

EQUAL JUSTICE in the balance

America's Legal Responses to the
Emerging Terrorist Threat

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& Michael J. Kelly

With a Foreword by **Michael Ratner**

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To Helen and Ernest Lawson, with love —R.L.M

To James and Rosemary Kelly, with love —M.J.K

We may 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 [to violate the] Constitution . . . 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 . . . 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.

—Justice Murphy’s concurring opinion in the U.S.

Supreme Court decision against application of martial law in Hawaii, *Duncan v. Kahanamoku* (1946), quoted in support of federal district judge Nancy G. Edmunds’s decision to open INS deportation hearings against the government’s request to keep them secret in *Detroit Free Press v. Ashcroft* (2002)