

soldiers had visited even the smallest Japanese hamlets in order to encourage participation, going so far as to intimate that people living in areas with a low voter turn-out would have their food rations cut. (A few judges concluded that in the immediate postwar years, Japan was not even a foreign state, within the meaning of the Nationality Act, but rather a United States mandate governed by American proconsuls.⁷⁴)

Several courts held that accepting employment in Japan was not an expatriating deed unless the government required absolute allegiance from the employee; others reasoned that individuals who sought employment in order to survive economically were acting under duress. Courts also heard many cases involving Nisei who had served in the Japanese military,⁷⁵ and as illustrated by a 1952 Supreme Court case, *Acheson v. Okimura*, they usually concluded that this participation had also been involuntary.⁷⁶

Okimura Kiyokuro was born in Hawaii in 1921, and when he was thirteen, his parents sent him to Japan to be educated. In June of 1942, Japanese authorities ordered him to report for an army physical, and, as he later explained, he complied lest he be imprisoned or even killed by the military police. He subsequently sought an exemption from service on the ground that he was a United States citizen, but his request was denied.

In 1943, Okimura was inducted into the Japanese army, and served in China for two years until he was captured. Upon his release, he returned to Japan, and in 1948, applied for an American passport. His bid was unsuccessful because, he was told, by serving in the Japanese army, he had forfeited his American citizenship.

When the Supreme Court eventually heard Okimura's suit, it held that he was entitled to the restoration of his citizenship. Justice William O. Douglas, who wrote the opinion, concluded that the young man's service in the Japanese army had been compulsory, rather than voluntary, since the record clearly demonstrated that any draftee who resisted induction was subject to persecution by the military police.

Not every Nisei who had served in the Japanese military was able to regain his citizenship, however. Kawakita Tomoya was one who could not, although his bizarre case bears little resemblance to others involving strandedees--not only because he was among the few found guilty of willful disloyalty, but also because while most Japanese-Americans attempted to convince government officials that they had *not* expatriated themselves, Kawakita strenuously tried to convince them that he had.

In 1939, shortly before his eighteenth birthday, Kawakita moved from California to Japan, and in 1941 he entered Meiji University. Upon graduation he placed his name in the family register, and then served until the end of the war as an English interpreter for the Oeyama Nickel Industry Company, where American POWs were forced to work in the mines and factory.

In 1945 Kawakita secured an American passport and returned to California, where he established a business. In September, 1947, while he was shopping in a Los Angeles department store, he was spotted by an American sergeant who immediately recognized Kawakita as the English interpreter who, two years earlier, had brutally abused him and his fellow POWs at the Oeyama Mine. The sergeant tracked down Kawakita's home address, and then reported him to the FBI.⁷⁷

Kawakita was eventually charged with treason. He denied having mistreated the POWs, but based his defense primarily on the claim that at the time of his alleged misdeeds he had repudiated his American citizenship, and thus as an alien was incapable of committing treason against the United States. He cited a number of specific deeds that, he maintained, were grounds for expatriation under the Nationality Act of 1940: He had entered his name in the family register, thereby affirming his allegiance to Japan; he had moved from California to Japan; traveled to China on a Japanese passport during wartime; and avowed his fidelity to the emperor of Japan.

Finally, Kawakita contended that the acts cited in the 1940 Nationality Act were not exhaustive, since according to international law everyone possesses the inherent right to transfer their national allegiance. His whole course of conduct, once he had graduated from Meiji University, was proof that he had exercised that right.

These arguments failed to persuade the Supreme Court, which concluded that the jury had acted justifiably when it convicted Kawakita of treason and sentenced him to death.⁷⁸ Justice William O. Douglas, speaking for a four-man majority, found abundant evidence that the appellant had engaged in "a long, persistent and continuous course of conduct directed against the American prisoners and going beyond any conceivable duty of an interpreter."⁷⁹ Nor was there any evidence to suggest that his actions were the result of coercion.

Kawakita's mistreatment of American POWs would constitute treason, however, only if he remained a citizen of the United States at the same time he aided its wartime enemy. His citizenship status, in turn, depended upon whether his actions during World War II were sufficient to effect expatriation under the Nationality Act of 1940.

Kawakita had claimed that entering one's name in a Koseki, or family register, constituted an expatriating act. Justice Douglas rejected that argument because, he reasoned, all Japanese are registered in a Koseki, which simply lists each person's vital statistics. The Japanese attorney general, moreover, had testified that an individual's registration could as easily be interpreted as an affirmation of an existing allegiance as a declaration of a new one.⁸⁰

While Kawakita insisted that his whole course of conduct in Japan evidenced his transferred loyalties, Justice Douglas pointed out that after the

war ended he had taken an oath of allegiance to the United States in order to receive an American passport. At any rate, whether or not Kawakita had engaged in expatriating acts was properly a question for the jury, which found that he had not intended to renounce his U.S. citizenship.

