
EDITOR'S FORUM

**HAWAII AND THE UNITED STATES SUPREME COURT:
THREE CASES ON LAW, HISTORY, AND
THE UNITED STATES CONSTITUTION**

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Histories of the Pacific islands have been written with a disciplinary bias in favor of political, administrative, and diplomatic processes and events. To a large extent, such bias has established colonial history as a permanent part of the Pacific island historiographical landscape. Quite often, however, such endeavors overlook the role of the judicial system in fashioning and legitimating metropolitan policies toward their respective Pacific island dependencies. The courts, as passive agents of authority, exercise an independent power in structuring the administrative apparatus through which political power must operate. What is especially peculiar about the judicial process is how the courts interpret historical evidence in reaching important conclusions of law.

Among the more important aspects of twentieth-century history in Hawaii is the role of the federal courts in adjudicating cases of profound constitutional importance. In deciding such cases, the federal judiciary is often compelled to pass upon historical evidence introduced by the disputants. Quite often "law office history," as it has been termed, has been deliberately calculated to win cases rather than to merely articulate orthodox history.¹ To be certain, history has often been used as a legal argument by the courts to aid in shaping policies of general importance.² It is the purpose of this essay to analyze the use of history in three cases of constitutional and historical importance to Hawaii. The three

cases--*Mankichi v. Hawaii* (1903), *Duncan v. Kahanamoku* (1946), and *United States v. Fullard-Leo* (1946)--were tried originally in Hawaii and reviewed in the United States Supreme Court, representing issues having considerable consequences for the islands and its people.

***Mankichi v. Hawaii* (1903)**

The 1893 overthrow of the Hawaiian monarchy and the subsequent 1898 annexation of the islands to the United States marked the formal extension of American rule into the Pacific islands. The acquisition of insular territories, though initially resisted in the United States Congress, proved to be both a novel and confusing constitutional issue. Though Congress had appropriate authority to acquire new territories, the Constitution did not specify the exact manner in which such areas should be governed. In 1900, Congress passed the Organic Act, which reorganized the government of the once independent and sovereign islands. The act itself attempted, in part, to balance the desire for legal continuity with the necessity of conforming the governance of the islands to the new constitutional order. As in almost all such circumstances, ambiguities in the law provided opportunities for legal challenges and judicial intervention. In 1899, Osaki Mankichi was arrested and charged with murder. He was subsequently tried and found guilty of the lesser offense of manslaughter under the laws of the Republic of Hawaii (1894-1898), which did not require indictment by a grand jury nor conviction by a unanimous twelve-member jury. He thereupon petitioned to a federal district court for a writ of habeas corpus on the grounds that his indictment and conviction under Hawaii municipal law then in effect violated the Fifth, Sixth, and Seventh Amendments of the United States Constitution.³ More specifically, Mankichi alleged that the federal Constitution was in force during the judicial proceedings in question and therefore applied in his case. In support of his allegation, the Newlands Resolution of Annexation (1898) was cited as authority: "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this Resolution nor contrary to the Constitution of the . . . United States shall remain in force until the Congress of the United States shall otherwise determine."⁴

The federal trial court ruled in favor of Mankichi on the following grounds. First, the challenged municipal law was inconsistent with the relevant constitutional amendments. Second, the Newlands Resolution by operation of its own provisions abrogated such challenged procedures. In so ruling, Judge Estee made the following observations:

. . . the Constitution came with the annexation and became ever since the supreme law of this territory. This is of paramount interest to the people of this territory, as it secures to all the equal protection of life, liberty and property, which are fundamental rights, and chief among which is the trial by jury. . . . It is fallacious to attempt to limit the force of the Constitution in this territory, or in view of the clear intent of the Resolution of Annexation, to curtail the constitutional rights of the citizen. The pointing out to the people, as the Supreme Court of the territory has done, that the Constitution "is not here in all its fullness," without stating what parts are not here, simply befogs the question; and the argument of the Assistant Attorney General of the territory that trial by jury is not one of the fundamental propositions of the Constitution is contrary to the settled opinions of such illustrious jurists as Marshall, Story and Kent, and also of the leading American statesmen who assisted in framing those Amendments of the Constitution.⁵

The court, in other words, chose to recognize citizenship as the fulcrum of the ultimate constitutional questions in the case. The territory appealed directly to the United States Supreme Court. The justices of the Court disagreed with the trial judge. Justice Brown, writing the majority opinion, felt compelled to make a few historical observations in the process of reaching a decision.

