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BEFORE THE BOARD OF REVIEW OF THE PASSPORT OFFICE
OF THE STATE DEPARTMENT

In re: KIYOSHI MATSUURA,
Appellant.

APPEAL FROM CERTIFICATE OF LOSS OF UNITED STATES NATIONALITY, AND DENIAL OF CERTIFICATE OF IDENTITY, AND MOTIONS TO REOPEN AND RECONSIDER APPLICATION FOR UNITED STATES PASSPORT AND FOR ISSUANCE OF UNITED STATES PASSPORT

Kiyoshi Matsuura of 941-3, Kirinoki-cho, Hiroshima-shi, Japan, born in Seattle, Washington, on October 24, 1914, hereby appeals from the "Certificate Of The Loss Of The Nationality Of The United States" dated January 27, 1953, and the denial to him of a Certificate of Identity hereto made and from the denial of the issuance to him of a United States passport for which he had applied, which said things were based upon a purported expatriation under the provisions of Section 401(c) of Chapter IV of the Nationality Act of 1940 by reason of his induction into and service in the Japanese Army from April 4, 1939, to May 4, 1939, and June 7, 1939, to April 10, 1939, and from June 7, 1945, to September 17, 1945, and under Section 401(e) of said Act by reason of having voted in Japan in 1947.

Attached hereto and made a part hereof, as additional evidence to be considered in connection with this appeal and the said motions is the "Statement Of Kiyoshi Matsuura", the appellant, dated the 27th day of August, 1958.

We request that if any of the documents heretofore submitted as evidence on appellant's application for a United States passport or Certificate of Identity or the affidavit herewith submitted

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as evidence to be considered on this appeal and motion to reopen and reconsider appellant's application for a United States passport for any reason be deemed insufficient in form or in substance as to cause an unfavorable decision to be rendered thereon the appellant requests an opportunity to have such deficiency corrected.

The application to reopen the cause and for reconsideration of the cause on its merits, for cancellation of the aforesaid Certificate Of Loss Of Nationality and for the issuance to appellant of a United States passport as a citizen of the United States are made in view of the evidence heretofore and now submitted in this cause and also in the light of the applicable rules announced in the recent United States Supreme Court decisions of Perez v. Brownell, U. S., 78 S.Ct. 568, and Nishikawa v. Dulles, U. S., 78 S.Ct. 612, both decided on March 31, 1958, and also the rule announced by the Court of Appeals for the Third Circuit on April 11, 1958, in Jalbuena v. Dulles, 254 Fed. 2d 379, at 381, which rules we declare are applicable and controlling in the instant case.

By letter dated February 9, 1956, the American Vice-Consul at Kobe, Japan, notified the appellant that a Certificate of Identity (and, presumptively, a U. S. passport) was denied to him upon the following grounds: (1) that he had resided in Japan since 1916 when he was 2 years of age; (2) that he served in the Japanese Armed Forces; (3) that he voted in a Japanese election in 1947; (4) that he had no knowledge of the English language and (5) that he exhibited no interest in establishing his U. S. citizenship until March 15, 1950, and thereafter failed to complete a formal application for documentation as a citizen of the U. S. until January 26, 1953, when he was 39 years of age. We contend that neither the stated reasons nor any of them operated to deprive the appellant of his fundamental "status" of citizenship or

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of his "guaranty" of citizenship by the provisions of the Fourteenth Amendment and safeguarded to him by the "due process" clause of the Fifth Amendment of the Constitution. These issues are hereinafter argued under separate captions, viz.

I.

Like many Nisei the appellant was taken to Japan when he was a mere child for economic reasons. He was reared and educated there and, in course of time, had to remain there to provide for his aged mother. His father returned to Japan from the United States in 1941 and passed away in that year so the appellant who had reached his majority had no opportunity prior to the outbreak of war to return to the United States which was the land of his birth. He didn't anticipate the outbreak of war. Governments are not prone to advise the people of war intentions in advance and the Government of Japan didn't inform the populace of its intention to initiate war. The appellant was compelled by adversity to reside in Japan and after the onslaught of war was trapped and had to remain there. He was 26 years of age at the time and the death of his father and the duty to support his alien mother which devolved entirely upon him prevented him being able to return. The 1941 difficulties of procuring transportation likewise made it impossible for him to leave Japan. His long residence in Japan, however, has no relevancy to his right to a U. S. passport and cannot form the basis of a denial to him of that right which is inherent in the native born. His inability to leave Japan before the outbreak of war and his necessarily prolonged residence there cannot form the basis for a deprivation of his citizenship or of rights inherent therein. He cannot be so penalized for his poverty or for his inaction or failure to return to the United States, the causes for which are revealed in his affidavit of August 27, 1958. There was no law requiring a native-born citizen

