G.R. No. 231658 – ***REPRESENTATIVE EDCEL C. LAGMAN, ET AL., Petitioners v. HON. SALVADOR C. MEDIALDEA, ET AL., Respondents.***

G.R. No. 231771 – ***EUFEMIA CAMPOS CULLAMAT, ET AL., Petitioners v. PRESIDENT RODRIGO ROA DUTERTE, ET AL., Respondents.***

G.R. No. 231774 – ***NORKAYA S. MOHAMAD, ET AL., Petitioners v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL., Respondents.***

Promulgated:

July 4, 2017

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SEPARATE OPINION

I **CONCUR.**

I hereby substantiate my concurrence in order to express my views on certain issues that I deem to be of greatest significance.

I

The 1987 Constitution is often described as an anti-martial law fundamental law. This may most probably be because the Filipino people have thereby firmly institutionalized solid safeguards to ensure against the abuse of martial law as a response to any internal or external threats to the stability of the Republic.

I think, however, that the description may not be entirely apt. Martial law had theretofore no generally accepted definition, much less precise meaning. The lack of an accepted or constant definition and precision has

been recognized in this jurisdiction for some time now.[1] The need for the Court to enlighten our people through a higher understanding of the concept of martial law thus exists even today. But the problem is not only about the meaning; it is also about the scope of martial law. Such understanding is essential to the determination of the serious issues that have been presented in these consolidated cases.

There is much about martial law that is mysterious probably because of its extraordinary and uncommon effects on civilians used to a rule by civil authority. The traditional concept of martial law is its not being law in the usual sense but the will of the military commander, to be exercised by him or her only on his or her responsibility to his or her government or superior officer; when once established, it applies alike to citizen and soldier.[2] In its comprehensive sense, the term *martial law* is that which is promulgated and administered *by* and *through* military authorities and agencies for the maintenance of public order and the protection of persons and property in territory wherein the agencies of the civil law usually employed for such purposes have been paralyzed, overthrown, or overpowered, and are unable,

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[1] See the concurring opinion of J. Barredo in *Aquino v. Enrile,* No. L-35546 September 17, 1974, 59 SCRA 183, which noted:

> Martial law pursuant to Proclamation No. 1081, however, does not completely follow the traditional forms and features which martial law has assumed in the past. It is modern in concept, in the light of relevant new conditions, particularly present day rapid means of transportation, sophisticated means of communications, unconventional weaponry, and such advanced concepts as subversion, fifth columns, the unwitting use of innocent persons, and the weapons of ideological warfare.
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> The contingencies which require a state of martial law are time-honored. They are invasion, insurrection and rebellion. Our Constitution also allows a proclamation of martial law in the face of imminent danger from any of these three contingencies. The Constitution vests the power to declare martial law in the President under the 1935 Constitution or the Prime Minister under the 1973 Constitution. As to the form, extent, and appearance of martial law, the Constitution and our jurisprudence are silent.
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> **Martial law pursuant to Proclamation No. 1081 has, however, deviated from the traditional picture of rigid military rule super-imposed as a result of actual and total or near total breakdown of government.**
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> Martial law was proclaimed before the normal administration of law and order could break down. Courts of justice were still open and have remained open throughout the state of martial law. The nationwide anarchy, overthrow of government, and convulsive disorders which classical authors mention as essential factors for the proclamation and continuation of martial law were not present.
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> More important, martial law under Proclamation No. 1081 has not resulted in the rule of the military. The will of the generals who command the armed forces has definitely not replaced the laws of the land. It has not superseded civilian authority. Instead of the rule by military officials, we have the rule of the highest civilian and elective official of the land, assisted by civilian heads of executive departments, civilian elective local officials and other civilian officials. Martial law under Proclamation No. 1081 has made extensive use of military forces, not to take over civilian authority but to insure that civilian authority is effective throughout the country. This Court can very well note that it has summoned and continues to summon military officers to come before it, sometimes personally and at other times through counsel. These military commanders have been required to justify their acts according to our Constitution and the laws of the land. These military officers are aware that it is not their will much less their caprice but the sovereign will of the people under a rule of law, which governs under martial law pursuant to Proclamation No. 1081.