In fixing upon the proper construction to be given to this [Newlands] resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and the civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come.⁶

In proceeding to the status of the Republic of Hawaii in the two-year interim between formal annexation in 1898 and the enactment of the Organic Act, the Court declared:

. . . it [the Republic of Hawaii] was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation.⁷

In the reasoning of the Court, Hawaiian municipal law remained in force until the actual enactment of the Organic Act and the Newlands Resolution was intended to be “temporary and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.”⁸ The Court’s interpretation of the Newlands Resolution itself was significant.

The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same “as a part of the territory of the United States, and subject to the sovereign dominion thereof;” 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine.⁹

Since the *Mankichi* decision rested upon judicial interpretation of the Newlands Resolution, the Court did not find it necessary to discuss similar constitutional issues that were raised in the *Insular Tariff Cases* with respect to the applicability of the Constitution to the overseas territories of the United States.¹⁰

Duncan v. Kahanamoku (1946)

During the course of World War II, another case of constitutional importance emerged, similar though distinguishable. On February 24,

1944, Lloyd C. Duncan, a civilian shipfitter employed at Pearl Harbor, embroiled himself in a quarrel with Marine sentries. Duncan was subsequently tried and convicted by a military Provost Court constituted by the military governor of Hawaii under then existing martial law. Less than a month later, Duncan petitioned the United States District Court for a writ of habeas corpus, alleging that his trial and conviction were unconstitutional because martial law was not in lawful existence since there was no demonstrable necessity for the trial of civilians in military courts.¹¹ The Department of Justice, in reply to the petition, alleged that although the federal and territorial courts were functioning adequately, a continued state of martial law existed in Hawaii warranting the suspension of habeas corpus and that since the Pearl Harbor attack, public safety required the continuance of martial law.

The *Duncan* and companion cases represented considerably more at stake than merely the constitutional rights of the complainants. The scope and depth of the controversy involved several contending political interests. The territory's civilian administration deeply resented the military government's refusal to release certain areas of political jurisdiction to the territorial government. The Hawaii Bar Association, likewise, strongly opposed military rule based on constitutional grounds as well as the continued curtailment of jurisdiction of the civilian courts.¹² During the initial stages of the *Duncan* case, Judge Metzger was subjected to personal harassment, "being repeatedly disturbed by telephone calls during dinnertime and until late into the night" impugning his loyalty.¹³ In deciding the fundamental issue, Judge Metzger made several findings of fact favorable to Duncan and others similarly situated. First, the military based its authority for martial law on Section 67 of Hawaii's Organic Act, which stated in relevant part:

That the Governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within 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 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 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 be made known.¹⁴

The hearing on the matter had several illustrious witnesses which demonstrated the nature and scope of interests. Governor Stainback testified that shortly after August 17, 1942, he conferred with military authorities about the possibility of discontinuing martial law, particularly the suspension of habeas corpus. Stainback was of the emphatic opinion that the strategic situation of the islands did not warrant the continuation of military rule, though perhaps a "modified form of martial law" should remain in effect.¹⁵ Lieutenant General Robert Richardson, the military governor--with Fleet Admiral Chester Nimitz, Commander in Chief of American Pacific forces, in agreement--testified that he "should have control over the civilian population in this area as well as the armed forces and have full authority to establish and control courts for enforcing his order relating to certain civilian acts and conduct."¹⁶ Richardson, moreover, asserted that in his opinion . . . Hawaii is and has been continuously since December 7, 1941, in imminent and constant danger of attack by Japanese agencies of warfare." Though Richardson's reference to attack by "Japanese agencies of warfare" was cryptic, it was later seen that it was an indirect reference to the presence of both alien and citizen Japanese then residing in the islands. Finally, the trial court made the following observations:

