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EX PARTE MILLIGAN v. THE FIVE COMPANIES: MARTIAL LAW IN HAWAII*

JOHN P. FRANK

It has become the fashion in recent years to criticize the decision of the United States Supreme Court in *Ex parte Milligan*,¹ to suggest that the decision was the production of an obsolete day and an outmoded science of war, to assert that it is filled with irrelevant dicta. It is argued that the Court did not mean what it said, or, if this is not so, that its teaching should be ignored or overruled.²

It is the thesis of this article that those critics are wrong. *Ex parte Milligan* is one of the truly great documents of the American Constitution, a bulwark for the protection of the civil liberties of every American citizen. It is the pledge of the Supreme Court to the people of the United States that the constitutional right of freedom from arrest and punishment at the caprice of the executive branch of the Government, particularly the military, and the right of trial by jury can never be taken away so long as the courts are open and can function. There are no more important constitutional rights than these.

Lambdin P. Milligan was a Civil War Copperhead and probable traitor to the North. He had never been in the armed forces of the United States and had no official post in the government or in the Confederate Army. He was seized by the military authorities in 1864 and, along with other alleged Confederate conspirators, was tried and sentenced to death by a military commission sitting in Indianapolis. The civil courts in Indiana were open and there was no reason why he could not have been prosecuted in a civil court with trial by jury. In May, 1865, he and his fellow defendants petitioned for habeas corpus. In

* The author of this article was an employee of the Department of the Interior during the period in which this article was written and its publication planned. However, the article does not purport to reflect the view, whether official or unofficial, of any person other than its author and is exclusively an independent expression of view.

1. 4 Wall. 2 (U. S. 1866).

2. The Attorney General in *Ex parte Quirin*, 317 U. S. 1 (1942) suggested that the *Milligan* rule should be modified; FAIRMAN, LAW OF MARTIAL RULE (2d ed. 1942) 163 says: "It by no means follows that what appeared a salutary restraint upon the tyranny of the Stuarts is today an appropriate limit on the power of both executive and legislature in a highly responsible national government"; WINTEROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 817 expresses the view that the minority opinion is sounder than the majority; King, *Legality of Martial Law in Hawaii* (1942) 30 CALIF. L. REV. 599, 626, conceding that under the majority view martial law in Hawaii is unconstitutional, suggests that perhaps the case will be overruled. RANKIN, WHEN CIVIL LAW FAILS (1939) 183, states the law substantially in accordance with the *Milligan* rule, and quotes a number of commentators pro and con.

April, 1866, the Supreme Court handed down opinions unanimously holding for the petitioners.³ Two opinions were filed, one subscribed by five and the other by four members of the Court. It is the opinion of the majority by Mr. Justice Davis over which the controversy rages and it is this opinion that has become and will be referred to as "the opinion" in the *Milligan* case.

Justice Davis held that the military authorities had not complied with the terms of the statute suspending the writ. He went on, however, to discuss the invalidity of the military action on any theory. The opinion is so forcefully and passionately written that its spirit can only be gained by full reading; but the core of the argument is this: The Constitution guarantees trial by jury and establishes many safeguards in judicial proceedings. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."⁴ The laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; . . ."⁵ Justice Davis then examines the necessities of the situation—"The necessity must be actual and present"⁶—and concludes that Milligan could only be prosecuted in the civil courts. If this is not so, ". . . Republican government is a failure. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."⁷ The Constitution permits suspension of the writ. "It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law."⁸ As soon as the courts can function, martial law ceases to exist: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."⁹

In the minority opinion Chief Justice Chase concurred in holding that the conviction was illegal under the statute. However, he challenged

3. For a full history of the *Milligan* case, see KLAUS, *THE MILLIGAN CASE* (1929); FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939) c. 4.

4. 4 Wall. at 120-121.

5. *Id.* at 121-122.

6. *Id.* at 127.

7. *Id.* at 124-5.

8. *Id.* at 126.

9. *Id.* at 127.

the majority contention that Congress could not authorize trials by military commissions though the courts were open. He argued that when the nation was at war, when some areas have been invaded and others may be, it is within Congressional power to determine where such imminent public danger exists as justifies trials by military tribunals. He suggested that in some instances Congress may not have confidence in the courts, although they be open.

The majority opinion in substance lays down certain explicit rules concerning the jurisdiction of military courts in wartime. They may be stated thus:

1. The writ of habeas corpus may under certain circumstances be suspended in wartime, as for example, to permit necessary preventive detention.

2. However, this does not mean that once habeas corpus is suspended, a citizen loses his right to trial in the civil courts if he is to be tried at all.

3. A person not otherwise subject to the laws of war¹⁰ is not subject to the jurisdiction of military courts upon suspension of the writ or declaration of martial law unless absolutely necessary. The civil courts shall judge that necessity.

4. Military trials of such persons will not be considered necessary "where the courts are open and their process unobstructed."

The Open Court rule thus announced by the Supreme Court in 1866 was as old as American law.¹¹

10. This qualification "not otherwise subject to the laws of war" is important. A person may be subject to the jurisdiction of military courts although the civil courts are open and functioning if he is charged with an offense which is traditionally within the military jurisdiction. Examples are members of the armed forces of the United States or foreign spies or invaders, as in the case of *Ex parte Quirin*, 317 U. S. 1 (1942). The *Quirin* case in no sense limits the *Milligan* doctrine, since the petitioners in *Quirin* were a small enemy force invading this country for purposes of sabotage and were, as the Court unanimously held, traditionally subject to the law of war.

11. In 1691 the legislature of South Carolina passed an act with the following preface: "WHEREAS, Lieut. Col. Ste. Bull, Major Charles Colleton, Paul Grimball, Esq. together with Landgrave James Colleton, late Governor of this part of the Province, did make articles of warr and erect and establish Martiall Law, and the same cause to be published at the head of every company of the militia of this part of the Province, under the paines of death and other penaltys as in the said articles is sett downe and required, and the same did enforce and put in execution against divers of their Majesties peaceable subjects inhabiting in this province, to the apparent breach of libertys, propertys and privileges, and to the dread and terrour of their Majesty's subjects, notwithstanding at the time there was noe appearance of any forraigne invasion or any domestick rebellion, tumult or sedition, and that at the same tyme all the Courts of Justice were opened and alwayes after continued to be so. . . ." [Emphasis added]. It was therefore enacted that none of the persons named could for two years hold any civil or military office in the colony. Act of March 25, 1691, No. 58, 2 COOPER (1836) 49. For discussion of the incident which gave rise to the act, see 3 ANDREWS, COLONIAL PERIOD OF AMERICAN HISTORY (1937) 231.

Thus understood, it is difficult to see why the Open Court rule should be criticized or declared incompatible with total war. It is true that modern war is technologically different from the earlier wars. The airplane "blitz" deep behind the enemy lines is not identical with J. E. B. Stuart's or Phil Sheridan's raids, and the saboteurs perform a somewhat different role from Major Andre. The Fifth Column may be distinguished, if you will, from the Copperheads and the Tories. But are the differences so great, and if they are, is there any relevant significance in the change? The question under the *Milligan* case is whether the courts are open, not whether the enemy's speediest method of transportation is an airplane or a horse. The Open Court rule is no mere mechanical test, nor was it intended to be. The *Milligan* decision carefully emphasized that the district court "needed no bayonets to protect it, and required no military aid to execute its judgments."¹²

It is hard to imagine what virtue there is in prosecution of a civilian accused, for example of embezzlement from another civilian, before a major sitting as a provost court rather than before a regularly appointed judge. A civil court can function as easily, and, within the restrictions of sound constitutional provisions, as quickly as a military court. There are three major conceivable reasons for making exceptions to the Open Court rule in areas in which civil government has not been utterly destroyed by war:

1. that the area has not enough manpower available to permit a jury to function;
2. that the proceedings require a greater secrecy than even an impounded civil record will permit;
3. that a jury in an area, for reasons of disloyalty, will not convict the guilty and that a change of venue is impractical.

There are few, if any, incidents in American history which could justify the exclusion of civil court jurisdiction on any of these grounds.

Today, in 1944, the problems of the *Milligan* rule emerge from the recesses of the political scientist's library into the public forum. The basic principles of civil liberty are once more at test in World War II—this time in the administration of the law of Hawaii. Here the *Milligan* rule is under the severest attack it has ever borne because for three years the Territory of Hawaii has been ruled by a military group, administering drumhead justice to the civilian population for violations of the civil law. This military government has been under attack in the courts of

12. 4 Wall. at 122; see WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) 106. For affirmation that the *Milligan* decision is a rule of substance and not a mechanical formula, see CHARLES E. HUGHES, WAR POWERS UNDER THE CONSTITUTION, SEN. DOC. 105, 65th Cong., 1st Sess. (1917) 11, 12.

