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Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946

By Harry N. Scheiber and Jane L. Scheiber

The tragic story of the Japanese-American internments in World War II is now indelibly marked in the chronicles of American history—a dreadful episode in repression, with no timely protection extended to the victims by the nation's courts, during a war fought in the name of universal freedoms.  

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1 Peter Irons, Justice at War: The Story of the Japanese-American Internment Cases (New York, 1983) [hereafter cited as Irons, Justice at War] offers the full
The standard histories of the war period seldom even mention another wholesale violation of civil liberties committed at the time in the name of wartime efficiency: the imposition of martial law against the civilians of the Hawaiian Islands and the comprehensive suspension of constitutional guarantees that continued until October 1944. The experience of Hawaii differed from that of the West Coast in that the Army's control over civilians in Hawaii extended not only to the 159,000 of Japanese ancestry, but to the entire population of 465,000.

When Hawaii's history after the Pearl Harbor attack is recalled at all, it is often for purposes of documenting the indictment against the internment policy on the mainland. The argument goes as follows: By contrast with the Army's actions in California, Oregon, and Washington, where residents of Japanese ancestry were detained and evacuated to the camps, in Hawaii most Japanese-Americans were left free to continue their lives. Yet not a single act of espionage or sabotage was committed after Pearl Harbor by anyone in the Japanese-American community in Hawaii. Therefore, the argument concludes, Hawaii's experience demonstrates that the internment policy on the West Coast—quite apart from its cruelty and the crushing of constitutional rights that it represented—was entirely unnecessary as a matter of security and defense.2

However, the significance of Hawaii's wartime experience should not be regarded primarily as evidence against the internment policy, though it may well be that, its principal significance concerns the crisis in constitutional rights that was created when and definitive account of these cases and their litigation, and treats in great depth the policy debates that lay behind the administrative decisions affecting the West Coast. Irons does not deal with the Hawaii situation, however, except with passing references to internment. See also the classic work by Jacobus tenBroek, Edward N. Barnhart, and Floyd W. Matson, *Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of the Japanese Americans in World War II* (Berkeley and Los Angeles, 1954, reissued 1968) [hereafter cited as tenBroek, et al., *Prejudice, War*].


the military authorities were given extraordinary discretionary powers. We offer a brief account of this experience here.

In the first section, we treat the nature of the military regime and the extent to which it involved the sacrifice of civil liberties from 1941 to 1944. We then consider the earliest legal challenge to martial law in Hawaii, as well as the way in which the Army and Franklin D. Roosevelt's wartime administration responded to demands for at least partial restoration of civilian control. The third section treats the legal assault on martial law—successive petitions for writs of habeas corpus instituted by prisoners who had been convicted by military tribunals—emanating from Hawaii in 1942 and 1943.

The final section is an account of the nearly forgotten case of Duncan v. Kahanamoku. Inaugurated in 1944 as a habeas-corpus petition in the district federal court in Honolulu, it was decided by the U.S. Supreme Court in February 1946, together with the companion case of White v. Steer. The court's decision was handed down more than five months after Japan's surrender—which itself had been preceded by the termination of martial law in Hawaii in October 1944—and so did nothing to affect actual Army rule in Hawaii. Nonetheless, Duncan stands today in stunning contrast to the notorious Japanese-American cases, which upheld the government's wartime power to sweep away citizens' constitutional rights. In Duncan, Justice Hugo Black, writing for the majority, declared that the trial of civilians by

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3 The standard study was published by a leading participant, J. Garner Anthony, *Hawaii Under Army Rule* (Honolulu, 1955) [hereafter cited as Anthony, *Hawaii Under Army Rule*].

Gwenfread Allen, *Hawaii's War Years, 1941-1945* (Honolulu, 1950) [hereafter cited as Allen, *War Years*], offers a rich overview of social life and the impact of war conditions. It is based on the extensive documentary collection now in the Hawaii War Records Depository, Richardson Library, University of Hawaii [hereafter cited as HWRD], and includes two chapters on Army rule. An excellent popular work featuring photographs and other illustrations, annotated with excerpts from contemporary documents, is DeSoto Brown, *Hawaii Goes to War: Life in Hawaii from Pearl Harbor to Peace* (Honolulu, 1989). See also Roger Daniels, S.C. Taylor, and Harry Kitano, eds., *The Japanese Americans: From Relocation to Redress* (Salt Lake City, 1986) [hereafter cited as Daniels et al., *Japanese Americans*], in which the government's treatment of the Hawaiian civilian population receives some attention, though not based on new research. The most recent original scholarly work to examine in depth any of the major themes analyzed in the present study is that of Fred Israel, "Military Justice in Hawaii, 1941-44," *Pacific Historical Review* 36 (1967) 252 [hereafter cited as Israel, "Military Justice"].


5 The earlier cases included the decisions upholding the exclusion and detention policies: *Hitabaschishi v. United States*, 320 U.S. 81 (1943); and *Korematsu v. United States*, 319 U.S. 432 (1943). See also Irons, "Race and the Constitution," supra note 1 at 18-26. In the *Endo* case, often forgotten in standard accounts, the court ruled against the government; see note 105 infra.
military courts, under the martial-law regime, had been without legal authority. The Army, in his view, had thus been allowed by the Roosevelt administration and the courts to perpetuate the very type of regime that had been "feared and unflinchingly opposed" by free peoples throughout Anglo-American history. It was, as a Hawaiian journalist declared in 1943, a story substantially without precedent: "Never in the history of the nation had martial law been established over so large an area, containing so many people. Never before on American soil had such a government continued in existence for so long a time."

THE DIMENSIONS OF MARTIAL LAW

The Japanese air attack on Pearl Harbor had been over for only a few hours on December 7, 1941, when the territorial governor of Hawaii and the military commander there announced the institution of martial law. It involved, as martial law does, an outright suspension of all constitutional liberties. In this instance, the civilian courts were declared closed, all governmental functions (federal, territorial, and municipal) were placed under Army control, and a military regime was put in place whose power was complete. The commanding general declared himself the "military governor" of Hawaii, with entire control of the civilian population and with absolute discretionary powers.

As on the mainland, the Army and the Federal Bureau of Investigation moved quickly to round up aliens and other persons who had been investigated previously and who were suspected of being disloyal or dangerous during a war. Some 159,000 Hawaiian residents were of Japanese descent—124,000 of them citizens and another 35,000 aliens. Both military and civilian security officials believed there was substantial danger of "fifth column" activity from within this group if Hawaii were invaded by Japan; such an invasion was, in their view, an immediate danger. The major security and internment effort was therefore against residents of Japanese ancestry. Of the 1,569 persons eventually detained on suspicion of disloyalty, 1,466 were of Japanese descent. With fears running deep about the loyalty of those of Japanese ancestry in

6327 U.S. 304, 319 [Black, J., per cur.].
8The general orders are reprinted in Anthony, Hawaii, supra note 3 at 138-89 (Appendix). The authors have also used for the present study the complete files of general orders in the HWRD.
Hawaii during the war's early weeks, it was a frightening time for the members of that population.\(^9\)

The Army's imposition of military rule, when Gov. Joseph Poindexter declared martial law and relinquished the entire civilian governmental authority to the Army on December 7, was accepted without resistance in Hawaii, and indeed with much enthusiasm in many segments of the civilian population. Nor was there expressed concern or resistance in the ensuing weeks, either in Hawaii or in official circles in Washington, though both the civilian territorial governor and some leading members of the Hawaii bar informed Army officials directly that they had gone much too far, even in such an emergency, in suspending normal liberties.\(^10\) Some of the business leaders who later adopted a posture of uncritical and enthusiastic support of martial law assumed in early 1942 that the situation would soon end, and they urged officials in Washington to consider speeding up the process. Only the Japanese-Americans and other residents of Asian ancestry in Hawaii were clearly apprehensive as to what martial law would mean for them.\(^11\)

Thus Army control was accepted as necessary because of the dire circumstances. It was generally thought, however, that the civilian courts would be reopened and criminal jurisdiction turned back to the territorial government once the danger of imminent invasion had passed. How far other functions of government would be normalized and returned to civilian control was a matter of speculation, but few commentators would have believed that most of the functions of civilian government would be retained by the military any longer than an acute emergency justified, probably only a few months at most.\(^12\)

\(^9\)War Department correspondence with the White House as early as 1937 granted the difficulties of defending the islands other than Oahu from such an invasion; deployment of troops had been made to give priority to holding Oahu. See Stetson Conn, Rose Engelman, and Byron Fairchild, *The United States Army in World War II: The Western Hemisphere and Its Outposts* (Washington, 1964), vol. 2, chs. 5-6 [hereafter cited as Conn et al., *The Western Hemisphere*]. On the fearful days for those of Japanese descent in Hawaii after Pearl Harbor, see Allen, *War Years*, supra note 3 at 39-46, 351-52. Eventually the internees were sent to the mainland, joined voluntarily by relatives; a total of nearly 1,900 were sent from Hawaii to the camps [ibid., 141]. See also Michl Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (New York, 1976) 49-52, 86-89.

\(^10\)One of them was Garner Anthony of Honolulu, who would later become a major figure in the challenges to martial law.

\(^11\)E.g., Frank Midkiff to Attorney General Francis Biddle, March 1, 1942, Box 435, Office of Civilian Defense Records, Hawaii State Archives [hereafter cited as HSA].

