

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a
resident of the State of Washington, as next
friend for SALIM AHMED HAMDAN,
Military Commission Detainee,
Camp Echo,
Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States
Secretary of Defense; JOHN D.
ALTENBURG, Jr., Appointing Authority for
Military Commissions, Department of Defense;
Brigadier General THOMAS L.
HEMINGWAY, Legal Advisor to the
Appointing Authority for Military
Commissions; Brigadier General JAY HOOD,
Commander Joint Task Force, Guantanamo,
Camp Echo, Guantanamo Bay, Cuba;
GEORGE W. BUSH, President of the United
States,

Respondents.

NO. CV04-0777L

**APPENDIX OF AUTHORITIES
SUBSTANTIALLY RELIED UPON BY
PETITIONER IN SUPPORT OF
MEMORANDUM FOR WRIT OF
MANDAMUS PURSUANT TO 28 U.S.C.
§ 1361 OR, IN THE ALTERNATIVE,
WRIT OF HABEAS CORPUS**

For the convenience of the Court, Petitioner Lieutenant Commander Charles Swift
submits this Appendix of Authorities to supplement the Memorandum in Support of Petition

for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus.

1. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), attached at pages 7 – 33.
2. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), attached at pages 34 – 108.
3. *Ex parte Quirin*, 317 U.S. 1 (1942), attached at pages 109 – 110.
4. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), attached at pages 111 – 143.
5. *In re Territo*, 156 F.2d 142 (9th Cir. 1946), attached at pages 144 – 150.
6. *In re Yamashita*, 327 U.S. 1 (1946), attached at pages 151 – 195.
7. *Johnson v. Eisentrager*, 339 U.S. 763 (1950), attached at pages 196 – 213.
8. *Kent v. Dulles*, 357 U.S. 116 (1958), attached at pages 214 – 227.
9. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), attached at pages 228 – 266.
10. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), attached at pages 267 – 299.
11. *Reid v. Covert*, 354 U.S. 1 (1957), attached at pages 300 – 342.
12. *Schlesinger v. Councilman*, 420 U.S. 738 (1975), attached at pages 343 – 361.
13. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), attached at pages 362 – 381.
14. *United States v. Grimley*, 137 U.S. 147 (1890) attached at pages 382 – 386.
15. *Whitmore v. Arkansas*, 495 U.S. 149 (1990), attached at pages 387 – 406.
16. 10 U.S.C. § 802(a)(12), attached at pages 407 – 411.
17. 10 U.S.C. § 810, attached at page 412.
18. 10 U.S.C. § 821, attached at page 413.
19. 28 U.S.C. § 1361, attached at page 414.
20. 28 U.S.C. § 1391(e), attached at pages 415 – 416.
21. 28 U.S.C. § 2241, attached at pages 417 – 418.
22. 42 U.S.C. § 1981, attached at pages 419 – 420.

23. 50 U.S.C. §§ 21-24, attached at pages 421 – 424.

24. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949,
arts. 3, 5, 103, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1956), attached at pages 425 – 428.

25. Joint Resolution: To Authorize the Use of United States Armed Forces Against Those
Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40,
115 Stat. 224 (2001), attached at pages 429 – 430.

26. Military Commission Instruction No. 2, 68 Fed. Reg. 39381 (July 1, 2003), attached at
pages 431 – 437.

27. Procedures for Trials by Military Commissions of Certain Non-United States Citizens
in the War Against Terrorism, 32 C.F.R. § 9.4(a)(5)(iv) (2003), attached at pages 438 – 440.

DATED at Seattle, Washington, this 15th day of April, 2004.

PERKINS COIE LLP

By s/ Joseph M. McMillan
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 14th day of April, 2004, I caused to be served true and correct copies of **Appendix of Authorities Substantially Relied Upon by Petitioner in Support of Memorandum for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus** upon the following, at the addresses stated below, via the method of service indicated:

Mr. John McKay
U.S. Attorney's Office
601 Union Street, Suite 5100
Seattle, WA 98101

Via hand delivery
 Via Certified Mail, Return Receipt Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

Mr. John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Via hand delivery
 Via Certified Mail, Return Receipt Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

Mr. George W. Bush
President of the United States
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Via hand delivery
 Via Certified Mail, Return Receipt Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Mr. Donald H. Rumsfeld
Secretary of Defense
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301

Via hand delivery
 Via Certified Mail, Return Receipt
Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

Mr. William J. Haynes, II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301

Via hand delivery
 Via Certified Mail, Return Receipt
Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

John D. Altenburg, Jr.
Appointing Authority for Military
Commissions
Department of Defense
3C967
1600 Defense Pentagon
Washington, D.C. 20301-1600

Via hand delivery
 Via Certified Mail, Return Receipt
Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

Brigadier General Thomas L. Hemingway
Legal Advisor to the Appointing Authority
for Military Commissions
Department of Defense
3C967
1600 Defense Pentagon
Washington, D.C. 20301-1600

Via hand delivery
 Via Certified Mail, Return Receipt
Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

Brigadier General Jay Hood
Commander Joint Task Force, Guantanamo
Joint Task Force 176
Guantanamo, APO AE 09360

Via hand delivery
 Via Certified Mail, Return Receipt
Requested
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