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to yield a foreign residence and to return to the United States under pain of expatriation until Sec. 350 of the Immigration and Nationality Act of 1952 became effective. It is likely that those provisions ultimately will be vitiated by judicial decision because of their repugnancy to the Constitution which nowhere authorizes Congress to divest the native-born of citizenship. The Supreme Court was hard put to uphold a loss of nationality in the Perez v. Brownell case where it stretched its imagination in finding a congressional source of power to lie in the "regulation of foreign affairs" to justify such a loss.

Because of the hardship imposed by the anti-oriental laws of certain States and the discrimination practiced against them by anti-oriental sentiment which restricted them in their occupations and limited them in their earnings many Issei parents were forced by difficult subsistence problems to send their native-born children to Japan to be reared. It was the usual practice for Issei fathers, when laboring under conditions of economic stress, to send their children and frequently their wives to relatives or friends in Japan where they could be maintained on the parents' or husband's earning. The joint earnings of the parents or the sole earnings of the husbands who remained here enabled the children sent abroad to be sustained for less money. It is a matter of common knowledge that the Issei preferred to send their children to Japan and frequently accompanied those children to Japan rather than have their children or themselves become recipients of public or private charity in the United States. Japanese families, by virtue of their training and traditions, solved their economic hardship problems by sending their children to relatives or friends in Japan and by so doing their earnings here could be stretched to support their children abroad. It was a commendable solution to an economic problem induced by the discrimination of which they were victims.

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The appellant's residence in Japan was not of his own choosing. He was taken there as a mere child and was reared and educated there. He had no chance of returning to the United States, saddled as he was when he came of age with the burden of caring for his alien mother who was inadmissible to the U. S. by reason of her oriental pedigree. Following the death of his alien father, who died in 1941 while on a visit to Japan, he was obliged to support his mother and had neither the funds nor the opportunity to return to the United States. However, whether or not a native-born citizen is taken abroad to the country of his ancestors or elsewhere for a long or short period of time and whether the residence there was caused by a parent or parents and whether it was continued by reason of adversity or choice, after he attained his majority of 21 years of age in nowise deprives him of his fundamental status of U. S. citizenship or of his constitutional guaranty of that status. Such things bear no relevancy whatever to that status or to that guaranty and cannot be construed to destroy either that status or that guaranty or any right inherent therein or arising therefrom. The limit to which Congress has gone is the creation of a disputable presumption of expatriation under Sec. 402 of the Nationality Act of 1940 and the validity of that presumption is at least doubtful. Likewise, the provisions of Sec. 350 of the Immigration and Nationality Act of 1952 divesting dual nationals of citizenship under certain conditions is of doubtful validity. Neither of these provisions is material to the issues herein.

II.

The appellant was first conscripted into the Japanese Army and was compelled to serve therein from April 1, 1939, to May 4, 1939, and from June 7, 1939, to April 10, 1939, and again was conscripted and forced to serve from June 7, 1945, to September 17,

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1945. The 1939 service took place during peacetime and before the enactment of the Nationality Act of 1940. The 1945 service took place during wartime. Neither the 1939 nor the 1945 service was voluntary. Conscription was compulsory for "dual nationals". The so-called "dual nationals" in Japan were subject to such military training and duty and were required to submit thereto under threat of punishment for a violation of the law.

The United States recognized that our own citizens who, by the law of Japan, were deemed also to be nationals of Japan were subject to the draft laws of Japan while in Japan. Our own Government was responsible for allowing Japan to impress our own citizens into its armed forces by recognizing the absurd status of "dual nationality" and by adopting the view that our citizens in Japan who were deemed to possess dual nationality must obey the laws of Japan while on Japanese soil. Our Government, through diplomatic channels ought to have informed the Japanese Government, that our citizens had a single nationality and allegiance only to the United States and to inform it that it must not impress our citizens into its armed forces, but it failed to do so. Also it ought to have notified our own citizens contemplating visits to Japan that they were not subject to being impressed into the Japanese armed forces and that our Consuls would intervene on their behalf to prevent their conscription, but it failed to do so. What is even worse, it shirked its own duty to our own citizens whose servant it is by leading our citizens to believe that because they were deemed "dual nationals" that they must comply with the laws of Japan while there and that included obedience to the Japanese conscription laws.

