PLAY IT AGAIN, UNCLE SAM[1]

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Yesterday we heard from some of the surviving participants in the World War II Japanese American internment experience, including litigants and attorneys who participated in the various test cases in the United States Supreme Court and the lower federal courts.[2] This morning, we heard from a panel of scholars who gave us a historical overview of the constitutional landscape sixty years ago, when *Korematsu v. United States*[3] and the other cases were litigated.[4] This afternoon, yet another panel of scholars will give contemporary meaning and perspective to those cases and demonstrate their relevance to today's troubled world.[5]

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1. Keynote Address, presented for "Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases of World War II on their Sixtieth Anniversary," a joint conference by the University of North Carolina School of Law, the UCLA Asian American Studies Center, and the Japanese American National Museum.

2. Panelists included Fred Korematsu, the defendant in *Korematsu v. United States*, 323 U.S. 214 (1944); Frank Emi, Yosh Kuromiya, and Gene Akutsu, litigants in the cases stemming from draft resistance at the Heart Mountain and Minidoka Relocation Centers; Lorraine Bannai, a member of the team of lawyers that secured the overturning of the wartime convictions of Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi in *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985), and *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986); Eugene Gressman, law clerk to Associate Justice Frank Murphy of the United States Supreme Court at the time of the Court's decision in *Korematsu v. United States*, 323 U.S. at 214; and Eleanor Jackson Piel, law clerk to Judge Louis Goodman of the United States District Court for the Northern District of California when he decided *United States v. Kuwabara*, 56 F. Supp. 716 (N.D. Cal. 1944), involving the draft resisters of the Tule Lake Segregation Center.

Eugene Gressman's contribution to this conference is published in this symposium issue. *See* Eugene Gressman, *Korematsu: A Study of Military Imperatives*, 68 L. & CONTEMP. PROBS. 20 (Spring 2005). Recollections of Frank Emi and Yosh Kuromiya on the subject of the Heart Mountain draft resistance movement have been published elsewhere. *See* Frank S. Emi, *Fair Play Committee*, *in* RESISTANCE: CHALLENGING AMERICA'S WARTIME INTERNMENT OF JAPANESE-AMERICANS 98 (William Hohri et al. eds., 2001); Frank S. Emi, *Protest and Resistance: An American Tradition*, *in* A MATTER OF CONSCIENCE: ESSAYS ON THE WORLD WAR II HEART MOUNTAIN DRAFT RESISTANCE MOVEMENT 51 (Mike Mackey ed., 2002); Yosh Kuromiya, *Fighting for My Country, My Constitution*, *in* RESISTANCE, *supra*, at 59; Yosh Kuromiya, *The Fourth Option*, *in* A MATTER OF CONSCIENCE, *supra*, at 77.

3. 323 U.S. 214 (1944).

4. Papers from this panel include John Q. Barrett, *A Commander's Power, a Civilian's Reason: Justice Jackson's* Korematsu *Dissent,* 68 L. & CONTEMP. PROBS. 57 (Spring 2005); Patrick Gudridge, *The Constitution Glimpsed from Tule Lake*, 68 L. & CONTEMP. PROBS. 81 (Spring 2005); Eric L. Muller, *A Penny for Their Thoughts: Draft Resistance at the Poston Relocation Center*, 68 L. & CONTEMP. PROBS. 119 (Spring 2005); Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 L. & CONTEMP. PROBS. 29 (Spring 2005).

5. Papers from this panel include Margaret Chon & Donna Arzt, *Walking While Muslim*, 68 L. & CONTEMP. PROBS. 173 (Spring 2005); Roger Daniels, *The Japanese American Cases, 1942–2004: A So-*

I am not a scholar and I am not here to give you a scholarly dissertation on the meaning of the World War II internment cases. My role, rather, is to bring to this conference the perspective of one who lived through the evacuation and internment and then went on to a career as a federal judge. In my twenty-four years as a federal judge, both in the trial court and on the appellate bench, it has been my privilege to participate in what I believe to be the primary mission of the federal courts—to uphold the rule of law and to hold the government to its constitutional obligations. Because we are all creatures of our past, I have no doubt that my life experiences, including the evacuation and internment, have shaped the way I view my job as a federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government.

