

# HAWAIIAN MARTIAL LAW IN THE SUPREME COURT

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THE decision of the Supreme Court in the Hawaiian martial law cases <sup>1</sup> holding invalid military trials of civilians in Hawaii was a salutary one. While it is of particular interest to lawyers, political scientists and historians, it is of general interest to every thoughtful citizen who believes that the constitutional safeguards of civil liberties are as important in time of war as in time of peace.

History demonstrates that the safeguarding of our civil liberties in time of war is more important and incidentally far more difficult than in less troublesome times. <sup>2</sup> No one in time of peace would be imprisoned without a trial or convicted otherwise than in conformity with the Bill of Rights or denied his freedom of religion or freedom of speech. Yet in time of war there will always be zealous and well-meaning souls who would rashly abandon the civil liberties of the individual under the guise of aiding the war effort. Such efforts usually have the approval of the crowd and sometimes the courts.<sup>3</sup> This decision, coming as we enter the threshold of the atomic age with the realization of the revolutionary methods of modern warfare still fresh in mind, is significant. It may serve as a warning for the future that the seizure of civil government by the military authorities in the absence of invasion or rebellion will not receive the sanction of the highest court in the land. The problem posed by these cases has been the subject of comment in legal periodicals which affords a background for the problem involved. <sup>4</sup> In order that the decision of the Supreme Court may be placed in its proper framework, a summary of the events in Hawaii leading up to it is in order.

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1. *Duncan v. Kahanamoku*, 327 U. S. 304 (1946) and its companion case, *White v. Steer*, were argued and decided the same dates.

2. In *Ex parte Quirin*, 317 U. S. 1, 19 (1942), Chief Justice Stone recognized that "the duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty. . . ."

3. CHAFEE, *FREE SPEECH IN THE UNITED STATES*, ix (1941): "When war begins, all thinking stops."

4. Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946); Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COL. L. REV. 639 (1944); Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477 (1943); Rankin, *Hawaii under Martial Law*, 5. J. POL. ECON. 270 (1943); Armstrong, *Martial Law in Hawaii*, 29 A.B.A.J. 698 (1943); Radin, *Martial Law and the State of Siege*, 30 CALIF. L. REV. 634 (1942); King, *Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599 (1942); Fairman, *Law of Martial Rule*, 55 HARV. L. REV. 1253 (1942); Anthony, *Martial Law in Hawaii*, 30 CALIF. L. REV. 371 (1942).

In 1940, the civil population in Hawaii was aware of the imminence of war in the Pacific. A plan of action in the event of emergency was drafted. Early in 1941, the Board of Supervisors of Honolulu passed an ordinance<sup>5</sup> declaring the existence of an emergency and creating a "Major Disaster Council" charged with the duty of administering and coordinating certain essential civilian activities.

In February 1941, the Hawaiian Legislature met in its regular session, debated the enactment of an M-Day law but adjourned without its adoption. On September 15, 1941, the Legislature was called into special session by Governor Poindexter for the purpose of enacting legislation which would grant extraordinary powers to the governor for use in the event of war. Governor Poindexter addressed the Legislature pointedly:

"That we will be drawn into the actual hostilities is an apprehension which all of us share, but which we must face with courage and determination. . . .

"I recommend the enactment of a measure which will make suitable and adequate provision for the immediate and comprehensive designation and delegation of powers which, under normal times, would be unnecessary in a democratic form of government. . . ."<sup>6</sup>

Lieutenant General Walter C. Short, commanding general of the Hawaiian Department, appeared before the Senate of Hawaii and stressed the urgency of appropriate legislative enactment in advance of hostilities:

"Many of these things can be done better by the civil authorities than by the military authorities, even after we possess the necessary powers to execute them. Many of them even after the declaration of martial law the military authorities would call on the civil authorities to perform. The proper action at this time might do much to delay or even render unnecessary a declaration of martial law. . . .

"The essential legislation to provide this protection is entirely a function of the government and the legislature. The military authorities have no place in such action. If we tried to prescribe action we would be invading the public affairs of the civil authorities."<sup>7</sup>

The Hawaii Defense Act<sup>8</sup> which the governor and the commanding general advocated speedily passed both houses of the Legislature and was approved October 3, 1941. It vested in the executive sweeping

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5. HONOLULU REV. ORD. § 746 (1942).

6. HAW. SEN. JOUR. (1941) Spec. Sess. 14.

7. *Minutes*, Sen. Com. of the Whole (Sept. 17, 1941).

8. HAW. REV. STAT. c. 324 (1945).

powers over the inhabitants of Hawaii and their property, powers adequate to meet any emergency limited only by minimum safeguards to the rights of the individual. No state in the history of the nation had previously enacted so complete a delegation of power to the executive. Thus the machinery was at hand to be used in the anticipated crisis, but it was rejected for a more dubious alternative.

On December 7, 1941, a few hours after the attack on Pearl Harbor, the governor of Hawaii issued a proclamation invoking the powers conferred on him by the Legislature under the Hawaii Defense Act. Later on the same day he issued a proclamation placing the territory under martial law and suspended the privilege of the writ of habeas corpus pursuant to Section 67 of the Hawaiian Organic Act which provides:

"The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii . . . and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the Territory, or any part thereof, under martial law until communication can be had with the president and his decision thereon made known."<sup>9</sup>

The governor in his proclamation<sup>10</sup> not only suspended the privilege of the writ of habeas corpus and proclaimed martial law but went beyond the provision of Section 67 by proclaiming:

". . . I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor; And I do further authorize and request the said Commanding General . . . during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory. . . ."

Simultaneously with the issuance of the governor's proclamation, General Short issued a proclamation in which he declared:

"I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the territory. . . ."

"I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, am-

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9. 31 STAT. 153 (1900); 48 U.S.C. § 532 (1940).

10. For the text of the governor's proclamation and the proclamation of General Short taking over the government of Hawaii, see *Ex parte White*, 66 F. Supp. 932, 939, 990 (D. Haw. 1944).

munition, and explosives and the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function." <sup>11</sup>

The text of the governor's proclamation was not communicated to President Roosevelt <sup>12</sup> but the governor on December 7, 1941, sent the following cable to the President:

"I have today declared martial law throughout the Territory of Hawaii and have suspended the privilege of the writ of habeas corpus. Your attention is called to Section 67 of the Hawaiian Organic Act for your decision on my action." <sup>13</sup>

President Roosevelt, on December 9, gave the governor his decision as follows:

"Your telegram of December seventh received and your action suspending the writ of habeas corpus and placing the Territory of Hawaii under martial law in accordance with U. S. C. Title 48, Section 532, has my approval." <sup>14</sup>

Neither the governor's proclamation, in which he attempted to turn over the powers of his office and the powers of judicial officers of the territory to the commanding general, nor the commanding general's proclamation, in which the general assumed the role of military governor of Hawaii, was ever submitted to the President. The governor had advised the President that pursuant to the act of Congress he (the governor) had suspended the privilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law. The President in his reply approved the action of the governor. The governor did not advise the President that he had turned over the duties of his office to the general and obviously the President did not approve this action of which he was completely in the dark.

General Short's proclamation indicates that it was his intention to administer martial law along orthodox lines, *i. e.*, that the "ordinances" which he forecast would have some relevance to military necessity to resist the "threatened invasion." Lieutenant Colonel Thomas H. Greene <sup>15</sup> who was the executive officer under General Short, the self-

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11. *Ibid.*

12. *Duncan v. Kahanamoku*, 327 U.S. 304, 308 n. 2 (1946).

13. *See Ex parte White*, 66 F. Supp. 982, 989 (D. Haw. 1944).