\(^12\)Interview of former Gov. Joseph Poindexter, Honolulu *Star-Bulletin*, April 27, 1946; see also *Newsweek*, September 6, 1943, 54; “Iolani Palace Beehive,” *Paradise of the Pacific*, July 1942, 24-25; Midkiff to Biddle, supra note 11.
Any assumption that martial law would be willingly modified or lifted by the Army proved to be erroneous. Until March 1943—for a period, that is, of more than fifteen months—the military authorities ruled Hawaii with virtually a free hand, suspending constitutional guarantees (including the right to jury trial in criminal cases and the privilege of the writ of habeas corpus) throughout that time. A month into the war, the Army permitted the civil courts to open for noncriminal cases, but jurisdiction was strictly limited; no jury trials or habeas-corpus petitions were permitted; and nearly all serious misdemeanors and felonies were tried before military tribunals. Martial law was not lifted until October 1944, more than two years after the Battle of Midway, which even official U.S. Navy and Army observers believed had ended any danger of invasion or massive strike against Hawaii. 13

In October 1941 the territorial legislature, anticipating a war emergency, had enacted the Hawaii Defense Act, which authorized the civilian governor to exercise sweeping executive powers in any war emergency—but with enforcement to be in the civilian courts, with full provision of due process for any person accused of violations. This statute lay at hand on December 7, but when the military assumed control it was cast aside with the rest of civilian law and constitutional rights. The Defense Act subsequently became important to the discussion of whether continued Army rule were necessary; many civilian leaders in Hawaii contended that the act gave the governor ample powers over security in the civilian community, with no need of Army courts to enforce the laws. In the early months of 1942, however, the Defense Act was rendered irrelevant by the preemptive effect of martial law. 14

The Army's readiness to take over every detail of government in Hawaii only hours after the Pearl Harbor attack was in startling contrast to its lack of military preparedness to deal with the onslaught by Japan's air fleet. Behind that readiness was the diligence and enthusiasm of Lt. Col. Thomas H. Green, an Army adjutant who was the chief legal officer for the military command in Hawaii. He had spent the better part of 1941 in planning the minute details of martial law; a bevy of "general orders" was thus in his files, and ready for promulgation, long before Pearl Harbor. During the period of military rule in Hawaii, until late October

13 There was a partial restoration of civilian courts' jurisdiction in September 1942, but most criminal jurisdiction still remained with the military tribunals. Restoration Day in March 1943 marked the formal return of many important civilian functions to civil authority. See Anthony, Hawaii Under Army Rule, supra note 31 and text at note 71, infra.

14 Hawaii Special Laws, 1941, Act 24. The act was amended in 1943 to give the governor an even greater scope of powers, in response to the partial restoration of civil authority [Special Laws, Act 5, approved March 8, 1943].
1944, some 181 such general orders were issued under the names of the commanding general or Col. Green, the latter having been given the title of "Executive, Office of the Military Governor." Under that title—and operating from the office of the territorial attorney general in Iolani Palace, Honolulu, which the Army summarily appropriated for its military governor's functions—Green served until mid-1943 as essentially the czar of civilian life and criminal-law enforcement in Hawaii.\(^\text{15}\)

The scope of military orders reached into every corner of daily life. One of the first measures instituted was the compulsory registration and fingerprinting of every civilian except infants—something that certainly ran against the norms of peacetime American communities.\(^\text{16}\) The Army imposed a strict censorship of the press and broadcasting as well as of the civilian mails, licensed newspapers (withholding such licenses for many months from all but two Japanese-language journals), and closely regulated broadcasting. The system was one of "stringent control over the civilian population," enforced by military police and by the civil agencies under Army direction, with violators brought before military tribunals.\(^\text{17}\)

The Army kept the Islands' schools closed for several weeks; hospitals and other emergency facilities were placed under direct military supervision; food sales were temporarily suspended; and liquor sales and possession were regulated. An evening curfew was imposed, prohibiting any movement by civilians, and strict blackout orders kept civilian homes entirely darkened after sunset—a source of great inconvenience that was at first accepted uncomplainingly, though it later became probably the single most prominent and resented element of Army intrusion into daily life.\(^\text{18}\) The military enforced special rules against enemy aliens, including prohibitions against their meeting in groups of ten or more (even for religious ceremonies); carrying flashlights, portable radios and cameras; or possessing radio transmitters and other items, even road maps, that could be used in espionage. Certain areas of Oahu, especially in and near the military district

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\(^{18}\)Allen, *War Years*, supra note 3 at 107-55.
embracing Pearl Harbor and the airfields, were ruled off limits for all enemy aliens. Thus many people of Japanese origin who had lived and worked in Hawaii for decades lost their jobs. Because Army police and sentries said they found it hard to differentiate Koreans from Japanese, the military authorities included persons of Korean ancestry in these prohibitions—a particularly stinging insult to a people whose country and kin had long suffered oppression under Japan's imperial and militaristic rule.19

Gen. Delos Emmons, who took command of the Army in Hawaii in January 1942 and succeeded to the appropriated title of Military Governor, authorized Green to extend Army control even to the full range of federal administrative functions. These eventually included all the wartime powers exercised by the War Production Board, the Office of Price Administration, the War Labor Board, and other "alphabet agencies." The Army's general orders in Hawaii also controlled wartime wages and working conditions. The military controlled allocations of labor on the plantations—including "sweetheart deals" with the sugar and pineapple plantation companies, by which they kept their labor force in place but contracted their workers out to the Army for military construction projects. Within a few months, general orders had been issued concerning gambling (including a ban on loaded dice, marked cards, and other cheating), traffic and parking regulations, assignment of street numbers to buildings, regulation of prostitution, and even dog-leash requirements—all in the name of military security.20 Every violation, from the most serious violent crimes to curfew and dog-leash infractions, was prosecuted in military courts with no conformity to normal constitutional requirements of due process.

The Army won over some powerful employer interests, and thus political influence within the civilian community, by criminalizing job switching and absenteeism from work. These draconian measures required employer permission to leave a job and made it an offense triable before a military tribunal to be absent without permission. The Army further strengthened its political position by preventing the food shortages that plagued many areas of the mainland. By including civilians on an equal basis with the military forces in calculating the overall need for foodstuffs, and by controlling the shipment and distribution of


food from the West Coast, the Army kept Hawaii's civilian households well supplied with food on a priority basis.21

Not surprisingly, therefore, organized business groups generally provided enthusiastic support for Army rule. At one point in late 1942, an officer of the Honolulu Chamber of Commerce told the territory's attorney general that the Chamber wanted martial law continued because the organization "was not interested in the courts or the rights of civilians, but was only interested in the obtaining of priorities and the freezing of labor."22 While this was one man's view, and not necessarily an accurate reflection of the prevailing view within the Chamber, that organization did become a mainstay of political support for the Army and threw its weight on the military's side when civilian officials in Washington moved to reduce the military's authority in Hawaii.

The Army's concern to maintain labor availability had one ironic benefit for the Islands' residents of Japanese ancestry: the military protected them against pressures for their removal into concentration camps or their evacuation to the mainland. President Roosevelt himself was convinced that this community must be evacuated from Oahu, as a minimum security measure, and either placed in camps on Molokai or else sent for internment to the mainland; and his secretary of the navy, Frank Knox, urged him that "no matter what it costs or how much effort it takes," Hawaii's Japanese-Americans must be removed.23 On February 26, 1942, Roosevelt actually instructed his cabinet officers to begin the process. "I do not worry about the constitutional question," he told Knox, first because his Executive Order 9066, which was the legal basis for the mainland evacuation orders, was already in place,

and, second, because Hawaii is under martial law. The whole matter is one of immediate and present war emergency.

I think you and [Secretary of War Henry L.] Stimson can agree and then go ahead and do it as a military project.

Ask the Director of the Budget how we can finance it.24

21 Allen, War Years, supra note 3 at 310-26; Anthony, Hawaii Under Army Rule, supra note 3 at 31; Star-Bulletin, May 24, 1944, 8. It should be noted that in 1944, when civilian controls were reinstalled over about half the work force, the civilian authorities directed an intensive public-relations effort against [but did not criminalize] labor absenteeism.

22 Reported in Garner Anthony to Joseph Farrington, January 26, 1943, Farrington Delegate Papers, HSA.

23 Knox to Roosevelt, February 23, 1942, PSF Confidential, FDR Papers, Franklin D. Roosevelt Library [hereafter cited as FDR Library].

24 Roosevelt to Knox, February 26, 1942, ibid. See also Conn et al., The Western Hemisphere, supra note 9 at 209.
The Army command in Hawaii resisted mass evacuation. Gen. Emmons did admit privately, however, that from the standpoint of military security he would have liked to see "all Japanese influence removed." An evacuation would also have satisfied a small minority of white civilians—including some prominent business figures—who advocated the policy explicitly because the Japanese-Americans had, in their view, gained an unseemly economic foothold and had become a threat to white control of the Islands' economic and even political life.²⁵

With no evidence of a single incident of espionage or sabotage after the attack of December 7, however, the argument for mass evacuation was a hollow one—based only on prejudice and the fear of disloyal activity, not on any palpable current threat. In late October, Stimson certified to the president that no persons of Japanese descent regarded as "hostile to the United States" any longer remained free in Hawaii and outside the internment camps.²⁶

The Army also opposed mass evacuation because it would tie up shipping desperately needed for troops and supplies.²⁷ But the most important reason for the Army's resistance to evacuation was that Hawaii's labor force would be decimated; a complete collapse of agricultural, dockyard, and commercial operations vital to the Army would ensue.²⁸ Arguing in War Department circles against mass removals, Emmons had the support of the most influential business leaders in Hawaii. And so, although in March 1942 the government was on the very brink of ordering mass evacuations from Hawaii, the president's preference in the matter apparently died a slow death by bureaucratic strangulation at subcabinet and staff levels.

"Mass evacuation from Hawaii is impractical," Assistant Secretary of War John McCloy asserted in a press release of March 27: "The Japanese problem [in Hawaii] is very complex and all

²⁵ Edwin G. Arnold to the Director, Alien Enemies Section [hereafter cited as AES], December 16, 1942, Hawaii files, Carton 1, Japanese-American Resettlement and Relocation Collection, Bancroft Library, University of California at Berkeley [hereafter cited as Japanese-American Resettlement Collection]. Emmons is quoted by Arnold.

²⁶ Stimson to Roosevelt [copy], War Department file, PSF Box 104, FDR Papers, FDR Library. A presidential commission headed by Justice Roberts visited Hawaii shortly after the Pearl Harbor attack to investigate responsibility for the catastrophe. Among other findings were some of espionage conducted in 1939-41 coordinated by the Japanese Consulate, the commission's report of this activity stimulated anti-Japanese sentiment. See Francis Biddle, In Brief Authority [Garden City, N.Y., 1962] 215-16.