So if I stray somewhat today from the path that judges usually take in their public remarks, it is because I believe that the voice of those who were wronged by their own government more than sixty years ago needs to be heard in the current debate on how the war against terrorism should be conducted.

Sixty years ago, I was in my third year as an internee in the War Relocation Authority ("WRA") internment camp at Poston, Arizona, on the Colorado River Indian Reservation. I was ten years old and in the fifth grade at the Poston I Elementary School. My fifth grade teacher was Miss Sato. Incidentally, I learned many years later that Miss Sato, and my fourth grade teacher, Miss Omori, were paid $19.00 per month for their professional labors, but that my third grade teacher, Miss Saddlewhite, who was white, was paid $150.00 per month.

In any event, Franklin Roosevelt had just won reelection for a fourth term. By November of 1944, the tide of war had clearly turned. The invasion of France had successfully been launched on the beaches of Normandy some five months earlier.[6] The great naval Battle of Leyte Gulf had ended decisively in our favor only a week earlier[7] and had turned the tide in the Pacific War as well. Yet, more than 80,000 Japanese Americans, most of them American citizens, were still held in WRA internment camps,[8] prisoners of their own government in their own country. It would be nearly another year before my family and I were permitted to return to our home in California, in August of 1945.

How did it happen that thousands of Americans were uprooted and forcibly removed from their homes, sent into a desert exile, and detained in internment camps in their own country, without any charges being filed, without any trial being held, without the right to confront their accusers, without any hearing or

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cial History, 68 L. & CONTEMP. PROBS. 159 (Spring 2005); Jerry Kang, *Watching the Watchers*, 68 L. & CONTEMP. PROBS. 259 (Spring 2005); Natsu Taylor Saito, *Interning the Non-Alien "Other": The Illusory Protections of Citizenship*, 68 L. & CONTEMP. PROBS. 217 (Spring 2005); Eric Yamamoto, *White (House) Lies*, 68 L. & CONTEMP. PROBS. 287 (Spring 2005).

6. *See* ROBERT GORALSKI, WORLD WAR II ALMANAC: 1931–1945 321 (1981).

7. *See id.* at 353.

8. *See* U.S. DEP'T OF THE INTERIOR, THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION 18 (1946).

judicial review, and held as prisoners by their own government for over three years? It happened, at least in part, because the federal courts, which were supposed to be the bulwark protecting the Constitution from an overzealous Executive, failed in fulfilling their mandate under Article III of the Constitution.

In the sixty years since the Supreme Court decided the *Korematsu* case, upholding the President's right to order the exclusion of Japanese Americans from the West Coast under his war powers,[9] it has been subjected to intensive and extensive criticism. I think it is fair to say that most of the scholarly commentary has been extremely critical of *Korematsu.*[10] Lawyers and judges generally have been critical of it, as well.[11] Congress even passed an act recognizing the evacuation and internment as a national policy mistake of the first order,[12] and President Reagan issued a formal apology on behalf of the nation for it.[13] But, as we have learned from recent history (to quote the popular maxim), "it ain't over till the fat lady sings,"[14] and the fat lady has yet to make her fabled appearance.

Since the attack on the World Trade Center on September 11, 2001, we have had an administration and an attorney general determined to expand the constitutional limits of the President's war-making powers, not against a foreign enemy, but here at home against our own citizens and residents. And we must live with the discomforting reality that, sixty years after it was decided, the *Korematsu* case has never been overruled by the Supreme Court and, thus, as lawyers like to say, it remains "good law" today.[15] I might also add that the Chief Justice of the United States has stated—although in his role as a historian and not in his capacity as the Chief Justice—that, in his opinion, if the Supreme Court were to be faced with the same case today as it was in *Korematsu* in 1944, it would make the same decision because of the Court's historic deference to the military and its reluctance to interfere with military decisions.[16]

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9. *See Korematsu*, 323 U.S. at 215-24.

10. *See, e.g.*, PETER IRONS, JUSTICE AT WAR (1993); Neil Gotanda, *The Story of* Korematsu*: The Japanese-American Cases*, *in* CONSTITUTIONAL LAW STORIES 249 (Michael C. Dorf ed., 2004); Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003); Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004).

