

## MARTIAL LAW IN HAWAII

Intimately connected to the confinement of U.S. citizens of Japanese ancestry was the denial of civil rights to all civilians, Japanese Americans and others, under wartime military dictatorship in Hawaii. Although there was no mass removal of local Issei and Nisei, their presence was central in the long legal and political struggle over military rule and the

refusal of the army to restore civilian authority.<sup>94</sup> When Commanding General Walter Short first insisted, at the time of the Pearl Harbor attack, that Governor John Poindexter sign the proclamation for unlimited martial law in Hawaii, he assured Poindexter that it would be only a temporary measure, until the immediate crisis had passed—a “reasonably short time.”<sup>95</sup>

Nevertheless, once granted extensive powers, the army proved reluctant to surrender any meaningful authority. The most recalcitrant figure was Colonel (later General) Thomas H. Green of the army Provost Marshal General’s office, the military’s chief executive officer. It was Green who drew up the martial law proclamation that bypassed the Hawaii Defense Act and gave absolute power to a military governor, and Green who created an organizational plan in the succeeding days that left Hawaii with a status resembling that of a conquered province. Over the ensuing months, Green drafted the military orders that regulated Hawaiian society. Rather than using the machinery of the existing civilian government, he confiscated relief funds granted by Congress and used the proceeds to hire civilian employees to carry out official functions.<sup>96</sup>

From the outset, a prominent feature of the martial law regime designed by Green was the imposition of military tribunals, erected under General Order 4. Although civilian courts were permitted to reopen a week after the attacks, they were restricted to civil cases. All criminal cases were tried by a network of military commissions and provost courts established by the military governor’s office, allegedly based on the model of military courts-martial. In fact, these military tribunals, presided over by armed officers generally untrained in law, were classic examples of drumhead justice, unfettered by rules of evidence, presumption of innocence, or constitutional safeguards of fair trials. Juries were forbidden, and lawyers discouraged or even barred. Defendants were not given copies of the charges against them and were permitted only to look at the prosecution’s copy of charge sheets. Furthermore, the suspension of habeas corpus meant that civilians could be held without charge. The tribunals frequently issued severe sentences, including fines and imprisonment, for misdemeanors and relatively trivial offenses, and the system had no machinery established for appeals. So seldom did the tribunals issue acquittals that defendants generally chose to plead guilty, whether or not they had not committed the crimes charged, rather than face the heavy penalties meted out to those who dared plead not guilty.<sup>97</sup> Of the 22,480 trials conducted in provost court in Honolulu in 1942–1943,

99 percent ended in convictions.<sup>98</sup> One official who heard 819 cases where defendants pleaded not guilty issued convictions in all 819!<sup>99</sup>

The case of Sanji Abe furnishes an illustration of the embattled position of Japanese Americans under the regime. Abe, a World War I veteran and former Honolulu policeman, was the lone Nisei senator elected to the prewar legislature. Despite (or because of) his position, Abe seems to have been closely watched by the military authorities once war began. On August 2, he was arrested and charged with possession of a Japanese flag. Abe protested that he had never bought or flown any Japanese flag—the item in question (which Abe suspected had been planted) was found among other stage property in a theater of which he was part owner. He also pointed out that the military orders making possession of Japanese flags a crime were not issued until August 8, six days after his arrest. Army officials were thus forced to release him on August 19. Still, even after he publicly burned the offending flag, he remained under suspicion. As if to demonstrate in graphic terms the authoritarian power of the military, in September 1942 Green had Abe rearrested, this time without charge, and placed in “custodial detention,” where he remained for nineteen months.<sup>100</sup>

There was little audible opposition within the islands to martial law or military justice. Neither the Hawaii Bar Association nor local business groups (who were delighted by the harsh curbs imposed on labor and the outlawing of strikes) took a contrary position. As late as December 27, 1942, the Honolulu Chamber of Commerce praised the government as “eminently fair and considerate of our civil rights.”<sup>101</sup> The local press, subjected to official censorship and the influence of the army’s propaganda apparatus, remained similarly supportive. As the *Hawaii Advertiser* editorialized in December 1942, “the community as a whole, business men, professional men and average citizens, do not desire complete elimination of martial law at this time.”<sup>102</sup> Honolulu Mayor Lester Petrie, the chief civilian office holder, was an outspoken defender of military rule, arguing that essential functions could be assured only by the army.<sup>103</sup>