[2] Id., citing *Johnson v. Jones*, 44 Ill 142.
In addition, Thurman Arnold wrote about Martial Law in the *Encyclopaedia of Social Sciences, viz.*:

> Martial law is a legal concept by which Anglo-American civil courts have sought in times of disorder to define the limits of executive or military control over citizens in domestic territory. It is analyzed in so many different ways, and there are so many theories as to its sanction that no definition can do more than express the most current legal impressions. Martial law is regarded as the substitution of the will of the executive or military commander for the process of the courts.

for the time being, fully to operate and function.[3] In its strict and absolute sense, however, martial law *supersedes* all civil authority during the period in which it is in operation.[4]

The latter sense is not true under the 1987 Constitution. The majority opinion, ably written for the Court by Justice Del Castillo, adverts to the discussion among the members of the Constitutional Commission on the added powers of the President during martial law.[5] As can be gathered from the discussion, martial law does not automatically vest legislative power in the President; and does not supplant the functioning of civil courts. During martial law, the President is granted the powers of a commanding general in a theater of war, and, as such, becomes authorized to issue orders that have the effect and force of law strictly in the theater of war.

The reference to the theater of war manifests the intent of the framers to revert to the traditional concept of martial law as developed in American jurisprudence. *Ex parte Milligan*,[6] decided around the end of the American Civil War, stands among the earliest cases explaining the necessity for martial rule to substitute civil authority during an invasion or civil war, when it is impossible to administer justice according to law. It is worthy to note that *Ex parte Milligan* referred to a theater of *active* of military operations or the locality of *actual* war in relation to martial rule, to wit:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it

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[3] Id., citing *State ex rel. O'Connor v. District Court in Shelby County*, 219 Iowa 1165, 260 NW 73, 99 ALR 967; *Ex parte McDonald*, 49 Mont 454, 143 P 947; *State ex rel. Grove v. Mott*, 46 NJL 328.

[4] Id., citing *Ex parte Mil*ligan, 71 US 2; *Martin v. Mott*, 25 US 19; *Johnson v. Jones*, 44 Ill 142; *State ex rel. O'Connor v. District Court in Shelby County*, 219 Iowa 1165, 260 NW 73, 99 ALR 967;*Ex parte McDonald*, 49 Mont 454, 143 P 947; *Ex parte Lavinder*, 88 W Va 713, 108 SE 428, 24 ALR 1178.

[5] *Records of the Constitutional Commission No. 042,* [July 29, 1986]:

> FR. BERNAS: That same question was asked during the meetings of the Committee: What precisely does martial law add to the power of the President to call on the armed forces? The first and second lines in this provision state:
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> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies . . .
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> The provision is put there, precisely, to reverse the doctrine of the Supreme Court. I think it is the case *Aquino vs. COMELEC* where the Supreme Court said that in times of martial law, the President automatically has legislative power. So these two clauses denied that. A state of martial law does not suspend the operation of the Constitution; therefore, it does not suspend the principle of separation of powers.
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> The question now is: During martial law, can the President issue decrees? The answer we gave to that question in the Committee was: During martial law, the President may have the powers of a commanding general in a theatre of war. In actual war when there is fighting in an area, the President as the commanding general has the authority to issue orders which have the effect of law but strictly in a theatre of war, not in the situation we had during the period of martial law. In other words, there is an effort here to return to the traditional concept of martial law as it was developed especially in American jurisprudence, where martial law has reference to the theatre of war.

[6] 71 U.S. (4 Wall.) 2 (1866)

> limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Another American case – *Duncan v. Kahanamoku*[7] – became the occasion to clarify that martial law, "*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*."

The right to proclaim, apply and exercise martial law is one of the rights of sovereignty, and is as essential to the existence of a nation as the right to declare and carry on war.[8] In republican Philippines, the power to proclaim martial law has always been lodged in the Presidency. This is by no means either odd or unwelcome. The necessity that can justify the wielding of the power looks to the President as the commander-in-chief of all the armed forces of the State to respond swiftly and capably to any internal or external threats. Giving to the bicameral Congress the right to exercise the power may be cumbersome, inconvenient and unwieldy, and is anathema to the notion of responding to the critical emergency that directly and immediately threatens to diminish, if not destroy, the sovereignty of the State itself over the territory and population of the country. Indeed, of the three great branches of the Government, it is the President, as the Chief Executive and commander-in-chief of the armed forces, who has the ability and competence and the means to make the timely and decisive response.