11. *See* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 n.75 (2002) (reviewing stated positions of currently sitting Supreme Court Justices regarding *Korematsu*); Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States*: A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37 (2003).

12. *See* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

13. *See* Julie Johnson, *President Signs Law to Redress Wartime Wrong*, N.Y. TIMES, Aug. 11, 1988, at A16.

14. This quotation, often mistakenly attributed to Yogi Berra, likely belongs to sports writer Dan Cook. *See* World Wide Words, *It Ain't Over Till The Fat Lady Sings*, *at* http://www.worldwidewords.org/qa/qa-ita1.htm (last visited Jan. 22, 2005) (on file with *Law and Contemporary Problems*).

15. *See* Charles Ogletree, *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 493 (1996–97).

16. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 218-25 (1998).

To add some hard-to-digest frosting to that unpalatable cake, there has been a revival in some extreme circles of the notion that the Japanese American internment was justified by the wartime record, and as being for the greater good and for the security of America—and, more importantly, that comparable extreme, racially motivated measures are similarly justified today in the so-called war against terrorism.[17] I refer here, of course, to Michelle Malkin's recent book, *In Defense of Internment: The Case for "Racial Profiling" in World War II and the War on Terror*.[18]

It is not my purpose today to engage in a critique of Ms. Malkin's thesis, although I want to make it clear that I agree neither with its premises nor with its conclusion. That necessary task has been ably undertaken by others, including two of this morning's panelists, Eric Muller and Greg Robinson.[19] I mention the book only as symptomatic of the kind of thinking behind the Bush Administration's conduct in the war against terrorism.

In years past, when I have had occasion to speak on the World War II internment and my experience as a part of it, I have often prefaced my remarks with the historian's well-known reminder of why we study history: We study history because those who forget the past are condemned to repeat it.[20] There is now a new and virulent strain of racism that touts the benefits of racial profiling, of wholesale "internment" of race- and religion-based groups, and of other racist policies, not only as a historical matter (arguing that the World War II internment of Japanese Americans was fully justified), but also as a current matter (advocating the adoption of similar race-based policies in the current war against terrorism). That was too much, even for *The Wall Street Journal*, which had this to say in its October 1, 2004, edition: "Varying the famous maxim, Ms. Malkin actually remembers the past but wants to condemn us to repeat it."[21] And, unfortunately, in my view, in the three years since 9/11, we have been repeating some of the worst that our past has to offer:

1. Hundreds of persons have been arrested and detained against whom no charges of terrorist activities have been brought and whose identities have not been disclosed.[22]

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17. *See, e.g.*, John Leo, *The Internment Taboo*, U.S. NEWS & WORLD REP., Sept. 27, 2004, at 74.

18. MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR "RACIAL PROFILING" IN WORLD WAR II AND THE WAR ON TERROR (2004).

19. *See* Eric L. Muller, *Indefensible Internment*, REASON, Dec. 2004, at 59; Eric L. Muller & Greg Robinson, *Muller and Robinson on Malkin*, *at* http://www.isthatlegal.org/Muller_and_Robinson_on_Malkin.html (last visited Jan. 22, 2005) (on file with *Law & Contemporary Problems*).

20. *See* 1 GEORGE SANTAYANA, THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS 284 (2d ed. 1924).

21. *Bookmarks*, WALL ST. J., Oct. 1, 2004, at W7.

22. Amy Goldstein, *A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A1; Neil A. Lewis, *A Nation Challenged: The Detainees. Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, Oct. 30, 2001, at B1.

