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BEFORE THE DEPARTMENT OF STATE

PASSPORT OFFICE

In the Matter of the Appeal From the
Refusal of a Certificate of Identity
Masato Fukumoto, Appellant.

BRIEF ON APPEAL FROM CONSUL'S REFUSAL

TO ISSUE CERTIFICATE OF IDENTITY

Masato Fukumoto appeals from the denial by the American Consulate at Fukuoka, Japan, of his application for a Certificate of Identity.

Statement Of Facts

Mr. Fukumoto was born a U.S. citizen of Japanese parentage at Sherman Island, Antioch, California, on May 15, 1924. In 1938, his parents took him to Japan. In October, 1944, when he was a student and 20 years of age, he was ordered conscripted in the Japanese Army under the duress of the Japanese conscription statute which fixes corporeal punishment for a violation of its provisions. In an effort to avoid his conscription, appellant informed the Japanese military authorities at that time that he was an American citizen but was told that did not make any difference because he was also a Japanese citizen. Thereafter, in a further effort to avoid conscription, appellant requested a postponement of his induction date but his request was rejected. His original letter requesting a postponement of induction is not

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obtainable because the official records concerning his military service and that of others kept at the village office were destroyed after the war. (The destruction of such records was a generalized policy of Japanese officialdom shortly after Japan's defeat and surrender.) The village official who was in charge of those records is deceased. The best available evidence of the fact that appellant made such a request is a letter written by Akira Yokoyama of Tokyo, Japan, who had his physical examination at the same time as appellant, and who states that appellant submitted an application for extension of conscription through the village official at the time of his physical examination to the Minister of the Army and that it was rejected by the Army Conscription Officer. The original of Mr. Yokoyama's letter, addressed to the American Consulate, was submitted by appellant to that Consulate in support of his passport application and is a part of the record in this case.

Appellant Has Established His Good Faith And Has Shown A Substantial Basis For The Issuance Of A Certificate Of Identity

The Immigration and Nationality Act, Title 8 U.S.C.A. Sec. 1503, provides that upon proof to the satisfaction of a diplomatic or consular officer that an application for a certificate of identity is made in good faith and has a substantial basis he shall issue to such person a certificate of identity. A certificate does not issue automatically on the filing a claim therefor, but, under the statute, when it is supported by a showing of good faith and a substantial basis therefor the certificate should issue so that, in due course, a court of proper jurisdiction may determine the cause.

Mr. Fukumoto's conduct and statements from the time of the order for his conscription to his induction under the Japanese conscription law demonstrates that he responded to the duress

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of the conscription law, that he protested his conscription and that he was inducted against his will. The choice of a so-called "dual national" of obeying the orders of the wartime Japanese military authorities who disregarded his statement that he was an American citizen and who told him he was, nevertheless, a Japanese citizen and subject to the compulsion of conscription, and who rejected his request for a postponement, or the choice of violating the orders of the ruthless Japanese military authorities, was no choice at all. Final obedience was the direct result of the coercion of the Japanese military authorities who were known to mete out punishment of their own on recalcitrant draftees and, in addition thereto, there were the statutory penalties also attaching to a violation of the Japanese draft laws.

In the case of Acheson v. Maenza, 202 F. 2d 453 (D.C. Cir. 1953), (which involved a peacetime foreign conscription) the court pointed out that Congress could not have intended that American citizenship would be wholly at the mercy of the military authorities of whatever foreign state chose to impress them into their armed forces. (That Court's view that "Congress cannot have intended to permit almost every foreign serviceman to escape the impact of the statute" apparently could relate only to service that was purely voluntary and even on such a point its decision is not conclusive for the Supreme Court yet must decide the question whether Congress can prescribe expatriation (involving loss of a constitutional status) as a penalty for the violation of statutory law which we doubt it is empowered to do and contend exceeds its lawful jurisdiction. Further, despite that Court's dicta the question whether foreign military service under a foreign peacetime conscription law, which imposes penalties for a violation, to which the conscriptee responds, can be said, nevertheless, to be voluntary service also is a question which

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finally must be decided by the Supreme Court for like reasons. We contend herein that duress necessarily exists where a conscriptee obeys a draft law which is enforceable by penalties especially where a foreign wartime conscription law is involved.)