²⁷ Arnold to the Director, AES, December 16, 1942, Japanese-American Resettlement Collection, supra note 25; Notes of Senator Monrad Wallgren, meeting of Committee on Aliens and Sabotage, February 5, 1942, Carton 7, ibid.

²⁸ Conn et al., The Western Hemisphere, supra note 9 at 208-11.
tied up with the labor situation." The Army would make the continued presence of 159,000 civilians of Japanese ancestry in Hawaii a key argument, however, for continuing martial law. The presence of this group would also be cited repeatedly by the government when martial law was subsequently challenged in judicial battles.

Even while he was successfully resisting a mass evacuation of Japanese-Americans in early 1942, Gen. Emmons pursued a policy of encouraging women and children who were Hawaiian residents to go to the mainland for their safety. Several thousand of them were evacuated from the Islands, most of them to California and Washington. Eventually they became an embarrassing problem for the military command, for, as the war situation improved in the Pacific, there was increasing political pressure in Hawaii to return them to their homes and families. Even in late 1943 an estimated 3,000 of these "strandees" were still on the West Coast, denied places on Hawaiian-bound ships by the system of allocations under the control of Col. Green in Honolulu. Clearly this was one of several cases in which Army policies in Hawaii were administered ineffectively.

The strandee issue took on political urgency when Hawaii's civilian community realized that the Army was recruiting thousands of male workers from the mainland for defense jobs in the Islands, and even giving shipping priorities to their wives (thereby, incidentally, creating enormous pressure on the Honolulu housing market), while continuing to strand residents of Hawaii on the West Coast. The fact that a significant proportion of workers being recruited for dockyard and other defense jobs were Afro-American may have added to the resentment of the recruitment policy. Civilian leaders in the Islands also resented the Army's apparent lack of concern regarding another aspect of the situation: a large number of young women who were recruited on the mainland to be office workers or "entertainers" for the troops were believed to have taken up a more remunerative life as prostitutes upon arriving in Hawaii.

It was Army-administered justice, however, that became the real storm center of controversy regarding Hawaii's military government. When the first general orders suspended civilian courts on December 7, 1941, the Army announced the creation of a "military commission"—which was initially planned to

29 Star-Bulletin, March 27, 1942.
30 Allen, War Years, supra note 3 at 106-9; Midkiff to Adm. E.S. Land, October 16, 1943, Farrington Delegate Papers, HSA. The Army was also strongly criticized for its failure to give priority to the provision of housing for workers recruited for defense jobs in Honolulu.
31 Stainback to Fortas, February 25, 1944, Harold Ickes Papers, LC; Walter E. Smith to Farrington, November 29, 1943, Farrington Delegate Papers, HSA.
include some civilians, but was almost immediately refashioned to consist only of Army officers—to try crimes of war such as treason and sabotage, as well as murder and other most serious crimes. The commission proved to have a limited role, in fact trying only a few cases during the war period. Much more important were the provost courts, established to enforce the whole range of military regulations; they also conducted trials for felonies and misdemeanors under territorial and federal laws, which were continued in effect by military orders. These provost courts, in sum, became the principal institutions of justice in Hawaii.32

Trial in a provost court bore only the remotest and most superficial relationship to a trial in civil court under ordinary constitutional rules of procedure. A single officer generally presided; most of the officers in provost court, though not all, were lawyers. Jury trials were prohibited. In the war's early months, the court officers all wore sidearms; prisoners, prosecutors, and witnesses [if any] typically stood in a circle and were examined or cross-examined in a free-hand way by the presiding provost judge only. Arrests, searches, and seizures of evidence were made, and the evidence admitted, with no requirement or even procedures for issuance of warrants. No written charges were given to prisoners, and for nearly a year there were minimal records, if any, in many provost courts; data on verdicts or sentences was therefore sadly lacking.33

In at least two instances, the Army used plantation managers as provost judges. These men, although not holding military commissions, presided over trials involving their own employees, and meted out sentences to them—an insidious form of labor control. Army leaders in Hawaii justified this extraordinary practice on grounds that no officers were available and “the number of white civilians was small”—an explanation that reflects a general assumption underlying many Army administrative policies that only citizens who were “of a high type” and were white could be trusted as competent or loyal enough to exercise authority in the most sensitive areas of military rule.34

The average trial in provost court took five minutes or less; more than 22,000 trials were conducted in Oahu alone during


34 Notes made by General Green at Washington, D.C., August 1942, MS, RG 338, supra note 33.
1942 and 1943. Guilty verdicts were handed down in more than 99 percent of the cases.\textsuperscript{35} The provost courts formally allowed defendants a right to counsel; but the provost judges apparently frequently told defendants it was neither desirable nor necessary to have a lawyer. It soon became the common wisdom that to appear with counsel virtually guaranteed a harsher sentence than to appear without one and contritely accept the court’s verdict. There was no right to appeal, though Green’s office claimed to review routinely each decision and sentence.\textsuperscript{36}

The sentencing policy was an especially egregious feature of military justice. The commanding general authorized the provost courts to exact compulsory purchases of war bonds from prisoners in lieu of fines, a practice that the Treasury Department later disallowed, but this was the least of the outrages. People convicted in provost court were required to donate blood, or else were given a choice between doing so and serving time (one pint was made the equivalent of fifteen days in prison). Moreover, economic discrimination was inherent in the practice of commuting certain sentences by the alternative of money payments—a practice not uncommon in civilian courts, to be sure, but one that was linked to the bond-purchase policy in this instance.\textsuperscript{37}

Open discussion by Hawaii’s citizenry of their complaints about martial law or of the notorious procedures of the provost courts was highly problematic: a suspicion of “disloyalty” could all too easily lead to summary internment, as befell more than 1,500 Hawaiian residents. In addition, press censorship ensured that there would be no critical reporting of trials (if there were any

\textsuperscript{35}Data on the 1942-43 operations of the Oahu provost courts are in the Transcript of Record, \textit{Duncan v. Kahanamoku}, U.S. Supreme Court (October Term, 1945) [hereafter cited as \textit{Duncan v. Kahanamoku}]. How the 99 per cent (or higher) conviction rate compares with a similar mix of cases, including police court cases, in Hawaii’s civil courts has not been determined. Note, however, that Anthony, \textit{Hawaii Under Army Rule}, supra note 3 at 52-53, states that in 1942 some 22,480 persons were arrested, of whom all but 359 were found guilty. The total number of cases heard by provost courts to mid-1944 was approximately 37,000, with more than $1 million in fines imposed. Several hundred persons were sentenced to prison, and in May 1944 some fifty-nine were still being held in Army custody or in civilian prisons on provost orders. An estimated 55,000 cases in all went through the provost courts during the war. (“Operation of Provost Courts,” \textit{Star-Bulletin}, May 18, 1944; Allen, \textit{War Years}, supra note 3 at 183; Anthony, \textit{Hawaii Under Army Rule}, supra note 3 at 50-52.)

\textsuperscript{36}Testimony of petitioner, \textit{Ex parte Spurlock}, Habeas Corpus 31 [Judge McLaughlin], Transcript of Record, 151-52, U.S. District Court, Hawaii, Habeas Corpus Files, Record Group 21, National Archives, San Bruno [hereafter cited as RG 21]; “Civil Affairs and Military Government,” supra note 15; Report of the Attorney General, Territory of Hawaii, on Martial Law (December 1943), MS, HSL.

\textsuperscript{37}Anthony, \textit{Hawaii Under Army Rule}, supra note 3 at 54-58.
reporting at all). Because of Army censorship of civilian mail, even private comment on the martial-law regime was necessarily guarded. Indeed, documents in the War Department archives reveal that Gen. Green's office obtained information of tactical importance to bureaucratic infighting by the simple expedient of having censors open and report the contents of correspondence between the civilian territorial officers, including the governor, and cabinet officials in Washington.

Moreover, to offset such criticism as did arise, Green's office developed a busy press-release operation and appointed the publisher of one of Hawaii's two major newspapers to be special public-relations adviser to the military governor. The management of news by officialdom is unique neither to the Army nor to wartime situations, but the Army command was indeed thorough in seeing that its side was presented, with suitable accompanying editorials, in the Hawaiian newspapers and magazines.

It is of little wonder, then, that one of the leading Hawaiian journalists, reflecting on the record of martial law in May 1944, concluded that the Islands' civilians had "experienced a greater regimentation in thirty months of war than that of any other American community in history." A federal district court judge put it rather differently, simply characterizing martial law in Hawaii as "the antithesis of Americanism."

**The Generals, the Roosevelt Administration, and the Politics of "Restoration" and Martial Law**

The military authorities' effort to portray martial law favorably did not end with classic public-relations and propaganda efforts; it carried over into the internal administrative realm, in particular the Hawaii command's duties to furnish the War Department with accurate background information for assessment of the martial-law policy. Gen. Emmons, as well as Col. Green—whose

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38 Allen, *War Years*, supra note 3 at 146-48; "Censorship," File 13, HWRD.

39 Thus contents of a letter from the governor to Ickes, reported "from usual source," were sent on by the commanding general in Hawaii to his legal officer, then in Washington [Emmons to Green, Radio 2338, August 19, 1942, McCloy Files, Record Group 107, National Archives [hereafter cited as McCloy Files]]. Censorship of nonmilitary mail was later shifted to the civilian office of censorship under line control from the civilian agency in Washington [Willard Wilson, "Censorship in Hawaii," MS, 3-11, HWRD].

40 Anthony, *Hawaii Under Army Rule*, supra note 3 at 38; Emmons to Green, Radio 2338, August 19, 1942, McCloy Files, supra note 39.

new responsibilities catapulted him almost overnight in the first months of war to the rank of one-star general—consistently provided Washington with only the most favorable picture of their policies and accomplishments. Even when the most notorious violations of fair process in the provost courts had forced Emmons to order an inside review and reform of those tribunals, he and Green repeatedly told the War Department that martial law had been "highly successful," largely because it was being "administered with the utmost regard for the feelings, the civil rights, and the interests of the local population." In provost-court procedure, they asserted, "the civil rights of the public have been interfered with as little as possible." 42

In the early months of the war, procedural issues tended to be obscured by memories of the recent air assault on Pearl Harbor and the terrible specter of a new assault by sea or air. Within a short time, however, the martial-law policy would come before the courts, bringing into the open some serious legal, constitutional, and administrative questions about the Army's methods and the scope of its rule in Hawaii. By mid-year, moreover, some influential figures in Hawaiian society and in the national government's highest circles were openly questioning the need for continued martial rule on so comprehensive a scale.