14. *Ibid.*

15. Now Maj. Gen. Thomas H. Greene, Judge Advocate General, United States Army.

styled "military governor," evidently did not share this view. He promptly set up a system for the administration of criminal law to punish civilians in provost courts presided over by army officers who meted out penalties without regard to the provisions of the statutes of the territory or of the United States.

On the Monday following the attack the civil courts were suppressed by order of General Short transmitted to the Chief Justice of the territory and army personnel moved in, took over the courtrooms, clerks' offices, clerks and facilities of inferior courts throughout the territory.

A series of military orders was issued by General Short erecting a complete military government over the Territory of Hawaii and vesting in the so-called military governor complete power over the inhabitants of Hawaii and their property. Orders were issued without regard to the applicable provisions of territorial and federal law and Constitution. The form of government of Hawaii was changed overnight, a rigid censorship was imposed over the press, radio and mails. The government of the inhabitants of Hawaii took the form of "General Orders" issued from the "Office of the Military Governor." In the traditional military practice the orders themselves were not signed by the commanding general but by an executive to whom he had delegated that function.

During the period December 30, 1941 to January 30, 1943, there were issued 181 general orders covering the entire sweep of government (except taxation), from the trial of civilians for felonies carrying the death penalty down to the most trivial misdemeanors into minutiae of the ordinary affairs of municipal government such as garbage collection and the numbering of houses. As the Supreme Court said:

"Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators."<sup>16</sup>

The population of Hawaii remained under this extreme military rule until a modification was ordered—at the insistence of territorial officials—in proclamations of the governor<sup>17</sup> and the commanding general which were issued on February 8, 1943, and became effective March 10, 1943.

Up to this point there had been no relaxation of military control ex-

16. *Duncan v. Kahanamoku*, 327 U. S. 304, 309 (1946).

17. Transcript of Record, p. 14, *Duncan v. Kahanamoku*, *supra* note 16, hereinafter cited as "Record"; see also Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus*, 31 CALIF. L. REV. 477, 508-11 (1943).

cept to permit the civil courts to dispose of certain civil business which military tribunals were unable to handle.

The proclamation of February 8, 1943, was the result of a compromise to avoid taking the issue to the President who was then engaged with plans for the African campaign. The compromise was presented by the Secretary of War, the Attorney General and the Secretary of the Interior in a letter to the President which stated:

"We are pleased to report that after lengthy discussions the Departments of War, Justice, and Interior have reached an operating agreement upon the distribution of governmental functions between the civil and military authorities in the Territory of Hawaii. . . . Copies of the proclamations are enclosed for your information. We also enclose a draft of a letter which we suggest you might appropriately send to the Secretary of War." <sup>18</sup>

The letter which had been prepared for the President's signature acknowledged receipt of the proclamations to be issued by the commanding general and the governor of Hawaii and then stated:

"I wish to congratulate all departments concerned in their cooperative and successful efforts to reach an amicable solution of the knotty problems involved. . . . I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs." <sup>19</sup>

It would seem obvious that the matter of defining the limits of military and civil jurisdiction could hardly be the subject of negotiation and compromise even though concurred in by the highest executive officers of the nation. The legislative branch of our government alone is the source of such powers and the executive is charged with carrying out the mandate of the Congress. The executive is not charged with rearranging the statutory scheme of government which Congress has enacted for Hawaii.

This is not the place to appraise the motives that led the responsible officials of the War Department to insist upon a continuance of a state of martial law years after any rational justification for its existence had passed. This is the task of the historian or the psychologist of the future. What we are here concerned with is an analysis of the action of the courts in two concrete cases.

#### FACTS IN THE *Duncan* CASE

On February 24, 1944, Duncan, a civilian ship-fitter employed at Pearl Harbor, reported to work. He engaged in a quarrel with two

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18. Letter dated January 18, 1943, Record, p. 74.

19. Letter from the President to the Secretary of War dated February 1, 1943, Record, p. 75, 76.

armed marine sentries stationed at the gate. Duncan was arrested, taken into custody and released the following morning. On March 2, 1944, he was brought before the provost court at Pearl Harbor presided over by a naval officer and there tried and convicted of the offense of assault and battery against military personnel. He was sentenced to imprisonment of six months in the Honolulu county jail.

On March 14, 1944, he petitioned the United States District Court for the Territory of Hawaii for a writ of habeas corpus, alleging that his conviction and imprisonment were unlawful and unconstitutional, that martial law did not lawfully exist in Hawaii and that regardless of the existence of martial law, there was no military necessity for the trial of civilians by a military tribunal. The return and answer admitted that the duly constituted federal and territorial criminal courts and civil courts were functioning; denied that petitioner's trial and conviction were unlawful or unconstitutional; alleged that the proclamation of the governor of February 8, 1943, continued a state of martial law and the suspension of the privilege of the writ of habeas corpus; alleged that Hawaii at all times since December 7, 1941, had been in imminent danger of attack, and that the public safety required the continuance of martial law and the suspension of the privilege of the writ; and alleged finally that the provost courts were necessary "for the successful prosecution of the war" and were established in good faith and in the honest belief that military necessity required them.

Upon the hearing on the return to the order to show cause the petitioner was released on bond pending a hearing on the merits. A full record was made which amply demonstrated the absence of civil strife, the functioning of territorial and federal courts and the lack of necessity for military trials of civilians.

After examining the testimony of Admiral Nimitz and Lieutenant General Richardson, the trial court found that they "agreed that an invasion by enemy troops is now practically impossible" and that "no part of the island of Oahu in the Territory of Hawaii is a battlefield today nor has it been for over two years. . . ." With respect to the compromise reached by the cabinet officers the trial court said:

"Congress may give the Territory of Hawaii any form of government it may see fit, conformable to Constitutional provisions, but no one in the War Department has such lawful power." <sup>20</sup>

The court also found that the

"regularly constituted civil government was either in efficient operation or fully capable of such operation in all of its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created." <sup>21</sup>

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20. *Ex parte Duncan*, 66 F. Supp. 976, 980 (D. Haw. 1944).

21. *Id.* at 981.

As a result of these findings the trial court concluded that martial law did not lawfully exist in Hawaii, that the office of military governor was without lawful creation and that the provost court possessed no lawful authority to try the petitioner; accordingly the court sustained the writ and ordered the prisoner discharged.

#### FACTS IN THE *White* CASE

Following the opinion of the district court in the *Duncan* case, a petition was filed by one White, a civilian stockbroker who had been tried, sentenced and convicted before a provost court on August 25, 1942, of the crime of embezzlement. White had been orally informed of the charge against him, appeared in the provost court by counsel who demanded trial by jury which was promptly denied and then demanded sufficient time to prepare his defense which was likewise denied. The provost court sentenced him to five years' imprisonment. White was discharged by the district court on May 2, 1944.<sup>22</sup>

#### THE OPINIONS OF THE CIRCUIT COURT OF APPEALS

The *Duncan* and *White* cases were appealed jointly to the Circuit Court of Appeals for the Ninth Circuit which disposed of them *en banc*<sup>23</sup> on November 1, 1944, with three opinions reversing the district court. The opinion of the court by Circuit Judge Healy concluded that the writ was available to test the validity of the military trials, that what was established in Hawaii was "nothing less than total military government," that the presence of a large Oriental population "posed a continuous threat to public security," that "the summary punishment of criminal offenders of every sort might conceivably serve to discourage the commission of offenses immediately endangering the general security," that at the time of the trial of White "the civil courts were disabled from functioning" and that "the situation necessitated his trial by the military."