The Board of Review of the Passport Office, Department of State, denied the issuance of a passport to appellant on July 17, 1956. The Board made reference in its denial letter to the decision in the case of Acheson v. Maenza, supra, which declared that there must be a consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom. However, we assert that the Board of Review disregarded the circumstances in the case of appellant and failed to draw the reasonable inferences therefrom. It quoted as its authority for upholding the denial of a passport in this cause the court's opinion dicta in that case which, however, has no relevancy to the case of appellant, and which, by that court's own dicta is not the decisive factor in the resolution of the question of citizenship in appellant's type of case.

The same court which decided the Maenza case, supra, later rendered its opinion in the case of Alata v. Dulles, 221 F. 2d 52 (D.C. Cir. 1955), where it stated that the rule is strong that factual doubts are resolved in favor of citizenship and that such a rule was clear from its decision in the Maenza case. Again the Court emphasized that although in the Maenza case it had said that induction into a foreign army under a conscription law is alone insufficient to establish involunteriness..."But we also said 'there must must be consideration of the circumstance attending the service in the foreign army, and the reasonable inferences to be drawn therefrom'".

American citizenship is not to be lightly taken away (if it can be taken away at all, which we contend cannot be done) and

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when the evidence, with its reasonable inferences, creates substantial doubt of the voluntariness of conduct said to have brought about expatriation, the resolution of such doubt in favor of the claimant to citizenship sustains his burden of involuntariness and his act does not expatriate him. Alata v. Dulles, 221 F. 2d 52 (D.C. Cir. 1955).

In Alata v. Dulles, supra, page 54, the court pointed out that although proof of the involuntary nature of the act of alleged expatriation is upon the one who has performed it, the rule is strong that factual doubts are resolved in favor of citizenship and that this rule is clear from its decision in Acheson v. Maenza, supra, and is supported by the great weight of authority, citing Dos Reis ex rel. Camara v. Nicholls, 161 Fed. 2d 860; Mandoli v. Acheson, 344 U.S. 133, 73 S.Ct. 135.

The Facts Demonstrate Appellant's Conscription Was Caused Solely By Duress

Even though the Board of Review entertained a belief that a so-called "dual national" in wartime Japan who, in obedience to a summons issued under Japanese draft laws, reports to the draft authorities and there is conscripted into the Japanese army, nevertheless, might have been voluntarily conscripted we wish to point out that such a thing is quite impossible. Obedience to the Japanese wartime draft law which imposed criminal penalties for a violation of its provisions caused the appellant to appear at a set time and place for conscription purposes. That fact alone conclusively establishes that he responded only under duress. It could be only in case a person appeared, without first being summoned by public authority, and volunteered for service, that would constitute a voluntary act. Mere appearance, pursuant to summons issuing under a draft law, non-compliance with which subjects a person to the criminal penalties of the draft laws, is caused by statutory duress and could not even contain an ele-

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ment of voluntariness. Add to this a rejection of appellant's contention made to the military conscription officer that he was a U.S. citizen and hence not conscriptable is an additional factor proving appellant acted under actual duress. Add also the additional fact that appellant strove to defer his conscription and thereby demonstrated resistance to his conscription as far as he dared or could be expected to dare under the circumstances demonstrates he was conscripted by duress. Had he attempted anything further he would have been subjected to brutal treatment by the military authorities (in his own words, any further protest would have been "suicidal") and also he would have been punishable by civil authorities for violation of the draft law. It must be remembered, too, that appellant was alone and isolated and was in the heart of enemy country in wartime Japan and was surrounded by the enemy. He had no choice except to obey and that choice was not a free choice but was a coerced one for which he cannot be held responsible. It cannot be deemed to be a voluntary act causing expatriation.

In consequence, we submit that appellant has made his application for a certificate of identity in good faith and has demonstrated a substantial basis therefor.

The Myth of Dual Citizenship

We contend that a native-born citizen of the U.S. in law and in fact cannot possess any foreign citizenship and cannot in anywise be a dual citizen (of two countries). We contend that dual citizenship (as to a native-born and also as to a naturalized citizen) is a mere fiction. The concept of such an inconsistent and impossible dual status is a figment of the imagination for which Congress, the State Department and also our courts have been responsible. The very ambiguity of the term and hazy notions arising therefrom have accounted for the predicament of

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countless persons. Our Government owed a duty and still owes a duty to our native-born and naturalized to clarify their citizenship status by completely repudiating the concept and status of dual nationality. In R.S. 1999, Title 8 U.S.C.A. Section 800 (U.S.C. 1940 ed.; Act of July 27, 1868, c. 249 Secs. 1, 15 Stat. 223) which has never been repealed, Congress expressly disavowed the claims of foreign government to the allegiance of emigrants to this country who have expatriated themselves from foreign lands and governments and has expressly disavowed the claims of foreign governments to the allegiance of the native-born descendants of emigrants to our shores, in the following language:

> "...and whereas in recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

By that congressional disavowal any and all claims foreign governments might make to the allegiance and citizenship of our native-born citizens and also of our naturalized ones are completely repudiated as being "inconsistent with the fundamental principles of the Republic". As a matter of law, therefore, no resident or non-resident American citizen has and none can owe any allegiance to a foreign power and none holds and none can hold foreign citizenship or the fictitious status of a dual citizen. A dual political status of such a nature is contrary to sovereignty itself.

Nevertheless, despite the impossibility of a U.S. citizen possessing a foreign nationality at the same time, the State Department as a division of the executive branch of government

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and also our courts have been responsible for treating a number of our citizens as though they possessed dual citizenship. Pursuant to such a notion and contrary to our fundamental law, they have acquiesced in foreign governments treating our own citizens abroad as their citizens and then utilized the concept of dual citizenship to deprive many of our own citizens not only of their legal citizenship rights but of their constitutional status of citizens as well simply by the usurpation of a power they unwittingly or wantonly have exercised. It is time for our Government to call halt to this arbitrary exercise of extra-constitutional power.

Government Policy Is Responsible For Service In Foreign Armies Of "Dual Nationals"

The State Department and our courts have led our so-called "dual nationals' into a belief that they actually possess dual nationality and that, in consequence, while abroad in foreign countries they, by reason of the jus sanguinis concepts of those countries where they are deemed to be citizens or, to put it in more exact terms, are deemed to be entitled to exercise rights equivalent to citizenship while on such foreign soil and have corresponding obligations and are bound to render duties and give allegiance to such countries or governments, may or must comply therewith without compunction. It was and is the duty of our State Department to call halt to such actions on the part of foreign governments. Instead of so doing, however, it has acquiesced in this mistreatment of our own citizens while they have been abroad. In failing to give such of our citizens the protection abroad to which they are entitled it has violated our fundamental law and, in so doing, has recognized, impliedly authorized and has ratified the actions of the foreign governments in impressing U. S. citizens into their armed forces and con-

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sented thereto. Therefore our Government itself has been responsible for placing our citizens in such predicaments and in countenancing the actions of foreign governments in impressing them into their military forces and so cannot hold them responsible for being impressed into such service while abroad and, therefore, such actions cannot constitute acts of expatriation causing them a loss of U. S. citizenship and they cannot in anywise be punished for such actions. Because it is the Government that has placed them in such predicament the U. S. Government has estopped itself from asserting that the appellant expatriated himself by service in Japan's armed forces.

If the Government persists, however, in recognizing a dual citizenship status then it impliedly sanctions such a status and cannot hold a dual citizen responsible for obedience to foreign law while abroad and cannot treat any such obedience as constituting an act of expatriation and cannot penalize or otherwise punish him for compliance therewith.

The appellant's obedience to the compulsory draft law of Japan, forced upon him because of his purported "dual citizenship" status is a question that must be resolved finally by our courts.

Forfeiture of Citizenship By Legislative Act Is Unconstitutional

Congress has no jurisdiction to legislate a rule of evidence (adjective law) or any substantive law which has the effect of depriving citizens of the constitutional status of citizenship which is of greater dignity than a mere constitutional right. There is no presumption of a waiver of a fundamental constitutional right -- (Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 297; and Johnson v. Zerbst, 304 U.S. 458, 463) and so there cannot be a presumption of a waiver of a fundamental

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constitutional status which is a fundamental thing of greater dignity per se than a mere constitutional right or guaranty. The applicable rule of evidence necessary to justify the loss of a constitutional right is that the evidence of such a loss necessarily must be proved by "clear, unequivocal and convincing" evidence. Because a constitutional status is of greater dignity than a mere constitutional right, the rule of evidence relating to the loss of such a status (a substantive status upon the unimpairment of which the Constitution itself depends) necessarily, by its very nature, must require proof of the loss by "overwhelming evidence."

