Emmons stated that Hawaii was

"... safe under the protective guns of one of the greatest fortresses on earth against any invasion the Japanese may be able to organize. . . ."<sup>61</sup>

The following facts would be relevant to the issues of "imminent danger" of invasion and what the "public safety requires": the processes of the federal, territorial and county governments are operating

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has enacted no legislation to implement Section 67 of the Hawaiian Organic Act, hence there are no terms or conditions of detention; *cf.* the Habeas Corpus Act of 1863 (12 Stat. 755) which required the Secretary of State and the Secretary of War to file with the judges of the circuit and district courts of the United States the names of prisoners, the date of their arrest and provided for their discharge in the event the grand jury met after the list was filed and adjourned without finding an indictment against the prisoner.

Section 67 of the Hawaiian Organic Act was the pattern of a similar provision later enacted for Puerto Rico [39 STAT. (1917) 951, 955 U. S. C. Title 48 §771]. It is of interest that the proposed amendments to the Organic Act of Puerto Rico recently submitted to the Congress by the President omit all reference to martial law and the writ of habeas corpus, see H. R. Doc. #304, 78th Cong., 1st Sess.

<sup>61</sup> Honolulu Star Bulletin, January 1, 1943.

smoothly and efficiently as they have done for many months; the courts have been sitting continuously in the trial of civil and criminal cases for more than a year; grand juries and trial judges are regularly summoned and perform their duties; guards around territorial buildings are gone; barbed wire that blocked the entrances to public places has been removed; the curfew has been extended from 8 p.m. to 10 p.m.; blackout restrictions have been relaxed to permit the showing of light not facing on the sea; newspapers and radio stations have operated continuously; the schools and churches are open; theaters, places of amusement, restaurants and bars are open; the island's principal business, the production of sugar and pineapple, has flourished, 778,891 tons of sugar and 409,228 tons of pineapple were exported last year; the carrying of gas masks has long been discontinued both by civilians and military personnel; the service personnel stationed here no longer carry sidearms; political campaigns and elections have been held and the legislature has met in the accustomed place in regular session; the board of supervisors, and commissions meet regularly to perform their duties; civilians who were urged to evacuate in 1941 and early 1942 are now being returned; steamers ply between Hawaii and the mainland; inter-island steamers call at the several island ports at planned irregular sailings; aircraft arrive and depart daily from overseas journeys; the treasury has revoked the regulations relating to the custody of securities; in short, people go about their business in a manner normal for any community in wartime.

As against the foregoing facts (which no doubt would be admitted if the issues were ever litigated) counsel seeking to uphold the suspension of the privilege of the writ would put on evidence by a military expert to the effect that submarines have been found in this area, that they are efficient instruments of modern warfare, that it would be possible for an enemy carrier to come within striking distance of our shores and launch an aerial attack, that the phases of modern warfare are highly mobile and subject to lightning changes and that, therefore, the conclusion of the expert would be that Hawaii is in imminent danger of invasion.

In support of the proposition that the public safety required the suspension of the privilege of the writ, a military expert would no doubt give evidence of the importance of military installations in Hawaii, the importance of Hawaii as a principal offensive base in the Pacific, the possible vulnerability to fifth column activity which

is known to be the usual enemy technique prior to an attack or invasion.

Cross examination of such an expert would avail little because the subject matter is a field peculiarly within the knowledge of military and naval authorities, and one could hardly expect a difference of expert opinion on such an issue. Furthermore, any military expert who found himself in an awkward situation on cross examination could always decline to answer on the ground that military secrecy forbade the disclosure sought and the court no doubt would sustain his refusal.

Confronted with such a record as suggested above, the court would be obliged to pass on the question. The conclusion reached would depend entirely upon the facts existing at the time.

#### MARTIAL LAW IS A TEMPORARY MEASURE TO RESTORE CIVIL POWER

Martial law never was intended to be of a permanent or even semi-permanent nature. Its existence is bottomed upon necessity and may be called into play irrespective of any proclamation or statute authorizing its declaration. Its purpose is to afford a justification for the exercise of extraordinary powers which otherwise would render a military commander answerable in damages. Martial law has always been employed to put down civil strife, insurrection or repel invasion so that the civil authorities could be reinstated (if disrupted) to function under the law. The moment order is restored, the necessity for martial law (hence its justification) ceases to exist.