II

Section 18, Article VII of the 1987 Constitution expressly provides:

> Section 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. **In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law.** Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

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[7] 327 U.S. 304 (1946)

[8] 53A Am Jur 2nd, Section 437, citing *Luther v. Borden*, 48 US 1.

> The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.
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> **The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.**
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> **A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus.**
>
> The suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion.
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> During the suspension of the privilege of the writ of habeas corpus, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.

Under the provision, the President has the leeway to choose his or her responses to any threat to the sovereignty of the State. He or she may call out the armed forces to prevent or suppress lawless violence, invasion or rebellion; or, in case of invasion or rebellion, when the public safety requires it, he or she may suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law for a period not exceeding 60 days.

These consolidated cases focus on the proclamation of martial law by President Duterte over the entire Mindanao through Proclamation No. 216. The herein petitioners essentially seek the review by the Court, pursuant to the third paragraph of Section 18, of the "sufficiency of the factual basis of the proclamation of martial law." The review is a legal duty of the Court upon the filing of the several consolidated petitions assailing the sufficiency of the factual basis for the proclamation of martial law.

There is no question to me that the third paragraph of Section 18, *supra*, vests in the Court the unqualified duty to review the factual sufficiency of the declaration of martial law, and the necessity for the declaration.

Invoking the paragraph, the petitioners insist that the action they have initiated is a *sui generis* proceeding, different from the Court's *certiorari*

powers stated in the second paragraph of Section 1,[9] Article VIII of the 1987 Constitution and those enumerated under Section 5(1),[10] Article VIII of the 1987 Constitution.

In contrast, the Office of the Solicitor General (OSG) posits that it is insufficient for the petitioners to merely invoke the third paragraph of Section 18 in order to enable the Court to review the sufficiency of the factual bases of Presidential proclamation No. 216 because they should also invoke the expanded judicial power of the Court to determine the existence of grave abuse of discretion under the second paragraph of Section 1, in relation to Section 5(1). Equating the *appropriate proceeding* under the third paragraph of Section 18 with the special civil action of *certiorari* under Section 5(1), the OSG theorizes that the third paragraph of Section 18 requires the petitioners to anchor their petitions on the existence of grave abuse of discretion because the appropriate proceeding under the third paragraph of Section 18 should be brought under the second paragraph of Section 1.

The majority opinion adopts the position of the petitioners. It holds that to equate the *appropriate proceeding* mentioned in the third paragraph of Section 18 with the *certiorari* action under Section 5(1) in relation to the second paragraph of Section 1 is to "emasculate the Court's task under Section 18, Article VII."[11]

I agree with the majority opinion.

The third paragraph of Section 18 suffices to confer on the Court the exclusive and original jurisdiction to determine the sufficiency of the factual bases of the proclamation of martial law. To equate the *appropriate proceeding* to the *certiorari* action authorized under Section 5(1), in relation to the second paragraph of Section 1, is erroneous. As earlier pointed out, the third paragraph of Section 18 defines the legal duty to review the sufficiency of the factual basis for the proclamation of martial law upon the filing of the petition for the purpose by *any* citizen. The Court has then to discharge the duty.

The silence of Section 5(1) on what the *appropriate proceeding* is should be of no consequence because Section 5 is not the sole repository of the cases or situations coming under the Court's jurisdiction.

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[9] Section 1. x x x

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[10] Section 5. The Supreme Court shall have the following powers:

1. Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*.

x x x x

[11] See the majority opinion, p. 22.

III

The check-and-balance constitutional design set down in Section 18 of Article VII of the 1987 Constitution establishes a structure of collaboration among the three great branches of the Government in the matter of the proclamation of martial law. Although the power of proclaiming martial law over the country or any part of it is exclusively lodged in the President, he or she is nonetheless required to report to Congress on the proclamation, and Congress shall then decide whether to revoke or extend the state of martial law. The Court, being a passive institution, *may be* called upon to review and determine the sufficiency of the factual basis of the proclamation, and whether the public safety requires it, only upon the petition for the purpose by any citizen.

The invocation of the third paragraph of Section 18 by the petitioning citizen suffices to initiate this Court's power to review the sufficiency of the factual bases of the declaration of martial law. This initiation, which triggers the inquiry or review by the Court, albeit unique, conforms to the constitutional design.

