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

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The U.S. Supreme Court's decision in Duncan v. Kahanamoku stands as an important beacon of liberty to reassert the values of individual freedom and civilian government which were so blatantly subverted during the martial law imposed upon Hawaii in World War II.

Within a few hours after the Japanese air attack on Pearl Harbor on December 7, 1941, the territorial governor of Hawaii and its military commander announced that martial law would be imposed on the islands. This proclamation suspended all civil liberties and extended into all facets of island life. All civilians except infants had to register and be fingerprinted. The press was strictly censored. Schools were closed for several weeks. The hospitals and the food distribution system were put under military control. An evening curfew was instituted, and hundreds of persons were incarcerated on suspicion of disloyalty.

The court system was also put completely under military authority. Although civil courts remained open for noncriminal cases, no jury trials or habeas-corpus petitions were permitted. All serious misdemeanors and felonies were tried before military tribunals. Some easing of restrictions occurred in 1943, but martial law was not finally lifted until October 1944.

The procedures in the "Provost Courts" which were set up to

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process almost all criminal matters were described in a recent article as follows:

> The average trial in provost court took five minutes or less; more than 22,000 trials were conducted in Oahu alone during 1942 and 1943. Guilty verdicts were handed down in more than 99 percent of the cases. 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 [General Thomas H.] Green's office claimed to review routinely each decision and sentence.[1]

These military decisions were not subject to either direct appellate court review or petitions for habeas-corpus review. In the words of Justice Hugo L. Black writing in the Duncan case:

> [T]he military authorities...could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through [Hawaii]....Military tribunals could punish violators of these orders by fine, imprisonment or death.[2]

Lloyd C. Duncan was a civilian shipfitter working in the Honolulu Navy Yard. On February 24, 1944, he had a fight with two Marine sentries at the yard and was arrested. Although considerable power had been returned to the civilian courts by then, the military retained jurisdiction over "violations of military orders," and Duncan was charged with violating an order that "prohibited assault on military or naval personnel with

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[1]Harry N. Scheiber and Jane L. Scheiber, Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946, 3 Western Legal History 341, 352-53 (1990).

[2]Duncan v. Kanahanamoku, 327 U.S. 304, 309 (1946).

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intent to resist or hinder them in the discharge of their duty."[3] A military tribunal convicted him and he was sentenced to six months imprisonment.

When the U.S. Supreme Court reviewed Duncan's case, the justices also examined a companion case involving Harry E. White. White was a stockbroker who had no business connected with the armed forces, but he arrested by the military police on August 20, 1942 and charged with embezzling stock belonging to another civilian in violation of Hawaii's laws. When White was brought before the military's "Provost Court" two days later, his attorney objected to the court's jurisdiction, requested a jury trial, and asked for time to prepare a defense. These motions were all rejected, and on August 25--five days after his arrest--he was tried and convicted and sentenced to five years imprisonment.[4] On August 31, 1942--six days later--the military issued an order permitting Hawaii's civilian courts to try nonmilitary matters such as White's with jury trials.[5]

Duncan and White challenged the procedure used to convict them by filing writs of habeas corpus in the U.S. District Court for the Territory of Hawaii in March and April 1944. (Earlier efforts to challenge the military rule had been frustrated by the

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[3] Id. at 310-11.

[4] Id. at 309-10. White's sentence was later reduced to four years.

[5] Id. at 353 n. 6 and 356 (Burton, J., dissenting), citing General Order No. 133.

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transfer off the islands or release of persons who brought such proceedings.)[6] District Judge Delbert E. Metzger held separate hearings in the two cases and ruled in favor of both Duncan and White. He determined that the civilian courts had been open and "able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts."[7]

The U.S Court of Appeals for the Ninth Circuit reversed, however, ruling that Section 67 of the Organic Act[8] passed by the U.S. Congress in 1900 to govern Hawaii authorized the establishment of martial law whenever the President determined that the public safety required it.[9]

The U.S. Supreme Court reversed once again, agreeing by a 6-2 vote with Judge Metzger that the decisions of the military tribunals could not stand. Justice Black wrote the main decision (joined by Justices Stanley Reed, William O. Douglas, and Wiley Rutledge), ruling that the Organic Act could not be interpreted to authorize the imposition of military justice on civilians if the civilian courts were still able to function. Chief Justice

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[6] See, e.g., H. Scheiber and J. Scheiber, supra note 1, at 355-57, describing the case of Dr. Hans Zimmerman, and at 366-68, describing the cases of Glockner and Seifert.

[7] Id. at 311-12.