In substance and effect our Government, largely through recognition of the "dual citizenship" status by the State Department was responsible for the predicament in which our citizens found themselves abroad and, in effect, acquiesced in their being

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impressed into the armed forces of Japan. (See also: Abstract of Passport Laws and Precedents, Passport Division Office Instructions, Code No. 1.6, of May 19, 1941, specifying that a dual national who lives in the country claiming him as a national owes that country an allegiance which is paramount to his allegiance to the U. S.). The State Department, however, was not alone in its failure to protect our own citizens abroad and from being conscripted into foreign armies. The Congress was guilty of assuming "dual nationality" to be a legitimate political status. The Supreme Court, likewise, was guilty of recognizing the spurious status of dual nationality and of holding that those deemed to possess dual nationality must obey the laws of the foreign power while physically within the jurisdiction of the foreign power, as stated in Kawakita v. U. S., 343 U. S. 717, 72 S.Ct. 950 at 961. Thus it has occurred that our own Government (State Department, the Congress and the Supreme Court) not only tacitly but expressly recognized and gave a kind of illegitimate validity to the absurdity called "dual nationality" despite the fact that Congress, in R.S. 1999 (Title 8 USCA Sec. 800, 1940 ed.), Act of July 27, 1868, c. 249, Secs. 1, 15 Stat. 223) which never has been repealed, expressly disavowed the claims of foreign governments that our citizens are their subjects and disavowed their claims to the allegiance of emigrants to this country who have expatriated themselves from foreign lands and expressly repudiated the claims of foreign governments to the allegiance of the native-born descendants of emigrants to our shores.

The Continental Congress conferred upon Lafayette and his descendants United States citizenship and, so far as counsel knows, it is the only instance in which this country has conferred citizenship upon a particular person and his descendants. Rights of U. S. citizenship have been exercised by at least one descendant of Lafayette, who was a citizen of France and a "dual"

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citizen of the U. S.

The appellant's conscription into the Japanese Army and his service therein from June 7, 1945, to September 17, 1945, was not a voluntary matter. It was compulsory for him as a dual national to respond or face the consequence of imprisonment by the civil authorities and ultimate delivery over to the military authorities in wartime Japan for punishment. The authorities in Japan were notorious for their harsh dealing with those who dared voice a protest against conscription. Appellant "was concripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject", a matter of which the Supreme Court, as in Nishikawa V. Dulles 78 S.Ct. 612 at 617, takes judicial notice. The evidence herein discloses that the appellant attempted to evade conscription and to defer induction but it was useless. His fear of swift and sure punishment for a refusal to submit to induction compelled him to comply with the Japanese draft law hence it was excusable as an act of duress and did not expatriate him.

III.

If a U. S. citizen who possesses only the citizenship of the U. S. goes to a foreign country and there voluntarily participates in a political election of that foreign country he expatriates himself. See: Perez v. Brownell, 78 S.Ct. 568, so deciding under the provisions Sec. 401(e) of the Nationality Act of 1940. (The rule does not apply, however, if the voting is caused by duress.) The Perez decision finds justification in the fact that the statute penalyzing a citizen by depriving him of U. S. citizenship for voluntarily voting in a "foreign election of significance politically in the life of another country" lies within the power of Congress to enact because Congress is empowered to "regulate foreign affairs" and such voting by a citizen causes "embarrassment

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in the conduct of our foreign relations." However, no such embarrassment arises when a dual citizen votes in a foreign election for such voting cannot embroil this country in a dispute with the foreign country.

The rule here applicable is that if a U. S. citizen who possesses "dual" nationality goes to the country where he is deemed a national of that country and there exercises rights of nationality in that country he does not thereby renounce or lose his U. S. citizenship. See Jalbuena v. Dulles, 254 Fed. 2d. 379, at page 381, decided on April 11, 1958, and distinguishing the rule applicable to dual nationality cases from the rule applicable to persons of a single nationality. That decision states:

> "The United States recognizes that a person may properly be simultaneously a citizen of this country and of another. Neither status in itself or in its necessary implications is deemed inconsistent with the other.....The concept of dual citizenship recognizes that a person may have and exercise the rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other....."