If the present laws do not give the Nation the fullest desirable protection against subversive or suspicious Japanese aliens, or even native-born persons of alien parentage, and such fact is known to the Army or Navy organizations, clearly it is the duty of such organizations to ask for legislative curb and procedure instead of insisting upon holding by force of arms an entire population under a form of helpless and unappealable subjugation called martial law or military government, under the reasoning of Army or Navy officers that such form of government is required, or is convenient to them.¹⁸

Judge Metzger was not persuaded by the testimony of the military witnesses and ruled that such opinions should not control the applicable laws of the land. Significantly, the court held that the War Department did not have the lawful power to delegate powers of governance rightfully belonging to Congress under the Constitution. The government appealed to the Court of Appeals for the Ninth Circuit. During the course of the controversy, the issue of martial law had been debated in legal journals. Territorial Attorney General J. Garner Anthony had written two law review articles against the propriety of martial law in

Hawaii.¹⁹ Charles Fairman of Stanford University Law School argued that martial law was justified on the basis of both statutory and constitutional law. After a lengthy legal analysis on martial law, Fairman made a few comments on the practical necessity of martial law in Hawaii:

Certainly no one will suppose that all the Nisei are disloyal to the United States. It would be fanciful to suppose that the opposite is true. . . .

The Japanese, including most of the Japanese Americans, have lived among us without becoming a part of us. This is not to be charged to them as fault. Fundamental differences in mores have made them inscrutable to us. Because of the absence of that frank interchange by which human personality is revealed, the Nisei have remained largely unknown to their fellow citizens.²⁰

Such arguments, whether derived directly from Fairman or not, became persuasive on appeal. The San Francisco appeals court accepted the military's perception of the domestic situation in the islands in juxtaposition with the Pacific war.

We need comment but briefly on the dangers inherent in the Hawaiian situation or the military importance of this exposed area. The Islands form a key outpost in the nation's Western bastion of defense. As is now known, the surprise attack on Pearl Harbor was so devastating and the destruction wrought so nearly complete as to put the Islands in peril of actual seizure by the task forces of a powerful and determined enemy. While immediate steps were taken to convert Hawaii into a fortress, and while the Japanese ultimately met with vigorous opposition in other parts of the Pacific, the perils which beset this strategic area did not vanish overnight. It is the opinion of responsible military and naval authorities that as late as the spring of 1944 the islands continued in imminent danger from the air, of submarine forays and commando raids from the sea.²¹

Most importantly, the court accepted the military's perception of the alien and citizen Japanese presence in the islands and set aside the trial court's conclusion on the matter.

Governmental and military problems alike were complicated by the presence in the Territory of tens of thousands of citizens of Japanese ancestry besides large numbers of aliens of the same race. Obviously the presence of so many inhabitants of doubtful loyalty posed a continuing threat to public security. Among these people, the personnel of clandestine landing parties might mingle freely, without detection. Thus was afforded ideal cover for the activities of the saboteur and the spy. In sum, the situation was such that informed leadership would be answerable at the bar of history if it presumed to take unnecessary chances.²²

The court noted further that since there was a high percentage of Japanese eligible to serve on juries and since they could not be lawfully excluded from jury service, such a situation "might well constitute an invitation to disorder as well as an interference with the vital business of the moment."²³