1 Judge Advocate General
2 Chief Litigation Division, U.S. Army
3 901 N. Stuart St., Room 449
4 Arlington, VA 22203
5
6
7
8
9

— Via hand delivery
X Via Certified Mail, Return Receipt
Requested
— Via Overnight Delivery
— Via Facsimile
— Via E-filing

10
11
12 DATED at Seattle, Washington, this 15th day of April, 2004.
13
14
15
16

17 **PERKINS COIE LLP**
18

19
20
21 By s/ Joseph M. McMillan
22 Harry H. Schneider, Jr., WSBA #9404
23 Joseph M. McMillan, WSBA # 26527
24 David R. East, WSBA #31481
25 Charles C. Sipos, WSBA #32825
26 Attorneys for Petitioner
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Supreme Court of the United States

DUNCAN
v.
KAHANAMOKU, Sheriff. WHIT
v.
STEER.

Nos. 14, 15.

Argued Dec. 7, 1945.
Decided Feb. 25, 1946.

Habeas corpus proceeding by Lloyd C. Duncan against Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu. Judgment sustaining petition and ordering discharge of petitioner was reversed by the Circuit Court of Appeals, 146 F.2d 576, and petitioner brings certiorari.

Reversed.

Habeas corpus proceeding by Harry E. White against Wm. F. Steer, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area. Judgment sustaining petition and ordering discharge of petitioner was reversed by the Circuit Court of Appeals, 146 F.2d 576, and petitioner brings certiorari.

Reversed.

Mr. Justice BURTON and Mr. Justice FRANKFURTER, dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

West Headnotes

[1] War and National Emergency ⇌ 31
402k31 Most Cited Cases

The term "martial law" carries no precise meaning and has been employed in various ways by different people and at different times.

[2] War and National Emergency ⇌ 31
402k31 Most Cited Cases

Where language of the Hawaiian Organic Act did not provide a satisfactory answer, the Supreme Court would look to the legislative history for possible further aid in interpreting the term "martial law" as used in the Act. 48 U.S.C.A. § 532.

[3] Territories ⇌ 8
375k8 Most Cited Cases

The Hawaiian Organic Act would be read as a whole and in the light of its legislative history in determining whether Congress intended the Constitution of the United States to have a limited application to Hawaii. 48 U.S.C.A. § 532.

[4] War and National Emergency ⇌ 31
402k31 Most Cited Cases
(Formerly 375k8)

Extraordinary measures in Hawaii, however necessary in the event of actual or threatened invasion, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to constitutional protection than others, since Congress did not in the Hawaiian Organic Act limit application of the Constitution. 48 U.S.C.A. §§ 495, 532, 635; Joint Resolution July 7, 1898, 30 Stat. 750.

[5] War and National Emergency ⇌ 32
402k32 Most Cited Cases
(Formerly 375k8)

The trial of Hawaiian civilians unconnected with the armed forces, by military tribunals under martial law, could not be supported on premise that Congress had enacted Hawaiian Supreme Court decision in a case allegedly favoring that view, as a part of the Hawaiian Organic Act. 48 U.S.C.A. § 532.

[6] War and National Emergency ⇌ 31
402k31 Most Cited Cases

(Formerly 375k8)

The power conferred on military authorities in Hawaii under provision of the Hawaiian Organic Act authorizing territorial Governor to proclaim martial law would be construed in the same way as a grant of power to troops stationed in any one of the states. 48 U.S.C.A. § 532.

[7] Constitutional Law ⇌ 50
92k50 Most Cited Cases

Courts and their procedural safeguards are indispensable to our system of government, having been set up by our founders to protect the liberties they valued.

[8] War and National Emergency ⇌ 31
402k31 Most Cited Cases
(Formerly 92k50)

The provision of the Hawaiian Organic Act authorizing territorial Governor with approval of the President to proclaim martial law in the interest of public safety was not intended to exceed the boundaries between military and civilian power. 48 U.S.C.A. § 532.

[9] War and National Emergency ⇌ 31
402k31 Most Cited Cases
(Formerly 92k50)

The phrase "martial law" within provision of the Hawaiian Organic Act authorizing the territorial Governor with approval of the President to proclaim martial law in the interest of public safety, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Island against actual or threatened rebellion or invasion was not intended to authorize the supplanting of courts by military tribunals. 48 U.S.C.A. § 532.

****607** Mr. ***306** Osmond K. Fraenkel, of New York City, for Petitioner white.

Mr. J. Garner Anthony, of Honolulu, Hawaii, for Petitioner Duncan.

Mr. C. Nils Tavares, of Honolulu, Hawaii, for

Territory of Hawaii, as amicus curiae, by special leave of Court.

Mr. Edward J. Ennis, of Washington, D.C., for respondents.

***307** Mr. Justice BLACK delivered the opinion of the Court.

The petitioners in these cases were sentenced to prison by military tribunals in Hawaii. Both are civilians. The question before us is whether the military tribunals had power to do this. The United States District Court for Hawaii in habeas corpus proceedings held that the military tribunals had no such power and ordered that they be set free. The Circuit Court of Appeals reversed, and ordered that the petitioners be returned to prison. 9 Cir., 146 F.2d 576. Both cases thus involve the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts to law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system ****608** of government we granted certiorari. 324 U.S. 833, 65 S.Ct. 677.