Hawaii during the last two years, and two recent decisions by the federal district judges in the cases of *White*¹³ and *Duncan*¹⁴ draw the issue squarely: Is the *Milligan* rule to be the protection to the Americans of the twentieth century that it was to the Americans of the nineteenth? Discussion of these particular cases provides the simplest method of drawing clear-cut issues: However, the cases must be considered against a double background of the history of martial law since the *Milligan* decision in 1866 and the history of Hawaii both before and since the inauguration of martial law. In the light of this background the reader can decide whether the *Milligan* decision should either be considered inapplicable or a dead letter, as the military authorities contend,¹⁵ or whether, as the two district judges imply, the conviction of these two civilians for civil offenses by military courts without trial by jury when the civil courts were ready and able to function, was an outrage against American constitutional government.

HAWAII BEFORE PEARL HARBOR

To understand the impact of martial law on a social system it is necessary to know something of what that social system is; and an appraisal of martial law in Hawaii since Pearl Harbor requires some knowledge of Hawaii before that time.¹⁶ The principal islands of Hawaii were first

13. District Court for the Territory of Hawaii, McLaughlin, J., Habeas Corpus 300, decided May 2, 1944.

14. District Court for the Territory of Hawaii, Metzger, J., Habeas Corpus 298, decided April 13, 1944.

15. Colonel King, *supra* note 2, at 626.

16. General information on the history of Hawaii can be obtained from the following sources: SEN. DOC. NO. 178, Part 14, 55th Cong., 2d Sess. (1897) (a publication by the Bureau of American Republics on Hawaii); SEN. DOC. NO. 23, 55th Cong., 1st Sess. (1897) (a paper on Hawaii read before the National Geographic Society); SEN. REP. NO. 227, 53rd Cong., 2d Sess. (1894) (report of the Senate Committee on Foreign Relations on the relation of the United States to the revolution of 1893 and the establishment of the Republic of Hawaii); Debates in Congress on the Organic Act of Hawaii, 33 CONG. REC. 2022-33, 2316-29, 3702-15, 3800-22 (1900). The best history of the revolution and events leading to annexation is PRATT, *EXPANSIONISTS OF 1898* (1936). More recent developments in Hawaii are contained in CASTLE, *HAWAII, PAST AND PRESENT* (1931 ed.). BARBER, *HAWAII: RESTLESS RAMPART* (1941), is a description of Hawaii with emphasis on the economic control of the Islands. Shoemaker, *Labor in Hawaii*, H. R. Doc. No. 848, 76th Cong., 3rd Sess. (1940), is a report by the Bureau of Labor Statistics on Hawaii. Other descriptive works are JARETT, *HAWAII AND ITS PEOPLE* (1933); CRAWFORD, *PARADOX IN HAWAII* (1933), which emphasizes education and race relations; MESICK AND FARRINGTON, *THE KINGDOM OF HAWAII* (1934); and Jones, *Geography and Politics in the Hawaiian Islands* (1938) 28 GEOGRAPHICAL REVIEW 193. The government of Hawaii from a mechanical standpoint is described in LITTLER, *THE GOVERNANCE OF HAWAII* (1929), and in two publications of the University of Hawaii: VITOUSEK, *FUNCTIONS AND PROBLEMS OF GOVERNMENT IN HAWAII* (1935), and GEORGE AND BACHMAN, *THE GOVERNMENT OF HAWAII* (1932). See also HAWAIIAN BUREAU OF GOVERNMENTAL RESEARCH, *OUR TERRITORIAL GOVERNMENT* (1937). An excellent recent survey of Hawaii in terms of its economic, social, and military problems is *Hawaii: Sugar Coated Fort*, FORTUNE MAGAZINE, August, 1940, p. 31.

discovered and named the Sandwich Islands by Captain James Cook in 1778. At that time the Islands were governed as separate principalities by separate rulers, but in 1795 King Kamehameha I extended dominion over the group. Thereafter the Islands were visited from time to time by traders and in 1820 the first missionaries arrived. These missionaries in many cases remained as businessmen. Two of them, Amos Cooke and Samuel Castle, became the founders of one of the principal commercial companies in the Islands today, Castle & Cooke. Throughout the nineteenth century representatives of several nations competed for the most influential position in the Islands but eventually the American group prevailed. Americans developed the sugar and pineapple industries and in due course five major companies, which began as sugar factors, became the controlling economic force in the Islands. In 1893 the American group conducted a successful revolution against the monarchy and established a republic. The Republic immediately petitioned for annexation by the United States, and was annexed during the Spanish-American War in 1898. In 1900 the Hawaiian Organic Act¹⁷ was passed by Congress.

In order to maintain an adequate labor supply, the plantation owners imported labor on a contract basis, principally from Japan and the Philippine Islands. These laborers came in great numbers, quickly outnumbering the native population.¹⁸ They were hired on a contract basis which was little better than slavery, and the debates in Congress on the passage of the Organic Act in 1900 are replete with tales of extreme brutalities suffered by the contract workers.¹⁹ The original draft of the Organic Act, prepared by a group of representatives of the former Hawaiian Republic, including Sanford B. Dole, and a group of Congressmen, permitted continuance of the contract-labor system, but this was forbidden by the Congress.²⁰

The development of Hawaii since 1900 is the story of the development of the sugar, pineapple, and tourist industries under the control of the Five Companies. These companies, by a system of interlocking marriages and directorates have kept economic and political dominion of the Islands among a small group of families. When the Organic Act was passed, it was accepted without question that Hawaii was to be governed by a "ruling class" of approximately 4,000 Americans and other Anglo-

17. 31 STAT. 141 (1900), 48 U. S. C. § 491 (1940).

18. In 1902, for example, out of 42,000 workers on the sugar plantations, 31,000 were Japanese, 4,000 Chinese, 2,700 Portuguese, 2,000 Puerto Rican, and only about 1,500 were Hawaiian or part Hawaiian. In later years many of the Japanese returned to Japan or left the sugar fields and their places were taken by the Filipinos. Shoemaker, *supra* note 16, at 34.

19. 33 CONG. REC. 2320 *et seq.*, 3712-3713 (1900).

20. 31 STAT. 143 (1900), 48 U. S. C. §§ 502, 503, 504 (1940).

Saxon peoples who were to have dominion over the remaining 145,000 residents of the Islands. Particular provisions of the basic law were specifically described by Senator Platt, who favored those provisions, as aimed at maintenance of the "governing class."²¹ In the intervening 44 years, the Islands have grown to 450,000 people, but the controlling group has maintained its dominion. That controlling group built up the industries of the Islands and in return dominated the Territory.²² The unity of economic control may be seen most vividly by a comparison of the interlocking directorates and top management of one of the Five Companies with the remainder of Hawaiian industry. This company's officers and directors occupy similar positions in twenty-eight sugar plantations, three irrigation companies, three other of the Big Five concerns, three banks, five public utilities, four pineapple companies, two steam navigation companies, two newspapers, two insurance companies, and seventeen other miscellaneous concerns. The total capitalization of those enterprises is far over \$100,000,000.²³

Labor unions have led a precarious existence in an economy which is still only a short forty years removed from almost pure feudalism. The attitude of the employing group has been described by a dispassionate observer as "benevolently paternalistic," and the history of Hawaiian management is said to be "one of antagonism to labor organization."²⁴

Important plantation strikes occurred in 1919, 1920, in 1924 when Philippine workers struck for a \$2.00, 8 hour day, and again in 1937. Non-plantation organization received its first impetus from the Wagner Act and according to one estimate there were only 500 persons in the Territory affiliated with national unions in 1935. In 1939 there were between 3,500 and 6,000 union members.²⁵ However, acceptance of the Wagner Act came slowly and the President of the Hawaiian Industrial Association was quoted in 1937 as saying that he "paid as little attention to the Wagner Act as he did to the Desha bathing suit law."²⁶

21. 33 CONG. REC. 2024 (1900).

22. For description of the domination of Hawaiian life by a handful of persons see BARBER, HAWAII: RESTLESS RAMPART (1941) generally and particularly c. 2, "The Big Five"; for a proud account of the accomplishments of Hawaiian industry, see CASTLE, HAWAII, PAST AND PRESENT (1931 ed.) c. 5. For a further account of the Big Five see *Hawaii: Sugar Coated Fort*, *supra* note 8. The Five Companies are Alexander & Baldwin, Castle & Cooke, American Factors, C. Brewer & Co., and Thos. H. Davies & Co.

23. This relation is charted in Shoemaker, *supra* note 16, at 197.

24. *Id.* at 198. FORTUNE MAGAZINE, *supra* note 16, describes Hawaiian economic government as "paternalistic semi-feudalism" [at 81], and quotes Ray Standard Baker as having said of Hawaii, "I have rarely visited any place where there is so much Charity and so little Democracy as in Hawaii."

25. Shoemaker, *supra* note 16, c. 26. For an illuminating analysis of employment practices, with special emphasis on race relations problems, see ADAMS & KAI, THE EDUCATION OF THE BOYS OF HAWAII AND THEIR ECONOMIC OUTLOOK (1928), a publication of the University of Hawaii.