"As necessity creates the rule, so it limits its duration."<sup>62</sup>

No one can say that Hawaii cannot govern herself or that the processes of civil government are disrupted to the point that it is necessary to continue to superimpose a military government or to continue martial law. From the standpoint of military security there is no need for the continuance of martial law since ample power exists under federal and territorial law to cope with any emergency.

The mere fact that Hawaii was attacked on December 7, 1941, is no justification for the continuance of martial law two years after. The justification for the continuance of martial law depends upon the facts existing at the time it is challenged. The facts which will warrant the continuance of martial law must disclose a necessity of

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<sup>62</sup> *Ex parte Milligan*, *supra* note 16, at 127.

such urgent character that will not admit of delay. The proposition that it does not depend upon the arbitrary fiat of the executive is well settled.

The subject of martial law received the attention of the Supreme Court in a case in which it was argued that the actions of the Governor of Texas in declaring martial law and issuing military orders directed against a federal court could not be judicially examined. Chief Justice Hughes speaking for a unanimous court said:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land. . . . 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. . . ." <sup>63</sup>

And again the Court said on the subject of whether the executive determination could be judicially examined:

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." <sup>64</sup>

A more striking example of the supremacy of the law was the recent trial of the Nazi saboteurs who landed on the east coast of the United States bent on the destruction of war industries. The President, as President and Commander-in-Chief, by order of July 2, 1942, <sup>65</sup> appointed a military commission for their trial and on the same day the President issued a proclamation denying such persons, as a class, access to the courts. He proclaimed that:

". . . all persons who are subjects, citizens or residents of any nation at war with the United States . . . who during time of war enter or attempt to enter the United States . . . and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be sub-

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<sup>63</sup> *Sterling v. Constantin* (1932) 287 U. S. 378, 397-398.

<sup>64</sup> *Ibid.* at 400, 401.

<sup>65</sup> 7 Fed. Reg. 5103.

ject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy, or maintain any proceeding directly or indirectly or to have any such remedy or proceedings sought on their behalf, in the courts of the United States or of its states, territories and possessions. . . ."<sup>66</sup>

Notwithstanding this prohibition<sup>67</sup> the saboteurs petitioned the United States District Court for the District of Columbia for writs of habeas corpus and promptly had their cases reviewed and determined by the Supreme Court.

The decision of the Court (that is, that unlawful belligerents who pass through the lines to destroy war materials and utilities are triable before military tribunals for offenses against the laws of war) is, of course, no authority for the trial of civilians who are not charged with a violation of the laws of war or the articles of war. On the contrary the Court has given notice that it will not be bound by a proclamation of the President as to what class of persons may be deprived of the kind of trial provided by Article III of the Constitution or what acts may be included within the phrase the "offenses against the laws of war." The ruling of the Court upon the Attorney General's argument that petitioners were not entitled to be heard in any court is highly significant. The Court said:

"It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."<sup>68</sup>

Reflection upon this proposition shows how necessary this conclusion is to preserve the civil liberty of the individual in time of war. The broad proposition urged by the Attorney General pressed to its logical limits would enable the Executive to foreclose access to the courts and decree military trials without giving any court the right and duty to pass upon the jurisdiction of the military tribunal

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<sup>66</sup> 7 Fed. Reg. 5101, 10 U.S.C. §1554.

<sup>67</sup> The presidential proclamation was against individuals seeking access to the courts; it was not directed to the courts; *cf.* General Orders 31, *supra* note 45.

<sup>68</sup> *Ex parte Quirin*, *supra* note 1, at 25; noted in (1943) 56 HARV. L. REV. 631; (1942) 41 MICH. L. REV. 481.



over the individual in question or the subject matter over which it claimed jurisdiction. Under the Federal Constitution no military tribunal even in time of war can be the final judge of its own jurisdiction. If this were so, then executive fiat, not the Constitution and laws in pursuance thereof, would be the supreme law of the land.