First came the court test in a suit initiated by Clara Zimmerman on behalf of her husband, Dr. Hans Zimmerman, a German-born American citizen who had a substantial osteopathic practice in Hawaii and apparently enjoyed considerable social standing. He had been picked up as a suspected security risk in the first sweep after the attack on December 7, brought before a mixed civilian-military board appointed by the military commander, found to be a subversive or loyalty risk, and interned by the Army with hundreds of Japanese-Americans and others apprehended in the initial days of the war. Zimmerman was never shown the charges or evidence against him, was given no opportunity to cross-examine witnesses, and was denied access to the written record, if any existed, of the board's proceedings. 43

When application for a writ of habeas corpus was presented to the federal district court in Honolulu, Judge Delbert Metzger declared that "as a matter of course" under federal law Zimmerman was entitled to the writ. But his court was "under duress" by the terms of the martial law that had been imposed, Metzger ruled, and the prevailing general orders had specifically suspended

42 Emmons to McCloy, July 1, 1942, and Notes Made by General Green, Washington, August 1942, MS, RG 338, supra note 33. Compare "Civil Affairs and Military Government," supra note 15, on abuses and the investigation followed by reforms. Some of the most flagrant abuses of due process continued until late 1944.

43 Transcript of Record, Ex parte Zimmerman, RG 21, supra note 36.
the privilege of the writ. Hence Zimmerman remained interned, without recourse. 44

The case was then appealed to the Ninth Circuit, and briefs were filed in San Francisco by Zimmerman's counsel and by the American Civil Liberties Union. The government, in a brief led by Solicitor General Charles Fahy, stood firm on the proposition that "military necessity" had clearly warranted the entire suspension of civil liberties (including the writ of habeas corpus) in Hawaii, and that martial law was soundly based, both on the government's legitimate right to defend itself against immediate calamity and on the terms of the relevant statutes—in this instance the Hawaii Organic Act, establishing the territory in 1900 and authorizing the territorial governor to declare martial law. Such a declaration, it is important to note here, was authorized by the statute "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it." 45

Against the government's contentions, the American Civil Liberties Union, in an impressive brief by A. L. Wirin, argued that the Organic Act was not a sufficient or proper basis for martial law. 46 The ACLU's position rested heavily on the terms of the 1866 decision of Ex parte Milligan, the most recent ruling of the Supreme Court on martial law affecting American citizens in wartime. In Milligan, the court's majority had set down the standard by which the validity of martial law should be adjudged: there must be conditions of actual, not merely anticipated, invasion; and the civilian courts must perforce be closed and unable to function by reason of the invasion. 47 On more general grounds, the ACLU brief argued that close judicial scrutiny of a major deprivation of civil liberties was certainly required in this case. 48 Scrutiny by the court, the brief went on, must extend to


46 Brief of the American Civil Liberties Union as amicus, Zimmerman v. Walker [hereafter cited as ACLU brief], No. 10,093, Case Files, RG 21, supra note 36.


48 The ACLU argued that judicial scrutiny in such an instance had been announced as necessary in dictum in the famous "Carolene footnote," in United States v. Carolene Products, 344 U.S. 144, 152n. (1938), and then applied in a leading civil-rights decision, Thornhill v. Alabama, which served as precedent.
the facts: the judges must inquire into the actual situation and decide whether the facts constituted a "military necessity" grave enough to suspend all traditional guarantees of due process.\footnote{ACLU brief, supra note 46 at 27-28.}

The Ninth Circuit decision, which came down with one dissent in November 1942, rejected out of hand the arguments for Zimmerman and against unrestrained Army discretion. The panel's majority subscribed wholesale to the view that if the Army declared that an emergency sufficient to warrant martial law existed, then it could be declared; it was legal under the Organic Act; and, furthermore, it could be perpetuated as long as the military authorities believed it was needed.\footnote{132 F.2d 442.}

In sum, just as the government's policies for internment of the mainland's Japanese-Americans would be upheld in the Ninth Circuit and the Supreme Court, the Ninth Circuit panel, with only one dissenting vote, approved a virtually plenary military regime in Hawaii. The Army commanders, who had been taken entirely by surprise at Pearl Harbor, were now unwilling to tolerate any division of authority which (as they believed) might aid the Japanese in effecting another devastating blow; and the Ninth Circuit responded with full and unqualified approval of this posture.

Zimmerman's counsel immediately prepared an appeal to the Supreme Court; but, rather than face such a test, "because the decision in his case is so favorable [to the Army]," as Gen. Green wrote, the Army decided to take Zimmerman to the mainland and release him there. Thus the case was purposefully mooted.\footnote{Green to Emmons, Radio 2006, Cramer to Comdg. Gen., December 24, 1942, RG 338 [also stating, "Parole prior to appeal would be more effective than after"], supra note 33; cf. Anthony, Hawaii Under Army Rule, supra note 3 at 63-64, 82.}

For Zimmerman, it was the end of an arduous, frustrating, and certainly humiliating imprisonment during which the Army had shipped him off to a camp in Wisconsin and then summarily returned him to Hawaii, only to send him again to California for his release.\footnote{Zimmerman's travails are detailed in a file memorandum by Metzger, reprinted in McColloch, "Now It Can Be Told," supra note 44 at 366-67.}

It also meant that the Supreme Court would have no chance to rule on martial law in Hawaii until another test case was launched and made its way (probably very slowly) through the system. Together with Judge Metzger's self-denying view that his court was "under duress," the Army's mooting of Zimmerman sent a disheartening message to others who might consider legal challenges to military rule. For the moment, martial law in Hawaii seemed virtually immune from effective legal attack.
If a curtain was drawn for the time on legal challenge, this did not foreclose the possibility of political challenge. As the months passed and the military situation improved in the Pacific, especially after the Battle of Midway had been won, challenge in the political arena gathered some strength. It came first from within the Roosevelt administration itself, especially from the Department of the Interior, whose secretary, Harold Ickes, was an old-line Progressive, a committed civil libertarian, and by no means an admirer of the military. Ickes had at first accepted the martial-law decision, even though it meant that his department lost control of Hawaii and that due-process guarantees were suspended there; but Ickes did not intend military rule to endure very long. By mid-1942, urged on by some of his closest aides in Interior, he had begun pushing the War Department to order a softening of military rule; he also sought, though with little success at first, to introduce the question into cabinet deliberations.53

In June 1942 the decision to appoint a new civilian governor for Hawaii served to open up the question of martial law still further in Washington. Ickes’s choice for governor, not opposed in Hawaii even by conservatives, was Ingram Stainback, a longtime Democrat who had been serving on the federal district court bench there. Stainback came to Washington in June for last-minute discussion of his appointment, which the president was sending forward, and for hearings on confirmation. While in town, he left a strong mark—indeed, an unforgettable one—in the War Department, where he put legal officers on notice that he regarded the martial-law regime as having gone well beyond the limits of what constitutional and statutory law properly allowed. His parting words to War Department legal officers were to the effect that if Hawaii’s governor could declare martial law, then the governor might equally well “revoke his call upon the commanding general to take charge.”54 From that day, he never reduced his pressure on Washington for curbs on military rule and the fullest possible restoration of civilian authority.

Stainback’s political efforts were seconded by the territory’s congressional delegate, Samuel Wilder King. In June King met with several administration officials, urging that the War, Interior, and Justice departments should formulate a mutually satisfactory division of powers to be retained by the Army and powers to be returned to the governor. It was improper, King declared, that the Army itself should decide the jurisdictional question:

Regardless of whether an enemy attack is imminent or not, martial law should not displace civil administration

for a prolonged period... For a civilian community to live for months under what is in effect a military government is detrimental to the maintenance of self-government and repugnant to every principle for which we are fighting.  

Meanwhile, a legal-academic debate had begun on the issues. Questions arising from Hawaii’s martial law were aired fully in an article in the California Law Review by Garner Anthony, a prominent Honolulu lawyer who had made most of his career as counsel to some of the Islands’ leading families and corporate firms. A member of Hawaii’s social establishment, Anthony, who as a young man had served in the military forces in World War I, now went to the ramparts against the Army’s claims of authority. His article provided the case from the Milligan principles that Hawaii’s martial law could be warranted in any event only if the federal courts had examined the factual situation and ruled that there was a sufficient necessity for such measures. Moreover, he denied that the regime was operating constitutionally so many months after the acute emergency of Pearl Harbor. The courts were in fact open (though only for civil and non-jury-trial cases) and were clearly able to function, except insofar as the Army had restricted their jurisdiction and operations; and the military’s authority ought not to extend to purely civilian matters in criminal law.

An Army legal officer, Col. Archibald King, responded to Anthony in the same journal, presenting the arguments for constitutionality and validity of the martial-law regime. In late 1942, a full analysis by one of the acknowledged legal experts on martial law, Charles Fairman (later a member of the Harvard Law School faculty), also came down squarely on the government’s side. The extent of Army rule, the suspension of guarantees, and even the drastic punishments in Hawaii’s provost courts were “about what one would expect,” he stated laconically. Military necessity was for the Army, not for civilian judges, to decide; the nation must be able to defend itself adequately. Fairman’s approval of broad discretion for the Army extended to the Japanese-interment policy and early court decisions upholding it, as well as to martial law in Hawaii.