The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under 'martial law.' Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 48 U.S.C.A. s 532, [FN1] authorizes the Territorial Governor to ***308** take this action 'in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it.' His action was to remain in effect only 'until communication can be had with the President and his decision thereon made known.' The President approved the Governor's action on December 9th. [FN2] The Governor's proclamation also authorized and requested the Commanding General, 'during *

* * the emergency and until danger of invasion is removed, to exercise all the powers normally exercised' by the Governor and by 'the judicial officers and employees of the Territory.'

FN1 'That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.'

FN2 The District Court heard much evidence and from it found as follows on this subject: 'By radio the Governor of Hawaii on December 7, 1941, notified the President of the United States simply that he had placed the Territory under martial law and suspended the writ. The President's approval was requested and it was granted by radio on December 8, 1941. Not until 1943 was the text of the Governor's December 7 proclamation furnished Washington officials, and it is still doubtful if it has yet been seen by the President.'

Pursuant to this authorization the Commanding General immediately proclaimed himself Military Governor and undertook the defense of the Territory and the maintenance of order. On December 8th, both civil and criminal courts were forbidden to summon jurors and witnesses and to try cases. The Commanding General established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the Military Government. Rules of evidence and procedure of courts of law were not to control the military trials. In imposing penalties the military*309 tribunals were to be 'guided by, but not limited to the

penalties authorized by the court martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.' The rule announced was simply that punishment was 'to be commensurate with the offense committed' and that the death penalty might be imposed 'in appropriate cases.' Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. Ex parte Vallandigham, 1 Wall. 243, 17 L.Ed. 589. The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment or death.

White, the petitioner in No. 15, was a stockbroker in Honolulu. Neither he nor his business was connected with the armed forces. On August 20, 1942, more than eight months after the Pearl Harbor attack, **609 the military police arrested him. The charge against him was embezzling stock belonging to another civilian in violation of Chapter 183 of the Revised Laws of Hawaii. Though by the time of White's arrest the courts were permitted 'as agents of the Military Governor' to dispose of some non-jury civil cases, they were still forbidden to summon jurors and to exercise criminal jurisdiction. On August *310 22nd, White was brought before a military tribunal designated as a 'Provost Court.' The 'Court' orally informed him of the charge. He objected to the tribunal's jurisdiction but the objection was overruled. He demanded to be tried by a jury. This request was denied. His attorney asked for

additional time to prepare the case. This was refused. On August 25th he was tried and convicted. The tribunal sentenced him to five years imprisonment. Later the sentence was reduced to four years.

Duncan, the petitioner in No. 14, was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24th, 1944, more than two years and two months after the Pearl Harbor attack, he engaged in a brawl with two armed Marine sentries at the yard. He was arrested by the military authorities. By the time of his arrest the military had to some extent eased the stringency of military rule. Schools, bars and motion picture theatres had been reopened. Courts had been authorized to 'exercise their normal functions.' They were once more summoning jurors and witnesses and conducting criminal trials. There were important exceptions, however. One of these was that only military tribunals were to try 'Criminal Prosecutions for violations of military orders.' [FN3] As the record shows, these military orders still covered a wide range of day to day civilian conduct. Duncan was charged with violating one of these orders, paragraph 8.01, Title 8, of General Order No. 2, which prohibited assault on military or naval personnel with intent to resist or hinder them in *311 the discharge of their duty. He was therefore, tried by a military tribunal rather than the Territorial Court, although the general laws of Hawaii made assault a crime. Revised L.H.1935, ch. 166. A conviction followed and Duncan was sentenced to six months imprisonment.

FN3 In addition, s 3 of a Proclamation of February 8, 1943, which returned some power to the civil authorities, had reserved a right in the Military Governor to resume any or all of the powers returned to the civilian government. In approving this Proclamation the President had expressed his confidence that the Military would 'refrain from exercising * * * authority over * * * normally civil functions' and his hope that there would 'be a further restoration of civil authority as and when the situation permits.'

Both White and Duncan challenged the power of the military tribunals to try them by

petitions for writs of habeas corpus filed in the District Court for Hawaii on March 14 and April 14, 1944, respectively. Their petitions urged both statutory and Constitutional grounds. The court issued orders to show cause. Returns to these orders contended that Hawaii had become part of an active theatre of war constantly threatened by invasion from without; that the writ of habeas corpus had therefore properly been suspended and martial law had validly been established in accordance with the provisions of the Organic Act; that consequently the District Court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the Military Governor issued because of military necessity were valid. Each petitioner filed a traverse to the returns, which traverse challenged among other things the suspension of habeas corpus, the establishment of martial law and the validity of the Military Governor's orders, asserting that such action could not be taken except when required by military necessity due to actual or threatened invasion, which even if it did exist on December 7, 1941, did not exist when the petitioners were tried; and that, whatever the necessity for martial law, there was no justification for trying them in military tribunals rather than the regular courts of law. The District Court, after separate trials found in each case, among other things, that the courts had always been 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 **610 regular*312 courts. [FN4] It accordingly held the trials void and ordered the release of the petitioners.

FN4 We do not set out the other grounds of challenge since under the view we take we do not reach them.