Justice Douglas explained that even American citizens who live abroad owe allegiance to the United States; otherwise, theirs would be a "fair weather" citizenship, retained for its benefits and discarded whenever they wanted to play "the part of the traitor."⁸¹ Since Kawakita continued to owe fealty to the United States, then, he was capable of committing treason against it--despite the fact, Justice Douglas conceded, that as a resident of Japan he nevertheless owed that country his chief allegiance.

Kawakita Tomoya is one of the few individuals in United States history to be successfully prosecuted for treason, and three members of the Supreme Court believed his conviction on this charge represented a miscarriage of justice.⁸² Whether the dissenting justices are right or wrong, the case underscores the difficulties facing dual nationals, whose divided loyalties and conflicting responsibilities frequently place both themselves and their affiliated states in problematic situations.

Six years after *Kawakita v. United States*, the Supreme Court decided *Nishikawa v. Dulles*,⁸³ its third case involving strandeds. Although the High Court had never permitted the government to denaturalize individuals without satisfying some burden of proof that their expatriating actions had been voluntarily undertaken, *Nishikawa* went beyond *Okimura v. United States* and most related lower court rulings by imposing a new and "onerous" standard that made this burden increasingly difficult to satisfy.

Nishikawa Mitsugi was born in the United States in 1916, at which time his father entered his name in the family register in Japan. When he was 23, Nishikawa went to Japan with the intention of remaining a few years to visit and study. Two years after his arrival, however, he was inducted into the Japanese army, in which he served from 1941 until 1945. At no time did he either protest his induction or tell any American or Japanese official that he was a United States citizen. He was, however, severely beaten by Japanese soldiers when he expressed his conviction that the United States would win the war.

After the war, when Nishikawa attempted to procure a passport to return to the United States, he learned that his service in the Japanese military had cost him his citizenship. He was penalized, as Kawakita Tomoya earlier had been, despite the doctrine in international law known as "primary allegiance," which holds that although dual nationals are obligated to discharge their responsibilities to both states of citizenship, if these responsibilities conflict, they must give preference to the ones imposed by their state of residence.⁸⁴

Nishikawa brought suit in a United States district court in an effort to regain his citizenship. He claimed that he had served in the military out of fear that if he failed to do so, the dreaded Kempi Tai, or Japanese Secret Police, would attack him. Moreover, he testified, he *had* sought assistance from his friend who worked at the American embassy, but was told that the consulate could not help him since he was a dual national. For its part, the government pointed out that Nishikawa had departed for Japan at a time when he was subject to conscription in the United States.

Although Nishikawa's testimony failed to convince two lower tribunals, which concluded that his military service had been voluntary, the Supreme Court reversed their judgments and remanded the case.⁸⁵ Chief Justice Earl Warren, speaking for the majority, held that the government cannot retract anyone's citizenship without first establishing that their expatriating actions had been voluntarily undertaken.

Nishikawa's claim of duress had merit, the Chief Justice pointed out, because he was a dual national and thus subject to conflicting laws: As a national of Japan he was obligated to serve it militarily, and faced penal sanctions if he refused; as an American, however, he was subject to the Nationality Act of 1940, which provided for the expatriation of anyone who served in an enemy's armed forces.

Whenever individuals have been stripped of their citizenship for acts which they claim were performed under duress, Chief Justice Warren continued, the Court suspends the general assumption, "dictated by common experience," that they have acted on their own free will.⁸⁶ Instead, it will require the government to establish the voluntariness of the expatriating act not only by "clear and unequivocal evidence," the standard used to date, but by "convincing" evidence as well.⁸⁷ The Court remanded the case in order to provide the government with an opportunity to satisfy this demanding new standard, and in the meanwhile restored Nishikawa's citizenship.

CONCLUSION

In the years immediately following the Second World War, the United States government retracted citizenship from many people who, like Nishikawa Mitsugi, claimed their expatriating actions had been involuntarily undertaken. During the McCarthy era, the government went further, sometimes succeeding in denaturalizing people solely because of their political beliefs.⁸⁸ Eventually the Supreme Court intervened, prompted by the realization that without judicially-imposed restraints, the political branches could continue snatching citizenship from people on increasingly untenable grounds. By now the Court was dominated by justices, moreover, who had come to regard denaturalization as a grievous and perhaps even

unconstitutional penalty, if not "the total destruction of the individual's status in organized society"⁸⁹ that Chief Justice Earl Warren later described it.

The Court's mounting intolerance for unilateral denaturalization was illustrated first in *Nishikawa v. Dulles*, in which it imposed stringent burden of proof standards on the government, and then in a series of subsequent cases where it rendered even *Nishikawa* essentially irrelevant by prohibiting Congress from terminating anyone's citizenship against their will. The Court noted in a 1967 case, *Afroyim v. Rusk*, that a citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship,"⁹⁰ and accordingly in a later case it emphasized that it would not assume individuals had forfeited their constitutional right unless they had manifested a clear and intelligent intent to do so.⁹¹ Events, then, had come full circle: Whereas until 1868 only the government could rupture the ties that bound individuals to their community, by 1967 the Supreme Court held that individuals alone could sever these bonds.

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