26. FORTUNE MAGAZINE, *supra* note 16, at 78.

The relations of labor, the Big Five, the police, and the Army are well described in a 1937 report of a National Labor Relations Board trial examiner in a case involving one of the Big Five and the Longshoremen's Union:

"No impartial person who observed the demeanor of witnesses on the stand and who heard the testimony and read the record and all of the exhibits offered at the hearing, could fail to be impressed with the fact that the longshoremen in the employ of respondents are afraid and they have reason to be. Their employer controls virtually the entire economic life of the Territory. To be discharged as a longshoreman at the Port of Honolulu means either that one must eke out a living fishing or go as a suppliant to one of the other enterprises owned by Castle & Cooke, Ltd., and seek employment. If one makes a remark that reflects in any manner on Castle & Cooke, Ltd., it is sure to get back to the management and one is called on the carpet for it. An employee must remember this even when seeking relaxation in drink, for his irresponsible statements made under the influence of liquor are reported and he is penalized just as if they were made when sober. The police department works with respondent to check any untoward activity and this is well understood. Moreover, the Army Intelligence cooperates with the Industrial Association of Hawaii, and the latter, in turn, is managed by an attorney for Respondent, Castle and Cooke, Ltd. . . .

"The mores of the Territory provide no place for a union of any of its employed inhabitants, and consequently activity in looking toward such union organization and moves made toward it which are commonplace on the mainland become endowed with portentous and revolutionary significance when seen through island eyes. It is not a healthy condition. . . ."²⁷

It was this Hawaii, a paternalist's paradise, which the Japanese bombs struck on December 7, 1941.

CHRONOLOGY OF MARTIAL LAW IN HAWAII

One of Governor Poindexter's first acts after the bombing was to issue a proclamation under Section 67 of the Organic Act of Hawaii²⁸ suspending habeas corpus, declaring martial law, and asking the military commander of the area to take necessary steps for the protection of the Islands. The proclamation authorized the general "during the present emergency and until the danger of invasion is removed", to exercise judicial power. The Governor's order was promptly approved by the President in accordance with the Organic Act. The commanding general then issued a proclamation and General Order No. 4 declaring himself military governor, an assumption of title utterly without authority in law. He suspended all proceedings in civil courts and declared that the

27. Report of Trial Examiner George Pratt, *In the Matter of Honolulu Longshoremen's Association and Castle and Cooke, Ltd., and Honolulu Stevedores* (National Archives, 1937) 35.

28. 31 STAT. 153 (1900), 48 U. S. C. § 532 (1940).

military commissions and provost courts had general jurisdiction to try offenses against the laws of the United States and of Hawaii. Thereafter the following events occurred:

1. On December 8, the Supreme Court of Hawaii closed all Territorial courts under "direction of the Commanding General."

2. On December 16, the military authorities issued General Order No. 29 remitting certain jurisdiction to the civil courts in condemnation, probate, and equity cases but barring subpoenas, the application of the writs of mandamus and habeas corpus, jury trials in civil actions, and all criminal proceedings. The military thus retained control of all cases in the outcome of which they had any conceivable interest.

3. On January 27, 1942, General Order No. 57 was issued continuing the prohibition against trial by jury, grand jury proceedings and any criminal jurisdiction except for limited types of pending cases. It also denied the power to grant the writ of habeas corpus. Actions against men in the armed services or essential industry were forbidden.

4. On February 20, 1942, Federal Judge Metzger announced his opinion in the case of Zimmerman who was detained without charge by the military authorities and petitioned for habeas corpus. Judge Metzger declined to grant the writ (though he thought the law required it) because he thought himself under "duress" by the military.²⁹

5. On March 21, 1942, the act of Congress requested by the War Department authorizing issuance of general defense regulations in military areas, violations of which were to be prosecuted in the civil courts, became law.³⁰

6. In August 1942, the Departments of War, Justice, and Interior³¹ held conversations concerning restoration of civil courts' jurisdiction. An agreement was reported to the President on August 28. The result of these negotiations were General Orders 133 and 135, continuing military jurisdiction over offenses directed against the government and violations of the orders of the military governor and continuing the suspension of the writ. Certain other jurisdiction not relevant here was also retained by the military tribunals.

7. On August 20, 1942, White was arrested and on August 25, he was tried by a military commission and sentenced to five years imprisonment.

29. The Circuit Court of Appeals for the Ninth Circuit affirmed the refusal to grant the writ, one judge dissenting, *Ex parte Zimmerman*, 132 F.(2d) 442 (1943) and the Supreme Court dismissed the petition for certiorari on the ground that the case had become moot due to the release of the petitioners on the Mainland. 319 U. S. 744 (1943).

30. 56 STAT. 173 (1942), 18 U. S. C. § 97(a) (Supp. 1943).

31. The Department of the Interior is the branch of the Federal Government responsible for administration of the territories.

8. General Orders 133 and 135 were not satisfactory to the Departments of Justice and Interior and negotiations were continued throughout the winter resulting in the agreement of February 8, 1943. Under this agreement, which was approved by the President, joint proclamations were issued by the Governor and General Emmons, the purported³² effect of which was to continue the suspension of the writ of habeas corpus and a state of martial law. Jurisdiction of the courts was reestablished in full except in cases of criminal and civil suits against persons in the armed forces and except for "criminal prosecutions for violations of military orders." These proclamations took effect on March 10. At the same time a revised code of military orders was published, one section of which made it a violation of a military order to commit assault and battery against military or naval personnel in relation to the duties of such personnel.³³

9. In July 1943, two persons, Glockner and Seifert, held by the military authorities without charge, petitioned Judge Metzger for habeas corpus. After prolonged difficulties in the course of which the Commanding general refused to acknowledge the writ and was fined for contempt by the Judge, a fine which was later substantially remitted, the prisoners were released on the mainland.³⁴

THE *White* AND *Duncan* CASES

On August 20, 1942, White, a citizen civilian employed in a Honolulu brokerage house, was arrested by the provost marshal for embezzlement. The offense had nothing to do with military affairs and the charge was based on Territorial law. White was held in custody until August 22, when he was brought before a provost court and was orally informed of the charges against him. Various motions, including a request for jury trial and for time to prepare a defense, were overruled. He was tried and convicted on August 25 and given a five year sentence, later reduced to four years by the military governor. In April 1944, White petitioned for habeas corpus before Federal Judge McLaughlin who, on May 2, filed an opinion granting the writ. Judge McLaughlin reasoned that it was irrelevant whether a state of martial law existed or not, since the Governor had no judicial power to delegate and the Military Governor

32. The interdepartmental negotiations are outlined in the record of the *Duncan* case, particularly in the testimony of Governor Stainback of Hawaii.

33. Federal Judge Metzger and the military authorities have differed over whether the privilege of the writ was suspended after the order, Judge Metzger holding that it was not. Armstrong, *Martial Law in Hawaii* (1943) 29 A. B. A. J. 698, 699.

34. For an elaborate account of martial law in Hawaii and particularly of the Glockner and Seifert controversy, see Armstrong, *Martial Law in Hawaii* (1943) 29 A. B. A. J. 698.

could therefore exercise none; and that martial law itself gave no such discretion since there was no military necessity for trial of such an offense in the military courts. He emphasized strongly that the civil courts, except for the limitations of the outstanding orders discussed below, were open for business.³⁵

Duncan was a civilian worker employed in the Navy Yard at Honolulu. On February 24, 1944, he engaged in a fight with two armed sentries at the yard, was arrested, and was tried by a provost court. In that trial he denied the allegations of drunkenness and in substance claimed self-defense. He was given a sentence of six months at hard labor. Subsequently Duncan petitioned for habeas corpus in the court of Federal Judge Metzger. The writ was granted and Duncan is now at large on his own recognizance pending appeal. In the trial of the case, Duncan conceded that the suspension of habeas corpus on December 7, 1941, was justified, but contended that martial law could no longer legally exist. In any case he claimed that there was no justification for a military court in cases such as his. The Government's answer denied that there was no longer a necessity for military courts and recited in great detail the interdepartmental agreement of February 1943 described below, which was approved by both the President and the Governor. Reliance on this agreement, with its related papers, is virtually the heart of the Government's case. The Government emphasized that the naval yard at which the alleged assault occurred was a major naval base. Substantially identical affidavits by Admiral Nimitz and General Richardson were offered asserting that Hawaii "now is and since December 7, 1941 has been" an actual theater of war, in "imminent danger of invasion," and that the public safety requires the suspension of habeas corpus and the imposition of martial law.

Governor Stainback testified that there had been nothing to keep the courts from sitting since December 8, 1941, that he as a federal judge had conducted a murder trial on that day, that there was no imminent danger of invasion, and that there had been no such danger since the Battle of Midway. He emphasized that the military's desire to keep labor controls was the principal reason for continuing military government.