The appropriate proceeding, once commenced, should not focus on whether the President gravely abused his or her discretion or not in determining the necessity for proclaiming martial law. Instead, the 1987 Constitution mandates the Court to examine and sift through the factual basis relied upon by the President to justify his proclamation of martial law and to determine whether the factual basis is sufficient or not. To rule that a finding of grave abuse of discretion is essential is to confine the discharge of the duty by the Court within limits not considered at the time of the ratification of the 1987 Constitution. Doing so may also produce impractical results. Consider this hypothetical scenario. Supposing that the President cites 10 factual bases for his proclamation of martial law, and the Court, upon its assiduous review of the factual bases, considers nine of the 10 as manufactured or fabricated or inadequate, leaving but one as true or authentic. Under the thesis of the OSG, the Court would necessarily nullify the proclamation simply because the President was found to have gravely abused his or her discretion. The Court would thereby act indifferently towards the one true or authentic justification on the ground that the grave abuse of discretion as to the nine tainted the proclamation.

Moreover, the determination of sufficiency or insufficiency of the factual bases for the proclamation of martial law is usually a matter of validating the good judgment of the President of the facts or information known to or made available to him or her. This goes without saying that such facts must have occurred *prior to* or *about* the time the determination by the President is made. Whether or not such facts are later shown by subsequent events to be fabricated or false or inadequate is not a decisive factor unless the President is credibly shown to have known of the fabrication or falsity or inadequacy of the factual bases at the time he or she

issued the proclamation of martial law. In that situation, the main consideration is definitely not whether or not grave abuse of discretion intervened.

My reading of the third paragraph of Section 18 tells me that the term *appropriate proceeding* is different from the proceedings or actions that the Court may take cognizance of under Section 5(1) or Section 1. My foremost reason for so holding is that the third paragraph of Section 18 textually mandates the Court to be a trier of facts, an office and function that the Court is not generally called upon to discharge under either Section 5(1) or Section 1. It is true that the Court is not always precluded from reviewing facts. There are occasions when it assumes the role of a trier of facts, like, to name some, in criminal appeals; in appeals from rulings of the Court of Appeals in proceedings for the writ of *amparo*; or when it sits as the Presidential Electoral Tribunal.[12]

In fine, I deem it to be plainly erroneous to subsume the *appropriate proceeding* allowed in the third paragraph of Section 18 to the *certiorari* jurisdiction vested by Section 5(1) in relation to the expanded jurisdiction defined in second paragraph of Section 1.

Nonetheless, considering that the *appropriate proceeding* under the third paragraph of Section 18 is initiated by a petition filed by *any* citizen, the Court need not be hamstrung by the foregoing differentiation. In discharging its constitutional duty of reviewing the sufficiency of the factual basis for the proclamation of martial law, the Court should be least curtailed by form and formality. It should dutifully undertake the review *regardless of form and formality*. It should also eschew the usual judicial tools of avoidance, like *locus standi* and justiciability, because the task at hand is constitutionally inevitable for the Court. Until adequate rules for the regulation of the *appropriate proceeding* under the third paragraph of Section 18 are crafted and promulgated, the Court should be content with the petitions as they have been filed in these consolidated cases.

In this connection, I have no hesitation in adopting the caution that our colleague, Justice Leonardo-De Castro, has written so clearly in her Separate Concurring Opinion herein, to wit:

> The Court should be cautious that it does not take a position in these consolidated cases that needlessly restricts our people's judicial remedies nor carelessly clips our own authority to take cognizance of the issue of constitutional sufficiency under Section 18, Article VII in ***any*** appropriate action that may be filed with the Court. Such would be antagonistic to the clear intent of the framers of the 1987 Constitution to empower our citizens and the Judiciary as a vital protections against potential abuse of the executive power to declare martial law and suspend the privilege of the writ of *habeas corpus*.

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[12] The 2010 Rules of the Presidential Electoral Tribunal (A.M. No. 10-4-29-SC dated May 4, 2010).

IV

One noticeable area of disagreement between the OSG and the petitioners is the burden of proof. This disagreement has to arise because the Court's task to be presently discharged requires the determination of the sufficiency of the *factual* basis of the necessity for martial law.