Further we direct attention to the fact that the appellant's voting in Japan in 1947 was not in a "foreign election" within the purview of Sec. 401(e) of the Nationality Act of 1940 but took place when and while Japan was an Allied occupied country. In addition, his voting was caused by the persuasion and pressure of SCAP and the Allied military authorities and by the Hiroshima municipal authorities. He feared to disobey the injunction requirement to vote and believed he must comply with it to avoid being deprived of rations which then were essential to his survival.

IV.

There is no legal requirement that a native-born citizen must possess a knowledge of the English language. The fact that the

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appellant's knowledge of English may be somewhat rudimentary is to be attributed to adversity and lack of opportunity to learn it. Certainly it cannot be distorted into a legal reason to deprive him of his "status" of citizenship or to constitute a waiver of his "guaranty" of citizenship. A great many Americans are illiterate insofar as the English language is concerned. A great number of first generation American born citizens and their alien parents, of occidental as well as oriental extraction, have never learned English or troubled themselves very much about acquiring that knowledge. (Only aliens seeking to be naturalized, upon whom our naturalization laws operate, are required to learn a smattering of English in order to become recipients of what actually is nothing more than a "conditional" citizenship through the naturalization process. No such legal requirement is imposed on the native born. We appear to have the right to be born, to grow up and to die ignorant of our mother tongue English which, itself, is a foreign importation. Perhaps we should all be versed in one or more Indian tongues. It is not long since that no such requirement of knowledgeableness in English was imposed on those seeking naturalization, moral character, industry and attachment to our government being deemed to be of superior importance to mere literacy in English.) Further, a large number of our native born cannot qualify for fluency or versatility in English and the actual number of those in our midst who possess a comprehensive knowledge of English probably is limited to a very few. There are few William Shakespeares and few Noah Websters, if any, on earth today and the rest of us are run of the mill. Literacy, however, has no relevancy to the citizenship of the native born or to the rights which inhere in citizenship or spring therefrom. In consequence, we insist that appellant's lack of an adequate knowledge of the English language (by which the Vice Consul must have intended the American lingo), asserted in the Kobe Vice-Consul's

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letter of February 9, 1956, as one of the reasons for denying him a passport was wholly erroneous.

The appellant's asserted failure to exhibit an interest in establishing his U. S. citizenship until March 15, 1950, and thereafter failing to complete a formal application for documentation as a U. S. citizen which were additional reasons stated in that letter as grounds for denying him a U. S. passport have no relevancy whatever to his right to receive a U. S. passport. The various U. S. Consuls' denials to citizens' applications for passports on various reasonable and also unreasonable grounds put the brakes on the filing of applications for passports. The Consuls' requirements arbitrarily placed upon the applicants to produce documentary evidence which was either unobtainable or difficult to obtain by reason of the war and the ravaging of Japan and a reluctance on the part of some of the Consuls to attach credibility to the assertions of applicants convinced many citizens it was useless to apply. The Nishikawa case, along with others, brought some of these matters to light and has caused the consuls to revise their requirements.

The appellant's native-born citizenship is not only a fundamental "status", preexisting the Constitution itself, but is also a Constitutional "guaranty". There is not an iota of evidence in the record or obtainable which would demonstrate by "clear, convincing and unequivocal" evidence that he voluntarily relinquished his pre-existing political "status" or waived his constitutional "guaranty" of U. S. citizenship. We point out also that there was neither a legal nor a moral duty incumbent upon a native-born American citizen to exhibit an interest in establishing his citizenship to the satisfaction of an office of the Government or to complete a formal application for documentation as a U. S. citizen until and unless he can or may decide so to do, at least until Sec. 350 of the Immigration and Nationality Act of

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1952 became effective. He was free at least until then to do so when and as he pleased and his status was not dependent on State Department rules, whimsy or expediency. An inability or failure to obtain sufficient evidence of his citizenship to satisfy an agency's request up to 1952 does not destroy his status or rights. A citizen's failure to apply for and complete an application for such documentation within a specified time prior to 1952, whether due to his caprice or inability, does not and cannot constitute a valid ground, legal or moral, for the denial to him of his right to a passport. It is doubtful if such duties can be cast upon citizens since the 1952 Act because of constitutional reasons. The appellant's failure to apply for such documentation and to complete his application therefor were dependent upon circumstances over which the appellant had no real control, as adequately explained in his affidavit of August 27, 1958.