Judge Metzger, in deciding for the petitioner, reasoned that the questions to be decided were whether a provost court had jurisdiction to convict a civilian for an offense against naval personnel on a naval reservation and whether the office of military governor existed at the time of the appointment of the provost court. He noted that the military forces could have had any legislation they wished from Congress and

35. The facts are sketchy because the record in this case at the time of preparation of this article was not available.

suggested that they turn there for necessary authority. He concluded that none of the Washington conferees in 1943 had authority to create or continue martial law. Under the law, martial law "ceases and becomes unlawful as soon as the civil government is capable and willing to resume its normal functions." Presidential approval is not required for revocation, nor could the act of 1900, passed at time of slow communication between the Islands and the mainland, have a different intent. The Judge found that "at all times during the year 1943 and continuing to this day" the civil government was capable and ready to operate and that on March 2, 1944, Oahu, the island on which Honolulu is located, was not in imminent danger of invasion. He concluded that martial law did not lawfully exist, particularly after March 10, 1943, and that the office of military governor was without lawful creation and had no authority.

One fact about these cases is vital to an understanding of their legal significance: Martial law is a legal concept which permits of division. There is a basic distinction between *qualitative* and *punitive* or *absolute* martial law.³⁶ The former term is used when troops are called out, when some civil functions are taken over by the military—as for example, the function of arrest—and the latter is used when all civilian government, including operation of the courts, is suspended.³⁷ Arrest and temporary detention are not the same as conviction and sentence. Qualified martial law involves the former and punitive martial law the latter power. The former acts are subject to civil review before great harm is done, since the civil courts retain the power to set the individual at liberty when the question of conviction and sentence arises; but where the military serves not only as its own police force and jailer, but as its judge and jury too, civil review is completely excluded. One type of martial law may be justified where the other is not. Even these are not black and white categories for the principal measure of martial law in a given situation is necessity. "Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed."³⁸

The *Duncan* and *White* cases involve punitive martial law in which the issue is the validity of prison sentences levied by military courts which in the *White* case particularly purport to be enforcing the law of the Territory. The cases do not involve suspension of the writ for the purpose of permitting preventive custody. Even the *Milligan* majority recognizes that under some circumstances suspension of the writ for purposes of preventive custody may be proper when at the same time

36. For a history of the development of these types of martial law in the United States, see RANKIN, *WHEN CIVIL LAW FAILS* (1939).

37. For discussion, see WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 11.

38. *Id.* at 16.

military courts can not legally function. A court may hold that in time of insurrection an executive can suspend the writ so as to hold the ring leaders in custody and still not be authorized to direct their trial by military commissions when the courts are open.³⁹ The distinction in this litigation is vital. Note, for example, the concurring opinion of Justice Douglas in *Hirabayashi v. United States*,⁴⁰ in which he voted to allow the temporary detention and transfer of a group where necessity for speed prevented individual hearing of cases, and yet implied that these people were entitled to eventual hearing.⁴¹

THE ADMINISTRATION OF MARTIAL LAW

Martial law when it governs a population for two and a half years is the foundation of a social system. Military government of this kind is no fleeting display of uniformed power seeking to control a military calamity. It is a system of law making and law administration which basically directs the life of a people. The *Duncan* and *White* cases insofar as they involve general legal principles should not be considered in a factual vacuum. The social system which the military authorities have created or preserved must be known if one is to understand as a practical matter the "necessity" of martial law.

After December 7, 1941, military control was extended to every aspect of civil life. It governed not only the courts, but municipal affairs, operation of taxis, rent control, garbage disposal, house numbering, traffic, labor, press censorship, civilian defense, health, jails, prices, liquor, food control, transportation, gas rationing, and almost everything else under the Hawaiian sun.⁴² At very few of these responsibilities did the military authorities show any great degree of either skill or judgment. High military officials were readily amenable to the persuasive blandishment of Island society and, as will be shown, the bulk of the military control program was of a sort more satisfactory to local business than to any other group in the Islands' population.⁴³

One of the military's experiments was its attempt to encourage food production. Due to shipping shortages, the Territory has a basic problem in wartime in supplying itself with food, particularly vegetables normally brought from the mainland. One method of increasing vegetable pro-

39. *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914).

40. 320 U. S. 81, 93 (1943).

41. The *Duncan* and *White* cases are thus unlike *Ex parte Zimmerman*, 132 F.(2d) 442 (1943), in which the Ninth Circuit upheld the detention of a person in Hawaii.

42. Anthony, *Martial Law in Hawaii* (1943) 31 CALIF. L. REV. 477, 479. An earlier article by Anthony is also helpful: *Martial Law in Hawaii* (1942) 30 CALIF. L. REV. 371.

43. See BARBER, HAWAII: RESTLESS RAMPART (1941) c. 3, for a discussion of the Big Five's methods of "selling" the Islands to strangers.

duction would be to cut down on pineapple and sugar acreage, using these lands for more immediate purposes. General Emmons appointed as director of food production, Walter F. Dillingham, member of one of the Big Five families. One of the first decisions of the new Food Director was to oppose all efforts to take land from the pineapple and sugar industries for food production.

Perhaps the most serious problem of the Islands was inflation. The flush of government money was felt in all its force. Honolulu became a boom town. Merchants, jewelers, amusement place operators, and others made stupendous profits. One result was a tremendous growth in the middle class. Another was a sharp rise in prices. The military authorities met this situation by an attempted price control, which was a failure until OPA took over the job, and by a wage freeze for employees in the Islands. Thus the employees were caught, with prices on the rise and wages relatively stable.⁴⁴

On December 1, 1942, Mr. Garner Anthony, Attorney General of Hawaii, submitted a report to the recently appointed Governor, Ingram M. Stainback.⁴⁵ The following paragraphs describe the practical operation of the military's "judicial" system as seen by Mr. Anthony:

"In place of the criminal courts of this Territory there have been erected on all the islands provost courts and military commissions for the trial of all manner of offenses from the smallest misdemeanor to crimes carrying the death penalty. Trials have been conducted without regard to whether or not the subject matter is in any manner related to the prosecution of the war. These military tribunals are manned largely by army officers without legal training. Those who may have had any training in the law seem to have forgotten all they ever knew about the subject.

"Lawyers who appear before these tribunals are frequently treated with contempt and suspicion. Many citizens appear without counsel; they know, generally speaking, that no matter what evidence is produced the 'trial' will result in a conviction. An acquittal before these tribunals is a rare animal. Accordingly, in most cases a plea of guilty is entered in order to avoid the imposition of a more severe penalty. Those who have the temerity to enter a plea of not guilty are dealt with more severely for having chosen that course.

* * * * *

"The accused is not furnished with a copy of the charge against him but is permitted to examine the prosecutor's copy. Trials take place in crowded

44. Many of the facts throughout this portion of the text are drawn from discussions with impartial observers who have been in the Islands since the inauguration of the military regime.

45. This report has been given general distribution. Stainback, a former federal judge, succeeded Governor Poindexter in August, 1942. Governor Stainback went to the Islands in 1912 and for years, as a practicing lawyer and as a Government official during the Wilson and Roosevelt Administrations, was almost the sole powerful opponent of the Big Five's rule. He leads the fight in Hawaii for complete restoration of civil government, a fight in which he has had the support of the Democratic Party in Hawaii.

courtrooms in which the officers in charge are fully armed. The witnesses are brought before the provost judges en masse, and stand in a circle about the bench together with the accused. The assemblage tells the judge their views of the matter. Cross-examination of witnesses is tolerated with none too much patience by the court.

"There have been instances in which arrests have been made and the accused kept in jail three or four days awaiting trial, even in the case of comparatively minor offenses. With the writ of habeas corpus suspended the unfortunate accused in such cases is without remedy.

* * * * *

"The 'military governor' has appointed what he styles a coordinator of courts. At the present time this is Captain Edward N. Sylva, who was formerly one of the deputies in this office. I am informed that as cases come in Mr. Sylva makes a determination whether or not they should be tried by the courts of the land or tried before the military tribunals. His determination is final.

"The proceedings in these military tribunals are not only shocking to a lawyer but to anyone with a sense of fair play. Severe and bizarre sentences are meted out by persons untrained in the law. The feeling of the public is that they are guilty before they step inside the courtroom and their main problem is to escape with as light a sentence as possible."

The press has been censored without any regard to the non-military nature of the matters controlled. For example, the press was not permitted to publish news of local crimes or to discuss the control of prostitution. An editorial mildly criticizing the military administration in one newspaper brought forth a prompt reprimand for the editor and notification that such criticism would not be tolerated by the self-styled Military Governor.

In the *Duncan* case, Governor Stainback, in the course of testimony asserting that martial law was utterly unnecessary and illegal, declared that the principal reason for retaining martial law was the desire by some persons to perpetuate the system of labor control instituted under it. This is probably the prime reason why martial law has lasted so long. Administration of labor problems by the military is therefore worth careful consideration.⁴⁶

As has been shown above, union membership in Hawaii under Big Five anti-labor practices was very small in 1935, and had grown to about 10,000 in December 1941. Thereafter, membership fell to about 4,000 as a result of the general confusion and the insecurity of persons of Japanese descent. A rise in union membership then began which, according to some reports, has now reached almost 20,000. This rise has been

46. Hawaii currently has a population of about 450,000 people, of whom 210,000 are employed. Approximately 150,000 of the employed persons are engaged in non-agricultural work. About half of this number are still under the control of the military authorities. Of this group, about 63,000 are employees of the Army and the Navy.

fought all along the line, and the military labor policies have made sound unionization particularly difficult.