85 Samuel King to Ickes, June 17, 1942, Assistant Secretary of War Records (McCloy), supra note 39.
If nothing else, this academic debate brought the issue of martial law out into a position of visibility and some controversy in the legal community. It also prompted Gen. Emmons to issue a press release in Honolulu replying to Anthony's views, contending that the Organic Act and the president's acceptance of the martial-law decision had fully warranted all that had been done in Hawaii. Although he acknowledged the propriety of "legal debates," Emmons concluded thus: "In this theater of operations we are not going to question the wisdom of our congress in passing the Organic Act nor question the judgment of our president in approving the declaration of martial law." 58

The sweeping claims on behalf of the military's discretion made by Col. King and by government counsel in the Zimmer­man case caused a deepening concern in the Interior Department that the Army was digging in to resist any concessions whatever on martial law. As the result of Ickes's personal concern, the dogged resolve of his departmental aides (especially his assistant secretary, Abe Fortas), and the pressure from Gov. Stainback and Delegate King, the War Department was forced to accept that some modification of the regime must be instituted. Gen. Green therefore was sent back to Washington to work out the details, but his arrogant and unyielding defense of the provost courts and other aspects of martial law simply hardened the perception in Interior and in the Justice Department that he was a rigid and undemocratic individual who had little concern for anything but sustaining the Army's monopoly of authority in Hawaii. The antagonism was mutual. Green, for his part, concluded from the talks that "the very purpose of the present controversy is to divest the Military from control"—a view of things that was perhaps somewhat exaggerated but not entirely devoid of truth. 59

Against this tense background, an interdepartmental agreement was reached in August 1942 that provided for restoration of the civilian courts' jurisdiction over criminal-law matters, but only a partial one. The exceptions were significant: members of the armed forces and persons engaged in defense activities under the Army's direction (numbering about 80,000, or half the work force) were to be tried only by military tribunals; specified violations of military general orders would similarly be enforced only by the provost courts. The writ of habeas corpus continued to be suspended, and the continued existence of martial law was explicitly recognized. 60

58 Quoted in the Advertiser, May 15, 1942, 4; and in the English-language paper serving the Japanese-American community, Honolulu Nippu Jiji, May 15, 1942, 1.

59 Notes made by Green at Washington, August 1942, MS., RG 338, supra note 33.

60 General Orders 133, HWRD.
The Army announced the new division of jurisdiction in early September 1942, and for two quiet days it seemed that the long-awaited modification of martial law had been put in place. But then the Army's Hawaii command dropped a legal bombshell, issuing a "delineation" order that purported to clarify terms of the new civilian-military division of authority. In fact, the order reversed the major concessions of the earlier order. The military tribunals' jurisdiction was now specified as including the control of prostitution, traffic violations on public roads after blackout hour, and a range of selected crimes under the terms of territorial and federal law. All military proceedings would be conducted, as before, without right to a jury or other due-process guarantees.⁶¹

Gov. Stainback was outraged by this blatant violation of the agreement worked out in Washington, and he called on Ickes and the War Department to straighten things out. It proved a difficult undertaking because of the Army's intransigence. Once again interdepartmental negotiations were necessary; once again Green was brought out from Hawaii to represent Emmons. And as

⁶¹ General Orders 135, HWRD.
before, Green's uncompromising position antagonized all the Justice Department and Interior officials who met him. No one, it seemed, could name a single concession of Army authority without eliciting from Green [and, by cable, from Emmons] a response that the entire defense of the Hawaiian Islands would thereby be jeopardized.62

Green miscalculated badly by taking so stubborn a line, for this time he managed to arouse the ire of Attorney General Francis Biddle, who had previously been reluctant to challenge the Army’s discretion in policy areas where a claim of military necessity was made. Biddle now became thoroughly convinced, however, that the military, “who are now running Hawaii lock, stock and barrel, don’t want to give an inch”; and in December he wrote directly to the president that he regarded the Army’s administration in Hawaii as “autocratic, wasteful, and unjust.” He also denounced Green as a “stuffy, overzealous, unyielding” martinet, recommending that he be replaced at once.63

Biddle’s intervention with the president turned matters around quite suddenly. Roosevelt penned a note indicating he wanted the War Department “to clean this thing up,” and the die was cast.64 Assistant Secretary of War John McCloy had visited Hawaii in October 1942, and, though he recognized that there was “considerable agitation among the lawyers,” had reported to the White House that he found general satisfaction with martial law. McCloy found no good reason, however, to keep civil (as opposed to criminal) jurisdiction in the hands of the provost courts any longer. He was even prepared, as he told a White House aide, to return to the civilian courts jurisdiction over all criminal cases that did not have “a military aspect.” And this became, in fact, the basis of the subsequent compromise agreement, which would finally be reached in January 1943.65

Gen. Emmons raised objections at virtually every step of the negotiations. It is worth recounting in some detail his position on the issues, because throughout the ensuing months it would represent the Army’s official view of military needs in Hawaii—and it would also be reflected in [and incorporated into] the government’s formal defense of martial law before the courts.

The cornerstone of Emmons’s position was that Hawaii was a “fortress” (a word he and others in the War Department used repeatedly), so that every aspect of civilian life must be regarded

62 Documentation of the negotiations is in the McCloy files, supra note 39.
63 Biddle to Roosevelt, confidential, December 17, 1942, Francis Biddle Papers, FDR Library [hereafter cited as Biddle Papers]. For Biddle’s deference to Army judgment earlier in the war, see Irons, Justice at War, supra note 1 at 17-18, 52-54.
64 Roosevelt to Biddle, December 18, 1942, Biddle Papers, supra note 63.
65 McCloy to Harry Hopkins, October 19, 1942, McCloy Files, supra note 39.
as part and parcel of the military effort and vital to the efficiency of military operations. Also basic to his argument was his view that security of the Islands could be assured only by complete military rule because of the presence of so many residents of Japanese ancestry. Emmons was certainly a moderate compared with Army leaders on the mainland with respect to how Japanese-Americans should be treated; indeed, he had spoken out on several occasions against mindless racial prejudice, urging that white citizens not discriminate against their compatriots of Japanese ancestry. He had also encouraged the enlistment of Japanese-Americans for Army Engineer unit service in the Islands, and, against much resistance in the War Department, he staunchly championed the formation of an Army combat unit to be composed of Nisei volunteers—an important matter of principle to Hawaii's Japanese-American community. The latter proposal came to fruition in early 1943, with the organization of Nisei enlistees into the famous 100th Infantry Battalion and the 442nd Regimental Combat Team, known as "the Army's most decorated unit." 66

Nonetheless, in all his dealings with his civilian superiors, Emmons reiterated the premise that a core of disloyal aliens and Japanese-American citizens existed in Hawaii. Moreover, he insisted that further air attacks on Hawaii were not only possible but even likely, so that the Army must have full control to avoid another disastrous experience like Pearl Harbor. It flowed from all this, in Emmons's rendition of the exigencies, that he, as commanding general,

[being] responsible for the security of the Hawaiian Islands, must be the one to determine what functions can be returned to the civil authorities and the courts. . . . I promise to consider sympathetically every recommendation from the Governor of Hawaii for the return of such functions; but, on the other hand, I feel that he must leave to me the final determination . . . and that when I so determine he loyally accept that determination and cooperate with me and the other personnel of the military government . . . Furthermore, it is my firm opinion that a decision as to the distribution of functions between the military and civil government cannot wisely be made here in Washington by persons unfamiliar with the military situation or local conditions. 67

66 Allen, War Years, supra note 3 at 263-73 [also discussing combat service by the Engineers' units]; cf. Eileen O'Brien, "Making Democracy Work," Paradise of the Pacific, November 1943, 42-45.

In all these contentions Emmons received the full backing of Adm. Chester Nimitz, the naval commander in Hawaii, and of the Department of the Navy. In the negotiations with Interior and Justice, Assistant Secretary McCloy—who was the civilian official to whom Emmons reported—staunchly defended Emmons's position, even though privately he differed with Emmons on some key points at issue. In the end, however, McCloy had to compromise under the instructions from the White House, and he effectively ordered Emmons to accept the compromise agreement when the time came.68

A fundamentally different view of the situation in Hawaii and the claims of military authority was advocated by Abe Fortas, who represented Interior in the negotiations, and by Attorney General Biddle. Far from accepting the argument that military security absolutely required a single unified control, Fortas and Biddle proposed the transfer to civilian agencies not only of ordinary civilian governance but also such security-related functions as mail censorship, civil defense, and price control. Little room for discussion was left in their response to Emmons's conclusion that he alone, as commander, should have the power to decide on what functions could be transferred without compromising military needs: "We think that no such proposition," they wrote, "has ever been advanced with respect to American territory." They also demanded that Emmons give up the self-assigned title of Military Governor, which they regarded as suitable only in enemy territory occupied by invading American troops.69

Both Gov. Stainback and the newly elected territorial delegate in Congress, Joseph Farrington, Jr., in press releases and private talks alike, lent their full support to the Interior and Justice positions opposed to the Army view. (As the scion of a leading publishing family and a socially prominent figure in Hawaii, Farrington enjoyed a certain degree of immunity from criticism of his "loyalty.") Meanwhile the Democratic Party in Hawaii had adopted a platform resolution that called for the restoration of civilian administration and reinstatement of the privilege of the writ of habeas corpus.70

The outcome of the talks in Washington, probably a foregone conclusion from the time President Roosevelt responded to Biddle's letter, was the new compromise understanding by which the military would give up its authority over a wide range of governmental functions. The plan provided for a continuation of

68 Correspondence of McCloy and Emmons, December 1942-January 1943, McCloy Files, supra note 39. See discussion of McCloy's style in dealing with the Army more generally, in Irons, Justice at War, supra note 1 at 44-53 et passim.
69 Biddle and Fortas to McCloy, December 19, 1942, McCloy Files, supra note 39.
70 Star-Bulletin, September 21, 1942; Anthony, Hawaii Under Army Rule, supra note 3 at 110-11; on Farrington, see ibid., 105-6.
martial law and of suspension of the habeas-corpus writ. The military also retained jurisdiction over rules-making and punishment with regard to absenteeism from jobs and other labor rules in areas under direct military control, such as the docks, covering half the total civilian work force. For some reason the Army also insisted on, and was granted, continued exclusive control over prostitution. Otherwise, however, the long-disputed decision was reached that jurisdiction over civil cases and over criminal offenses not directly related to security was to be returned to the civilian authorities. The territorial and federal courts would thus resume functioning in these areas, with restoration of due process except for habeas corpus. Food and price controls, labor relations except where under military control, and censorship of civilian mail were also transferred back to civilian agencies, both federal and territorial. The title of Military Governor was left for settlement later. A “recapture” clause was also inserted, authorizing the commanding general to reinstate full martial law in case of acute military emergency. Finally, unknown at first to the Army generals in Hawaii, McCloy agreed under great pressure to transfer the controversial Green to a new post. 71 [McCloy kept a surprise from Ickes and Green’s other critics: Green would later be named adjutant general of the U.S. Army.]