In July 1942 a new territorial governor, Federal Judge Ingram Stainback, was appointed, although his power was largely nullified under the military government. As the menace of invasion by Tokyo receded following the battle of Midway, he grew increasingly impatient over army control and attempted to negotiate a return to civilian rule. However, he made no headway with Green and the other military commanders, at least in part because of the issue of Japanese Americans. Green had already in-

sisted to Assistant Secretary of War McCloy that if regular criminal courts reopened, the one hundred U.S. citizens of Japanese ancestry of doubtful loyalty who were being held on Sand Island would be able to file habeas corpus suits for their release. In any case, he noted, no Japanese American charged with a criminal offense could secure a fair trial in wartime Hawaii (irrespective of the presence of Nisei jurors), so military tribunals could better assure justice.<sup>104</sup> Navy Secretary Frank Knox, backed by Admirals Chester Nimitz and Ernest King, commanders of the Navy's Pacific Fleet, immediately protested any relaxation in martial law because of the danger posed by Japanese Americans, and "the large number of unquestionably pro-Japanese who are still at large" on Oahu.<sup>105</sup> Rebuffed by the military, on October 3 Stainback took office with a unilateral proclamation restoring civilian rule. He then named J. Garner Anthony as his attorney general. Anthony, a wealthy member of an elite local firm, had boldly published an article in the *California Law Review* during the spring of 1942 arguing that martial law was unconstitutional.<sup>106</sup>

Stainback and Anthony turned for help to Interior Secretary Harold Ickes, whose department exercised official oversight of the territory. Ickes (who had been privately outraged by the unjust treatment of Japanese Americans) was widely known to have been shocked and displeased by Poindexter's action in turning over all authority to the military.<sup>107</sup> Throughout 1942, Ickes had watched events in Hawaii closely, thanks to an agent, Ben Thoron, whom the secretary had sent in February 1942 to report on the situation. Ickes had also attempted without success to intervene with the War Department to curb the excesses of military justice.<sup>108</sup> Stainback and Anthony found Ickes strongly in agreement—although the secretary ordered Stainback to excise the part of his proclamation officially withdrawing Poindexter's declaration of martial law, on grounds that it was better to try for a negotiated settlement.<sup>109</sup> Ickes's undersecretary Abe Fortas held a series of conferences in August 1942 with Green and with Justice Department officials. Initially there was a spirit of conciliation and an accord was reached. Fortas proposed that civilian courts resume jurisdiction over all civil and criminal trials except for matters involving members of the armed forces and those employed by the military governor, which would continue to be heard by the military tribunals. The army delegates objected that Japanese Americans and other non-whites could be called as jurors, and there was great risk that their racial hatreds or disloyalty would prevail over impartial justice. To calm such

fears, Fortas agreed to grant the military governor authority to exempt any classes of persons from jury service.<sup>110</sup>

Upon his return to Hawaii, on August 31 Colonel (now General) Green issued General Order 133, which restored jurisdiction over ordinary criminal matters to the civil courts, while retaining the suspension of habeas corpus. However, he followed four days later with General Order 135, which “interpreted” the former order to forbid federal courts from trying civil or criminal cases challenging statutory provisions for the protection of the government, the war effort, or national security. Similarly, territorial courts were barred from trying cases based on local ordinances involving such matters as vagrancy, prostitution, and assault and battery against law enforcement officers.<sup>111</sup> This meant there was little change in practice. Emmons, while more flexible than Green, upheld these actions. Emmons insisted that the civilian governor must remain subordinate to the military, and that he must be the one to determine what powers to return to civilian control and when. Further air attacks on Hawaii, he told McCloy, were possible, even likely. Most important, he needed to control the civilian population. He made clear that the presence of so many Japanese American citizens and aliens, “some . . . disloyal and others of doubtful loyalty,” made security an urgent consideration.<sup>112</sup>

Ickes was outraged by Green’s actions, which he considered a violation of the spirit of Fortas’s agreement. In a (barely) anonymous interview, Ickes complained that the military regime had “violated every guarantee of the Bill of Rights except possibly that of free worship.”<sup>113</sup> He resolved to work for a more significant rollback of military rule. To build support in Congress, Ickes threw his support to Joseph Farrington, who was elected territorial delegate in November. Farrington was an outspoken opponent of martial law, which he claimed was detrimental to the war effort. Meanwhile, Ickes and Biddle began a new set of conferences with McCloy to find an arrangement. Both McCloy and Secretary of War Stimson believed that in the “fortress” of Hawaii, the local commander must have maximum authority. They pointed to newspaper reports (which they did not bother to mention were issued by a censored press dependant on the goodwill of the military governor’s office) that martial law in Hawaii was popular with all except “the politicians.”<sup>114</sup> In December 1942 Stainback traveled to Washington, hoping to persuade the president to revoke martial law. He and Anthony joined Biddle (and occasionally Ickes) in a new series of negotiations with McCloy and Emmons—Green was present at

