May 25, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M C P

The Department of State made a determination on August 12, 1987 that M C P expatriated himself on October 17, 1984 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Panama upon his own application. 1/ P filed a timely appeal from that determination.

For the reasons given below, it is our conclusion that appellant voluntarily acquired the citizenship of Panama, but that it was *not* his intention to relinquish his United States nationality. Accordingly, the Department's holding of loss of his nationality will be reversed.

I

Appellant acquired United States nationality by virtue of his birth at [redacted] Nebraska on [redacted] He was educated in the United States, and received a law degree from the University of Nebraska in 1967. He is married to a United States ctizen. They have two children. In 1970 appellant and his wife moved to Panama. Early in 1971 he became a member of the Canal Zone Bar Association, a small group of lawyers licensed to practice before the United States District Court for the District of the Canal Zone, and began the practice of law as a sole practitioner. According to appellant, a majority of his clients were United States citizens residing in the Canal Zone. The record shows that he developed a substantial practice and played an active and prominent part in the affairs of the civilian and military communities of the Canal Zone.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application,...

Pub. L. 99-653, 100 Stat. 3655 (1986), amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

The Panama Canal Treaty ("Treaty") entered into force on October 1, 1979. On that date, United States territorial and legal jurisdiction in the Canal Zone was terminated and the Canal Zone ceased to exist. The Treaty prescribed a 30-month transition period, however, from October 1, 1979 to April 1, 1982 during which the United States District Court for the District of the Canal Zone continued to function to dispose of pending cases. Business and professional people in the Canal Zone were allowed 30 months to regularize their status under Panamanian law if they wished to continue to work in that country.

In order to regularize his status, appellant was required to obtain a certificate of eligibility from the Panama Supreme Court. To receive such a certificate, one must, in addition to meeting other criteria, be a citizen of Panama. