

Sec. 2—Powers, Duties of the President

Cl. 1—Commander-In-Chiefship

By section 5 of the Organic Act, “the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States.” In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding till February 1946,²¹⁵ the Court, speaking by Justice Black, held that the term “martial law” as employed in the Organic Act, “while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.”²¹⁶

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Stone concurred in the result. “I assume also,” he said, “that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,”²¹⁷ but added that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that “courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight.”²¹⁸

Articles of War: The Nazi Saboteurs.—In 1942 eight youths, seven Germans and one an American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the

²¹⁵ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

²¹⁶ 327 U.S. at 324.

²¹⁷ 327 U.S. at 336.

²¹⁸ 327 U.S. at 343.