Legislation of Congress prescribing forfeiture of citizenship is outside its jurisdiction. Congress does not and cannot grant the status of citizenship to the native-born and cannot interfere with, limit or restrict its scope because citizenship is a status and is more basic and is of a constitutional dignity of more substance than the constitutional creation of the divisions of government because without a citizenry which exists a priori and is the foundation of the Constitution itself government loses its signification. The divisions of government themselves are artificially created and constitute nothing but agents for political purposes of citizens generally. It is because of this basic concept of citizenship that the framers of our Constitution intended that the expatriation of a citizen could occur only by the deliberate voluntary choice of a citizen coupled with intent to relinquish U. S. citizenship and that it could not be forced upon him as a forfeiture by any executive, legislative, or judicial fiat for a violation of statutory law.

The courts have recognized that expatriation can occur only by a voluntary choice on the part of a citizen. A citizen voluntarily may relinquish citizenship but Congress cannot take it away from him. However, Congress, in enacting the provisions

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of former Title 8 U.S.C., Sec. 801 (a) (c), corresponding provisions of the present Title 8, Sec. 801 (a) (3) and the conclusive presumption of subd. (b) thereof, sets up expatriation as a penalty for a voluntary violation of statutory law and, in so doing, has usurped power and has exceeded its proper legislative sphere. We contend that such enactments are void for being in excess of its constitutional jurisdiction. Congress may prescribe by legislation mere formalities by which a citizen, in compliance therewith, voluntarily may expatriate himself but it cannot deprive a native-born or naturalized citizen of his citizenship status by any forfeiture method whatever. We assert that the question of law whether this expatriation statute is constitutional is one of the questions involved in this case and that it should be resolved by the courts.

Appellant's Appearance To Draft Summons
And His Conscription Was Caused By Duress

We contend also that if a U. S. citizen acts under any form of oppression, mental or physical, however slight or however intense, ranging from mere undue influence to duress (covering the fields of undue influence, fraud, menace, mistake of fact or law, intimidation, coercion and duress), and including statutory duress (such as a Japanese draft regulation requiring a United States citizen in Japan to comply with a conscription act under any penalty whatsoever), such action cannot and does not constitute an act of expatriation causing loss of his U. S. citizenship because his obedience to such a law is caused solely by coercion or by coercion mixed with a degree of willingness. If the latter be the case the coercive element taints whatever degree of willingness might be suspected to have existed in the conscript's mind and, in consequence, whatever degree of willingness might be suspected of having existed at the time and even if

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admitted to have existed, it necessarily could be only an inseverable and imaginable factor of voluntariness. Because such voluntariness necessarily was tainted with the coercion of the summons to which he responded his conscription was the result of duress because of the taint and he could not expatriate himself thereby. This is true because, despite the intrusion of any real, imagined or incidental psychological element of willingness to be conscripted, the person responding to the summons acts only in obedience to the summons or otherwise would not be conscripted, except by physical force. The decisive cause of such conscription, therefore, is obedience to the summons which causes him to appear and his appearance and conscription could not be the product of anything but the duress.

In short, we contend that a U. S. citizen abroad who responds to the summons of a compulsory draft law in a foreign country and is conscripted responds under duress and such service does not constitute an act of expatriation. Such person is not responsible for his act. We contend also that a U. S. citizen abroad who, in the absence of a summons to serve in the military forces of a foreign country, appears of his own volition and enlists acts voluntarily but that such enlistment and service does not constitute an act of expatriation. In the latter instance although his act is voluntary yet it does not cause his expatriation because he does not thereby elect or intend to lose his U. S. citizenship and Congress cannot compel a forfeiture of his citizenship - only he can relinquish it - but he can be punished by us for committing such an act if Congress first has forbidden such act and has not either expressly or impliedly authorized it.

The issues whether obedience on appellant's part to the Japanese compulsory conscription laws, whether that obedience was induced solely by statutory duress, or by statutory duress coupled with the duress of the Japanese military conscription

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officer and whether or not there may have been a psychological element of willingness (voluntariness) in being drafted present solid issues of fact and of law which necessarily should be resolved finally by our courts.

Conclusion

Mr. Fukumoto's conscription against his will and in spite of his protest by the military authorities in Japan, who looked upon him as a Japanese citizen and so, under compulsion to serve, and at whose mercy he was, establish a substantial basis, and together with appellant's demonstration of good faith, meet the statutory requirements for the issuance of a certificate of identity to enable him to test in a judicial proceeding the issue of his citizenship.

Appellant requests that a certificate of identity issue to him with promptness, so that he, as a native-born citizen, may be secure in his right to test the issue of his citizenship, as provided under the Immigration and Nationality Act.

Dated: June 7, 1957

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