The Circuit Court of Appeals, assuming without deciding that the District Court had jurisdiction to entertain the petitions, held the military trials valid and reversed the ruling of the District Court, 9 Cir., 146 F.2d 576. It held that the military orders providing for military trials were fully authorized by Section 67 of

the Organic Act and the Governor's actions taken under it. The Court relied on that part of the section which as we have indicated authorizes the Governor with the approval of the President to proclaim 'martial law', whenever the public safety requires it. The Circuit Court thought that the term 'martial law' as used in the Act denotes among other things the establishment of a 'total military government' completely displacing or subordinating the regular courts, that the decision of the executive as to what the public safety requires must be sustained so long as that decision is based on reasonable grounds and that such reasonable grounds did exist.

In presenting its argument before this Court the government for reasons set out in the margin [FN5] abandons its contention as to the suspension of the writ of habeas corpus and advances the argument employed by the Circuit Court for sustaining the trials and convictions of the petitioners by military tribunals. The petitioners contend that 'martial law' as provided for by s 67 did not authorize the military to try and punish civilians such as petitioners and urge further that if such authority should *313 be inferred from the Organic Act, it would be unconstitutional. We need decide the Constitutional question only if we agree with the government that Congress did authorize what was done here.

FN5 The Government points out that since the privilege of the writ was restored and martial law terminated by Presidential Proclamation on October 24, 1944, No. 2627, petitioners are entitled to their liberty if the military tribunals were without jurisdiction to try them. We therefore do not pass upon the validity of the order suspending the privilege of habeas corpus or the power of the military to detain persons under other circumstances and conditions.

Did the Organic Act during the period of martial law give the armed forces power to supplant all civilian laws and to substitute military for judicial trials under the conditions that existed in Hawaii at the time these petitioners were tried? The relevant conditions, for our purposes, were the same

when both petitioners were tried. The answer to the question depends on a correct interpretation of the Act. But we need not construe the Act, insofar as the power of the military might be used to meet other and different conditions and situations. The boundaries of the situation with reference to which we do interpret the scope of the Act can be more sharply defined by stating at this point some different conditions which either would or might conceivably have affected to a greater or lesser extent the scope of the authorized military power. We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact, the buildings had long been open and actually in use for certain kinds of trials. Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, [FN6] those directly connected with such forces, [FN7] or enemy belligerents, prisoners of war, or others charged *314 with violating the laws of war. [FN8] We are not concerned with the recognized power of **611 the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. [FN9] For Hawaii since annexation has been held by and loyal to the United States. Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war. [FN10] And finally, there was no specialized effort of the military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts. For these petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts. If the Organic Act, properly interpreted, did not give the armed forces this awesome power, both petitioners are entitled to their freedom.

(Cite as: 327 U.S. 304, *314, 66 S.Ct. 606, **611)

FN6 *Wilkes v. Dinsman*, 7 How. 89, 12 L.Ed. 618; *Ex parte Reed*, 100 U.S. 13, 25 L.Ed. 538; *Martin v. Mott*, 12 Wheat. 19, 6 L.Ed. 537; *In re Grimley*, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636; *Johnson v. Sayre*, 158 U.S. 109, 15 S.Ct. 773, 39 L.Ed. 914; *Carter v. McClaghry*, 183 U.S. 365, 22 S.Ct. 181, 46 L.Ed. 236.

FN7 *Ex parte Gerlach*, D.C., 247 F. 616; *Ex parte Falls*, D.C., 251 F. 415; *Ex parte Jochen*, D.C., 257 F. 200; *Hines v. Mikell*, 4 Cir., 259 F. 28. See cases and statutes collected and discussed in *Underhill*, supra, 12 Cal.L.Rev. 81--98.

FN8 *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3; *In the Matter of General Tomoyuki Yamashita*, 327 U.S. 1, 66 S.Ct. 340. See 10 U.S.C. ss 1553, 1554, 10 U.S.C.A. ss 1553, 1554. See also cases and statutes collected and discussed in *Underhill*, supra, 12 Cal.L.Rev. 81--98.

FN9 *Cross v. Harrison*, 16 How. 164, 14 L.Ed. 889; *Leitensdorfer v. Webb*, 20 How. 176, 15 L.Ed. 891; *The Prize Cases*, *The Amy Warwick*, 2 Black 635, 17 L.Ed. 459; *In re Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L.Ed. 915; *Ford v. Surget*, 97 U.S. 594, 604, 24 L.Ed. 1018; *City of New Orleans v. Steamship Co.*, 20 Wall. 387, 393, 22 L.Ed. 354; *Dow v. Johnson*, 100 U.S. 158, 166, 25 L.Ed. 632; *The Grapeshot*, 9 Wall. 129, 19 L.Ed. 651; *Mechanics' & Traders' Bank v. Union Bank*, 22 Wall. 276, 22 L.Ed. 871. Nor is this a case where violators of military orders are to be tried by regular courts. Cf. *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

FN10 *Moyer v. Peabody*, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410; *Ex parte Milligan*, 4 Wall. 2, 125, 126, 18 L.Ed. 281; *Luther v. Borden*, 7 How. 1, 45, 46, 12 L.Ed. 581; see *Sterling v. Constantine*, 287 U.S. 378, 400, 53 S.Ct. 190, 196, 77 L.Ed. 375; Fairman, *The Law of Martial Rule*, Chicago 1943, 209--218.

I.