[8] 31 Stat. 153, c.339, 48 U.S.C.A. sec. 532.

[9] 146 F.2d 576 (9th Cir.).

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Harlan Fiske Stone wrote a separate concurring opinion agreeing with the result.

Justice Frank Murphy also wrote a separate concurring opinion. Although he agreed with Justice Black's view, he wanted to comment on the issue that Justice Black avoided (because it was not necessary for the result). Justice Murphy stated explicitly that the U.S. Constitution would not permit the substitution of military tribunals for civilian courts, even if the Organic Act could have been interpreted to authorize such action. Justices Harold H. Burton and Felix Frankfurter dissented, arguing that the courts must defer to judgments made by the executive branch and the military in times of war. Justice Robert H. Jackson did not participate in this decision.

Although Justice Black's opinion for the Court relies on a statutory interpretation of the language of the Organic Act rather than on the U.S. Constitution, it is clear from the concerns identified by Justice Black that the Constitution also imposes limits on the ability of the military to eliminate the power and role of the civilian courts. Section 67 of the Organic Act authorized the Governor of Hawaii to suspend the privilege of the writ of habeas corpus or to impose martial law on the Territory "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it" until the President can be contacted for guidance. (In this situation, President Franklin D. Roosevelt approved the imposition of martial law on December 9, 1941.)

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Justice Black began by noting that "the term 'martial law' carries no precise meaning."[10] He then examined the status of Hawaii and determined that, although it was a territory, Hawaii was entitled to the same protections of the U.S. Constitution as the 48 states (because of language in Section 5 of the Organic Act).[11] "It follows," he wrote, "that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country."[12]

He then turned to periods of high tension in U.S. history and found that except in the Civil War period, our people have never permitted military rule to supplant civilian courts. Some of his statements in this part of the opinion are quite eloquent:

> People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government Congress has authorized here....[13]
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> ...Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.[14]

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[10] Id. at 315.

[11] Id. at 317-18.

[12] Id. at 318.

[13] Id. at 319.

[14] Id. at 322.

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The Court's ruling was thus that:

> ...[W]hen Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act.[15]

Justice Murphy's concurring opinion is similarly filled with eloquent statements recalling the proud traditions of the nation. He sought to establish a strong precedent that the martial law imposed on Hawaii should never be repeated in the future, and he goes into some additional detail in answering the government's arguments. In one important section, Justice Murphy responds to testimony offered by military leaders and by the U.S. Court of Appeals for the Ninth Circuit that jury trials were inappropriate in Hawaii because of Hawaii's "'heterogeneous population with all sorts of affinities and loyalties which are alien in many cases to the philosophy of life of the American Government' one-third of the civilian population being of Japanese descent."[16]

Justice Murphy points out that "[t]he lack of any factual or logical basis for such implications is clear."[17] Then he states that "this use of the iniquitous doctrine of racism to justify

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[15]<u>Id</u>. at 324.

[16]<u>Id</u>. at 333 (Murphy, J., concurring), citing and quoting from 146 F.2d 476, 580, where the U.S. Court of Appeals had referred to the presence of "thousands of citizens of Japanese ancestry besides large numbers of aliens of the same race" who were of "doubtful loyalty."

[17]<u>Id</u>. at 334 (Murphy J., concurring).

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the imposition of military trials" is "[e]specially deplorable."[18] He goes on to say that:

> Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise....It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding.[19]

The ruling and opinions of the U.S. Supreme Court in Duncan v. Kahanamoku thus stand as eloquent reminders of the principles of freedom that have guided the United States. During the martial law period, these principles were largely forgotten and the conditions of freedom were denied to the residents of Hawaii, far beyond the requirements of military security. The ugly specter of racism led the military and executive decisionmakers to impose harsh military justice on the civilian population of the islands leading to arbitrary action and suffering for many.

But when the situation was finally brought to the attention of the country's highest court, the justices issued a strong decision explaining why the civilian courts should not have been replaced with military tribunals and stating clearly that assertions of military necessity cannot justify trampling upon the freedoms that form the basis for the American heritage.

"Courts and their procedural safeguards," Justice Black

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[18]Id.

[19]Id.

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wrote, "are indispensable to our system of government."[20] "[M]ilitary trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law"[21] that they could not be justified in Hawaii even in the early years of the war. Residents of areas where the U.S. flag flies are entitled to be protected by the rule of law as enforced by civilian courts rather than by the "expression of a General's will dictated by what he considers the imperious necessity of the moment."[22]

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[20] Id. at 322.

[21] Id. at 317.

[22] Id. at 315.

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