The appellate court did, however, make some important and perhaps complicating conclusions of law. In interpreting the portions of the Organic Act that authorized martial law, the judges concluded that since Congress had adopted verbatim a similar provision contained in the Constitution of the Republic of Hawaii, judicial deference should be given similar interpretation made by the local courts with respect to that same provision in the island Constitution. More specifically, the appellate court relied upon a previous Hawaii Supreme Court decision, *In re Kalaniana'ole*.²⁴ In that case, Jonah Kuhio Kalaniana'ole was tried and convicted of treasonous acts against the government by a military commission constituted under martial law. Upon application for a writ of habeas corpus to the Hawaii Supreme Court, it was alleged that the judicial proceedings were void on the grounds that martial law did not lawfully exist. The republic's Supreme Court ruled that in view of the "local insurrection" martial law was validly declared and that the military commission was appropriately constituted to preside over Kuhio's trial. Under such circumstances, the appeals court held that the *Kalaniana'ole* decision was controlling with respect to a similarly worded provision of the Organic Act. The court, furthermore, ruled that the military government in Hawaii required a forum to enforce its orders since civilian courts were not empowered to do so in the absence of congressional legislation. The *Duncan* case was appealed to the Supreme Court. The issue framed before the Court was: "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."²⁵

Justice Black delivered the majority opinion and in one succinct sentence said that ". . . Hawaii since annexation has been held by and loyal to the United States."²⁶ In his concurring opinion, Justice Murphy elaborated:

The implication apparently is that persons of Japanese descent, including those of American background and training, are of such doubtful loyalty as a group as to constitute a menace justifying the denial of the procedural rights of accused persons in Hawaii. It is also implied that persons of Japanese descent are unfit for jury duty in Hawaii and that the problems arising when they serve on juries are so great as to warrant dispensing with the entire jury system in Hawaii if the military so desires. The lack of any factual or logical basis for such implications is clear. It is a known fact that there have been no recorded acts of sabotage or fifth column activities by persons of Japanese descent in Hawaii either on or subsequent to December 7, 1941.²⁷

Since the Court chose to focus its inquiry on the relevant portions of the Organic Act, it turned its attention to the circuit court's interpretation of the *Kalaniana'ole* decision. The Court accepted the lower court's construction of the subject statutory language, but made an important distinction.

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 of 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 was 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 the courts by mil-

itary tribunals we are certain that Congress did not wish to make that case part of the Organic Act.²⁸

Though there was controlling precedent in *Ex parte Milligan*²⁹ that would have sustained the appeals court's decision, the Supreme Court felt reluctant to apply the controversial Civil War decision to the *Duncan* case. Indeed, the *Milligan* decision had been under considerable attack by legal scholars questioning its constitutional vitality.³⁰ In concluding the controversial case, Justice Black made an important declaration of law and policy:

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 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. . . . 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 had to limit the application of the Constitution [citation omitted]. The people of Hawaii are therefore entitled to constitutional protection to the same extent as the inhabitants of the 48 states.³¹

The Court concluded that the *Kaluniana'ole* case did not give the military the authority to try civilians in military tribunals and that for purposes of martial law Hawaii could not be differentiated from the other states in the Union. In a post-*Duncan* article, J. Garner Anthony commented:

It will probably be years before the historian of the future can clearly appraise the motives and causes that led the Army to pursue the course it did in Hawaii. It is inconceivable that those in high places in the War Department were not cognizant of the fact that the regime erected in Hawaii superceding the civil government was not only illegal but contrary to our most cherished traditions of the supremacy of the law. It is readily understandable that military personnel not familiar with the mixed peoples of Hawaii should have certain misgivings concerning them. However, the conduct of the populace on De-

ember 7 and thereafter should have put these military doubts at rest. To be sure it took some time for the military authorities to assure themselves that the civil population was all that it seemed--a loyal American community. What is not understandable is why the military government was continued after several years had elapsed and the fears of the most suspicious had been allayed.³²

United States v. Fullard-Leo (1946)

