point of disagreement was over which department of the government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning, and in which there were no hostilities, does not qualify.[1615] The minority argued that the question was for Congress' determination.[1616] The entire Court rejected the Government's contention that the President's determination was conclusive in the absence of restraining legislation.[1617]

Similarly, in *Duncan v. Kahanamoku*,[1618] the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare martial law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor's order.

Enemy Country.—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by congressand the President.[1619] "What is the law which governs an army invading an enemy's country?" the Court asked in *Dow v. Johnson*.[1620] "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

These conclusions follow not only from the usual necessities of war but also from the Court's doctrine that the Constitution is not automatically applicable in all territories acquired by the United States. The question turns upon whether Congress has made the area "incorporated" or "unincorporated" territory.[1621] In *Reid v. Co-*

[1615] 71 U.S. at 127.

[1616] 71 U.S. at 132, 138.

[1617] 71 U.S. at 121, 139–42.

[1618] 327 U.S. 304 (1946).

[1619] New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874); Santiago v. Nogueras, 214 U.S. 260 (1909); Madsen v. Kinsella, 343 U.S. 341 (1952).

[1620] 100 U.S. 158, 170 (1880).

[1621] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).