In the *Duncan* case the circuit court of appeals had more difficulty. It was confronted with a proclamation which substantially restored civil authority. The court observed, however, that under the criminal statutes of Hawaii the act of assaulting a military person was not the subject of a specific crime punishable in the civil courts (which were not authorized to enforce military orders). Reasoning from this premise, the court held:

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22. *Ex parte White*, 66 F. Supp. 982 (D. Haw. 1944).

23. The court that heard the case consisted of Circuit Judges Wilbur, Garrecht, Denman, Matthews and Stephens; by oral stipulation it was agreed that Circuit Judge Healy (who was absent) could participate. The opinion of the court was written by Healy, J., and concludes with the statement "Stephens, Circuit Judge, did not participate in the decision of these cases." *Ex parte Duncan*, 146 F.2d 576, 591 (C.C.A. 9th 1944).



"... the power to punish infractions of military regulations of this type must of necessity reside somewhere. If it has not by legislation or municipal ordinance been delegated to the ordinary courts or made subject to the authority of the civil police, the power must perforce exist in the military arm of the government acting through the medium of commissions or like tribunals." <sup>24</sup>

It will be noted that this reasoning is circular. It proceeds upon the assumption that military orders proscribing certain acts of civilians as crimes are valid and since they are not made specifically enforceable in the courts ordained by law they must of necessity be enforceable somewhere and therefore are enforceable in military tribunals. This assumes the issue involved, *i.e.*, the validity of the orders. If the military orders were valid that would be the end of the case. Obviously, if one assumes them to be valid, a logical conclusion upholding the trials presents no problem.

Circuit Judges Wilbur and Matthews evidently had some misgiving as to the validity of the military trial of a civilian and preferred to state an additional ground to support the reversal of the trial court, namely, that the writ having been suspended by the President, it was not available to test the validity of the petitioner's trial and "without a finding of implied fraud on the part of the governor and the military authorities the decision cannot be sustained." <sup>25</sup>

The opinion of Judge Denman, who concurred in the reversal, placed the case upon the ground that the petitions "show no facts invoking the jurisdiction or power of the District Court to issue the writs." <sup>26</sup> It is somewhat difficult to understand this opinion since the petition clearly alleged imprisonment after conviction by a tribunal whose jurisdiction was challenged both on statutory and constitutional grounds. Apart from the fact that the courts have shown great liberality in the technical aspects of petitions for writs of habeas corpus, the petitions in these cases squarely challenged the validity of the restraint of the prisoners. <sup>27</sup>

The disposition by the circuit court of appeals of *Ex parte Spurlock*, <sup>28</sup> a companion to the *Duncan* and *White* cases, sheds light on the basis of the court's opinion in the latter cases. *Spurlock*, a civilian, was charged in the magistrate's court of Honolulu with assaulting a

24. *Id.* at 584. The argument that there was a void in the federal and territorial law making assault and battery a crime because it punished the wrongful act generally but did not make assault and battery against military personnel a specific crime, is reminiscent of the remark attributed to Judge Bean who is said to have ruled that he could find nothing in the criminal code of Texas that made the killing of a Chinaman murder.

25. *Id.* at 589.

26. *Id.* at 590.

27. *Cf. Holiday v. Johnston*, 313 U. S. 342, 350 (1941).

28. 66 F. Supp. 997 (D. Haw. 1944), *rev'd per curiam en banc sub nom. Steer v. Spurlock*, 146 F.2d 652, (C.C.A. 9th 1944).

police officer and was released on bond in November 1941. His case was not called up for disposition until after the outbreak of war. In January 1942, he was summoned by the provost court on the charge previously made against him in the magistrate's court. In the interim the military courts had ousted the civil courts of jurisdiction. He entered a plea of not guilty, was promptly found guilty, sentenced to five years' imprisonment, begged for clemency and was placed on probation. Thereafter he reported to the territorial probation officer as directed. In March 1942, Spurlock was involved in a fight with another civilian in Honolulu, taken into custody by the military police, held for four days without bond and then brought before the provost court. When his case came before the provost judge he was asked whether he was on probation; having replied in the affirmative he was promptly sentenced to five years of hard labor.

At the hearing on Spurlock's petition for a writ of habeas corpus, the clerk of the provost court testified as to the procedural history of the case, there being nothing in the record to indicate whether Spurlock had entered a plea or was given any trial at all. The district court found "that Spurlock did not plead guilty to the March 28 charge, but was, without trial, found guilty and disposed of accordingly. . . ." <sup>29</sup>

The district court pointed out that even a person subject to military trial is entitled to due process and that Spurlock, having been convicted and imprisoned without trial, was denied his constitutional rights under the Fifth Amendment. The action of the circuit court of appeals in reversing the judgment of the district court in the *Spurlock* case *per curiam* is significant in probing the basis of the judgment of the appellate court in the *Duncan* and *White* cases. The opinion of reversal in the *Spurlock* case holds that during time of war, when the privilege of the writ of habeas corpus has been suspended, a civilian may be charged in a military tribunal, found guilty without trial, and sentenced to imprisonment, and that the action of the military authorities is not subject to judicial inquiry.

Spurlock petitioned for a writ of certiorari in the Supreme Court on January 13, 1945. The Department of Justice, evidently not desiring to attempt to sustain the decision of the circuit court of appeals, on February 15, 1945, filed a "suggestion that the cause has become moot," the suggestion being based upon a pardon filed by Lieutenant General Robert C. Richardson, Jr., reciting that

" . . . it appears to the best interest of the United States that the execution of so much of the sentence of the said Frederick L. Spurlock as remains unexecuted on this 3 February 1945 be remitted so that he may engage in work that will promote the national defense of the United States." <sup>30</sup>

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29. *Ex parte Spurlock*, 66 F. Supp. 997, 1001 (D. Haw. 1944).

30. *Id.* at 1006; under § 66 of the Hawaiian Organic Act, 31 STAT. 153 (1900), as

Spurlock had been imprisoned by the military government of Hawaii from March 28, 1942 to February 3, 1945, without trial upon the charge of having committed a misdemeanor.

The record of the Department of Justice in mooting cases involving martial law in Hawaii to prevent a determination of the issue in the Supreme Court is impressive. In *Zimmerman v. Walker* the petition for certiorari was filed on March 13, 1943; promptly thereafter the Solicitor General filed a memorandum which recited that the case had become moot by reason of the release of the petitioner on or about March 12, 1943.<sup>31</sup> The War Department would have been better advised to have pressed for a prompt decision in the Supreme Court in the *Zimmerman* case in early 1942. The strategic advantage of such a course seemed clearly indicated for two reasons: (1) the war had not progressed to a point where victory was in sight and (2) the particular case involved internment for military security and not the validity of a military trial. Although there is little to choose between being imprisoned without a trial and being imprisoned after a trial by a court that has no jurisdiction (except for the stigma that exists in the former case) it is far easier to find a legal justification in the former case than it is in the latter.

#### THE OPINION OF THE SUPREME COURT

Certiorari was granted in the *Duncan* and *White* cases and they were argued in the Supreme Court on December 7, 1945, four years after Pearl Harbor. In the meantime the President by proclamation effective October 24, 1944, had formally terminated the state of martial law and restored the privilege of the writ of habeas corpus.<sup>32</sup>

Restoration of the privilege of the writ by presidential proclamation prompted the Government in the Supreme Court to recede from its position denying the jurisdiction of the district court to entertain the petitions for writs of habeas corpus.<sup>33</sup> With the issues thus narrowed

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amended, 48 U.S.C. § 531 (1940) the pardoning power is in the governor and the President; assuming the invalidity of the trial the commanding general's exercise of the pardoning power presented no problem.