Stainback was displeased that Interior had compromised on the key issue of continuing martial law and had not obtained firm agreement on the Army’s giving up the title of Military Governor. For his part, Emmons was equally distressed by the agreement, predicting that “divided authority, indecision, confusion, and endless and unhappy arguments” would ensue. 72 There was no escaping the decision, however, and so in January 1943 he and Stainback issued proclamations simultaneously, stating the terms that had been reached. Civilian agencies, territorial and federal, immediately geared up for change. 73

The official transfer of power occurred on March 10, 1943, announced as “Restoration Day,” at a gala marked by music from the Royal Hawaiian Band, dancing, and other entertainment amidst lavish floral displays in the legislative chamber. The Army provided a unique basso continuo by running a big anti-aircraft gun drill in Honolulu at the same hour. The symbolism of the gesture was not lost on the governor’s party guests. 74

71 A surprisingly detailed recounting of the inside negotiations in Washington came out in testimony in the Duncan case. See Transcript of Record, Duncan v. Kahanamoku, supra note 35. The proclamations of the governor and commanding general [military governor] are also in the transcript, and are reprinted in Anthony, Hawaii Under Army Rule, supra note 3 at 129-32.

72 Emmons to McCloy, January 3, 1943, McCloy Files, supra note 39.

73 On the proclamations, see note 71 supra.

74 “A Unique Experience in Government,” Paradise of the Pacific, April 1943, 2.
The modified martial-law regime would remain in place with only minor adjustments until October 1944, when, after additional cabinet-level debate, control of civil affairs was finally restored fully to civilian authorities in Hawaii. Meanwhile Gen. Emmons was succeeded in June 1943 by Gen. Robert C. Richardson, Jr., who would prove no less obdurate than his predecessor in demanding plenary authority and would defend equally vigorously the record of the provost courts. The same was true of Col. R. C. Morrison, who had been Gen. Green's chief staff officer and who succeeded him in June 1943 as "Executive" for the military government. 75

Many lawyers and territorial judges in Hawaii remained convinced that the continued suspension of the writ of habeas corpus was wholly unconstitutional, despite the Zimmerman decision, and thus it came as no surprise that the issue should have soon returned to the federal courts. 76 The first challenge occurred in July 1943, four months after Restoration Day, and it quickly developed into a spectacularly embarrassing confrontation between the Army and the federal district court.

The resulting scenario had comic-grotesque aspects that belied the seriousness of the constitutional issue in question. The legal challenge took the form of two petitions for writs of habeas corpus, presented in federal district court in Honolulu, in the cases Ex parte Glockner and Ex parte Seifert. 77 The two prisoners in question were U.S. citizens, born in Germany and naturalized, who had been picked up by the Army as security risks—Glockner just after Pearl Harbor, Seifert in December 1942. They had been held without trial, without the opportunity to confront witnesses, and without access to the record. In the Zimmerman hearing in February 1942, Judge Metzger had declared his court closed "under duress"; this time he determined to hear the petitions,

75 The lifting of martial law was accompanied by the declaration that Hawaii was a military area, with application of Executive Order No. 9066 and enforcement of military regulations by the federal courts. This placed the Hawaiian Islands in the identical legal status as the West Coast when the mainland internments policy was put into effect. See proclamations in Anthony, Hawaii Under Army Rule, supra note 3 at 185-90.

76 See Anthony, Hawaii Under Army Rule, supra note 3 at 31 (that the agreement was an unfortunate compromise).

77 Support for the account here of these cases in the district court is in Anthony, Hawaii Under Army Rule, supra note 3 at 64ff.; and McColloch, "Now It Can Be Told," supra note 44 at 365. The Honolulu newspapers also covered the stories closely.
which were submitted in July, and he called upon the Army to respond. Gen. Richardson refused to file an answer, on grounds that the Army’s general orders had closed the court to habeas petitions. The U.S. attorney, representing Richardson, also indicated that the secretary of war and Gen. George C. Marshall, commanding general of the Army, had specifically instructed Richardson not to appear. This refusal was based explicitly on the view that the military authorities should not be required to justify before a civilian court their opinion that “military necessity” required martial law.78

Metzger was known as a tough, curmudgeonly lawyer; before the war, he had served as counsel to labor organizers in some of Hawaii’s most turbulent labor disputes. It was therefore not surprising that he should have called the Army to account in this case. When Richardson refused to accept process, even permitting his guards to rough up one of the deputy U.S. marshals who was seeking to serve papers in August, Metzger declared the general in contempt and fined him $5,000. Richardson then responded with a general order that specifically prohibited the federal court from continuing with the proceedings, making Judge Metzger subject to trial by a military commission, with a sentence for violation as long as five years at hard labor, or other “appropriate” punishment.79

Officials in Washington were aghast at Richardson’s precipitate response to the court’s orders. Ickes by then had a sympathetic hearing in other departments for his view that “the time has come when we must stop governing Hawaii through a series of law suits, and resort to common sense instead.”80 After hasty consultations with War and Interior officials, the Department of Justice sent Edward J. Ennis, who had worked on the Japanese-American mainland evacuation policy and resulting legal cases, to Hawaii to mediate. With the help of territorial officials on the scene, Ennis worked out a compromise by which Richardson withdrew his extraordinary order and Judge Metzger lifted the contempt order (though he insisted on a nominal $100 fine to make his point). Eventually the president gave Richardson a pardon.

78 Advertiser, August 27, 1943; Transcript of Record, Ex parte Glockner, RG 21, supra note 36.

79 Anthony, Hawaii Under Army Rule, supra note 3 at 70-71. Harriet B. Sawyer wrote briefly in 1967 of Metzger’s service as counsel to the Filipino labor leader Manlapit in 1924, when Metzger successfully obtained a writ of habeas corpus releasing Manlapit from jail and permitting him to speak to plantation workers whom he sought to organize. (Sawyer to the editor, Star-Bulletin, April 29, 1967; see also “Ex-Judge Metzger Dies: Champion of Civil Rule,” Star-Bulletin, April 25, 1967.)

80 Ickes to Stimson, April 20, 1944,McCloy Files, supra note 39.
Ennis and the attorneys for Glockner and Seifert meanwhile agreed that the prisoners would be transferred to the mainland, thus removing them from Metzger's jurisdiction, and that their cases would be presented at once for a judgment to the Ninth Circuit Court in San Francisco. All parties knew that the circuit court had come down foursquare on the Army's side in the Zimmerman case a year earlier. This time, however, the outcome might be different. As Ennis declared, most likely

the Government will have more difficulty with any habeas corpus proceeding now.... I do not believe that any lawyer could say with certainty that the courts will not inquire into the particular facts, in any particular case, when the person detained under martial law has been detained for over a year and a half.... Although review of the facts of a particular case has never been judged necessary, ... no case testing the propriety of a detention, under martial law, lasting over a year and a half has ever been decided by the Supreme Court.81

Apart from the possibility that the federal courts might be inclined to follow the line that Judge Metzger had clearly been prepared to pursue—that is, to give close judicial scrutiny to the military's claim that "necessity" required continuation of martial law—there was another, potentially embarrassing, facet of the Glockner case. As Ennis warned, "The FBI reports indicate that there is almost nothing which would suggest that this man is dangerous." The ominous import of Ennis's suggestion persuaded the Anny to moot both cases, and thus avoid review, by releasing both prisoners.82

Although the Glockner and Seifert cases were thus put behind them, cabinet officials in Washington found in the confrontation between Richardson and Metzger's court additional reason to press for termination of military rule. Thus Ickes declared to the War Department in February that he was "getting fed up with the usurpations of power and the monkey shines thereunder" by Richardson, and he again demanded that the title of Military Governor be given up. Justice Department officials, especially in light of Ennis's dealings with the Army command in Hawaii, were more skeptical than ever as to whether the martial-law policy could stand a full court test.83

81 Ennis to McCloy, August 7, 1943, RG 338, supra note 33.
82 Ibid., see also Anthony, Hawaii Under Army Rule, supra note 3 at 76 (Ennis's statement to the press that military tribunals legitimately had jurisdiction over matters directly related to military security—a position different from Richardson's, demanding plenary authority).
83 Ickes to McCloy, February 1, 1944, Ickes Papers, LC; James Rowe, oral-history interview, Bancroft Library.
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Richardson, for his part, was taking an even harder line and seeking ways to save martial law from what he viewed as the naive and sometimes unprincipled "political" attacks that were being sounded. His response, had it been known to Ickes, would simply have confirmed the latter's worst suspicions: the general suggested to the War Department, as a "logical and proper" reform, the transfer by presidential order of entire formal jurisdiction over government for the Territory of Hawaii from the Department of the Interior to the War Department. In a single stroke, Richardson pointed out enthusiastically, the Army could thereby put to rest "the consistent complaining of the Territorial officials by making them responsible to the Secretary of War for the duration." Even if the president did not agree to the plan, he continued, mere discussion of the idea in Washington would perhaps have "a salutary effect" by inducing Interior Department people to be "content with the existing martial law setup" as the better alternative. 84