From the discussion thus far it should be fairly clear that cases which involve the jurisdiction of military tribunals, the validity of acts done under martial law, and the suspension of the privilege of the writ of habeas corpus are the proper subjects of judicial inquiry. It is not unlikely that some of these problems will be ultimately determined by the Supreme Court unless they are settled earlier by executive action.

Apart from whatever conclusion may be reached by the Court, if a case involving these issues ever reaches it, an executive review of the subject would seem advisable. It is the writer's view that the Court should not be called upon to determine such issues except as a matter of last resort, that is, after the executive departments of government have examined the matter and arrived at a considered judgment.

It is submitted that the termination of martial law and restoring the privilege of the writ of habeas corpus by proclamation could be effected now without the slightest danger to military security.

#### EXISTING FEDERAL LAW GRANTS EVERY POWER NECESSARY FOR INTERNAL SECURITY

Some who are not acquainted with either the subject of martial law or the acts of Congress are under the misapprehension that a lifting of martial law or restoring the privilege of the writ of habeas corpus would expose Hawaii and the Nation to grave dangers.<sup>69</sup> Nothing could be farther from the fact. The Congress has not overlooked the dangers on the home front. For the very purpose of internal security Congress enacted the following statute:

"That whoever shall enter, remain in, leave or commit an act in any military area or military zone prescribed, under the authority of an executive order of the President, by the Secretary of War or by any military commander designated by the Secretary of War contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of

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<sup>69</sup> New York Times, Sept. 16, 1943; Honolulu Advertiser, Sept. 12, 17, 1943.

the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5000 or to imprisonment for not more than one year, or both, for such offense."<sup>70</sup>

Prior to the adoption of this statute, the President by Executive Order No. 9066 of February 19, 1942,<sup>71</sup> authorized the Secretary of War and the military commander designated by him

“... to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion.”

On March 2, 1942, General DeWitt of the Western Defense Command promulgated Public Proclamation No. 1<sup>72</sup> establishing a portion of the Pacific Coast as a military area. This was followed by Public Proclamation No. 2 of March 16, 1942,<sup>73</sup> setting forth certain restrictions in these areas applicable to persons remaining within them. On March 18, 1942, Executive Order No. 9102<sup>74</sup> was issued by the President establishing the relocation program.

At the time the military area statute was discussed in the Senate, the executive orders of the President and the public proclamation of the Western Defense Command were before Congress. The Supreme Court, in upholding the validity of the statute in the West Coast curfew cases,<sup>75</sup> ruled that Congress had ratified Executive Order No. 9066.

Under the provisions of the Act of Congress military areas and zones have been established on the West Coast, the East Coast, along the Gulf of Mexico and Alaska, and measures necessary to security have been taken. An examination of the Federal Register discloses no order designating Hawaii as a military area pursuant to Executive Order No. 9066; however, General Orders No. 7, 3.01,<sup>76</sup> dated March

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<sup>70</sup> *Supra* note 49.

<sup>71</sup> 7 Fed. Reg. 1407.

<sup>72</sup> *Ibid.* 2320.

<sup>73</sup> *Ibid.* 2405.

<sup>74</sup> *Ibid.* 2165.

<sup>75</sup> *Hirabayashi v. U. S.* (1943) 63 Sup. Ct. 1375, 87 L. Ed. Adv. Ops. 1337; the Court did not pass upon the evacuation orders but confined its judgment to the curfew order which it found valid and sufficient to support the sentence below.

<sup>76</sup> *Supra* note 29.

10, 1943, issued by General Emmons, establishes Hawaii as such an area and would seem to fulfill the requirements of the statute.

If the designation of Hawaii as a military area has not been completed in the manner required by the law, it would be a simple matter to promulgate such a regulation and publish it in the Federal Register. This would afford an orderly and lawful basis for any measure which the Commanding General might reasonably promulgate. Such regulations would have the force and effect of law and would be enforced in the federal court. The Commanding General would then be in the position of acting under powers granted by Congress. He could not, to be sure, erect a military government or enforce regulations in provost courts, but a solid basis for an orderly administration of military measures would be assured.