[1] In interpreting the Act we must first look to its language. Section 67 makes it plain that Congress did intend *315 the Governor of Hawaii, with the approval of the President, to invoke military aid under certain circumstances. But Congress did not

specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals. Cf. *Coleman v. Tennessee*, 97 U.S. 509, 514, 24 L.Ed. 1118. If a power thus to obliterate the judicial system of Hawaii can be found at all in the Organic Act, it must be inferred from s 67's provision for placing the Territory under 'martial law.' But the term 'martial law' carries no precise meaning. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as 'military law' limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a General's will dictated by what he considers the imperious necessity of the moment. See *United States v. Diekelman*, 92 U.S. 520, 526, 23 L.Ed. 742. In 1857 the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion had this to say about it: 'The Common Law authorities and commentators afford no clue to what martial law, as understood in England, really is. * * * In this country it is still worse.' 8 Op.Atty.Gen. 365, 367. What was true in 1857 remains true today. [FN11] The language of s 67 *316 thus fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals.

FN11 For discussions of the great contrast of views see the following writings: Fairman, supra, Ch. II; Wiener, *A Practical Manual of Martial Law*, Harrisburg 1940, Ch. 1; *Military Aid to the Civil Power*, Fort Leavenworth 1925, pp. 230--232; *Underhill, Jurisdiction of Military Tribunals in the United States over Civilians*, (1924) 12 Cal.L.Rev. 75, 163--178; *Ballentine, Qualified Martial Law* (1915) 14 Mich.L.Rev. 102, 203, 204; *Max Radin, Martial Law and the State of Siege* (1942) 30 Cal.L.Rev. 634.

****612 II.**

[2] Since the Act's language does not provide a satisfactory answer, we look to the legislative history for possible further aid in interpreting the term 'martial law' as used in the statute. The government contends that the legislative history shows that Congress intended to give the armed forces extraordinarily broad powers to try civilians before military tribunals. Its argument is as follows: That portion of the language of s 67 which prescribes the prerequisites to declaring martial law is identical with a part of the language of the original Constitution of Hawaii. Before Congress enacted the Organic Act the Supreme Court of Hawaii had construed that language as giving the Hawaiian President power to authorize military tribunals to try civilians charged with crime whenever the public safety required it. *In re Kalaniana'ole*, 10 Hawaii, 29 . When Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian Supreme Court.

In disposing of this argument we wish to point out at the outset that even had Congress intended the decision in the *Kalaniana'ole* case to become part of the Organic Act, that case did not go so far as to authorize military trials of the petitioners for these reasons. There the defendants were insurrectionists taking part in the very uprising which the military were to suppress, while here the petitioners had no connection with any organized resistance to the armed forces or the established government. If, on the other hand, we should take the *Kalaniana'ole* case to authorize the complete supplanting of courts by military *317 tribunals, we are certain that Congress did not wish to make that case part of the Organic Act. For that case did not merely uphold military trials of civilians but also held that courts were to interfere only when there was an obvious abuse of discretion which resulted in cruel and inhuman practices or the establishment of military rule for the personal gain of the President and the armed forces. But courts were not to review whether the

President's action, no matter how unjustifiable, was necessary for the public safety. As we shall indicate later, military 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, that the tenuous circumstance offered by the government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian Supreme Court decision permitting such a radical departure from our steadfast beliefs. [FN12]

FN12 We point out in this connection that by Section 83 of the Organic Act Congress provided how juries should be constituted and provided for the drawing of grand juries and for unanimous jury verdicts in criminal cases. 31 Stat. 141, 157, 48 U.S.C.A. s 635.

[3] Partly in order to meet this objection the government further contends that Congress in enacting the *Kalaniana'ole* case, not only authorized military trials of civilians in Hawaii, but also could and intended to provide that 'martial law' in Hawaii should not be limited by the United States Constitution or by established Constitutional practice. But when the Organic Act is read as a whole and in the light of its legislative history it becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii. Along with s 67 Congress enacted s 5 of the Organic Act which provides 'that the Constitution * * * shall have the same force and effect within the said Territory as elsewhere in the United States.' 31 Stat. 141, 48 U.S.C.A. s 495. Even when Hawaii *318 was first annexed Congress had provided that the Territory's existing laws should remain in effect unless contrary to the Constitution. 30 Stat. 750. And the House Committee Report in explaining s 5 of the Organic Act stated: 'Probably the same result would obtain without this provision under Section 1891, chapter 1, Title XXIII, of the Revised Statutes, but to prevent possible question, the section is inserted in the bill.' [FN13] (Italics supplied). Congress thus expressed a **613 strong desire to apply the Constitution without qualification.

FN13 Government for the Territory of Hawaii, H.Rep.No.305, 56th Cong., 1st Sess., p. 10. In the House, Representative Knox, the Republican leader for the bill, stated: 'This bill, in so many words extends the Constitution to Hawaii, so that there has not been practically a moment of time since the Hawaiian Islands were annexed to the United States that the Constitution has not been the standard by which all the laws of that country must be measured * * *. The decisions of the Supreme Court of the United States will be equally operative in Hawaii as in any portion of the United States as to any constitutional rights which he possesses.' 33 Cong.Rec. 3800 (1900). See the following decisions of this Court relating to the applicability of the Constitution to United States Territories. Territory of Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016; Rassmussen v. United States, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862; Farrington v. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646. See also Frank, Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii (1944) 44 Col.L.Rev. 639, 658-660.