Richardson's enthusiasm for this scheme was not shared by Assistant Secretary McCloy, who apparently spared his superiors in the War Department (not to mention the president) any information of it. Ickes and Abe Fortas meanwhile pressed McCloy to consider an alternative legal means for enforcement of Army regulations that were deemed vital to security in Hawaii, by application of the presidential order (No. 9066) and the congressional legislation (the Act of March 21, 1942) that had authorized the Japanese-American evacuations on the West Coast. These measures, Fortas declared, were more than sufficient to Hawaii's needs. They provided that any restrictions imposed on the population of a declared military area should be enforced in the federal courts, where they ought to be, thus the Army could give up its controversial and (as Fortas saw it) unwarranted use of the provost courts for enforcement against civilians. 85 This plan—in essence advocated earlier by Garner Anthony—became the basis for the later agreement to end martial law in Hawaii, a change finally ordered in October 1944. 86

An intervening episode—one that surely had a decisive effect on the discussions of whether, and how, to end martial law—was the beginning of legal proceedings in the Duncan case, which was first brought in federal district court on March 14, 1944, on petition for a writ of habeas corpus. A civilian shipyard worker,

84 Richardson to McCloy, February 10, 1944, RG 338, supra note 33.
85 Fortas to McCloy, April 6, 1944, McCloy Files, supra note 39.
86 As early as August 1943, Ickes had also proposed ending martial law and substituting the enforcement of Army regulations under the terms of Executive Order 9066 and the implementing congressional act of 1942 [Ickes to McCloy, August 9, 1943, Ickes Papers, LC]. See also Anthony, "Martial Law," supra note 47.
Lloyd Duncan, had quarreled with and struck two military sentries in February. Arrested by military police, he was tried and convicted by a provost court a few days later and sentenced to six months in prison.87

Judge Metzger’s courtroom was again the scene of proceedings, only this time the Army did not challenge the district court’s hearing the petition. Anthony, the former territorial attorney general, represented Duncan in what quickly became a dramatic legal debate over the constitutionality and legality of the Army’s rule. Ennis was once again sent out by the Justice Department to represent the Army. He based a vigorous defense of continued martial law on the view (embodied in the Ninth Circuit’s 1942 decision in the Zimmerman case, and consistently argued for by the Army since then) that “military necessity” was a factual issue that only trained military authorities could properly decide. Unlike a year earlier, in the confrontation over the Glockner and Seifert petitions, the War Department this time instructed the principal uniformed officers in Hawaii to testify in the district

court on the matter of "necessity." Both Gen. Richardson and Adm. Nimitz gave oral testimony and were cross-examined; both insisted that, despite the waning of Japanese military and naval power, there was a continuing emergency and serious danger of "imminent invasion." Anthony put Gov. Stainback on the stand to testify that the civilian authorities (including the courts) had ample power under the Hawaii Defense Act and federal law to deal with any security threats behind the lines. It was also accepted as stipulation that the "courts were open" and capable of functioning, and had been so at least since March 1943—an important factual matter, given the Milligan test for the validity of martial rule's supplanting civilian justice. 88

Judge Metzger found in favor of Duncan and issued the writ, ordering him to be released from the Army's custody. The opinion stated that the Nimitz and Richardson testimony, contrary to the conclusion these two witnesses had offered, actually supported the view that "an invasion by enemy troops is now practically impossible." The office of military governor had been created illegally in any event, the court ruled: there was no authority under the statutes or by terms of the compromise "Restoration" agreement of 1943 for the provost courts to try civilians for ordinary crimes. Martial law was illegal, Metzger stated, at least from Restoration Day in March 1943 forward. 89

Immediately afterward, another habeas petition was presented to the federal court, with Judge J. Frank McLaughlin presiding. The petitioner was Harry E. White, a stockbroker and resident of Honolulu who had been convicted of embezzling $3,240 from clients' funds with his firm and sentenced to five years. The date of his trial was crucial, since it had been conducted in a provost court in August 1942, seven months before the Restoration Day agreement had gone into effect, and its legality was thus not decided by Metzger's ruling in the Duncan case. White now contended that his sentence of five years in prison by a military tribunal was a violation of his constitutional rights. The testimony of Stainback, Richardson, and Nimitz was incorporated, by agreement of counsel, from the record of the Duncan case. Ennis again handled oral argument for the government, contending that whether martial law was for military security reasons "necessary" in August 1942 was "the kind of determination which courts

88 The testimony of Richardson, Nimitz, and Stainback is in the Transcript of Record, Duncan v. Kahanamoku, supra note 35. See also excerpts in majority and dissenting opinions, Duncan v. Kahanamoku, 327 U.S. 304 (1946).

89 66 F. Supp. 976, 979-81, Star-Bulletin, April 14, 1944. The court's interpretation of the Restoration Day military orders and the civilian governor's proclamation was strained at best and confused at worst, and the decision thus turned on a seriously deficient construction of language in the orders. Judge McLaughlin took a different tack in Ex parte White, discussed at note 91 infra.
should leave to the executive." With the nation still "actively at war," he argued, "there is no reason for the courts to interfere." 90

Judge McLaughlin's decision also went against the government, but on much broader grounds than had prevailed in the Duncan decision. He ruled that the case must turn upon whether the civilian governor's proclamation of December 7, 1941, which had originally ceded all authority over civil justice matters to the Army, had been valid. He decided that the governor had exceeded his legal authority in thus "abdicating" his authority, going well beyond what the Organic Act had warranted. Hence he found the "purported delegation of powers that [the governor] did not have" to have been "absolutely and wholly invalid." As to "necessity," the court found that trying White before a military tribunal, denying the defendant the basic constitutional rights of a citizen before the law, had "advanced, preserved, and protected the military situation in Hawaii not one iota." Merely to proclaim that there was a military necessity "does not make it so," McLaughlin declared. Thus White was given his freedom—but, more important, the entire legality of martial rule in Hawaii was thrown into question. 91

With a third case, Ex parte Spurlock, which was later mooted by the Army, the Duncan and White decisions were appealed immediately to the Ninth Circuit. The court's decision, announced in November, reaffirmed its position in the Zimmerman case, upholding the full range of powers claimed by the Army in Hawaii. 92 Judge William Healy, author of the court's opinion, cited the continued presence of a large Japanese-American population in Hawaii as a potential threat to security; he accepted the government's contention that "summary punishment of criminal offenders of every sort" could materially assist the Army's maintenance of "general security" by acting as a deterrent force against unrest or crime; and he asserted that "the courts were disabled from functioning," making a military trial necessary in August 1942 and even in March 1944. That the courts were "disabled" only because the Army had decided to disable them, as counsel for the prisoners had pleaded, was a point on which the court did not discourse. 93

90 Advertiser, April 21, 1944.
92 Ex parte Spurlock, 66 F. Supp. 997 (D. Haw. 1944); Steere v. Spurlock, 146 F.2d 652 (9th Cir. 1944). For lack of space, and because of the now-familiar mooting tactic that removed the case before it reached the Supreme Court, Spurlock is not considered here but will be treated in our larger study (in progress).
93 146 F.2d 576 (9th Cir. 1944). Two concurring opinions were filed, in one of which two members of the court declared that, lacking "implied fraud on the part of the governor and the military authorities," a finding by the Army must be upheld and the lower court reversed. See the full discussion of the opinions in J.
Once again, the government faced the possibility of a test of its martial-law policy before the Supreme Court. While all the foregoing judicial tests of the Army's rule were taking place, and while the war in the Pacific took the area of combat farther and farther from Hawaii, the Army continued to maintain rigorous, and often harsh, control of Hawaiian society through general orders enforced in the provost courts. The Army maintained jurisdiction over all labor cases associated with the military operations (which, as noted earlier, involved some 80,000 civilian workers), enforced curfew and blackout rules, and continued to have full control over regulation of enemy aliens and citizens interned because of suspected disloyalty. Until the final hours of martial rule in October 1944, the provost courts continued to operate under policies that departed from every norm of constitutional justice in the civilian courts of the nation.94

Despite Assistant Secretary McCloy's view that the title of Military Governor was "always an obnoxious one in our own country" and hardly worth the grief it had caused, and despite Interior's view that in civilian eyes the title was "an important symbol of military usurpation," the War Department also permitted Richardson to hold the title until July 1944.95 The Army, in sum, was obviously determined to maintain its control in Hawaii on its own terms, and with the nomenclature of its choice. It was fully upheld in that position by the Ninth Circuit Court of Appeals in every case that court had decided since Pearl Harbor.96 Nonetheless, the Army command in Hawaii well knew that martial law stood on a legal foundation that by its nature became weaker as time passed and the tide of war shifted. It would be difficult, as even the military's own legal officers recognized, to


94 This last phase of martial rule will be treated fully in the authors' forthcoming longer study.

95 McCloy to J.A.G. Cramer, November 17, 1944, Fortas to McCloy, April 6, 1944, McCloy Files, supra note 39. In July 1944 Richardson adopted the title of "Office of Internal Security" as a replacement for "Office of the Military Governor." It was a cosmetic change only (Richardson to McCloy, July 21, 1944, ibid).