The decision of the Supreme Court in *Hirabayashi v. United States*<sup>77</sup> makes it clear that any regulation or order, which at the time of its issuance, is reasonably necessary in the judgment of the military commander to resist threatened injury or damage, will be upheld. A procedure could be worked out to exclude from the Hawaii area persons whom the intelligence services believe to be dangerous to the public safety; to be sure the exclusion could not be a star-chamber proceeding, the basic requirements of due process (notice and fair hearing) would have to be met.

Under the program in Hawaii, suspected citizens were rounded up and placed in a local interment camp. They were given no hearing, such as is known to any judicial or administrative proceedings, since the "hearings" apparently consist of reports of investigations and cross examination of the suspected individuals. No charges either oral or written are furnished the prisoner. The proceedings are secret; prisoners are not confronted with witnesses against them, nor are they charged with any specific act. Civilians (whose identity is not disclosed) participate in these proceedings in an advisory capacity of some nature. Regulations governing the proceedings are not made public.

The procedure in Great Britain<sup>78</sup> under the famous Regulation 18B might well be considered by us. Under their system constitutional provisions of course present no difficulty since Parliament is supreme. Notwithstanding this difference we can still learn from a people who are both liberty-loving and tough. In the first place

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<sup>77</sup> *Supra* note 75.

<sup>78</sup> Carr, *A Regulated Liberty* (1942) 42 COL. L. REV. 339.

internment is a civil function under the direct supervision of the Home Secretary, a high cabinet officer. The internee may object to the order of internment before an advisory committee (Mr. Carr reports that the chairman is Sir Norman Birkett, K.C., a judge of the High Court). The Home Secretary is obliged to inform the detainee of his right to object.<sup>79</sup> He is obliged to report the number of cases detained and the number in which he refused to follow the advice of the advisory committee. Finally the Home Secretary may be called to account at any time on the floor of the House of Commons. The procedure places the whole subject of internment on the high, serious level on which it belongs. The Attorney General of England has recently told us how Great Britain, even when she stood alone, true to the traditions that have made her great, insisted upon a reign of law and was not swept away by the false gods of totalitarianism.<sup>80</sup>

No doubt there may be individuals both in Hawaii and on the mainland who are suspected of disloyalty by the intelligence services, and those services find themselves unable to furnish proof of any overt act for which the suspected individuals could be charged. Such persons who are detained, as President Lincoln once put, "... not so much for what has been done, as for what probably would be done."<sup>81</sup>

If there are such individuals in any area, and military necessity required it, it would be within the provisions of the Act of Congress to order their exclusion. This would require a hearing at some stage and the order or exclusion could only be enforced in a federal court.<sup>82</sup> Persons excluded would be free to move about other parts of the United States (except other designated military areas) and go about their business as law abiding individuals. This would involve a minimum infringement on the liberties of the citizen and at the same time adequately secure the public safety. Aliens would present no problem

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<sup>79</sup> Cf. Zimmerman's allegation re advice being unnecessary, *Zimmerman v. Walker*, *supra* note 30.

<sup>80</sup> Somervell, *Law and Liberty* (1943) 29 A. B. A. J. 547.

<sup>81</sup> From the letter to Erastus Corning of June 12, 1863, a masterpiece of the reasons for the suspension of the privilege of the writ, STERN, *LIFE AND WRITINGS OF ABRAHAM LINCOLN* (Mod. Lib. ed.) 760. The conditions under which the privilege of the writ was suspended during the Civil War were far different from those prevailing today; then, the country was divided and the enemy was within our midst; today, the country is united and instances of disloyalty within are comparatively rare, cf. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941) 105.

<sup>82</sup> See concurring opinion of Douglas, J., in *Hirabayashi v. U. S.* (1943) *supra* note 75 at 1388, 87 L. Ed. Adv. Ops. at 1349.

for they could be interned in Hawaii by the same procedure as they are interned on the mainland. Possibly there could be added to the exclusion order a requirement that excluded individuals should report periodically to law enforcing offices so that their whereabouts and activities could be kept track of. A requirement that all naturalized citizens be obliged to report periodically to the FBI would not be objectionable upon constitutional grounds. Such regulations might be burdensome, but they would afford an orderly procedure under known law in sharp contrast with the action of the military authorities in Hawaii rounding up a number of persons (many of them citizens) moving some of them back to Camp McCoy, Wisconsin, and then returning them to the local internment camp in Hawaii, undoubtedly to avoid meeting the issue in a habeas corpus proceeding.