31. *Zimmerman v. Walker*, 132 F.2d 442 (C.C.A. 9th 1942), *cert. denied* "on the ground that the cause is moot, it appearing that Hans Zimmerman, on whose behalf the petition is filed, has been released from respondent's custody," 319 U.S. 744 (1943). *Ex parte Glockner*, (D. Haw. 1943, No. 295), (dismissed by the district court as moot by reason of the removal of prisoner and his release in California). *Ex parte Seifert*, (D. Haw. 1943, No. 296), (dismissed by the district court as moot by reason of the removal of prisoner and his release in California). *Steer v. Spurlock*, 146 F.2d 652 (C.C.A. 9th 1944), *cert. denied* "on the ground that the cause is moot," 324 U.S. 868 (1945).

32. Proclamation 2627, 9 FED. REG. 12831 (1944).

33. *Duncan v. Kahanamoku*, 327 U.S. 304, 312 (1946). The Supreme Court did not pass on the issue whether the suspension was a general one or limited to cases which the public safety required. Petitioner took the position that the suspension both under the

the convictions in the provost court were challenged upon three grounds: (1) that Section 67 of the Hawaiian Organic Act did not authorize the trial of civilians before military tribunals; (2) that if Section 67 authorized the trial of civilians before military tribunals it was unconstitutional; and (3) that if Section 67 was constitutional and authorized the trial of civilians before military tribunals, the factual situation existing on March 14, 1944, did not warrant this extreme application of martial law.

Four opinions were delivered, Justice Black writing for the Court, Chief Justice Stone and Justice Murphy writing concurring opinions and Justice Burton writing a dissent in which Justice Frankfurter joined. Justice Black did not find it necessary to pass upon the constitutional issue involved since the first question, namely, whether the Organic Act authorized the trial and punishment of civilians by the military, was decisive. In examining Section 67 of the Organic Act, Justice Black stated first that Congress did not attempt a definition of the term "martial law" and that the Constitution makes no reference to it from which he concluded:

"The language of Section 67 thus fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals."<sup>34</sup>

This conclusion discounts the fact that prior judicial decisions had given content to the term "martial law."

Justice Black next considered the argument that the language of

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Constitution and Section 67 of the Organic Act was limited to the class of persons hostile to the government and that the writ was available in all other cases—*e.g.*, abduction or any other unlawful detention including detention as a result of conviction by a tribunal that had no jurisdiction. Historically the suspension of the privilege of the writ was confined to enemies of the state. This is clear from the legislative suspensions in England, see 18 GEO. III, c. 1, (1778); and although it is not clearly recorded in the debates, there can be little doubt that the framers of the Constitution had the precedents of British legislative suspensions in mind when Art. I, § 9, cl. 2 was adopted, see 2 FARRAND, RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION 438 (1911), 3 *id.* at 149; HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND THE WRIT OF HABEAS CORPUS 116 (2d ed. 1876). The Civil War suspensions by President Lincoln were likewise limited; see Proclamation of May 10, 1861 (authorizing the military commander in Florida to suspend the writ "and to remove . . . dangerous or suspected persons"), 6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 16 (1898); Proclamation of September 24, 1862, 13 STAT. 730 (1862) (authorizing the detention of persons "guilty of any disloyal practice"); Proclamation No. 7 of September 15, 1863, 13 STAT. 734 (1863) (after statutory sanction of the suspension, authorizing the detention of certain persons as "aiders or abettors of the enemy"). Horace Binney, an advocate of executive suspension during the Civil War, held the view that the Constitution permitted only a limited suspension as to persons hostile to the government, see BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION 19 (2d ed. 1862).

34. 327 U.S. 304, 315-6 (1946).

Section 67 was imported from the Constitution of the Republic of Hawaii and that in *In re Kalanianaʻole*<sup>35</sup> the Supreme Court of Hawaii had construed Article 31 of the Constitution of the Republic to authorize the trial of civilians before military tribunals. Justice Black pointed out in passing that the defendants there involved,

" . . . were insurrectionists taking part in the very uprising which the military were to suppress, while here the petitioners had no connection with any organized resistance to the armed forces or the established government."<sup>36</sup>

Not, however, content with this distinction, Justice Black proceeded, on behalf of the Court, to reject the contention that the *Kalanianaʻole* decision was any guide whatsoever to the meaning of Section 67 of the Organic Act:

" . . . we are certain that Congress did not wish to make that case part of the Organic Act. For that case did not merely uphold military trials of civilians but also held that courts were to interfere only when there was an obvious abuse of discretion which resulted in cruel and inhuman practices or the establishment of military rule for the personal gain of the President and the armed forces. But courts were not to review whether the President's action, no matter how unjustifiable, was necessary for the public safety."<sup>37</sup>

The conclusion that the term "martial law" as used by Congress in Section 67 of the Hawaiian Organic Act is virtually meaningless is not too persuasive historically. Section 67 of the Organic Act was taken verbatim from Article 31 of the Constitution of the Republic. The Organic Act was adopted in 1900. Five years prior to its adoption the Supreme Court of the Republic of Hawaii had decided the *Kalanianaʻole* case which held that a military commission was authorized by Article 31 of the Constitution of the Republic. Chief Justice Frear who was the author of the opinion was also one of the annexation commissioners who appeared before Congress on the adoption of the Hawaiian Organic Act. It would seem reasonable to suppose that Chief Justice Frear understood Section 67 to mean what he had read the same words as meaning for the Supreme Court of the Republic five years before.

The important distinction, however, between the *Kalanianaʻole* case and *Duncan v. Kahanamoku* is that the accused in the former case was engaged in aiding the insurrection, while the accused in *Duncan v. Kahanamoku* was not opposed to the government. Moreover at the time of the trial of the *Kalanianaʻole* case, the civil courts were open

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35. 10 Haw. 29 (1895).

36. 327 U.S. 304, 316 (1946).

37. *Id.* at 317.

and exercising their statutory criminal and civil jurisdiction.<sup>38</sup> In no instance during the state of martial law did military tribunals assert any jurisdiction except as to those who were charged with disloyal practices. There is one further point of difference: namely, in the *Kalanianaʻole* case, Article 31 of the Constitution was supplemented by legislative acts which authorized the trial of disloyal persons before military commissions and although this was not mentioned in the opinion of the court in *In re Kalanianaʻole*, it is nonetheless significant.<sup>39</sup> In the face of this history it would seem that the term "martial law" was intended to permit the trial by a military commission of civilians charged with disloyal practices—to which category the petitioners Duncan and White did not belong.

This poses two constitutional issues: assuming Section 67 intended to permit military trials of civilians (1) is the section valid on its face? and (2) if it is valid, are the particular military trials in question ones required by the public safety and hence unassailable? The opinion of the Court does not reach the constitutional issues since the Court found that the words of the statute do not include such trials. While as a matter of the legal history of Hawaii this interpretation of the section may be questionable, it should be remembered that the Constitution of the Republic of Hawaii did not contain the crisp language of the Fifth and Sixth Amendments guaranteeing the rights of due process, indictment by a grand jury and trial by a jury. At the time Article 31 was drafted and when *In re Kalanianaʻole* was decided the Constitution of the Republic did not unequivocally guarantee a trial by jury.<sup>40</sup>

The Government in the *Duncan* case argued that Section 5 of the Organic Act, in which Congress provided "that the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States,"<sup>41</sup> extended the Constitution only to a limited extent and specifically as circumscribed by Section 67 and the judicial construction placed thereon by the *Kalanianaʻole* case. This tenuous view had earlier been put forth in support of the military regime in Hawaii in an article which confessed that a similar course would be unconstitutional within the continental limits of the United States.<sup>42</sup> Never since the annexation had the application of the Federal Consti-

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38. This was specifically provided in the Proclamation of President Dole of January 7, 1895; see *In re Kalanianaʻole*, 10 Haw. 29, 45 (1895).