On December 20, 1941, General Order No. 38 was issued, freezing jobs and wages. On January 26, 1942, General Order No. 56 created a director of labor control, a position to which a civilian plantation manager was appointed. On March 31, 1942, General Order No. 38 was revoked and General Order No. 91 was issued making some wage adjustments on Government projects; requiring a 48-hour week on war projects, with time and a half for work over 48 hours; continuing a substantial job freeze; requiring that employees with frozen jobs report for work regularly; and setting up an appeals agency for employees discharged with prejudice. On May 6, 1942, General Order No. 91 was amended to permit some relief from the wage freeze, but there was no substantial improvement in conditions. Subsequently, a 40-cent minimum wage was ordered which had very little consequence in a territory already in the grip of inflation. As of March 1, 1943, there were still 110,000 workers frozen in their jobs.

Any resemblance between these labor controls and those applied on the mainland are more superficial than real. The wage and job freeze not only preceded those of the mainland, but were surrounded with none of the safeguards of individual rights applied on the continent. The freezes were established not after consultation with the workers involved but by fiat, and no genuine machinery was established for the alleviation of hardships. As recently as the summer of 1944, when War Labor Board Chairman Davis went to Hawaii, the first steps were still being taken to establish any agency which could effectively adjust wage inequities to meet a rising cost of living. In Hawaii, a wage and job freeze was in truth a perpetuation of every traditional injustice. But greater than all other differences was the fact that in Hawaii alone has the violation of job freeze orders been enforced by prison sentences levied by military courts.

The Labor Control Board established by the military authorities to hear the appeals of employees discharged with prejudice was virtually moribund. Headed by a succession of plantation executives, it was always so heavily stacked in favor of employers that few ever supposed that it would function impartially and almost no cases were brought to it.⁴⁷

At the same time, the prison population rose as the military courts vigorously enforced the job freeze by jailing any employees who did not report for work. These cases were tried with as little regard for constitutional process as would be expected from the description above of the provost courts. In 1943, the number of such cases rose to about 80 a month. As recently as the spring of 1944, residents of Honolulu were

47. See note 44 *supra*, and consider the actual cases described *infra*.

accustomed to seeing in their newspapers such headlines as, "Five Charged with Absenteeism Jailed by Lt. Col. Newkirk," or "Three Fined \$100," or stories to the effect that "having failed to work regularly and faithfully" an employee had been given one month in jail. In addition to these military controls, the Honolulu police "vag squad" was permitted to assist in enforcement of labor orders by certain techniques all its own.

Despite these strenuous methods, it is the opinion of persons acquainted with the Islands that labor outside the military jurisdiction had a better record on absenteeism than the labor force subject to military control.

The sugar and pineapple industries have had their own labor problems. War work drained many of their employees away, and the number of employees in the sugar fields declined. The Big Five met the situation by striking a bargain under which the plantation workers would be loaned to the military establishments from time to time, particularly in off seasons, with the plantation owners continuing to pay their wages and furnish living quarters and supplies. The owners were reimbursed by the military for these expenditures, and whether the plantation owners had profited unduly by this method of selling the service of their employees is not yet clear.

On March 10, 1943, by joint proclamations of the Commanding General and the Governor, certain jurisdiction over labor matters was relinquished to the civil government. The method of division chosen, based on the degree of military interest in the particular establishment, had the effect of splitting territorial labor through the middle, giving divided control and keeping employees in particular industries separated.⁴⁸ The military handled the employee complaints by doing little or nothing about them. Hawaiian labor, fearful of public opinion because of labor's multi-racial composition and keenly conscious of the importance of the work in which it was engaged, felt bound not to strike by the no-strike pledge, and therefore had no recourse. Principal complaints were against the Hawaiian Electric Company and the Honolulu Transit Company.⁴⁹ The Hawaiian unions have complained frequently concerning alleged violence done their organizers by military officials. Three major A. F. of L. unions issued a memorandum in the spring of 1944, alleging that on the

48. For example, of sixteen contracting establishments formerly under military jurisdiction, seven were relinquished to civilian control. Thirteen out of eighteen hospitals and eleven out of fifteen laundries were also relinquished.

49. On February 18, 1943, the National Brotherhood of Electrical Workers distributed in Honolulu and to officials of the Federal Government a mimeographed complaint concerning the impasse in which it found itself with the Hawaiian Electric Company, where it had overwhelmingly won an election as collective bargaining representative but with whom it was impossible to come to any agreement on union security, wages, or grievance procedure.

Island of Kauai the lieutenant colonel in charge caused the arrest of the union head of the Longshoremen's local, and held him for six months. He was subsequently released under longshoremen's pressure, but meanwhile the union was crushed. It also was asserted that the military forbade the collection of dues for ten months among cannery workers on the Island, resulting in the death of the union. On another island a civilian employee of Military Intelligence allegedly successfully dissuaded a number of sugar workers from joining a union. This employee was subsequently discharged by the Army but the local Military Intelligence officer, brother of the plantation manager, issued a statement praising his work. The most recent incident of this type was a report in the Honolulu press in March 1944, of a complaint by the C.I.O. that when five of its organizers visited one of the smaller islands they were forcibly expelled by the major installed as provost marshal, and told to report to their local draft boards.

The biggest labor case decided by the Labor Control Board is known as the Tuna Packers decision, decided in January 1944. This case involved a controversy between the Marine Engineers and Drydock Workers and the Hawaiian Tuna Packers, which does Navy repair work. Issues were maintenance of membership, voluntary check-off, a labor management committee, and wages. The Military Governor referred the case to the Labor Control Board. The Military Governor at first refused to allow the union to be represented by its regular leaders, insisting on company employees, but he later reversed himself. The panel, without regard to the practices of the National War Labor Board, held that the Military Governor had complete jurisdiction over labor disputes whether or not they were submitted for arbitration. It rejected maintenance of membership as "incompatible with the war program." It declared that the check-off would be illegal. The panel rejected the labor management committee, saying that management had the basic responsibility for the war program which "can neither be divided between a company and a union, nor can it be abridged by reason of existence of a management-labor committee or by anything else."

Honolulu newspaper reports for January 28 contained the reactions to the opinion. The general manager of Tuna Packers said: "In all important aspects, the company's position has been sustained and the demands of the union rejected. We are pleased that the controversy has been settled. . . ." The union said: "In spite of this raw deal, the members of our union at Hawaiian Tuna Packers will continue their all-out war production, though their morale must be severely tried. They know that this war must be won at the earliest possible moment so that democracy can be reestablished throughout the world."

It is not difficult to understand why the desire to retain the labor control is said to be the chief reason for the existence and the continuance of martial law and why spokesmen for the Big Five have endorsed it. On December 27, 1942, the Honolulu Chamber of Commerce, in telegrams to the President and other government officials, expressed its satisfaction with martial law. The *Honolulu Advertiser* has expressed a similar view.⁵⁰

THE APPLICABLE LAW IN THE *Duncan* AND *White* CASES

The great issue in the *Duncan* and *White* cases is whether a state of martial law has been validly declared which has the effect of giving military courts jurisdiction under the Constitution to try these persons.⁵¹ This involves three principal questions: (1) Does the Constitution extend to Hawaii? (2) If so, what is the jurisdiction of the court for cases of this kind? (3) If the courts had jurisdiction to review the validity of habeas corpus and the imposition of martial law, are these trials legal?

50. For the intimate relation of the Honolulu press to its principal advertisers among the Big Five, see BARBER, HAWAII: RESTLESS RAMPART (1941) c. 3.

51. Conceivably either *Duncan* or *White* might have been subject to military jurisdiction even if martial law had not been declared. This is scarcely a serious possibility as to *White* whose offense had no relation to the armed forces, but is arguable as to *Duncan* who is a civilian naval employee charged with assaulting a sentry on a naval reservation.

The second Article of War deals with "Persons subject to Military Law" and includes camp retainers and, in time of war, all "persons accompanying or serving with the Armies of the United States in the field," both within and without the territorial jurisdiction of the United States. A. W. 2(a), 41 STAT. 787 (1920), 10 U. S. C. § 1473 (1940). For a general discussion of the scope of this Article with particular reference to its relation to naval employees, see Shapiro, *Jurisdiction of Military Tribunals of the United States Over Civilians* (1924) 12 CALIF. L. REV. 75, 91. This Article has been held to give jurisdiction over a contract surgeon serving with the Army in Texas and over civilian employees at ports of embarkation in the United States, as well as employees of a contractor engaged in emergency work for the AEF in France. For discussion see TILLOTSON, ARTICLES OF WAR ANNOTATED (1942) 8. Under such holdings, *Duncan*, had he been an Army employee, would be subject to punishment under the Articles of War.