[4][5][6] It follows that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country. We are aware that conditions peculiar to Hawaii might imperatively demand extraordinarily speedy and effective measures in the event of actual or threatened invasion. But this also holds true for other parts of the United States. Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to Constitutional protection than others. For here Congress did not in the Organic Act exercise whatever power it might have *319 had to limit the application of the Constitution. Cf. Territory of Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016. The people of Hawaii are therefore entitled to Constitutional protection to the same extent as the inhabitants of the 48 States. And Congress did not enact the Hawaiian Supreme Court's decision in the Kalaniana'ole case and, thus, authorize the military trials of petitioners. Whatever power the Organic Act gave the Hawaiian military authorities, such power must therefore be construed in the same way as a grant of power

to troops stationed in any one of the states.

III.

Since both the language of the Organic Act and its legislative history fail to indicate that the scope of 'martial law' in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.

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. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no *320 need to retell it all. But we might mention a few pertinent incidents. As early as the 17th Century our British ancestors took political action against aggressive military rule. When James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right [FN14] which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated. [FN15] When later the American colonies declared their independence one of the grievances listed by Jefferson was that the King had endeavored to render the military superior to the civil power.

The executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation, did not lose **614 sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power. In 1787, the year in which the Constitution was formulated, the Governor of Massachusetts colony used the militia to cope with Shay's rebellion. In his instructions to the Commander of the troops the Governor listed the 'great objects' of the mission. The troops were to 'protect the judicial courts * * *', 'to assist the civil magistrates in executing the laws * * *', and to 'aid them in apprehending the disturbers of the public peace. * * *' The Commander was to consider himself 'constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose * * * (his) * * * marching to execute these orders.' [FN16] President Washington's instructions *321 to the Commander of the troops sent into Pennsylvania to suppress the Whiskey Rebellion of 1794 were to the same effect. The troops were to see to it that the laws were enforced and were to deliver the leaders of armed insurgents to the regular courts for trial. The President admonished the Commanding General 'that the judge can not be controlled in his functions.' [FN17] In the many instances of the use of troops to control the activities of civilians that followed, the troops were generally again employed merely to aid and not to supplant the civilian authorities. [FN18] The last noteworthy incident before the enactment of the Organic Act was the rioting that occurred in the Summer of 1892 at the Coeur-d'Alene mines of Shoshone County, Idaho. The President ordered the regular troops to report to the Governor for instructions and to support the civil authorities in preserving the peace. Later the State Auditor as agent of *322 the Governor, and not the Commanding General, ordered the troops to detain citizens without trial and to aid the Auditor in doing all he thought necessary to stop the riot. [FN19] Once more, the military authorities did not undertake to supplant the courts and to

establish military tribunals to try and punish ordinary civilian offenders. [FN20]

FN14 3 Chas. 1, c. 1.

FN15 Hallam, Constitutional History, c. 3. See also discussions in dissent in *Luther v. Borden*, 7 How. 1, 48, 63, 12 L.Ed. 581; In re *McDonald*, 49 Mont. 454, 468, 143 P. 947, L.R.A.1915B, 988, Ann.Cas.1916A, 1166.

FN16 Federal Aid in Domestic Disturbances, Senate Document No. 263, 67th Cong., 2d Sess., 10.

FN17. *Id.* pp. 31, 32. See also on the same subject the dissent in *Luther v. Borden*, supra, 7 How. at pages 77--81, 12 L.Ed. 581.

FN18 This appears from the facts related throughout Senate Document No. 263, 67th Cong., 2d Sess., supra.

After the passing of the Organic Act disturbances in the coal fields of West Virginia, a longshoremen's strike in Galveston and a packers' strike in Nebraska City, all led to criminal trials of civilians by military tribunals which were upheld by decisions of state and lower federal courts. *State ex rel. Mays v. Brown*, 71 W.Va. 519, 77 S.E. 243, 45 L.R.A., N.S., 996, Ann.Cas.1914C, 1; *Ex parte Jones*, 71 W.Va. 567, 77 S.E. 1029, 45 L.R.A., N.S., 1030, Ann.Cas.1914C, 31; *United States ex rel. McMasters v. Wolters*, D.C., 268 F. 69; *United States ex rel. Seymour v. Fischer*, D.C., 280 F. 208. But cf. In re *McDonald*, supra, 49 Mont. 454, 143 P. 947, L.R.A.1915B, 988, Ann.Cas.1916A, 1166. All these cases rested on the ground that the governor's determination of the existence of insurrection conclusively established that all the governor had done was legal. The basis of these decisions was definitely held erroneous in *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375, where this Court said: 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' 287 U.S. at page 401, 53 S.Ct. at page 196, 77 L.Ed. 375. As one commentator puts it this Court 'has knocked out the prop' on which these aforementioned cases rested. Wiener, *A Practical Manual of Martial Law*, 1940, p. 116.

FN19. Senate Document No. 263, 67th Cong., 2d Sess., 190 ff.

(Cite as: 327 U.S. 304, *322, 66 S.Ct. 606, **614)

FN20 Even as late as 1937 when the War Department promulgated regulations concerning the employment of troops in aid of civil authorities, it was aware of this tradition. A.R. 500-50, 7e stated: '* * * Persons not normally subject to military law, taken into custody by the military forces incident to the use of troops contemplated by these regulations, should be turned over to the civil authorities. Punishment in such cases belongs to the courts of justice and not to the armed forces.' But cf. A.R. 500-50, 8.