39. See Acts of the Republic of Hawaii, 1895: Act 18 of February 8, 1895, authorizing the execution of sentences of military commissions; Acts 20 and 24 of March 15, 1895, ratifying and granting immunity.

40. CONSTITUTION OF THE REPUBLIC OF HAWAII (1894), Art. 6, § 1. "No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case."

41. 31 STAT. 141 (1900); 48 U.S.C. § 495 (1940).

42. King, *The Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599, 632 (1942).

tution to Hawaii been seriously challenged. In fact, an unbroken line<sup>43</sup> of decisions had indicated that the Constitution (and specifically the Bill of Rights) protects the rights of residents in the territory to the same extent that it protects those of residents in the several states. The opinion of Justice Black puts that issue at rest:

"It follows that civilians in Hawaii are entitled to the constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country. . . . For here Congress did not in the Organic Act exercise whatever power it might have had to limit the application of the constitution. *Cf. Hawaii v. Mankichi*, 190 U. S. 197. The people of Hawaii are therefore entitled to constitutional protection to the same extent as the inhabitants of the 48 states."<sup>44</sup>

It should be noted that the opinion of the Court leaves open the question as to the power of Congress to limit the application of the Constitution to an organized territory. Although that issue was not necessary to a decision it has generally been believed that the extension of the Federal Constitution to an organized territory is irrevocable.<sup>45</sup>

Since the Organic Act, according to the Court's opinion, gives no clue to the scope and meaning of "martial law," Justice Black found it necessary to turn to the history of our institutions to interpret the expression, pointing out the profound distrust which Anglo-American peoples have traditionally had of the exercise of military power. Quoting with approval the Court's historic admonition in *Dow v. Johnson*,<sup>46</sup> that "the military should always be kept in subjection to the laws of the country to which it belongs, and . . . he is no friend to the Republic who advocates the contrary," Justice Black concluded that Section 67 afforded no authority for the petitioners' detention:

"We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of 'martial law' it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the defense of the Islands against ac-

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43. *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *cf. Inter-Island Co. v. Hawaii*, 305 U.S. 306 (1938); *Dorr v. United States*, 195 U.S. 138 (1904); *Binns v. United States*, 194 U.S. 486 (1904); *Mormon Church v. United States*, 136 U.S. 1 (1890). For the status of an unincorporated territory, *see Balzac v. Porto Rico*, 258 U.S. 298 (1922).

44. 327 U.S. 304, 318-9 (1946).

45. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

46. 100 U.S. 158, 169 (1879).

tual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals." <sup>47</sup>

It has been noted that, according to the Court, Section 67 of the Hawaiian Organic Act gives no clue to the meaning of "martial law". Justice Black's opinion says that the language "fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals." <sup>48</sup>

The expression "martial law," however indefinite it was in 1857 when Caleb Cushing wrote his opinion <sup>49</sup> on the subject, had gathered form through the passage of years. Text writers and the courts had reached the conclusion that martial law is nothing more than the exercise of executive power which is necessary to cope with a given emergency. Thus it had been held in *Moyer v. Peabody* that during times of strife after a declaration of martial law it is competent for the executive to detain persons connected with the current strife and such detention during the period of the exigency is not a denial of due process of law. <sup>50</sup> The Court in that case had before it the narrow issue whether the temporary restraint during the existence of martial law was justified. The Supreme Court held that it was. Some, however, have been misled by the rhetoric of Justice Holmes into the mistaken view that the case stands for the proposition that under any circumstances "a decision by the head of the state upon a matter involving its life" is final and not reviewable by the courts.

Reflection upon this proposition reveals its invalidity in a system of government based on the separation of powers. If we reach the conclusion that in a given circumstance the acts of the executive branch are not reviewable in the courts, then it follows that the executive branch is supreme over either the legislative or judicial branches of government. To be specific, if the executive by an appropriate finding says that in a particular circumstance the life of the state is at stake, then, irrespective of the existence of legislation or the availability of judicial review, the acts of the executive are final. Thus the historic doctrine of the separation of powers is completely nullified.

Fortunately for the law of the subject, the generality of the language used by Justice Holmes has been limited in an opinion by an unani-

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47. 327 U.S. 304, 324 (1946).

48. *Id.* at 316.

49. 8 OPS. ATT'Y GEN. 365 (1857).

50. 212 U.S. 78 (1909). Dictum in the opinion of the Court written by Justice Holmes is frequently cited for more than the proposition which the case actually holds. Justice Holmes said: "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment." *Id.* at 85.



mous Court involving the declaration of martial law by the governor of Texas. The Supreme Court, in reviewing the action of the executive and specifically the proposition urged upon it that the acts of the executive were not reviewable in the courts, said:

"If this extreme position could be deemed to be well taken, 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. . . ." <sup>51</sup>

The Court also said:

"There is no such avenue of escape from the paramount authority of the Federal Constitution. . . ."

"What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." <sup>52</sup>

It should be noted that the Court in reaching the conclusion in the case just referred to found an "appropriate answer in . . . *Ex parte Milligan*. . . ." <sup>53</sup> In other words, the exercise of martial law powers by a state governor in time of domestic disturbance within the state is to be measured by the same standard applicable to the exercise of martial law powers by the military authorities in time of civil war.

It has been suggested that the powers exercised by the nation in time of a war of survival are different in kind from those required in time of civil strife falling short of a national or civil war. At first blush this has a ring of validity. No one will dispute the proposition that our Government should not and must not be curtailed in the prosecution of war. The Constitution gives the Government through its legislative and executive branches the power to wage war and, as Chief Justice Hughes once said, "the power to wage war is the power to wage war successfully." <sup>54</sup>

The difficulty with the apologists for the exercise of military power is that the rule which they advocate means that the executive, in times of great exigency, may do anything which he in his unreviewable determination concludes is necessary or proper for the advancement of the military program. This view is really not as desirable from the military standpoint as it might appear even wholly apart from its unconstitutionality. The executive alone cannot raise armies or levy taxes, or at least he cannot perform these tasks effectively and comprehensively unless we are prepared for a complete surrender to a to-

51. *Sterling v. Constantin*, 287 U. S. 378, 397 (1932).

52. *Id.* at 398, 401.

53. *Id.* at 402.

54. Hughes, *War Powers under the Constitution*, SEN. DOC. NO. 105, 65th Cong., 1st Sess. 7 (1917); 47 A.B.A. REP. 232, 238 (1917).

talitarian state. Under our frame of government the power to wage war is vested jointly in the executive and the legislative branches.<sup>55</sup>

Obviously neither the executive nor the legislative branch may wage war successfully alone; the joint action of both is essential in order that the full force of our power may be exerted. There is no reason to assume that the Congress would be less desirous of victory than the executive nor to suppose that it would withhold any needed power from the executive. The role of the judiciary in time of war is essentially no different than it is in time of peace since our system is designed to function in war and in peace under the same pattern. This does not mean, however, that the exertion of either executive or legislative power which might be doubtful in time of peace would not be upheld in time of war.<sup>56</sup>

In time of war there is a wide difference between the exercise of executive power pursuant to an act of Congress and the unilateral action of the executive. At the outset of World War II, Congress and the executive by joint action concluded that the safety of the nation required the removal of persons of Japanese ancestry from the west coast. In *Korematsu v. United States*, this exercise of the war powers was affirmed by a divided Court.<sup>57</sup>

Although the *Korematsu* decision has been sharply criticized,<sup>58</sup> irrespective of one's views on the results reached by the Court it must be remembered that the Court was confronted with a *fait accompli* and that an adverse decision would have meant endless complications in the midst of war. The fact that an opposite result would have posed an extremely difficult domestic problem at the time when a united effort was most needed is not too solid a basis for a constitutional decision but it is not without precedent in our constitutional history.<sup>59</sup> It must be remembered that the Supreme Court is only one of the branches of government and that the power it exerts is largely negative. It is not an instrument for either the initiation or administration of governmental programs in war or in peace.