V.

There never was a legal or moral right lodged in the State Department and its agents to deny a claimant to citizenship the right to return to the United States to establish that citizenship. If the State Department doubted a claimant's status it speedily should have paved the way for him to return to appear before a competent judicial tribunal to test the issue inasmuch as it is not within its province to decide judicial questions. The executive practice of denying the citizenship status and the constitutional guaranty of that status to claimants and the resultant blocking of them from returning because of conscription into the Japanese forces until the Supreme Court decided the Nishikawa case was a gross violation of law. The State Department in fact not only usurped judicial functions but also arbitrarily suspended the Constitution as to these unfortunate citizens and thereby not only violated the Constitution but irreparably injured those citizens.

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The enforcement of a Department's policy which was contrary to law was, in essence and substance, a form of criminality for which, unfortunately, the Government goes unpunished and the victimized citizens whose servant the Government is have no recourse. No monetary damages are awarded the injured citizens and as there does not exist any conceivable remedy for lost rights the loss of personal rights of such citizens is an irreparable loss. Had Congress enacted a law compensating citizens for governmental violation of their rights, which it long ago should have enacted, governmental agencies would shy away from abridging the rights of citizens and resolve all legal doubts in favor of claimants to citizenship and in cases of serious doubts let the judicial tribunals determine whether a citizen's status or rights had been lost or waived.

Conclusion

In the Perez case the Supreme Court decided that "Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily", citing Mackenzie v. Hara, 239 U.S. 299, 311-312.

In the Perez decision the Supreme Court declared:

> "Whatever divergence of view there may be as to what conduct may, consistent with the Constitution, be said to result in loss of nationality, cf. Perez v. Brownell, 78 S.Ct. 568, it is settled that no conduct results in expatriation unless the conduct is engaged in voluntarily. Mandoli v. Acheson, 344 U.S. 133, 73 S.Ct. 135, 97 L.Ed.

In the Nishikawa decision the Supreme Court decided that in all expatriation cases under all the subsections of Section 401 of the Nationality Act of 1940 the burden of proof rests upon the government to prove expatriation by "clear, convincing and unequivocal" evidence, in the following language:

> "In Gonzales v. Landon, 350, U.S. 920, 76 S.Ct. 210,100 L.Ed. 806, we held the rule as to burden of proof in denaturalization cases applied to expatriation cases under Section 401(j) of the Nationality Act of 1940. We now conclude that the same rule should govern cases under all the subsections of Section 401." (Italics supplied.)

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The evidence discloses the facts to be that the appellant's induction into the Japanese Army and his service therein took place in wartime Japan while and when circumstances prevented him from returning to the United States. He was powerless to prevent his conscription because of the coercion of the Japanese civil and military conscription laws and the Japanese authorities. His fears that if he disobeyed or resisted further that he would be severely punished by the authorities and also would face being imprisoned by the civil authorities or punished by the military authorities were well founded fears. His submission thereto was the direct and proximate result of duress and his fear of punishment and, in consequence, his submission thereto as a matter of law and as a matter of fact did not constitute an act of expatriation under Section 401(c) of the Nationality Act of 1940.

We submit, also, that the appellant's voting in Japan in 1947 was not voting in a "foreign election" within the meaning of Sec. 401(e) of the Nationality Act of 1940 but took place while Japan was an occupied country. Further that voting was caused by the persuasion and pressure of SCAP and the Allied military authorities and the municipal authorities in Hiroshima and he feared penalties would be invoked against him if he didn't participate and also that a failure to vote would result in loss of rations which then were essential to sustain his life. In consequence, his voting also was involuntary and the product of duress and did not constitute an act of expatriation on his part.

We submit that the evidence is conclusive that the appellant's induction into the Japanese Army and his service therein and his voting in 1947 were wholly involuntary and did not as a matter of law or as a matter of fact constitute expatriating acts on his part and that appellant's cause should be reviewed in the light of the Perez, Nishikawa and Jalbuena decisions, supra, and be decided in his favor.

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Wherefore, appellant requests that his motions to reopen the cause and for reconsideration thereof be granted and that his appeal be sustained and that a United States passport issue to him.

Dated: October 3, 1958.

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