the initial sessions but was thereafter excluded. The army refused to surrender any real authority. It was clear to observers that their resistance was fueled (or at least justified) by the fear of Hawaii's racial diversity, especially the local Japanese. One journalist noted, "Hawaii contains within itself a highly explosive population condition which the military authorities feel can be controlled only by absolute military power."<sup>115</sup>

Although all the parties had hoped to shield President Roosevelt from the debate, given the vast wartime burdens on him, once the two sides reached obvious deadlock Biddle appealed to him to press the military, who he said were "now running Hawaii lock, stock, and barrel," to turn back the civilian functions in the territory to Governor Stainback. Biddle's assistant James Rowe, a former White House assistant, had already forwarded the president a memo enclosing Anthony's reports on the army's police state tactics in Hawaii and strongly recommending that he read them in full.<sup>116</sup> Now the attorney general sent the president reports of poor administration and curfew violations by the army and complained of Green's arrogant and unyielding attitude—even McCloy had agreed that he be replaced. Biddle warned that if conditions did not improve, Republicans would have ammunition to attack the administration.<sup>117</sup> Roosevelt agreed that Hawaii was "insidious" in its impact on the military and was especially sensitive to the political problem. "The real point of the matter is that while Hawaii will not, in all probability, be attacked again, the eyes of the country are, and will be, on Hawaii and all conditions there."<sup>118</sup> He told Biddle he supported removal of Green and rotation of officers to break up the entrenched army elite and improve administration. Stimson responded by telling FDR that if he wanted the "fortress" of Hawaii defended by the army he must give them proper authority, and he added facetiously that if Roosevelt wanted to abolish martial law, Harold Ickes would have to take responsibility for defense. Roosevelt quickly agreed with Stimson.<sup>119</sup> While he proceeded to assure the press that he thought martial law could be "relaxed," he made no effort to intervene on the scope of military authority—he seemed untroubled by the reports of civil liberties abuses.<sup>120</sup>

In January 1943, with Roosevelt's support, Ickes and Stimson finally brokered a compromise providing for a gradual restoration of authority to Hawaii's civilian government, but only "when and as the military situation permits," and subject to reversal at any time. The president issued an official letter approving the arrangement. "I can readily appreciate the

difficulty in defining exactly the boundaries between civil and military functions. I think th[is] formula . . . meets the present needs.”<sup>121</sup> In accordance with the deal, on February 8, 1943, Emmons issued a decree, effective March 10, returning authority over eighteen governmental functions to the territorial government. On February 17 the Hawaiian legislature was finally allowed to meet, after a fifteen-month recess. For the first time in a decade, there were no Nisei legislators—the eight prewar Japanese American representatives either had been pressured not to run or had been defeated for reelection, while Senator Sanji Abe, who remained in detention, had resigned.

Notwithstanding the partial restoration of civilian rule, the army insisted on retaining special emergency powers, including censorship powers, curfew enforcement, and control of alien populations, as well as regulation of labor in defense-related jobs and control of prostitution. The martial law regime continued to exercise broad powers over “security.” The military governor also stated publicly that the “privilege” of habeas corpus remained suspended and continued the use of provost courts to try military officials and those accused of offences involving them.<sup>122</sup> Again, the military was not shy about playing the race card. As one friendly observer wrote:

It is generally assumed that if the Japanese population in Hawaii were less numerous, the military authorities would be much more willing to relinquish their control over civilian affairs. Here the decision of the authorities seems to be justified by the record. Thorough policing and selective detention of the Japanese are regarded as effective means of handling this difficult problem. The facts that there have been no interracial disturbances of consequence and that the Japanese have been well behaved are seen as evidence that the Army’s methods are producing satisfactory results.<sup>123</sup>

Despite the language of the agreement, there were no further changes in the scope of military rule in the following eighteen months, even as the United States moved closer to victory over Japan and the threat of invasion grew increasingly remote. Emmons refused to make further changes in the scope of martial law before his departure. His successor, General Robert C. Richardson, who assumed the title of military governor on June 1, 1943, would prove determined to retain power.