#### THE CONCURRING OPINION OF JUSTICE MURPHY

Justice Murphy concurred in the opinion of the Court in the *Duncan* case holding that military trials were not authorized under Section 67 of the Organic Act, but he felt obliged to state separately his rea-

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55. *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

56. *Bloch v. Hirsh*, 256 U.S. 135 (1921) (upholding rent-control in the District of Columbia in World War I); *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919) (upholding wartime prohibition by legislative action in World War I).

57. 323 U.S. 214 (1944).

58. Rostow, *The Japanese American Cases—a Disaster*, 54 YALE L. J. 489 (1945).

59. Cf. *Norman v. B. & O. R. R.*, 294 U.S. 240 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

sons why "the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action."<sup>60</sup>

While it might be thought that Justice Murphy's concurring opinion is not in keeping with the judicial tradition against passing upon more than what is necessary to the disposition of a particular case, nevertheless in the light of the Government's argument and the inadequacies of the dissenting opinion the reasons for Justice Murphy's separate concurrence become apparent.<sup>61</sup> He examined the Government's arguments seriatim.

*First:* The notion that a state of martial law is an "all or nothing" concept and that anything that is done after a declaration is not reviewable in the courts is palpably untenable. Because Hawaii, subsequent to the original raid of December 7, may have been subject to the threat of subsequent raids, is certainly no reason for upholding military orders not required by the public safety which were issued several years later. Granting the existence of the danger of a subsequent attack Justice Murphy said:

"But it does not follow from these assumptions that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated."<sup>62</sup>

*Second:* The argument that the civil courts were not swift enough to meet the needs of the commanding general who could not brook a delay<sup>63</sup> is hardly a justification for scrapping the Bill of Rights. This becomes clear once it is conceded that what the public safety requires and not what a particular general desires is the standard.

*Third:* The argument that the military commander should have a tribunal at his disposal to enforce his orders is simply an argument for dictatorship:

"Moreover, the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not afford a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning."<sup>64</sup>

*Fourth:* Obviously untenable is the argument that the military area

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60. *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946).

61. The opinion of the Court, like the separate opinion of Justice Murphy, goes beyond the minimum holding necessary for the disposition of the case. Thus the situation presented in *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866), was repeated for the same reasons.

62. 327 U.S. 304, 330 (1946).

63. Lt. Gen. Robert C. Richardson, Jr., admitted on cross-examination that he had no basis for his testimony as to delays in the courts of Hawaii. Record, p. 1051.

64. 327 U.S. 304, 332 (1946).

statute,<sup>65</sup> which vested in the military arm broad powers to promulgate regulations in designated areas but required their enforcement in the federal courts, was inadequate because the regulations were enforceable only in federal courts:

"That the military refrained from using the statutory framework which Congress erected affords no constitutional justification for the creation of military tribunals to try such violators."<sup>66</sup>

It is for the Congress to decide this issue, not the executive.

*Fifth:* Another argument in support of military trials was advanced by the Government on the basis of the testimony of General Richardson to whom the civil courts were obnoxious because as he testified they were subject to "all sorts of influences, political and otherwise." The natural preference of a military commander for tribunals which will do precisely what he commands is hardly equivalent to a finding that military trials are essential to the public safety. In fact such a preference does not even meet the test of reasonable judgment laid down in *Hirabayashi v. United States*<sup>67</sup> where the Court was passing on formal legislative action—not military fiat standing alone. "This," according to Justice Murphy, "is merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority. It does not qualify as a recognizable reason for closing the civil courts to criminal cases."<sup>68</sup>

*Sixth:* The feeble argument that attendance at jury trials would interrupt war work was readily disposed of by the observation that war workers could be excused from jury service.<sup>69</sup> This was the very thing that the senior circuit judge in Honolulu had proposed to the military authorities immediately after the outbreak of war.

*Seventh:* The last reason advanced by the Government in support of military trials was the character of the population of Hawaii and the presence of those of Japanese ancestry. This red herring was injected into the case by the return and answer of the Government.<sup>70</sup>

65. 56 STAT. 173 (1942), 18 U.S. § 97(a) (Supp. 1946).

66. 327 U.S. 304, 332 (1946).

67. 320 U.S. 81, 95 (1943).

68. 327 U.S. 304, 332 (1946).

69. Judge A. M. Cristy testified: "... on the morning after the so-called blitz, the Judges assembled. . . . Shortly after that, and during that week or the following week, several conferences were had with officers delegated from the Military Governor's office as to the contribution that the Judges of the Court could make toward assisting, and anything that would be necessary in curtailing their activity for a time being until things were settled down. . . . And suggestions were made as to how the Judges could conduct their business, both as to continuances and as to setting of cases so as to make the least disturbance or necessity for popular gathering around the Courthouse but carry on the business of the Court. But we got nowhere for quite awhile." Record, p. 600-1.

70. The Government's return and answer in the *Duncan* case cover 356 pages in the printed record. Record, pp. 25-381.

How this could be advanced seriously in the light of the conduct of the inhabitants of Hawaii and specifically that of the Americans of Japanese ancestry is difficult to understand,<sup>71</sup> except on the theory that it might strike a responsive chord on the bench.<sup>72</sup> The record in the *Duncan* case contains a complete demonstration of the loyalty of all elements of the Hawaiian population. No contention was advanced that the Hawaiians of Japanese ancestry were anything but law-abiding, loyal citizens; the Government's theory evidently was, however, that they might be otherwise, and that therefore the military should have military tribunals to administer criminal punishment to the entire community. As stated by Colonel Kendall J. Fielder, in charge of military intelligence in Hawaii during the period, no act of sabotage or espionage was known to have been committed by persons of Japanese descent in Hawaii either on or subsequent to December 7, 1941.<sup>73</sup>

#### THE CONCURRING OPINION OF CHIEF JUSTICE STONE

The concurring opinion of the late Chief Justice Stone follows the dogma of the Court in deciding a case on the narrowest issue necessary for its disposition.<sup>74</sup> Had there been but one opinion in the case, his would have adequately disposed of the litigation with a minimum of rhetoric. The late Chief Justice did not agree that the term "martial law" as used in Section 67 of the Hawaiian Organic Act is "devoid of meaning."<sup>75</sup> His succinct definition of "martial law" is a distillation of the previous decisions of the Court on the subject:

"It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and the necessities of the case. The exercise of the power may not extend beyond what is required by the exigency which calls it forth."<sup>76</sup>

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71. See LIND, *HAWAII'S JAPANESE, AN EXPERIMENT IN DEMOCRACY* (1946).

72. No member of the Court accepted this argument which had no basis in the record; but see the opinion of the circuit court of appeals, 146 F.2d 576, 580 (C.C.A. 9th 1944).

73. Record, p. 687. Admiral Chester W. Nimitz, testifying before the House Committee on Public Lands, said: "Before World War II, I entertained some doubt as to the loyalty of the American citizens of Japanese ancestry in the event of war with Japan. From my observation during World War II, I no longer have that doubt." *Hearings before Committee on Public Lands on H. R. 49*, 80th Cong., 1st Sess. 63 (1947), and see the unanimous report of the Committee reporting favorably on H.R. 49 (Hawaii Statehood Bill), H.R. REP. No. 194, 80th Cong., 1st Sess. (1947).