If it be true that Glockner and Seifert are "dangerous to the public peace and safety of the United States" as General Richardson was advised to say in his return<sup>83</sup> (filed with the newspapers, not the court) it is most unfortunate that they are at large. They have far greater latitude to do harm (if that is their bent) at large on the continent than they would have at large in Hawaii. A far more secure and orderly arrangement could be had if the matter were handled under the Act of Congress and pursuant to regulations issued thereunder.

Under this Act blackout, curfew, traffic, travel, radio and other restrictions could be imposed and every measure necessary for security could be taken. The great advantage over operating under the Act of Congress rather than under martial law, is that in the former case the War Department would be assured that it was acting in a perfectly valid manner. Only a successful challenge in the courts would limit such orders. It is safe to say that the Supreme Court would never countenance any exercise of judicial power that in fact interfered with the actions of a military commander which had any reasonable relation to military necessity that confronted him. Our judges are neither fools nor fifth columnists and are by training and experience equipped to perform the duties entrusted to them by Congress.

The internment of citizens who are disloyal or who are thought to be disloyal is a national problem. Such a person can do as much harm at the point of embarkation as he could do at a point of distribution such as Hawaii. Hawaii is only a distribution point for the

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<sup>83</sup> Honolulu Advertiser, August 26, 1943.

military production of the nation. None of the military necessities of Hawaii can be met unless the factories produce, nor unless their production is successfully transported. The question whether civil rights must stand aside throughout the entire war must be met by the nation as a whole, not by Hawaii alone.

As we have seen, offenses against the laws of war are properly triable before military tribunals. If the traditional list of such offenses is inadequate, it should be expanded. This is a national question. It is not answered by attempting to silence the courts of Hawaii with the excuse that Hawaii may be invaded. It is neither an honest nor an intelligent approach to the problem.

Congress has provided for the establishment of military areas, for the issuance of military orders, and for their execution and enforcement in the federal courts. If this law is inadequate for its avowed purpose, it should be strengthened and improved.<sup>84</sup> If one area is a more critical area than another, then the military orders for the more critical area may be of greater stringency. Military orders that could not be upheld in Boston might very well be upheld in Honolulu.<sup>85</sup> If there are persons who are not to be trusted to remain, they may be excluded. Once excluded, they may be accorded their civil rights on the mainland, whatever those may be. Hawaii's problem will have been met by their exclusion.

The two years that have elapsed since the outbreak of war have been ample time to get Hawaii's house in order. The record of her people in any phase of the current war would do credit to any state in the Union. The capacity for the government contemplated by the acts of Congress is not and could hardly be questioned. A substantial recovery of lawful authority has already been achieved but the task will not be complete until the present uncertain status is clarified. A termination of martial law by proclamation would seem to be the solution.

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<sup>84</sup> See Advanced Program American Bar Association (1943) 125.

<sup>85</sup> Cf. *Schueller v. Drum* (August 20, 1943) U. S. D. C. (E. Dist. Pa.) No. 3161; *Wilcox v. DeWitt* (September 15, 1943) U. S. D. C. (So. Dist. Calif) No. 283.

APPENDIX I  
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.

(SEAL OF THE TERRITORY OF HAWAII)

(SGD) J. B. POINDEXTER,  
Governor of the Territory of Hawaii.

APPENDIX H  
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.

(signed) Walter C. Short,  
Lieutenant General, U. S. Army  
Commanding.  
Military Governor of Hawaii.

### APPENDIX III

#### By the Governor of Hawaii

#### A PROCLAMATION

WHEREAS, the Governor of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawaii under martial law, in exercise of his powers under section 67 of the Organic Act, which action was confirmed by the President of the United States on December 8, 1941; and

WHEREAS, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended;

NOW, THEREFORE, I, INGRAM M. STAINBACK, Governor of Hawaii, under the authority given by section 67 of the Organic Act, do hereby proclaim:

1. The Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law, with respect to the following matters, and others necessarily related thereto:

- (a) Control of prices
- (b) Rationing of commodities among the civilian population
- (c) Control of hospitals, medical personnel, and medical supplies
- (d) Food production by and distribution of food among the civilian population
- (e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours



(g) Public Health, sanitation, and prevention of disease among civilians  
(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the Territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the Territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. For the purposes of the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations, the Commanding General shall continue so far as he deems the military security of the Territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are resumed by civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to exercise such of the functions and jurisdictions as are hereby or may hereafter be resumed by the civil authorities, or to issue such additional military orders, after consultation with the Governor of the Territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the Territory.