However, *Duncan* was a Navy employee working at a naval reservation and is charged with assaulting a marine. The Navy has no equivalent authority and an Act of Congress passed in 1943 giving naval courts wartime martial jurisdiction over certain civilian employees specifically excludes the Hawaiian Islands "except the islands of Palmyra, Midway, Johnston. . . ." 57 STAT. 41, 34 U. S. C. § 1201 (Supp. 1943). The legislative history of this act clearly shows that Congress meant to give naval courts jurisdiction only when there were no established civil courts readily accessible. Letter of Acting Secretary of the Navy Forrestal to the Speaker of the House of Representatives, H. R. REP. No. 192, 77th Congress, 1st Sess. (1943).

There is a second line of argument excluding the possibility that the *Duncan* trial was a court martial under the Articles of War. Under Article of War 4, A. W. 4, 41 STAT. 788 (1920), 10 U. S. C. § 1475 (1940), a marine officer such as the person who sat as provost marshal in the *Duncan* case is not eligible to serve in a court martial. While *Duncan* might be said to have waived his privilege under Article 18 to object to such a court, assuming that this was a court martial under the Articles of War, it is unthinkable that such a waiver could operate in a case where the court never purported to function under the Articles of War but rather to be based on martial law.

Does the Constitution apply? Section 5 of the Hawaiian Organic Act, provides that "The Constitution and, except as is herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: . . ."⁵² Section 67 authorizes the Governor "in case of rebellion or invasion, or imminent danger thereof, or when the public safety requires it [to] suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law. . . ."⁵³ It is the contention of Col. Archibald King of the Judge Advocate General's office that, admitting that the course adopted in the Islands is in conflict with the principles of the *Milligan* decision, the Constitution, and hence the decision, do not, to the extent that these activities are in conflict with the *Milligan* decision, apply in the Islands.⁵⁴ His theory is that Section 5 and Section 67 must be construed together; and that therefore Section 67 must be considered a modification of Section 5. Since Colonel King is one of the top officials of the Judge Advocate General's office, his view cannot be considered unofficial and the position he takes warrants careful analysis since it may be considered the basis of the entire War Department position.

The King argument is that familiar principles of statutory construction require that two sections of the same act be construed in harmony with each other. In another context he emphasizes that Congress in adopting Section 67 was merely including Article 31 of the constitution of the former republic of Hawaii and that under Article 31, the Supreme Court of Hawaii had recently held flatly in conflict with the *Milligan* decision.⁵⁵ Fairman also emphasizes that Section 67 was adopted after and presumably in the light of this decision.⁵⁶ As a matter of logic it is obvious that Section 5 can be interpreted as modifying Section 67 instead of the other way around and while the usual rule is that the explicit will be considered as modifying the general, the applicability of that rule in any given case must be determined in the light of the legislative history of the statute and the decisions which interpret it. In this instance both the decisions and the legislative history of the act appear to require the conclusion that Section 5 is a modification of Section 67 and that martial law and the suspension of habeas corpus are legal in Hawaii only to the extent that they would be legal in any other part of the United States. It is thus unnecessary to face the question of whether Congress could legally limit the scope of the Constitution in Hawaii.⁵⁷

52. 31 STAT. 141 (1900), 48 U. S. C. § 495 (1940).

53. 31 STAT. 153 (1900), 48 U. S. C. § 532 (1940).

54. King, *Legality of Martial Law in Hawaii* (1942) 30 CALIF. L. REV. 599, 626 *et seq.*

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

56. FAIRMAN, *LAW OF MARTIAL RULE* (2d ed. 1943) 240.

57. *Cf. Downes v. Bidwell*, 182 U. S. 244 (1901).

Section 5 of the Organic Act finds its general origin in the language of the Joint Resolution of Annexation which took effect in July 1898. The Organic Act was introduced in the same term of Congress but it was not until the next Session, that it was acted upon.⁵⁸ The House report on the bill in the 56th Congress stated that Section 5 was included to avoid any possible question that the Constitution extended to Hawaii. It stated further that Section 1891 of the Revised Statutes would give the same result but that the clause had been included out of an abundance of caution. Section 1891, a general statute similar to Section 5, was then in the laws of eight of the territories in the continental United States.⁵⁹ It is obvious that Congress meant to apply a well-established general principle by its establishment of Section 5 in a form which customarily meant exactly what it said without any modification at all.

The Senate discussion of the bill, though extremely lengthy, does not shed any light on the meaning of clauses under consideration. In the House, Representative Knox, the Republican leader for the bill, stated that: "This bill, in so many words, extends the Constitution to Hawaii; so that there has not been practically a moment of time since the Hawaiian Islands were annexed to the United States that the Constitution has not been the standard by which all the laws of that country must be measured. . . . *The decisions of the Supreme Court of the United States will be equally operative in Hawaii as in any portion of the United States as to any constitutional right which he possesses.*"⁶⁰ Representative D. E. Armond moved to strike the phrase extending the Constitution on the ground it was superfluous. Knox supported the clause. The discussion shows that it was contemplated that the Hawaiians should have every constitutional right compatible with territory status. They were to be excluded only from such rights as voting for president.⁶¹

The decisions support the interpretation of the legislative history that the Organic Act made the Constitution fully applicable in Hawaii. The leading case in point is *Hawaii v. Mankichi*.⁶² In that case the Court held five to four that the Constitution did not apply in Hawaii for the purpose of requiring grand jury and petit jury in criminal cases between 1898-1900. The four dissenting justices held that the Constitution applied in full force in Hawaii from 1898 on. Two of the majority justices

58. The Joint Resolution authorized the appointment of a commission composed of Hawaiian and continental members to prepare an organic act. The report of this commission recommended § 5 and § 67 (numbered § 69 in the commission's draft) in substantially their present form. SEN. DOC. NO. 16, 55th Cong., 3rd Sess. (1899). The report of the commission contains nothing significant bearing on the question under consideration here.

59. H. R. REP. 305, 56th Cong., 1st Sess. (1900) 10.

60. 33 CONG. REC. 3704, 3709 (1900). (Emphasis added).

61. 33 CONG. REC. 3800 (1900).

62. 190 U. S. 197 (1903).

held that the Constitution applied only from 1900 on. The remaining majority justices held that prior to 1900 the Constitution was not applicable in any except major matters, for which they gave as an example, "municipal statutes of Hawaii . . . depriving a person of liberty by the will of the legislature."⁶³ Justice Harlan, dissenting, quoted the *Milligan* case at length by way of showing that trial by jury was preserved for Hawaii by the Constitution.⁶⁴ The several opinions in the *Mankichi* case made its conclusion confusing. But for purposes of the present Hawaiian problem the statement by Justice White in his concurring opinion fairly puts the rule of the case: By the Act of 1900 "the Islands were undoubtedly made a part of the United States in the fullest sense."⁶⁵ The majority opinion was given this interpretation by Justice Brown, its author, and Justice White in subsequent decisions.⁶⁶

The legislative history and the cases thus show that Section 5 makes the Constitution fully applicable in Hawaii and that Section 67 must be read in the light of that fact. It is fair to argue further that Congress by adopting these sections meant to adopt the *Milligan* rule as setting the sole basis for martial law and the suspension of the writ. The *Milligan* rule stated the permissible extent of martial law and suspension of the writ as Congress knew the Constitution in 1900. If it can be argued that Congress could not have intended by Section 67 to have authorized the unconstitutional, it may be concluded that the Organic Act authorizes martial law subject to the limitations of the *Milligan* case and no more. In other words, it may be said that the outstanding constitutional decision as to the permissible extent of martial law in 1900 was the *Milligan* case and Congress in adopting Section 67 carried with it all the *Milligan* limitations on martial law.⁶⁷

It is always difficult to determine whether Congress in general language meant to assume the continuing validity of a constitutional decision or whether it meant its statute to occupy any new ground which subsequent interpretations of the Constitution might permit. This question must be resolved case by case. However, doubts as to Congressional intent should be resolved in the light of recent acts of Congress which carefully preserve the jurisdiction of the civil courts. Every evidence from such statutes indicates that the current Congress at least wants to preserve the jurisdiction of the civil courts wherever possible.⁶⁸

63. *Id.* at 217.

64. *Id.* at 245.

65. *Id.* at 220.

66. *Carter v. Gear*, 197 U. S. 348, 355 (1905); *Rasmussen v. United States*, 197 U. S. 516, 535 (1905).

67. See Lyon, *Old Statutes and New Constitution*, *supra* at 599.

68. 56 STAT. 173 (1942), 18 U. S. C. § 97(a) (1943), authorizes military officials to make necessary regulations for military areas, violations of which are punishable by penalty in the civil courts. This statute is basis enough for all

Jurisdiction of the Court. It is customarily argued in cases in which individuals attempt to test the validity of the imposition of martial law or the suspension of the writ of habeas corpus that the courts have little or no jurisdiction—that the executive department is the sole judge of the necessity of martial law and the validity of the acts done under it. This is not the law. It is true that a number of cases, particularly in state courts, look in this direction; but these cases are either in conflict with Supreme Court decisions or have been limited in their own jurisdictions.