74. Adherence to judicial self restraint is a characteristic of the late Chief Justice's opinions. See his dissent in *United States v. Butler*, 297 U.S. 1, 79 (1936).

75. 327 U.S. 304, 335 (1946).

76. *Ibid.*

The Chief Justice conceded broad discretion in the determination of the necessity of martial law and its exercise,

"But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency."<sup>77</sup>

This terse statement is an acute comment on the Government's position, namely, that whenever an order was issued by a military commander the fact of the issuance of the order alone was proof of its necessity and that judges who thought otherwise were invading the hallowed ground of military strategy. If this extreme view of executive power were to be accepted by the courts it would be an end of liberty under the law. Whether the public safety demands the suppression of the civil courts is not a question on which the military have any superior degree of expert knowledge.

Willing to assume that the Constitution permits the substitution of trials by military tribunals for trials in civil courts if the public safety requires it, Chief Justice Stone then observed that the invasion of December 7 had ended long prior to the military trials in question. Furthermore, the fact that places of amusements were opened on December 24, 1941, and that bars were opened on February 4, 1942, was cogent evidence that the public safety did not require the closing of the courts, for "trials of petitioners in the civil courts no more endangered the public safety than the gathering of the population in saloons and places of amusement, which was authorized by military order."<sup>78</sup> Thus, in the Chief Justice's words,

"The military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts. I can only conclude that the trials and convictions upon which petitioners are now detained, were unauthorized by the statute, and without lawful authority."<sup>79</sup>

#### THE DISSENTING OPINION OF JUSTICE BURTON

Justice Burton in his dissenting opinion took occasion to announce his faith in the Bill of Rights and thereafter apparently conceded (counter to the main argument of the Government) that the Federal Constitution applies in Hawaii in full force and effect as elsewhere in the United States. The dissent, in which Justice Frankfurter concurred, then proceeds with a detailed examination of the military situation not

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77. 327 U.S. 304, 336 (1946).

78. *Id.* at 337.

79. *Ibid.*

only in Hawaii but in the Central Pacific, Southwest Pacific and European theaters. This analysis bears little or no relation to what the public safety in Hawaii required which, as the Chief Justice pointed out, is the key to any judgment on executive action after the declaration of martial law.

Simply because there has been a declaration of martial law does not mean that all acts subsequent thereto are required by the public safety. What is in fact required is a judicial question and is reviewable in the courts. Justice Burton quite properly observed that in the field of military action in time of war the executive has wide discretion and that "it seems clear that at least on an active battlefield, the executive discretion to determine policy is there intended by the Constitution to be supreme."<sup>80</sup>

He then posed the question, "What is a battlefield and how long does it remain one after the first barrage?"<sup>81</sup> To answer this question he first observed that courts have power to review "the outer limits" of the jurisdiction of the military authorities but that this requires a court to put itself in the position of the executive; that to recreate the emergency is impossible and the court should be reluctant to judge military action "too closely by the inapplicable standards of judicial or even military hindsight." What the Justice does not seem to have realized is that there is a difference between such acts of a military commander as taking possession of a building or a beach or requiring certain fortifications to be built or even interning suspicious characters and the creation by the military commander of a system of military tribunals for the trial of civilians. In the one category the acts of the military commander for all practical purposes are conclusive.

The reason the courts will not review or, to speak more accurately, are reluctant to review the actual exertion of force by a military commander after a declaration of martial law, is precisely what Justice Burton had in mind when he talked about the difficulty of recreating the emergency and judging action by judicial or military hindsight, for in such instances the commander acts *in extremis*. He may be right or he may be wrong but under no other method could warfare be conducted. Therefore his judgment is conclusive. The trial and punishment of persons charged with crime, however, takes place under no such stress. Even a military tribunal presumably undertakes a deliberative<sup>82</sup> process with an avowed effort on the part of the provost court to give the accused due process and mete out justice. It is not some-

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80. *Id.* at 342.

81. *Ibid.*

82. The picture of meting out rough and swift justice "amidst great social disorder" discussed by BIRKHEIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 492 (1892), has no factual resemblance to Hawaii after December 7, 1941.

thing that has to be done on the spur of the moment lest the fate of the nation be imperiled; hence such trials in the instant case were not required by the public safety.

The standard to be applied is far different in this field (military trials of civilians) from the standard to be applied in judging the exertion of force. The dissent is wholly unrealistic in concluding that, because Pearl Harbor was under attack for several hours on December 7, 1941, and in that sense could be considered a battlefield, it therefore was a battlefield in March, 1944, when our forces were knocking at the inner ring of the Japanese defenses.

The dissent is inaccurate in stating the President "supported" the action of the governor in turning over his functions and those of judicial officers to the commanding general. After quoting the proclamation of the governor turning over the government to the commanding general the opinion states: "This action was communicated by him to the President. . . ." <sup>83</sup> That action was never communicated by the governor to the President and hence the President never passed on the question whether the governor should or was authorized to turn over his statutory powers and those of judicial officers to the commanding general.

Beyond this inaccuracy, however, there is a deeper defect, namely, that neither Section 67 nor any other statute authorizes such a delegation of power. In other words, assuming a valid declaration of martial law, there is no escaping from the conclusion that the act of Congress contemplates that the governor and not a general or an admiral or anyone else should be the administrator of the martial law proclaimed.

It is of interest to note that the theory of the Government's defense, namely that the powers of the military were derivative from the governor, was an innovation of the Department of Justice; it was not the operating theory of the army in Hawaii. The army's position was that after the declaration of martial law and the suspension of the privilege of the writ the power of the military was supreme in all branches of the Hawaiian government. The "supersession" as it has been called was complete including the governor himself as well as the courts, the Legislature of Hawaii and the Congress. Thus, when restoration took place by proclamation on February 8, 1943, two proclamations were issued, one by the governor which had legal standing and effect under Section 67 of the Organic Act and the other by the commanding general in which he announced:

"1. Full jurisdiction and authority are hereby relinquished by the Commanding General to the Governor and other officers of the Territory of Hawaii, to the courts of that territory, to the city and county of Honolulu, to other counties, to all other officers of the

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83. 327 U.S. 304, 347 (1946).



territory or other persons acting under its authority, to the United States District Court for Hawaii, and to the appropriate officers of the United States, to exercise such powers as may now or hereafter be vested in them respectively by law over the following matters and others necessarily related thereto." <sup>84</sup>

The proclamation of the commanding general purporting to give back powers that he never held was without statutory basis but is significant to demonstrate the military view of its supremacy to the civil power.

Justice Burton seems to have been of the view that the military proceeded to relax controls as and when the exigencies of the situation permitted. This is unsupported by the record which discloses that the original restoration by the proclamation of February 8, 1943 (effective March 10, 1943) was accomplished only after protracted negotiations in Washington and that thereafter not a single step was taken to relax the controls despite the fact that the President in approving the compromise had expressed this request. <sup>85</sup> The dissent disregards the facts as to what the public safety required and the findings of the trial court as to the absence of civil strife or obstruction of the courts in their ordinary functions. It should be remembered that at the time of the trial of the *Duncan* case the criminal as well as the civil courts were in the full exercise of their powers, trying thousands of cases after December 7, 1941. No reason was suggested in the dissent why the civil courts which were actually trying cases involving major crimes could not enforce any regulations that were promulgated by the General pursuant to the act of Congress authorizing them. The military authorities were adamant in clinging to the last degree to their assumed powers.