One of the more lengthy and protracted cases was *United States v. Fullard-Leo*.³³ The controversy arose in 1939 when the U.S. Navy began constructing facilities on Palmyra Island pursuant to congressional authorization. Leslie Fullard-Leo and others contended that the island was held by them in fee simple title. The federal government then filed an action requesting the federal court to declare that Palmyra was federal property.³⁴ As the petitioners, the Navy contended that the island had become the property of the United States as a result of the Newlands Resolution, whereby the federal government had become the successor in interest to all public lands held by the Republic of Hawaii at the time of annexation.³⁵ The Fullard-Leos responded, saying that they had acquired good title to the island from the original grantors, Zenas Bent and Johnson Wilkinson. The historical documents indicated that Bent had been authorized to acquire possession of Palmyra in 1862 in the name of Kamehameha IV. The records of the Hawaiian Interior Department indicated further that after acquisition of the island, Bent had made commercial improvements for the *bêche-de-mer* trade. The chain of title from Bent and Wilkinson was clearly documented in the land records with the Fullard-Leos acquiring the land from Henry Cooper for \$15,000 in 1922.

The trial court chose to rule on the legal theory that the putative original grantors had acquired title while the Hawaiian Crown had assumed sovereignty.³⁶ Hence, the Fullard-Leos had lawful title against all other claims. The government, on the other hand, argued that under international law neither person had secured the occupancy of the island necessary for the perfection of fee title and, alternatively, no actual documentation was produced that could confirm title in either Bent or Wilkinson. The court rejected such arguments, stating that the Hawaiian Crown could acquire sovereignty over Palmyra without necessarily acquiring fee title and that the king had the authority to prescribe the terms of territorial annexation independent of international

law in existence at the time. Since no actual instruments of title existed on the record, the court chose to infer that good title had been secured from the actions and circumstances surrounding the events in question.

Apparently all of their operations were at their own expense, and there is no evidence that they ever considered it necessary or appropriate to procure permission from the King or officers of the Kingdom for their occupancy or acts, or paid or became indebted for any rental, royalty, or share to the King or Kingdom. This is indicative that they claimed this right and that the King recognized a proprietorship in them.

It is probable that the King was influenced more by his ideas of natural law and promptings of justice, than by whatever knowledge he may have possessed of international law. Under the Constitution then in force, he was the supreme Executive Magistrate.³⁷

In the end, the court found that although sovereignty now rested with the United States under the terms of the Newlands Resolution, the respondents had fee title to the island since predecessor governments had never questioned or challenged private interest since 1862. The government promptly appealed to the Court of Appeals for the Ninth Circuit.

In a brief but thorough decision, the appeals court reversed the trial court's ruling. Accepting the lower court's historical findings, the appellate court applied the law of Agency to the facts. The judges concluded that Bent was acting as an agent of the Hawaiian Crown and that his actions therefore served to vest title with the Hawaiian monarchy. As such, the case was remanded to the trial level for further action. On remand, the trial court proceeded to an alternative claim made by the Fullard-Leos based upon the theory of the "lost grant." Under this theory of law, courts recognize that although actual recorded documentation to real property may not have been properly executed or is otherwise lost, the lapse of time may serve to cure such defects.³⁸ Since the circuit court had ruled that the Hawaiian Kingdom had acquired both title and sovereignty to Palmyra, the district court ruled that the Hawaiian Interior Ministry had granted title back to Bent and Wilkinson after the initial acquisition by the Crown. The court applied the "lost grant" theory as follows.

There is not a scintilla of evidence that the Hawaiian monarchy, the Provisional Government or the Republic of Hawaii at

any time claimed that Palmyra was public land. There is no record evidence that any of those governments ever regarded Palmyra as property. Uncontradicted evidence shows that the claim of private ownership of the island had been continuously maintained through the years to the knowledge of the Department of State, the Department of the Interior and the officers of the United States Navy as well as of the prior governments of Hawaii.³⁹

The federal government appealed again to the Ninth Circuit, urging reversal. The appeals court ruled in favor of the Fullard-Leos in a manner having considerable historical and legal significance for Hawaii.