4. Nothing in this proclamation shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred or shall occur prior to the thirtieth day hereafter.

5. I call upon all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and spirit, such orders as the

Commanding General may issue under this proclamation and during the continuance of the state of martial law.

DONE at Honolulu, Territory of Hawaii, this 8th day of February, 1943.

(SEAL OF THE TERRITORY OF HAWAII)

(SGD) INGRAM M. STAINBACK

Governor of Hawaii

APPENDIX IV  
PROCLAMATION

U. S. ARMY

Headquarters, Hawaiian Department.

Honolulu, Feb. 8, 1943.

TO THE PEOPLE OF HAWAII:

I, DELOS C. EMMONS, LIEUTENANT GENERAL, UNITED STATES ARMY, as Commanding General, Hawaiian Department, and as Military Governor of Hawaii, do hereby proclaim:

1. Full jurisdiction and authority are hereby relinquished by the Commanding General to the Governor and other officers of the Territory of Hawaii, to the courts of that territory, to the city and county of Honolulu, to other counties, to all other officers of the territory or other persons acting under its authority, to the United States District Court for Hawaii, and to the appropriate officers of the United States, to exercise such powers as may now or hereafter be vested in them respectively by law over the following matters and others necessarily related thereto:

- (a) Control of prices
- (b) Rationing of commodities among the civilian population
- (c) Control of hospitals, medical personnel, and medical supplies
- (d) Food production by and distribution of food among the civilian population
- (e) Control of rents
- (f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours
- (g) Public health, sanitation, and prevention of disease among civilians
- (h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations
- (j) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

- (k) Censorship of mail from civilians in the territory
- (l) Control of liquor and narcotics
- (m) Schools and children
- (n) The custody of alien property
- (o) Collection and disposition of garbage, ashes, and other waste
- (p) Banking, currency, and securities, provided that the Commanding General may

prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(g) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee, which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. The Commanding General, Hawaiian Department, is charged with responsibility for the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations. For such purposes he shall continue, so far as he deems the military security of the territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are transferred to civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to resume such of the functions and jurisdictions as are hereby or may hereafter be transferred to the civil authorities, or to issue such additional military orders, after consultation with the Governor of the territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the territory.

4. Neither this proclamation nor the revocation of orders announced in paragraph 5 hereof shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred prior to the effective date of this proclamation or such revocation.

5. This proclamation shall take effect thirty days after its date. Those parts of all military orders affecting the subjects enumerated in paragraph 1 hereof are hereby revoked effective thirty days after the date hereof.

(Signed) Delos C. Emmons  
Lieutenant General, U. S. Army,  
Commanding.  
Military Governor of Hawaii.

APPENDIX V  
OFFICE OF THE MILITARY GOVERNOR  
IOLANI PALACE  
HONOLULU, T. H.

25 August 1943

GENERAL ORDERS )  
NO. 31 )

HABEAS CORPUS PROCEEDINGS AND INTERFERENCE  
WITH MILITARY PERSONNEL IN PERFORMANCE  
OF MILITARY FUNCTIONS PROHIBITED.

1. PURPOSE.

1.01. This General Orders is issued to eliminate, prevent, and prohibit interference with military personnel in the performance of their military functions or duties within the Territory of Hawaii, and to eliminate, prevent, and prohibit interference with military operations within the Territory of Hawaii, and thereby to further the defense and internal security of the Territory of Hawaii.

## 2. HABEAS CORPUS PROCEEDINGS PROHIBITED.

2.01. No clerk, deputy clerk, other officer, or employee of the District Court of the United States for the Territory of Hawaii, or of any court of the Territory of Hawaii, shall accept or receive for filing in such clerk's office, deposit for filing, or file, or allow, authorize, or permit to be deposited for filing, or to be filed in such clerk's office, or with such clerk, any application or petition for a writ of habeas corpus, or make, issue, or execute any summons, citation, decree, order, or other process in any habeas corpus proceedings.