A month after the decision of the Supreme Court the Secretary of War, prompted by radio broadcasts involving the exercise of military authority in Hawaii, wrote a letter of explanation to Representative Walter G. Andrews, dated March 25, 1946, which the Representative inserted in the Congressional Record. Secretary Patterson in his letter said:

"The Army did not in any sense oust or overthrow the civil government of the Territory. The civil authorities of the Territory continued for the most part to function as before, their authority supported and assured by martial law." <sup>86</sup>

The Secretary went on to state, "The War Department, of course, accepts as settled law the decision of the Supreme Court in the *Duncan*

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84. Record, p. 77.

85. On the relaxation of military control after March 10, 1943, the governor testified, "Nothing has been relinquished as far as I know, and we have taken no action." Record, p. 892.

86. 92 CONG. REC. A1699 (1946); but see the statement of a better informed observer, District Judge J. Frank McLaughlin, 92 CONG. REC. A4930-4 (1946).

and *White* cases and will follow it with circumspection." In his letter the Secretary in defense of the army's actions in Hawaii quotes at length from the opinion of the circuit court of appeals in the *Zimmerman* case, which was mooted by a release of the prisoner simultaneously with the filing of the petition for certiorari in the Supreme Court.<sup>87</sup> Secretary Patterson does not quote from the decision of the Supreme Court in the *Duncan* case and his statements "that the Army did not in any sense oust or overthrow the civil government" and that "the civil authorities of the territory continued for the most part to function as before" disclose a lack of knowledge of the facts and, what is even more remarkable, a lack of knowledge of the contents of the opinion of the Supreme Court.

## CONCLUSION

### I

It probably will be years before the historian of the future can clearly appraise the motives and causes that led the Army to pursue the course it did in Hawaii. It is inconceivable that those in high places in the War Department were not cognizant of the fact that the regime erected in Hawaii superseding the civil government was not only illegal but contrary to our most cherished traditions of the supremacy of the law. It is readily understandable that military personnel not familiar with the mixed peoples of Hawaii should have certain misgivings concerning them. However, the conduct of the populace on December 7 and thereafter should have put these military doubts at rest. To be sure it took some time for the military authorities to assure themselves that the civil population was all that it seemed—a loyal American community. What is not understandable is why the military government was continued after several years had elapsed and the fears of the most suspicious had been allayed.

After bases which the Japanese held several thousand miles west of Hawaii were captured by our forces it was clear that there could be no invasion of Hawaii. Why then was the regime continued? A possible explanation may have been military fears that, having assumed a fictitious title of military governor<sup>88</sup> and having erected a military government without legal sanction, the army would lose prestige if it were to admit its error.

A military government is essentially like any other form of bureaucracy. Its tendency is to expand, not liquidate. In the matter of rank, for example, if a military government has sufficient subordinate personnel then of course it can justify the creation of a certain number of

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87. *Zimmerman v. Walker*, 319 U.S. 744 (1943).

88. The title of "military governor" was dropped on the eve of President Roosevelt's visit to Hawaii. See General Orders No. 63, July 21, 1944.

lieutenants, captains, majors, colonels and generals. On the other hand, if the activity should decline with declining need, that would require a reduction of personnel and rank. The reluctance of the military governor's office to reduce its size and power is not peculiar to the military. However, there is one important difference between a civil and a military bureaucracy. If the action of a civil official is too arbitrary or too wide a departure from either statutory or regulatory authority, then the courts will review the matter, whereas in the case of a military government, as Justice Black pointed out, all power is centered in one person, and the individual affected by the operation of such a government is powerless to have his case reviewed by anyone since he must turn to the very person he claims as his oppressor and ask for relief from the oppression.

## II

On March 1, 1946, *nunc pro tunc* as of November 1, 1944, Circuit Judge Stephens filed a dissenting opinion in the *Duncan* case.<sup>89</sup> In a preliminary statement, Judge Stephens explained that he had reached the conclusion that the judgment should be affirmed and had distributed an opinion to his colleagues on the circuit court of appeals, but because the war was still in progress he had concluded that a dissenting opinion held more possibility of harm than of good and had accordingly withheld it. The opinion contains an exhaustive discussion of the problems presented and it is only to be regretted that his dissent was not made known when the case was disposed of in the circuit court of appeals. Surely we are sufficiently strong as a nation to sustain the impact of a judicial opinion even though it be critical of the military arm of our government during time of war.

Even though a particular decision may be considered ill-founded as a matter of law or unfortunate as a matter of policy it would be far more unfortunate to suppress conflicts among members of our courts. Justices Murphy and Rutledge did not hesitate to express themselves in the *Yamashita* case.<sup>90</sup> There are some who hold the view that dissenting opinions shake the confidence of the people in the judicial system and who long for the return to the days when dissenting opinions were less frequent and unanimity appeared to be a prime judicial objective. Although it is desirable from many standpoints that dissents be confined to a minimum, it does not appear desirable where large issues are at stake that a dissent should be avoided simply to portray a solidarity of judicial opinion which is unreal.

The holding of the Supreme Court may be summarized as follows:

(1) The Federal Constitution and particularly the Bill of Rights

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89. *Ex parte Duncan*, 153 F.2d 943 (C. C. A. 9th, 1946).

90. *In re Yamashita*, 327 U.S. 1, 26, 41 (1946).

apply in the Territory of Hawaii as elsewhere in the United States; whether Congress can in any way limit their territorial application remains, technically, an open question.

(2) Section 67 of the Hawaiian Organic Act does not authorize the trial of civilians before military tribunals.

(3) After a declaration of martial law every act of the military commander in pursuance of the declaration does not automatically become lawful simply because the military commander has ordered it done. Lawfulness of such a military act is reviewable in the courts and is judged by whether or not the particular act in question was required by the public safety.

The decision of the Court leaves unanswered several questions that arise out of the army's rule of Hawaii; some of these may never be determined, others may find their way into the courts. What, for example, are the rights of citizens who were interned after the suspension of the privilege of the writ?<sup>91</sup> What are the rights of individuals who paid fines imposed by military tribunals, the judgments of which are now held invalid?<sup>92</sup> What are the rights of employers and employees under the Fair Labor Standards Act who paid and received wages based upon the hours of overtime and prescribed by military orders and approved by the administrator of the Wages and Hours Division?<sup>93</sup>

The statement of questions such as those just enumerated indicates the morass in which we become involved if we fail to adhere to the principle basic in our government, namely, that we are all bound by the Constitution and laws of the United States and that no emergency however great can justify ignoring them.

The phase of martial law passed on by the Court involves the most extreme exercise of martial law powers—the supplanting of the civil courts and the trial of civilians by military tribunals. This is the ultimate in the exercise of such powers. At the other end of the scale lie invasions of personal and property rights whose justification must also depend on judicial balancing of the invaded rights against the acuteness of the emergency which is alleged to require their sacrifices.

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91. Four cases are pending in the United States District Court for Hawaii involving actions for damages brought by internees against the military commanders and others.

92. Provost courts levied and collected fines in excess of \$1,000,000 during the period of martial law. These monies less "operating expenses" were turned over to the Territory of Hawaii for distribution among the several counties. Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477, 481 (1943).

93. Several cases are pending in the United States District Court for Hawaii in which among other things the employer has interposed a defense against suits for overtime based upon military orders and the wage schedule prescribed by the military governor; it would seem that payments made pursuant to military orders constitute a defense under § 9 of the Portal-to-Portal Act of 1947, Pub. L. No. 49, 80th Cong., 1st Sess. (May 14, 1947).