The argument for excluding the courts from jurisdiction is put thus by King: "The decision and action of the executive pursuant to the emergency provisions formerly in the Constitution of Hawaii and now in the Organic Act are final and conclusive."⁶⁹ The basic proposition in such a view is that a court can do no more than determine whether martial law is validly declared or, in the case of suspension of the writ, that the writ has been legally suspended.⁷⁰ There its power ends. It may be taken without further discussion that the executive cannot close the courts to the extent of forbidding all habeas corpus review. This was attempted by the President in the Saboteur case and was flatly rejected in *Ex parte Quirin*.⁷¹

King, to support his argument for exclusion of comprehensive judicial review, relies principally on eight cases, all of which either fall short of proving the point attributed to them or have no force.⁷² The cases which lend most comfort to his positions⁷³ are labor cases in which mar-

necessary military regulations in Hawaii. The Act of March 22, 1943, described *supra* note 51, carefully extends naval military court jurisdiction over civilians only to areas in which civil courts are not functioning, and with equal care excludes Hawaii from such jurisdiction.

69. King, *supra* note 54, at 618.

70. The Civil War cases go to this point—who can suspend the writ?—and hence are irrelevant here. *E.g.*, *Ex parte Merryman*, 17 Fed. Cas. 144, No. 9487 (C. C. Md. 1861); *In re Kemp*, 16 Wis. 382 (1863).

71. 317 U. S. 1, 25 (1942): "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."

72. *Moyer v. Peabody*, 212 U. S. 78 (1909); *Luther v. Borden*, 7 How. 1 (1849); *Martin v. Mott*, 12 Wheat. 19 (U. S. 1827); *Ex parte Moyer*, 35 Colo. 154, 91 Pac. 738 (1905); *In re Kalanianaʻole*, 10 Hawaii 29 (1895); *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1899); *Barcelon v. Baker*, 5 Phil. 87 (1905); *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533 (1914); *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913); *State v. Brown*, 71 W. Va. 519, 77 S. E. 243 (1912). King might fairly have added two contemporary English cases, *Liversidge v. Anderson*, [1942] A. C. 206, and *Greene v. The Secretary of State for Home Affairs*, *id.* at 284. The *Liversidge* and *Greene* cases are contemporary English holdings that, under a wartime statute and the resultant order in council, a person may be restrained upon order of the Home Secretary and, in substance, that the scope of the Court's review is limited to a determination that the order was made. This is a far cry from earlier English decisions such as *Wolf Tone's Case*, 27 How. St. Tr. 613 (K. B. 1798). It is significant, however, that these cases make the point that the restraint is preventive rather than (as in the *Duncan* and *White* cases) punitive.

73. Such as the *Boyle*, *Moyer*, and *Hatfield* cases, *supra* note 72

tial law was torn out of its normal province in the law of war and applied to support one side in the vigorous strikes that marked labor's flexing of its muscles in the period between 1900 and the World War. If these cases are to be considered as of any weight, the military forces today must carry the burden of showing the relevance of the attitude of state governors and courts in the early Twentieth Century toward labor unions to the second World War.

*Martin v. Mott*⁷⁴ holds that the executive has unreviewable authority to call out the militia, a point not in issue here, and *Luther v. Borden*⁷⁵ holds that his decision as to the necessity of martial law will not be reviewed. As will be shown in the discussion of *Sterling v. Constantin*,⁷⁶ this is not the same as an exemption of the executive from review of particular acts performed once martial law is declared. These cases might have been pushed to the point that King suggests, but this development is foreclosed by later opinions. The same is true of *Moyer v. Peabody*, in which Justice Holmes, upholding martial law in an Idaho strike, used needlessly broad language, saying, "Public danger warrants the substitution of executive process for judicial process."⁷⁷ The generality of this decision was specifically disavowed in the *Constantin* decision.⁷⁸

The West Virginia decisions, under which martial law was made the basis of military trials of hundreds of striking workmen, were based on the theory that a governor might declare that a state of war existed and thereafter be liable for abuses only by impeachment.⁷⁹ These decisions have been strongly criticized in West Virginia,⁸⁰ have been modified⁸¹ there, and have not been followed elsewhere. They are so obviously in conflict with the *Constantin* decision as to be of no weight.

The *Kalaniana'ole* case⁸² involved an insurrection against the newly formed Republic in behalf of the monarchy only eighteen months after the establishment of the Republic. Under martial law about 200 people were tried by military commissions for misprision of treason. The Court held that the President of the Republic's decision as to necessity was not reviewable, openly rejecting the *Milligan* argument. The opinion is elaborately stated but so obviously is aimed to serve purposes of state rather

74. 12 Wheat. 19 (U. S. 1827).

75. 7 How. 1 (U. S. 1849).

76. 287 U. S. 378 (1932).

77. 212 U. S. 78, 85 (1909).

78. 287 U. S. 378, 400 (1932).

79. *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533 (1914); *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913); *State v. Brown*, 71 W. Va. 519, 77 S. E. 243 (1912).

80. See the strong dissenting opinions of Robinson, J., in cases cited in note 79 *supra*, and address of Wm. G. Mathews, President, West Virginia Bar Association, SEN. Doc. No. 230, 63rd Cong., 1st Sess. (1913) 5846.

81. *Ex parte Lavinder*, 88 W. Va. 713, 108 S. E. 428 (1921).

82. 10 Hawaii 29 (1895).

than to determine the law that it has little value as a precedent. The Court candidly admits that military commissions were essential because Hawaiian juries would never have convicted the defendants.⁸³ The Republic was new and was foisted on the natives through revolution by a small ruling American group which could not have kept its seat without dictatorial methods.

The basic American decisions are to the effect that the courts may review suspension of the writ or declarations of martial law to the extent required to determine whether a particular act taken by the military authorities was in fact necessary and legal.⁸⁴ In *Ex parte Milligan*, the Court held that: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."⁸⁵ The Court, on this understanding, proceeded to review the necessity for the proceeding of the military commission and found it invalid. In *Ex parte Quirin*, the Court similarly held that it had jurisdiction to review the legality of the proceedings by the military commission, though in that case the issue of necessity was not squarely involved.

This problem was clearly before the Court in *Sterling v. Constantin*. There the governor of Texas had declared martial law in the oil fields for the purpose of enforcing certain oil controls which were of doubtful legality under existing decisions. The district court enjoined the governor from interfering with lawful production, and the Supreme Court affirmed in a unanimous opinion by Chief Justice Hughes. The district court examined into the basis of the governor's procedure and found as a fact that there was no war or insurrection. The Supreme Court held that it was not barred by the executive determination from reviewing the basic facts. If not, "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. . . ."⁸⁶ The Court, relying on the *Milligan* decision, held that the governor has exclusive authority to determine whether military action is required to cause the laws to be faithfully executed and to decide whether the militia must be called up, and that there is a wide range of executive discretion as to the actions to be taken, but "what are the allow-

83. *Id.* at 63. This counter-revolution is described in PRATT, *EXPANSIONISTS OF 1898* (1936) c. VI.

84. See, on a related point, *Mitchell v. Harmony*, 13 How. 115, 134 (U. S. 1852), holding that private property of a citizen may be taken in wartime upon a declaration of military necessity, but that in determining liability the Court will review the necessity of the taking, measuring the facts from the point of view of the officer who acted.

85. 4 Wall. at 130-131.

86. 287 U. S. 378, 397 (1932).

able limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."⁸⁷

Many state and lower federal court decisions also uphold the view that the military discretion is subject to judicial review.⁸⁸

In the light of these cases it may be concluded that the court has jurisdiction to determine "whether the invasion of interests normally protected was, under the circumstances, arbitrary and in excess of the occasion,"⁸⁹ for "where necessity is absent, measures of martial law may not legally be used."⁹⁰

This is not to say that the military and executive decisions will be treated lightly or be subject to review *de novo*. "Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."⁹¹ The judicial review, however, should do more than determine, as in the case of the normal administrative finding, whether mere substantial evidence exists to support the executive decision. Here some presumption against restraints on civil liberty may apply.⁹²

Were these military trials constitutional? If it is concluded that the Constitution applies to Hawaii and that the courts have a duty to determine the necessity of the suspension of the civil courts, the question remains whether the suspension of those courts was unnecessary and the trials by military tribunal illegal.

87. *Id.* at 401.

88. *United States v. Philips*, 33 F. Supp. 261 (N. D. Okla. 1940); *Miller v. Rivers*, 31 F. Supp. 540 (M. D. Ga. 1940); *Powers Merc. Co. v. Olson*, 7 F. Supp. 865 (D. C. Minn. 1934); *Herlihy v. Donohue*, 52 Mont. 601, 161 Pac. 164 (1916); *Allen v. Okla. City*, 175 Okla. 421, 52 P.(2d) 1054 (1935); *Hearon v. Calus*, 178 S. C. 381, 183 S. E. 13 (1935); *Ex parte Lavinder*, 88 W. Va. 713, 108 S. E. 428 (1921).