2.02. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall accept or receive for filing with, in, or before such judge or court, or in the office of the clerk or such court, or with such clerk, deposit for filing or file or allow, authorize, order, or permit to be filed with, in or before such judge or court, or in the office of such clerk or with such clerk, any application or petition for a writ of habeas corpus.

2.03. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall authorize, allow, decree, order, direct, or permit any habeas corpus proceedings to be commenced, maintained, or prosecuted before or by such judge or in or before the court in or over which such judge sits or presides; nor shall any such judge maintain, prosecute, hear, try, or determine in whole or in part, any habeas corpus proceedings or any phase of, or matter related to or in any way connected with, any habeas corpus proceedings.

2.04. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall issue any writ of habeas corpus, order that any writ of habeas corpus issue or be issued, or authorize, direct, permit, or allow any writ of habeas corpus to issue, or be issued, from the court over which or in which such judge presides or sits, or from the office of the clerk of said court, or by the clerk of said court.

2.05. No person, either in his own behalf or as attorney, agent, or in any way for or on behalf of another person, shall present to, file or attempt to file, or deposit for filing, any application or petition for a writ of habeas corpus, to or with the clerk, deputy clerk, a judge, other officer, or employee of the District Court of the United States for the Territory of Hawaii, or of any court of or within the Territory of Hawaii; nor shall any person, either in his own behalf or as attorney, agent, or in any way for or on behalf of another person, commence, maintain, or prosecute any habeas corpus proceedings in or before the District Court of the United States for the Territory of Hawaii or in or before any other court of or within the Territory of Hawaii.

2.06. Neither the United States Marshal for the Territory of Hawaii, any deputy or employee of such marshal, or any other officer or employee of the District Court of the United States for the Territory of Hawaii, or of any other court of or within the Territory of Hawaii shall accept or receive for service an application or petition for a writ of habeas corpus or copy thereof, or any writ of habeas corpus, any summons, citation, order, decree, warrant, or process of any kind in a habeas corpus proceedings; nor shall the United States Marshal for the Territory of Hawaii, any deputy of such marshal, or any other officer or employee of the District Court of the United States for the Territory of Hawaii, or any officer or employee of any court of or within the Territory of Hawaii, serve or attempt to serve any application or petition for a writ of habeas corpus or copy thereof, or any writ of habeas corpus, or any summons, citation, mandate, decree, order, warrant, or process of any kind in a habeas corpus proceedings or issued or arising out of any matter or proceeding related to or in any way connected with a habeas corpus proceedings.

2.07. Any judge of the District Court of the United States for the Territory of Hawaii, or of any other court of or within the Territory of Hawaii, before whom a habeas corpus proceedings now is pending, shall forthwith discontinue such habeas corpus proceedings, and shall not maintain or prosecute, or allow, permit, or authorize to be maintained or prosecuted before such judge or the court in which such judge sits or presides, such habeas corpus proceedings any further, and hereafter shall not hear, try, or determine said habeas corpus proceedings or any phase of or matter related to or in any way connected with or arising out of such habeas corpus proceedings; nor,

except as authorized in paragraphs 2.08 and 2.09 herein, shall any such judge hereafter issue any order, decree, mandate, summons, citation, warrant, or process of any kind in any such pending habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with any pending habeas corpus proceedings; and such judge forthwith shall withdraw, revoke, and rescind any order, decree, mandate, summons, citation, warrant, or process of any kind, remaining unexecuted in any pending habeas corpus proceedings or in any matter, action, or proceedings arising out of, related to, or in any way connected with any pending habeas corpus proceedings.

2.08. Neither the Honorable Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, nor any other judge of the said District Court of the United States in and for the Territory of Hawaii, shall make or issue, or order, direct, or cause to be made or issued, any process, mandate, summons, citation, order, decree, decision, determination, direction, or action in or relative to, or arising out of, by reason or because of, that certain habeas corpus proceedings now pending in the District Court of the United States in and for the Territory of Hawaii substantially styled or entitled as follows: "In the Matter of the Application of Walter Glockner," and bearing file or identification number or mark "H. C. 295," in the office of the Clerk of the District Court of the United States in and for the Territory of Hawaii. The said Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, forthwith and immediately shall stay, refrain from, cause to be stayed, and desist from, all pending or further action or proceedings in said habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with, such pending habeas corpus proceedings.