[7] Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they **615 valued. Ex part Quirin, supra, 317 U.S. at page 19, 63 S.Ct. at page 6, 87 L.Ed. 3. 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. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself. See Ex parte Milligan, 4 Wall. 2, 18 L.Ed. 281; Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

Military tribunals have no such standing. For as this Court has said before: '* * * the military should always *323 be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.' Dow v. Johnson, 100 U.S. 158, 169, 25 L.Ed. 632. Congress

prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. Insofar as that legislation applied to the Southern States after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history. [FN21] And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary *324 to curtail our appellate jurisdiction. [FN22] Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that 'civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.' Ex parte Milligan, 4 Wall. 2, 124, 125, 18 L.Ed. 281.

FN21 In one of these vetoes President Johnson said: 'The trials having their origin under this bill are to take place without the intervention of a jury and without any fixed rules of law or evidence. The rules on which offenses are to be 'heard and determined' by the numerous agents are such rules and regulations as the President, through the War Department, shall prescribe. No previous presentment is required nor any indictment charging the commission of a crime against the laws; but the trial must proceed on charges and specifications. The punishment will be, not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the country.' Messages and Papers of the Presidents, Richardson, Vol. VI, 399. In another he said: 'It is plain that the authority here given to the military officer amounts to absolute despotism. But to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint, for it declares that he shall 'punish or cause to be punished.' Such a power has not been wielded by any monarch in

(Cite as: 327 U.S. 304, *324, 66 S.Ct. 606, **615)

England for more than five hundred years. * * * This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all.' *Id.*, pp. 502, 503.

FN22 *In re McCardle*, 6 Wall. 318, 18 L.Ed. 816. See also Warren, *The Supreme Court in United States History*, Vol. 2, 464, 484.

[8][9][10] We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of 'martial law' it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always **616 believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Yet the government seeks to justify the punishment of both White and Duncan on the ground of such supposed Congressional authorization. We hold that both petitioners are now entitled to be released from custody.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, concurring.

The Court's opinion, in which I join, makes clear that the military trials in these cases were unjustified by the *325 martial law provisions of the Hawaiian Organic Act. Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United

States, which applies in both spirit and letter to Hawaii. Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and out-right repudiation of the action.

Abhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. See *The Federalist*, No. 83. History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power' and who was 'depriving us of the benefits of trial by jury.' In the earliest state constitutions they inserted definite provisions placing the military under 'strict subordination' to the civil power at all times and in all cases. And in framing the Bill of Rights of the Federal Constitution they were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. They believed that a trial by an established court, with an impartial jury, was the only certain way to protect an individual against oppression. The Bill of Rights translated that belief into reality by guaranteeing the observance of jury trials and other basic procedural rights foreign to military proceedings. This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations.

Such considerations led this Court in *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281, to lay down the rule that the military lacks *326 any constitutional power in war or in peace to substitute its tribunals for civil courts that are open and operating in the proper and unobstructed exercise of their jurisdiction. Only when a foreign invasion or civil war actually closes the courts and renders it

impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions. Even the suspension of power under those conditions is of a most temporary character. 'As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power.' *Id.*, 4 Wall. at page 127.

Tested by the Milligan rule, the military proceedings in issue plainly lacked constitutional sanction. Petitioner White was arrested for embezzlement on August 20, 1942, by the provost marshal. Two days later he was orally informed of the charges against him. Various motions, including a request for a jury trial and for time to prepare a defense, were overruled. On August 25 he was convicted and sentenced to five years in prison. Petitioner Duncan was accorded similar streamlined treatment by the military. On February 20, 1944, he engaged in a fight with two armed sentries at the Navy Yard at Honolulu. He was promptly tried without a jury in the provost court on March 2 and sentenced to six months at hard labor, despite his plea of self-defense. Both the petitioners were **617 civilians entitled to the full protection of the Bill of Rights, including the right to jury trial.

It is undenied that the territorial courts of Hawaii were open and functioning during the period when the foregoing events took place. Martial law was proclaimed on December 7, 1941, immediately after the attack on Pearl Harbor; provost courts and military commissions were immediately established for the trial of civilians accused of crime. General Orders No. 4. On the next day, December 8, the territorial courts were closed by military *327 order. Thereafter criminal cases of all description, whether involving offenses against federal or territorial law or violations of military orders, were handled in the provost courts and military commissions. Eight days later, however, the military permitted the reopening of the courts for the trial of limited classes of cases not requiring juries or the subpoenaing of witnesses. General Orders No. 29. On January 27, 1942, further power was

restored to the courts by designating them 'as agents of the Military Governor' to dispose of civil cases except those involving jury trials, habeas corpus and other specified matters and to exercise criminal jurisdiction in limited types of already pending cases. General Orders No. 57. Protests led to the issuance of General Orders No. 133 on August 31, 1942, expanding the jurisdiction of civil courts to cover certain types of jury trials. But General Orders No. 135, issued on September 4, 1942, continued military jurisdiction over offenses directed against the Government or related to the war effort. Proclamations on February 8, 1943, provided that the jurisdiction of the courts was to be reestablished in full except in cases of criminal and civil suits against persons in the armed forces and except for 'criminal prosecutions for violations of military orders.' These proclamations became effective on March 10, together with a revised code of military orders. Martial law was finally lifted from Hawaii on October 24, 1944.