It was the purpose of Congress, as expressed in the Organic Act, to leave the ceded public lands in the control of the Territory to be administered by it for the benefit of its people. There is in this benign program no proper place for advantaging the United States at the expense of the inhabitants on grounds which affront the sense of justice. Nothing occurs to us to be more at war with the policy than the assertion of title by the United States, in doubtful cases, to land long occupied by local inhabitants in good faith under claim of right, more particularly in instances where the occupancy and claim originated long prior to annexation and were acquiesced in by the then Hawaiian government. In such a situation the occupant is entitled to the benefit of every presumption and to have all doubts resolved in its favor.⁴⁰

What was especially remarkable about the circuit court's opinion was judicial recognition of the importance of the Organic Act, not merely from a legal standpoint but as a document of wide-ranging policy on the governance of the islands and its citizens.

The government petitioned the Supreme Court for a writ of *certiorari*, which was subsequently granted. Justice Reed spoke for the majority of the Court.⁴¹

Before . . . the islands composing the present Territory of Hawaii existed independent from the rest of the world and sovereign as far back as history and local tradition reached. When American Christian missionaries arrived at the islands in 1820, the Hawaiian Civilization merged with that of the rest of the world. At that time the principal islands of the present Territory had been united a few years before into a monarchy under

a strong leader Kamehameha I. Notwithstanding his death, a short time before the coming of the missionaries, the kingdom welded by him from the several island communities continued as a recognized monarchy under his successors until its fall in 1893. A Provisional Government succeeded the monarchy and was in, turn followed by the Republic of Hawaii, the foreign governmental authority mentioned in the Congressional Resolution of Annexation as ceding Hawaii to the United States. From Kamehameha I to annexation, Hawaii made steady advances in conforming its laws and economy to the manner of life of other civilized nations of the world.⁴²

The Court declared that since the Hawaiian Kingdom possessed a land tenure system similar to Anglo-American practices, the same legal construction could be given.

Kamehameha I, as King and Conqueror, was recognized by Hawaiian law as the sole owner of all feudal tenures. Not too clearly defined large portions of the royal domains were divided among the chiefs by Kamehameha I and his successors and this process of infeudation continued to the lowest class of tenants. This system of tenures created dissatisfaction among the chiefs and people because of the burdens of service and produce that the inferior owed the superior. Consequently, by a series of royal and legislative steps, the King and the House of Nobles and Representatives, provided for a land system which finally resulted in a separation of the lands into the lands of the Government, the Crown and the people.⁴³

The Court took judicial notice that the laws of Hawaii prior to annexation became part of the laws of the nation after 1898. While affirming that federal courts should ordinarily "lean heavily" upon the decisions of the Hawaiian courts on matters concerning local laws, the majority stated that the federal judiciary was not thereby bound when such matters concerned interpretations of federal law. Since the "lost grant" theory was recognized by the local courts, such a claim could be forthrightly recognized by the federal judiciary.⁴⁴

Conclusion

While it may be readily seen that the foregoing cases involved federal interpretations of the 1900 Organic Act and the 1898 Newlands Resolu-

tion, the judicial sense of history added to the logic of the law. Though such interpretations were apt to be one-dimensional or parochial, the use of history reinforced long-held understandings of historical direction and purpose. In declaring new law or affirming old doctrines, the Supreme Court must insist upon the certainty of its reasoning process. Courts are ongoing institutions that from time to time must reinforce the notion that law is contemporaneous with ongoing history.

The world of the judge is relatively unrestrained with respect to the use of history. Lawyers may lose poorly presented cases. But judges win them all. Historians rise and fall in their open society on the basis of the quality of their work. Sanctions against judges for poor opinions, and therefore the poor use of history, are basically a matter of individual standards and sensitivity to colleagues and critics. Nevertheless, the Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs.⁴⁵

The judicial process as analyzed here may be forthrightly considered as a part of the political apparatus of government, especially in matters in which the executive and legislative branches are not competent or are reluctant to act. Unlike the other branches of government, however, the courts must be able to rationalize their decisions with an ostensible sense of fairness and finality.