89. FAIRMAN, *LAW OF MARTIAL RULE* (2d ed. 1942) 104.

90. WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 19.

91. *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943). It should be noted as extremely important that the Court in the *Hirabayashi* case carefully distinguishes the case from one involving martial law or trial by military tribunal. At 92. Justice Douglas, concurring, noted that the general orders affecting the Japanese Americans were subject to ample civil review. At 106. Justice Murphy, concurring, quoted *Milligan* with approval. At 110. Justice Rutledge, concurring, expressly reserved opinion on the discretion of the executive in suspending habeas corpus. At 114.

92. *United States v. Carolene Products, Inc.*, 304 U. S. 144, 152 (1938). In determining the extent to which it will review military judgments, the courts will be sure to be influenced by the type of consideration which appeared conclusive to the Supreme Court of the Philippine Islands in *Barcelon v. Baker*, 5 Phil. 87, 94 (1905). In that case the court suggested the possibility that the Philippines might some day be invaded by "one of the thickly populated governments near this archipelago," which might, "without warning, appear in one of the remote harbors

The issue here is not whether there is an imminent danger of invasion. In these cases Admiral Nimitz and General Richardson have filed affidavits and testified that invasion was imminent. Governor Stainback testified that invasion was not imminent, and Judge Metzger in his holding sided with the Governor. However, this is a false issue and there is no necessity for the courts to set themselves up as arbiters of this factual dispute on a military question. There has been invasion and the question is, assuming the likelihood of the possibility of a repetition, *to what extent* is suspension of the writ and imposition of martial law justified? It is here that the distinction between qualified and absolute martial law, discussed above, becomes of the sharpest significance. Qualified martial law may have been justified by the events, but is the same true of punitive martial law? None of the key phrases of Section 67 of the Organic Act, "imminent danger of invasion," "suspension of the writ of habeas corpus", and "martial law" have any sharp, clear-cut meaning. In the light of all the circumstances, how much, if any, suspension of constitutional rights is authorized?⁹³

The *Milligan* rule is that military trials cannot be tolerated under the Constitution where the courts are open and can, as a practical matter, function. Under this rule, as Colonel King concedes, the convictions of Duncan and White are completely unjustified. There is not a fact in the record of these cases or any fact known to common knowledge which indicates that the civil courts could not have functioned when these men were convicted. The record shows that as a matter of fact the courts have been able to function since December 8, 1941. On December 16, 1941, a substantial portion of their jurisdiction was remitted to them and this was amplified by General Order 57 on January 27, 1942. There is no reason other than military interference why the courts could not have functioned at least from December 16, 1941, or January 27, 1942. There is not a scintilla of evidence to support the hypothesis that the Hawaiian legal system cannot be trusted to try these

with a powerful fleet and begin to land troops." If someone then, resisting the suspension of habeas corpus, contended that no invasion actually existed, the court declared that it would certainly not call the officers in the field away from their posts of duty to justify suspension of the writ. It is the contention of this article that no such interference with military activity is necessary for a court to determine that the military effort to close the civil courts of Hawaii was completely illegal.

93. The line in the *Milligan* decision that "martial law cannot arise from a *threatened* invasion" [4 Wall. 2, 127 (U. S. 1866)], has also been emphasized out of all proportion in discussions of the validity of martial law in Hawaii. Here the invasion was not only threatened but real. No one has denied that preventive arrests in Hawaii on December 8, 1941, would have been upheld. The argument as to whether the threat had terminated may be discarded as profitless if, as contended in this article, the military trials are invalid without raising this question.

cases, particularly one involving a humdrum embezzlement, or that their judicial processes are any slower than respect for the constitutional deficiencies, ignored by the military courts, requires.

Even under the minority opinion in the *Milligan* case it may be argued that the trial of civilians by military courts under the circumstances known to exist in Hawaii was completely illegal. The minority opinion suggests that Congress has the authority to authorize military courts when the courts are open if there is a likelihood of insurrection in the area or when the courts may not be loyal to the government.⁹⁴ No one has ever so much as suggested that the courts of Hawaii are not completely loyal and there is no evidence at all of a probable insurrection.

There can be no doubt then that under the *Milligan* rule the arrest, trial and punishment of Duncan and White by military tribunals is utterly and completely illegal. The sole question remaining is whether the *Milligan* rule will be followed, or whether, as suggested by the commentators mentioned at the beginning of this article, it is to be discarded.

The prediction of court actions is a precarious undertaking, but at least there is nothing in the decisions since 1866 which would indicate that the Supreme Court will abandon the *Milligan* rule. There have been no Supreme Court holdings squarely in point, but the case has been frequently quoted with approval, and in both the *Quirin* and *Hirabayashi* decisions, the Court carefully distinguishes the *Milligan* problem and reserves the questions raised by it for future decision.

The state cases which have trenched on the *Milligan* rule can give little guidance to the Supreme Court. As has been noted, they are for the most part labor cases in which the state courts have permitted martial law so that the governor could control strikes.⁹⁵ In the most extreme of the cases and almost the only ones which authorize punitive martial law and trials of civil offenses by military courts, the labor disputes were particularly severe.⁹⁶ The *Milligan* case has customarily been claimed as a shield by organized labor in its protests against imprisonment by military officials for strike participation. The state cases dealing with the *Milligan* rule presented problems of labor relations and

94. Concurring opinion, *Ex parte Milligan*, 4 Wall. 2, 140-141 (U. S. 1866).

95. The only instance known in which the governor declared martial law to aid the strikers is *Powers Merc. Co. v. Olson*, 7 F. Supp. 865 (D. C. Minn. 1934).

96. These are the three West Virginia cases, *supra* note 79. For a description of the causes of these strikes and their conduct, see *FEDERAL AID IN DOMESTIC DISTURBANCES*, SEN. REP. No. 321, 63rd Cong., 2d Sess. (1914).

did not involve the application of the war power.⁹⁷ But even in the field of labor relations many state courts have supported the *Milligan* rule.⁹⁸ As has been reiterated in this discussion, the Supreme Court of the United States has never approved punitive martial law, and has never upheld a military tribunal in a conviction for a civil offense by a military tribunal. *Moyer v. Peabody*, involves detention but not criminal prosecution. Only three cases have been discovered in American law which uphold criminal prosecutions by military courts for violation of civil laws.⁹⁹

It is not odd that so few decisions support what has been done in Hawaii, for criminal proceedings before military tribunals against civilians for violations of civil law are wholly foreign to American democratic government and are likely to be so termed by the Supreme Court. The basic American policy is that expressed by President Wilson during the World War when he was asked to comment on a bill that would extend martial law throughout the United States. He said: "I am wholly and unalterably opposed to such legislation, and very much value the opportunity to say so. I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise."¹⁰⁰ Nothing of weight in American legal history supports the view that the Supreme Court has any intention of abandoning one iota of the rule of *Ex parte Milligan*.

CONCLUSION

From the contract labor, near slavery economy of the Hawaiian Republic to the provost marshal labor system of World War II is very little progress indeed in the nation's administration of a territory. We are told by Hawaii's chief executive, himself an avowed enemy of martial rule, that the chief excuse for the continuation of martial law is the desire by some persons to maintain this convenient method of wartime labor control. It is significant that the attacks on the *Milligan* decision,

97. The subject of labor relations and martial law is discussed in RANKIN, *WHEN CIVIL LAW FAILS* (1939). For a history of the use of federal troops in various disturbances, and the martial law applied in some instances, the basic work is SEN. DOC. NO. 209, 67th Cong., 2d Sess. (1922).

98. RANKIN, *op. cit. supra* note 97, c. 7; *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914).

99. These are the West Virginia cases, where all the defendants were pardoned as soon as strike was over, the *Kalamanaole* case, and *United States ex rel. McMasters v. Wolters*, 268 Fed. 69 (S. D. Tex. 1920), in which a district court denied habeas corpus to a petitioner jailed for a traffic offense by a military tribunal during a period of martial law in a Galveston strike. The opinion contains substantially no reasoning. *Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind. 1935) upholds martial law in an Indiana labor dispute but the case involves detentions only.

100. Rankin, *op. cit. supra* note 97, at 138-139.

whether in Hawaii in 1944 or in West Virginia in 1914 or in Colorado in 1906, are all of a piece. They are, under one guise or another, assaults on one of the foremost constitutional protections for organized labor.

But the problem in the instant case far overshadows the relatively petty issues of labor disputes. As the history of military maladministration in Hawaii so abundantly shows, the question is: Which shall rule, caprice or law, generals or civil government; which shall be the basic document of the American Government, the Manual for Courts Martial or the Constitution?

The *Milligan* opinion was written by Justice David Davis, who had been a circuit judge in Illinois before whom Lincoln had practiced. Davis managed Lincoln's campaign for the presidential nomination in 1860 and was the administrator of Lincoln's estate. He was appointed to the Supreme Court by Lincoln and served until 1877 when he went into the Senate. In politics he was an independent liberal, and as senator he sided sometimes with the Republicans and sometimes with the Democrats. In 1872 he was nominated by the Independent Labor party for president on an anti-monopoly ticket, and came close to being the nominee of the liberal Republicans and Democrats, who eventually chose Greeley. He combined eastern education and frontier tradition. He was a very wise man.