96 The vexed history of the Hawaii habeas-corpus petitions, and the appeals they generated, strongly support John P. Frank's view that when the federal judiciary has given citizens protection against governmental attacks on civil liberties, they have generally acted definitively not during but after—sometimes long after—the crises that produced those attacks, and therefore long after the effective damage was done (Frank, "Judicial Review and Basic Liberties," in *Supreme Court and Supreme Law*, ed. Edmond Cahn [Bloomington, 1954], reprinted in *American Law and the Constitutional Order*, ed. Lawrence Friedman and Harry N. Scheiber [Cambridge, Mass., 1978] 397-407).
make the "necessity" argument before the Supreme Court. As early as January 1944, months before Duncan went up on appeal, Ennis—who had been a principal figure in preparing and arguing the infamous Japanese-interment cases as well as the Duncan hearing and its appeal to the Ninth Circuit—was expressing strong personal reservations as to whether martial law was defensible. In fact, Ennis was telling his colleagues in the Justice Department that martial law in Hawaii was "probably unconstitutional."97

The Army was also finding it increasingly hard to withstand the inexorable political pressures building in 1944, when the threat of a Japanese attack against Hawaii began to appear altogether remote. For the same reason, in the middle of that year the Army began slowly turning back to civilian agencies some of the more controversial—and administratively bothersome—aspects of economic controls.98

After wrestling with his conscience, Ennis finally overcame his scruples and continued to represent the government position competently on behalf of the Army in the Duncan arguments. (He had done likewise in the Japanese-American cases, even after becoming aware that the Army had engaged in a misrepresentation of facts to justify the evacuation and internment policy to the president and Congress.) However, he privately hoped that, as new test cases were brought in the Supreme Court, the justices would choose to reaffirm traditional constitutional liberties and equal justice rather than to give reflexive approval of the Army's judgments of "necessity" simply because war conditions prevailed.99

**Denouement: The Duncan and White Appeals in the Supreme Court**

The Supreme Court heard argument in the joined Duncan and White appeals on December 7, 1945, four years to the day after the attack on Pearl Harbor—and nearly four months after V-J day. Because of the extensive testimony given by Gen. Richardson, Adm. Nimitz, and Gov. Stainback in the district courts, the justices had the full argument spread before them on the record with respect to the vexed and oft-aired issues of "military necessi-

97 Ennis to the Solicitor General, memorandum, January 21, 1944, Charles Fahy Papers, FDR Library.
99 On Ennis and the litigation of the Japanese-American cases, see, inter alia, Irons, "Race and the Constitution," and *Justice at War*, supra note 1. See also note 97 supra.
ty." All the four opinions that finally came down—Justice Hugo Black's for the majority, Justice Frank Murphy and Chief Justice Harlan Stone in concurrences, Justice Harold Burton for himself and Justice Felix Frankfurter in dissent—referred explicitly to that testimony.

The government's brief, led by the solicitor general and Ennis, presented the court with an argument that the Organic Act, Section 67, offered ample legislative basis for the imposition of martial law as had been done in December 1941, standing as a modification of the Constitution's restriction of martial law as interpreted in Milligan. Moreover, the government argued, even if the Constitution applied fully in Hawaii, military rule could be imposed constitutionally in emergency conditions as a matter of "the inherent power of self-defense and self-preservation possessed by this nation." If the civilian courts were to subject the military's judgment to a test in such an instance, it should be only that of "determining whether all the circumstances afforded a reasonable basis for the action taken." This invitation to the court to address whether a "reasonable basis" existed was an opening that the Army had never wanted to admit. By contrast, the Ninth Circuit had declared that such judicial review (to determine "reasonableness" or on any other grounds) would risk "idle or captious interference" by judges in strictly military affairs. Since 1941 the Army had always insisted on an absolutist view of necessity and discretion in regard to the martial-law policy; the Army contended that only military leaders could, and should, decide when martial law was justified.

In his brief as counsel for Lloyd Duncan, Garner Anthony came back to the Milligan criteria for validating martial law, quoting that decision to effect that even if habeas corpus were properly denied, the Constitution does not permit a citizen so denied to be "tried otherwise than by the course of common law." Nothing in the legislation authorizing suspension of the writ, he said, could be construed as authorizing the executive "to prescribe new crimes or offenses or to create 'courts' or 'tribunals' to try offenses." Imploring the court to overturn the Ninth Circuit ruling

100 Brief for the United States, 55-57, 58-59, in Duncan v. Kahanamoku, supra note 35. Perhaps it was a concession to Ennis by the Justice Department strategists that this argument was put forward; certainly it was consistent with Ennis's apparent intention to place the military-necessity issues before the court in a way that fell short of full endorsement of the Army's "blanket" position.

101 The Ninth Circuit is quoted from Ex parte Zimmerman, 132 F. 2d 442, 446 (1942). The Army's absolutist position has been termed the "blanket view" of the martial-law power—as opposed to the "qualified view," which admits that the military's judgment can be reviewed on the facts by civilian courts. See discussion in Anthony, Hawaii Under Army Rule, supra note 3 at 64; Frank, "The Five Companies," supra note 47; and, for the early constitutional history, George M. Dennison, "Martial Law: The Development of a Theory of Emergency Powers, 1776-1861," American Journal of Legal History 18 (1974) 52-79.
a decree that, he contended, "in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land"—Anthony asked the justices to find that nothing in the Organic Act or the Constitution could prevent judicial review or issuance of a writ in the case of a civilian tried by the provost courts "for an offense of the class constitutionally triable only by jury."*102 In an amicus brief filed on behalf of the petitioners, the Bar Association of Hawaii and Nils Tavares, territorial attorney general, similarly called upon the court to rule that the existence of martial law could not itself be cited as ample reason for closing the courts and subjecting civilian justice "to the will of the military commander."*103

Invalidity of the provost-court trials was a theme also hammered home by the ACLU in a brief signed by seven of the nation's most distinguished constitutional lawyers, with Osmond Fraenkel appearing for oral argument. The Army had enjoyed a period of more than two years, it was pointed out, before the arrest and conviction of Duncan, "during which no attempt had been made to get congress to authorize military trials of any kind." This, the argument concluded, "show[ed] the absence of any real necessity for such trials" so long after the true emergency following the Pearl Harbor attack.*104

This strategy of underlining the arbitrariness of the military's claims to authority and the lack of explicit congressional authorization for the provost courts' jurisdiction over civilian offenders proved highly effective. First, at a general level, it distinguished the facts of the Duncan and White cases from the Japanese-American cases, which had been concerned with evacuation orders explicitly authorized by the president and then pursued under terms of a statute and appropriations bills that reinforced the executive's action, and which technically had been concerned only with the initial actions of the Army for evacuation, amidst the emergency conditions of early 1942. This brought Duncan more within the ambit of the Endo case, the one major decision of the war period in which the high court overturned an Army internment order precisely because it was lacking in statutory

*102 Brief for Lloyd C. Duncan, Petitioner, Records and Briefs, Duncan v. Kahanamoku, supra note 35 at 39-40, 44-45. In preparing for oral argument, Anthony conferred intensively with the Interior Department's legal staff, whose talents were thus mobilized behind the scenes for use against the Justice Department and Army lawyers [interview with John P. Frank, October 1989. In 1944-45 Frank was a lawyer in Interior and worked with Anthony on the Duncan case issues].


*104 Brief of American Civil Liberties Union, Records and Briefs, Duncan v. Kahanamoku, supra note 35 at 20.
authority that would possibly have validated denial of normal constitutional due process.\textsuperscript{105}

Second, and probably of overriding importance, by pointing so tellingly to lack of clear statutory authority for extraordinary wartime military discretion, counsel cast a strong light on the threat to judicial power itself inherent in the government's view of "necessity" and validation of martial law. Justice Black's opinion for the majority rested in a technical sense upon the interpretation of the Organic Act, which he construed as lacking the sweeping authority for the Army to have undertaken a program of comprehensive rule. In a narrow legal sense his opinion thus did not reach the constitutional issue of whether Congress could ever properly authorize such a regime over a long war period with a receding threat of invasion.\textsuperscript{106} Nonetheless, his long discourse on the entire history of habeas corpus in Anglo-American law eloquently represented the Army's rule as the very kind of tyranny that made the writ so vital to liberty.\textsuperscript{107}

In a spare and eloquent concurring opinion, highly focused on a single key issue, Chief Justice Stone was willing to concede that "a law of necessity" can justify great sacrifices of liberty. He found, however, that power to command sacrifice "may not extend beyond what is required by the exigency which calls it forth." It was the civil courts operating under constitutional rules, and not flat of the Army, that must be relied upon to decide the necessity.\textsuperscript{108} A very different tone and scope characterized Justice Murphy's concurring opinion. Obviously outraged by the Richardson testimony in the district court, Murphy discussed the general's views seriatim: he refuted each one vigorously, especially assertions such as that the civilian courts could not be relied upon because they were subject to "all sorts of influences, political and otherwise," and that to be effective martial law must be comprehensive and not subject to challenge. Murphy saved his strongest criticism for the government's argument that the presence of Japanese-Americans in Hawaii in such large numbers was a justification for Army rule despite the complete absence of any documented sabotage or espionage.\textsuperscript{109}


\textsuperscript{107} 327 U.S. 304, 319-23 [Black, J.].

\textsuperscript{108} 327 U.S. 304, 336-37.

\textsuperscript{109} Ibid. at 324-35.
The dissenting opinion by Justice Burton, with Justice Frankfurter concurring, replayed in considerable measure the main themes of the Ninth Circuit majority's position since 1942 on the matter of necessity. Openly raising the issue whether the court's vote in *Duncan* might not have been quite different if the war were still being waged—that is, if the court were not ruling while enjoying the luxury of peacetime conditions as well as the hindsight that time afforded—Burton asserted the need to leave the military with a wide range of authority when the nation was threatened by war conditions. "The possible presence of many Japanese collaborators," the exposed condition of Hawaii (which was "like a frontier stockade under savage attack"), and above all the need to give the executive appropriate latitude, all supported a broad construction of the Organic Act's terms, and in Burton's view should have validated the Ninth Circuit's reversal of the district court grants of writs to the petitioners.110

**Conclusion**

Army rule under martial law in Hawaii thus lasted through most of the war, ending only in October 1944; even then, its legal defense was pursued in the nation's highest court well after the surrender of Japan. The Supreme Court's majority ruling was, in an important sense, technical and narrow, with its focus on construal of the Organic Act; but still, the justices had at a minimum reasserted (albeit in dictum) the essence of the *Milligan* doctrine, that "our system of government clearly is the antithesis of total military rule. . . . Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government. Military tribunals have no such standing."111 If nothing else, should the fate of civil liberties again hang in the balance against arguments for military necessity in wartime, in *Duncan* the court had underlined the judiciary's responsibility as the guardian of those "cherished American institutions."

Legal historians and constitutional lawyers alike have permitted the social-legal and administrative history of Hawaii's martial law in World War II to recede gradually from consciousness as a significant chapter in the history of civil liberties. The admonition of Garner Anthony some forty years ago is still fully applicable: that the study of Army rule in Hawaii is of deep interest not only to scholars and lawyers but also to everyone "who believes that the constitutional safeguards of civil liberties are as important in time of war as in time of peace."112

110 Ibid. at 337, 341-42.
111 Ibid. at 322.