NOTES

1. Paul L. Murphy, "Time to Reclaim: The Current Challenge of American Constitutional History," *American Historical Review*, Vol. 69 (October 1963) p. 77.
2. Charles A. Miller, *The Supreme Court and the Uses of History* (New York: Simon and Schuster, 1969), p. 195.
3. *In the Matter of Mankichi*, Reports, United States District Court, Hawaii (1902), p. 303.
4. 30 Statutes-at-Large 750 (July 7, 1898).
5. *Mankich* *op.cit.*, p.310.
6. *Ibid.*
7. 190 U.S. 198, 216 (1902). The Organic Act (31 Statutes-at-Large 141) was enacted pursuant to congressional authority provided under Art. IV, Sec. 3 of the Constitution.
8. *Ibid.*

9. *Ibid.* For further comment on Hawaii's territorial status under the Constitution and the Organic Act see Robert M. C. Littler, *The Governance of Hawaii* (Stanford, Calif: Stanford University Press, 1929), pp. 29-63.
10. The *Insular Tariff Cases* consisted of *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. U.S.*, 195 U.S. 138 (1904); *Dowell v. U.S.*, 221 U.S. 325 (1911); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Rasmussen v. U.S.*, 197 U.S. 516 (1905). The *Mankichi* decision was not technically part of this *corpus juris*, though legal historians have included it because of similarly framed issues on the Constitution and its applicability to overseas territories.
11. *Ex parte Duncan*, 66 F.Supp. 976 (D. Hawaii 1944). Two companion cases, *Ex parte Spurlock*, 66 F.Supp. 997 (D. Hawaii 1944) and *Ex parte White*, 66 F.Supp. 652 (D. Hawaii 1944), were litigated simultaneously with *Duncan* and involved similar questions of law.
12. Claude McColloch, "Now It Can Be Told: Judge Metzger and the Military," *American Bar Association Journal*, Vol. 35 (May 1949) p. 446.
13. *Ibid.*, 446-447.
14. 48 U.S.C. Sec. 532.
15. *Duncan*, op. cit., 979.
16. *Ibid.*
17. *Ibid.*, 980.
18. *Ibid.*
19. Garner Anthony, "Martial Law in Hawaii," *California Law Review*, Vol. 30 (May 1942) pp. 371-396; idem, "Martial Law, Military Government and the Writ of Habeas Corpus," *California Law Review*, Vol. 31 (December 1943) pp. 477-485.
20. Charles Fairman, "The Law of Martial Rule and National Security," *Harvard Law Review*, Vol. 48 (June 1942) p. 1301.
21. *Duncan*, 146 F.2d 576, 579-80 (9th Cir. 1944).
22. *Ibid.*, 580.
23. *Ibid.*
24. 10 Haw. 29 (1895).
25. 327 U.S. 304, 314 (1946).
26. *Ibid.*, 313.
27. *Ibid.*, 334.
28. *Ibid.*, 313.
29. 4 Wall. 2 (1882).
30. John P. Frank, "*Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*," *Columbia Law Review*, Vol. 44 (September 1944) pp. 638-668.
31. 327 U.S. 304, 318-19.

32. J. Garner Anthony, "Hawaiian Martial Law in the Supreme Court," *The Yale Law Journal*, Vol. 57 (November 1947) pp. 52-53.
33. 331 U.S. 257 (1946).
34. 66 F.Supp. 774, 778 (D. Hawaii 1942).
35. *Ibid.*, 780.
36. *Ibid.*
37. *Ibid.*
38. 331 U.S. 257, 271 (1946).
39. 66 F.Supp. 782, 786 (D. Hawaii 1944).
40. 156 F.2d 756 (9th Cir. 1944).
41. 331 U.S. 257 (1946).
42. *Ibid.*, 261.
43. *Ibid.*, 261.
44. *Ibid.*
45. Miller, *op. cit.*, 177.