2. Thousands of foreign nationals who are, for the most part, here in this country legally, have been arrested for minor immigration violations and held in secret detention.[23]
3. Thousands more have been questioned by the FBI, after having been singled out for questioning based solely on racial, ethnic, or religious criteria.[24]
4. Private internet, medical, library, and university records have become susceptible to search by the federal government under its newly granted authority under the USA PATRIOT Act[25] without a showing of probable cause to believe that a crime has been committed and without any accountability.[26] In fact, those whose records have been subpoenaed under the USA PATRIOT Act are forbidden from disclosing that fact or talking about it.[27]
5. And, most egregiously, the President has claimed the right to detain indefinitely American citizens without charges being brought, without the right to counsel, and without the right to judicial review.[28]

All this is in an end-justifies-the-means war on terrorism that threatens to destroy the very values of a democratic society governed by the rule of law that we should be fighting to preserve. And there is more:

1. In our treatment of al Qaeda detainees, we have been careful to state that we are complying with the "principles" of the Geneva Convention, but not with the Convention itself.[29]
2. And even our observance of those so-called "principles" has been niggardly: At the highest levels of our government, we have adopted a definition of "torture" which permits the infliction of physical and mental pain on prisoners of war and suspected enemy combatants, so long as it does not result in significant long-term psychological harm or in physi-

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23. *See* Dan Eggen, *Long Wait for Filing of Charges Common for Sept. 11 Detainees: Delays Reasonable, INS Officials Say*, WASH. POST, Jan. 19, 2002, at A12; *The Talk of the Town: The Choice*, NEW YORKER, Nov. 1, 2004, at 40.

24. *See* Joel Stein, *Just a Few Questions: The Attorney General Wants 5,000 Arabs Here to Come in for a Chat. Is This the Way to Fight Terrorism?* TIME, Dec. 10, 2001, at 41.

25. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 47 U.S.C., and 50 U.S.C.).

26. *See* Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy under the USA Patriot Act*, 80 DENV. U. L. REV. 375 (2002).

27. *See* 50 U.S.C. § 1861(d) (Supp. I 2001).

28. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2636 (2004); Brief for the Petitioner, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027).

29. Ari Fleischer, Statement by the Press Secretary on the Geneva Convention (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html (last visited Jan. 22, 2005) (on file with Law and Contemporary Problems) ("Consistent with American values and the principles of the Geneva Convention, the United States has treated and will continue to treat all Taliban and al Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention. . . . In addition, President Bush today has decided that the Geneva Convention will apply to the Taliban detainees, but not to the al Qaeda international terrorists.")

cal pain that is equivalent in intensity to the pain of organ failure, impairment of bodily function, or death.[30]

3. This lack of moral leadership has, undoubtedly, been one of the principal causes of the inhumane and degrading mistreatment of prisoners at the Abu Ghraib and other American-run prisons in Iraq, Afghanistan, and elsewhere.[31]
4. We have turned over suspected terrorists to countries known to our State Department to subject such detainees to torture,[32] in violation of our obligations under the Convention Against Torture.[33]

As we have in the past, we have again turned to the federal courts to check the excesses of the Executive branch. Will the courts again fail to fulfill their constitutional obligation, as they did in *Korematsu*? Although the final chapter in the judiciary's response to the government's excesses in its conduct of the war on terrorism has yet to be written, the Supreme Court did address some of the issues in its last term, with mixed results.

The most important case was *Hamdi v. Rumsfeld*,[34] which involved an American citizen who was captured in Afghanistan during military operations and who allegedly was an "enemy combatant."[35] The government asserted that it had the right to detain Hamdi indefinitely, in a military prison on United States soil, without any charges being filed, without the assistance of counsel, and without the right of access to an impartial tribunal.[36] The Supreme Court first held that the President does have the authority to detain American citizens who are, in fact, "enemy combatants," because such detention has been authorized by an act of Congress—in this case the Authorization for the Use of Military Force, adopted by the Congress shortly after the 9/11 attack.[37] The Supreme Court, however, went on to hold that if such a prisoner disputes, as did Hamdi, that he is an enemy combatant, "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[38] In other words, a citizen-detainee

30. *See* Memorandum from the U.S. Department of Justice Office of the Legal Counsel for Alberto R. Gonzales, Counsel to the President, at 1-2 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (last visited Jan. 22, 2005) (on file with Law & Contemporary Problems).

31. On the prisoner mistreatment at Abu Ghraib, see SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

32. *See* David E. Kaplan et al., *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After al Qaeda*, U.S. NEWS & WORLD REP., June 2, 2003, at 18, 27; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

33. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85.