2.09. Neither the Honorable Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, nor any other judge of the said District Court of the United States in and for the Territory of Hawaii, shall make or issue, or order, direct, or cause to be made or issued, any process, citation, order, decree, decision, determination, direction, or action in or relative to, or arising out of, by reason or because of, that certain habeas corpus proceedings now pending in the District Court of the United States in and for the Territory of Hawaii substantially styled or entitled as follows: "In the Matter of the Application of Erwin R. Seifert," and bearing file or identification number or mark "H. C. 296," in the office of the Clerk of the District Court of the United States in and for the Territory of Hawaii. The said Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, forthwith and immediately shall stay, refrain from, cause to be stayed, and desist from, all pending or further action or proceedings in said habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with, such pending habeas corpus proceedings.

### 3. INTERFERENCE WITH MILITARY PERSONNEL PROHIBITED.

3.01. No judge of the District Court of the United States for the Territory of Hawaii, or of any court of the Territory of Hawaii, no United States Marshal for the Territory of Hawaii or his deputy, nor other public officer, deputy of such public officer, public employee, or any other person, shall, for any cause, whether or not such cause is deemed lawful cause by such judge, or other public officer, public employee, or any other person, in any manner, way, or form impede, oppose, or interfere with The Commanding General, United States Army Forces, Central Pacific Area, or with any other member of the armed forces of the United States, in his performance of his military functions, military duties, or military orders, or in his performance of any orders heretofore or hereafter issued by the Military Governor of the Territory of Hawaii regardless of whether or not such order or orders are published in the newspapers of the Territory of Hawaii; provided, however, that nothing contained in this paragraph shall be construed or deemed to prohibit municipal police officers from arresting members of the armed forces for traffic offenses triable by the Provost Courts.

### 4. PROVISIONS OF THIS GENERAL ORDERS TO BE LIBERALLY CONSTRUED.

4.01. Except where otherwise clearly indicated, in addition to being applicable to habeas corpus proceedings hereafter commenced, the provisions of this General Orders

shall be applicable to habeas corpus proceedings heretofore commenced and now pending in the District Court of the United States for the Territory of Hawaii or in any other court of the Territory of Hawaii. The provisions of this General Orders shall be liberally construed so that the purposes for which this General Orders is issued, set forth in Paragraph 1.01, may be fully effected and accomplished.

5. PENALTIES.

5.01. Any judge of the District Court of the United States in and for the Territory of Hawaii, any United States Marshal or Deputy United States Marshal in and for the Territory of Hawaii, or any other public officer, deputy of such other public officer, public employee, or any other person, who directly or indirectly, expressly or impliedly, in any manner, shape, or form, shall violate, attempt to violate, evade, or attempt to evade, or aid, assist, or abet, in any violation of, any provision of this General Orders, upon conviction thereof by a Provost Court heretofore or hereafter appointed by the military Governor of the Territory of Hawaii, shall be punished by confinement, with or without hard labor, for a period not to exceed five (5) years, or by a fine not to exceed five thousand dollars (\$5,000.00), or by both such confinement and fine, or if convicted thereof by a Military Commission heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii shall be punished as such Military Commission shall determine.

6. ISSUANCE OF THIS GENERAL ORDERS IS NECESSARY EXERCISE OF MARTIAL LAW POWERS OF MILITARY COMMANDER IN THIS THEATER OF WAR.

6.01. This General Orders is issued by the undersigned as the Military Governor of the Territory of Hawaii and as the Military Commander of the military forces of the United States in this theater of war in which martial law duly has been established and exists. This General Orders is a necessary exercise of the martial law powers of the undersigned as Military Commander of the military forces of the United States in this theater of war.

(S) Robert C. Richardson, Jr.  
Lieutenant General, United States Army  
Commanding General, United States Army  
Forces, Central Pacific Area  
Military Governor of the Territory of Hawaii