There can be no question but that when petitioners White and Duncan were subjected to military trials on August 25, 1942, and March 2, 1944, respectively, the territorial courts of Hawaii were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so. The Chief Justice of the Supreme Court of Hawaii stated that after the month of April, 1942, he knew of 'no sound reason for denial of trial by jury to civilians charged with criminal offense under the *328 laws of the Territory.' The Governor of the Territory also testified that the trial of civilians before military courts for offenses against the laws of the Territory was unnecessary and unjustified by the conditions in the Territory when petitioner White was charged with embezzlement in August, 1942. In short, the Bill of Rights disappeared by military fiat rather than by military necessity.

Moreover, there is no question here as to the loyalty of the Hawaiian judiciary or as to the desire and ability of the judges to cooperate fully with military requirements. There is no evidence of disorder in the community which might have prevented the courts from

conducting jury trials. As was said in the Milligan case, 4 Wall. at page 127, 'It is difficult to see how the safety of the country required martial law in Indiana (Hawaii). If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.' Thus, since the courts were open and able to function, the military trials of the petitioners were in violation of the Constitution. Whether, if the courts had been closed by necessity, the military could have tried the petitioners or merely could have held them until the courts reopened is a constitutional issue absent from these cases.

The so-called 'open court' rule of the Milligan case, to be sure, has been the subject of severe criticism, especially by military commentators. That criticism is repeated by the Government in these cases. It is said that the fact that courts are open is but one of many factors relevant to determining the necessity and hence the constitutionality *329 of military trials of civilians. The argument is made that however adequate the 'open court' rule may have been in 1628 or 1864 it is distinctly **618 unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating. Hence if a military commander, on the basis of his conception of military necessity, requires all civilians accused of crime to be tried summarily before martial law tribunals, the Bill of Rights must bow humbly to his judgment despite the unquestioned ability of the civil courts to exercise their criminal jurisdiction.

The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts.

It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.

The untenable basis of this proposed reversion back to unlimited military rule is revealed by the reasons advanced in support of the reasonableness of the military judgment that it was necessary, even though the civil courts were open and fully able to perform their functions, to impose military trials on all persons accused of crime in Hawaii at the time when the petitioners were tried and convicted:

First. According to the testimony of Admiral Nimitz and General Richardson, Hawaii was in the actual theatre of war from December 7, 1941 through the period in question. They stated that there was at all times a danger of invasion, at least in the nature of commando raids or submarine attacks, and that public safety required the imposition of martial law. For present purposes it is unnecessary to dispute any of such testimony. We may *330 assume that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their

temporary suspension. If those rights may safely be respected in the face of a threatened invasion no valid reason exists for disregarding them. In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended. 'Martial law (in relation to closing the courts) cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.' Ex parte Milligan, supra, 4 Wall. at page 127.

Second. Delays in the civil courts and slowness in their procedure are also cited as an excuse for shearing away their criminal jurisdiction, although lack of knowledge of any undue delays in the Hawaiian courts is admitted. It is said that the military 'cannot brook a delay' and that 'the punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger *331 and be protracted.' This military attitude toward constitutional processes is not novel. Civil liberties and military expediency are often irreconcilable. It does take time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law. But experience has demonstrated that such time is well spent. It is the only method we have of insuring the protection of constitutional rights and of guarding against oppression. The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give **619 effect to constitutional rights to be used as the very reason for taking away those rights. It is our duty, as well as that of the military, to make sure that such rights are respected whenever possible, even though time may be consumed.

Third. It is further said that the issuance of military orders relating to civilians required that the military have at its disposal some sort

of tribunal to enforce those regulations. Any failure to civil courts to convict violators of such regulations would diminish the authority and ability to discharge military responsibilities. This is the ultimate and most vicious of the arguments used to justify military trials. It assumes without proof that civil courts are incompetent and are prone to free those who are plainly guilty. It assumes further that because the military may have the valid power to issue regulations there must be an accompanying power to punish the violations of those regulations; the implicit and final assumption is then made that the military must have power to punish violations of all other statutes and regulations. Nothing is more inconsistent with our form of government, with its distinction between the power to promulgate law and the power *332 to punish violations of the law. Application of this doctrine could soon lead to the complete elimination of civil jurisdiction over crime.

Moreover, the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not furnish a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning. Constitutional rights are rooted deeper than the wishes and desires of the military.

Fourth. Much is made of the assertion that the civil courts in Hawaii had no jurisdiction over violations of military orders by civilians and the military courts were therefore necessary. Aside from the fact that the civil courts were ordered not to attempt to exercise such jurisdiction, it is sufficient to note that Congress on March 21, 1942, vested in the federal courts jurisdiction to enforce military orders with criminal penalties. 56 Stat. 173, 18 U.S.C.A. s 97a. It is undisputed that the federal court in Hawaii was open at all times in issue and was capable of exercising criminal jurisdiction. That the military refrained from using the statutory framework which Congress erected affords no constitutional justification for the creation of military tribunals to try such violators.