34. 124 S. Ct. 2633 (2004).

35. *Id.* at 2635.

36. *Id.* at 2636.

37. *Id.* at 2639-43.

38. *Id.* at 2648.

is entitled to minimal due process—notice and an opportunity for a hearing—before he can be deprived of his liberty.

In reaching that conclusion, Justice O'Connor, speaking for a plurality of the Court, made some noteworthy and pointed comments—the kind of comments that were spoken only in dissent and went unheeded in *Korematsu.* In her opinion, Justice O'Connor said the following: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[39] She then quoted from an opinion written by Chief Justice Warren thirty-seven years earlier: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which make [sic] the defense of the Nation worthwhile."[40] And, in marshaling the arguments in support of her conclusion, Justice O'Connor also quoted from Justice Murphy's dissent in *Korematsu*: "[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled."[41] Finally, Justice O'Connor pointedly noted the following: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[42]

In a companion case, *Rasul v. Bush*,[43] a number of foreign nationals who were being held as prisoners at the Guantanamo Bay Naval Base, in Cuba, sought to challenge the legality of their detention. The lower courts had thrown out the lawsuit on the ground that because the petitioners were being held in a prison over which the United States did not exercise sovereignty, the federal courts had no jurisdiction to entertain their petitions for habeas corpus.[44] The Supreme Court, however, reversed, holding that the federal courts could hear the case because the Guantanamo Bay Navy Base was an area over which the United States exercises exclusive jurisdiction and control.[45] The case was returned to the district court to be heard on the merits. It is interesting to note also what has happened in the case, or, more accurately, what has not happened, since the Supreme Court rendered its decision on June 28, 2004. In an editorial on the ruling four months later, the *Los Angeles Times* noted that the Bush Administration was stonewalling the *Guantanamo* decision, marshaling one excuse after another for not complying with the Supreme Court's directive. The *L.A. Times* noted that "[a]s the administration continues to stonewall

39. *Id.*

40. *Id.* (quoting United States v. Robel, 389 U.S. 258, 264 (1967)).

41. *Id.* at 2650 (quoting Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting)).

42. *Id.*

43. 124 S. Ct. 2686 (2004).

44. *See* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

45. *See Rasul*, 124 S. Ct. at 2696-98.

judges doing what the founding fathers intended—ensuring that the president doesn't overstep his authority—it is not a stretch to say that Americans are witnessing the makings of a constitutional crisis."[46]

All in all, these cases, even in their tentativeness, still amount to a stinging rebuke of the Administration's stated policy of denying *all* legal rights to American citizens being held in indefinite detention, based solely on the military's designation of a citizen as an enemy combatant. They are also a firm rejection of the Administration's companion policy that suspected Taliban detainees being held at the Guantanamo Bay Naval Base can likewise be denied of *all* legal rights, including the right to an impartial hearing to determine whether the detainee is, in fact, an enemy combatant. These and other court cases, like the war on terror itself, are far from over—we will have to await future developments to learn how broadly or how narrowly the Constitution's protection will be available, even to American citizens in the context of the war on terrorism.

In closing, let me paraphrase from a book review I wrote for the *Michigan Law Review*[47]of Professor Muller's book, *Free to Die for Their Country*,[48] The federal courtroom is the stage upon which both the majesty of the Constitution and the failures of the rule of law are vividly displayed. Today, the cast in the federal courtroom has changed from the cast some sixty years ago in San Francisco and Portland and Seattle in the curfew and internment cases, and from the cast in Boise and Cheyenne and Denver and Phoenix in the draft resister cases; but, like the stage itself, the scenarios remain familiar. In this post-9/11 world, many of the themes played out in the World War II internment cases are being played out again. As much as it was sixty years ago, it is again up to the federal courts to protect the Constitution and the people's rights under the Constitution. For if the courts fail, as *Korematsu* has taught us, there is nowhere else to turn.

46. *Guantanamo Stonewall*, L.A. TIMES, Oct. 30, 2004, at B24.

47. A. Wallace Tashima, *Patriotism: Do We Know It When We See It?*, 101 MICH. L. REV. 2007, 2014-15 (2003).

48. ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001).