The petitioners' argument that the burden of proof immediately falls on the Government is difficult to accept. My view is that the burden of proof to show that the factual basis of the President in proclaiming martial law *was* insufficient has to fall on the shoulders of the citizen initiating the proceeding. Such laying of the burden of proof is constitutional, natural and practical – *constitutional*, because the President is entitled to the strong presumption of the constitutionality of his or her acts as the Chief Executive and head of one of the great branches of Government;[13] *natural*, because the dutiful performance of an official duty by the President is always presumed;[14] and *practical*, because the alleging party is expected to have the proof to substantiate the allegation.

For purposes of this proceeding, President Duterte, by his proclamation of martial law, discharged an official act. He incorporated his factual bases in Proclamation No. 216 itself as well as in his written report to Congress. The petitioners have come forward to challenge the sufficiency of the factual bases for the existence of actual rebellion and for the necessity for martial law (*i.e.*, the public safety requires it). It was incumbent upon the petitioners to show why and how such factual bases were insufficient. Although there may be merit in the urging of the petitioners that the Government carried the burden of proof on the basis of the proclamation of martial law being a derogation of civil rights and liberties, I persist in the view that the burden of proof pertained to the petitioners considering that despite embedding numerous safeguard mechanisms, the 1987 Constitution has not dissolved the presumption of good faith in favor of the President. In other words, we should presume that the President, in proclaiming the state of martial law, did so in good faith.[15]

Nonetheless, I also suggest future consideration that where the petitioning citizen has incorporated or stated in the petition those of the factual bases that he or she admits, and those that he or she denies because he holds them to be false or fabricated, or inadequate to justify the proclamation, specifying the reasons for the denial or for holding such factual bases as false, fabricated or inadequate, then the burden of evidence – as distinguished from the burden of proof – may be shifted to the

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13 *Abakada Guro Party List v. Purisima*, G.R. No. 166715, August 14, 2008, 562 SCRA 251, 272.
14 Section 3 (m), Rule 131 of the *Rules of Court.*
15 *Dimapilis-Baldoz v. Commission on Audit*, G.R. No. 199114, July 16, 2013, 701 SCRA 318.

Government. This process, known in civil procedure as the *specific denial*,[16] may be very useful in allocating the duty to come forward with the evidence.

V

The Government has convincingly shown that the President had sufficient factual bases for proclaiming martial law over the entire Mindanao. Indeed, the facts and events known to the President when he issued the proclamation provided sufficient basis for the conclusion that an actual rebellion existed.

The point has been made that the proclamation of the state of martial law should be confined to the areas of Mindanao under armed conflict.

After accepting the factual premises based on the existence of an *actual* rebellion fueled by the movement for secession, and knowing that the rebellion has been happening in various areas of Mindanao for a long time already, I agree with the majority that the proclamation of martial law over the entire Mindanao was warranted. Indeed, the local armed groups had formed linkages aimed at committing rebellion *throughout* Mindanao, not only in Marawi City, which was but the starting point for them. Verily, the rest of Mindanao, even those not under armed conflict at the moment of the proclamation, were exposed to the same positive danger of the rebellion that gave rise to the necessity for the proclamation.[17]

I **VOTE TO UPHOLD** the constitutionality of Proclamation No. 216 over the entire Mindanao.

LUCAS P. BERSAMIN
Associate Justice

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[16] Section 10, Rule 8 of the *Rules of Court* recites:

> Section 10. *Specific denial.* — A defendant must specify each material allegation of fact the truth of which he does not admit and, whenever practicable, shall set forth the substance of the matters upon which he relies to support his denial. Where a defendant desires to deny only a part of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Where a defendant is without knowledge or information sufficient to form a belief as to the truth of a material averment made in the complaint, he shall so state, and this shall have the effect of a denial. (10a)

[17] Lieber, G. Norman, *What is the Justification of Martial Law?*, The North American Review, Vol. 163, No. 480 (Nov., 1896), pp. 549-563 (published by the University of Northern Iowa), quoting Dr. Francis Lieber's manuscript note entitled "*Instructions for the government of the armies of the United States in the field*," to wit:

> It has been denied that the government has any right to proclaim martial law, or to act according to its principles, in districts distant from the field of action, or declare it in larger districts than either cities or counties. This is fallacious. **The only justification of martial law is the danger to which the country is exposed, and as far as the positive danger extends, so far extends its justification.** (Bold underscoring supplied)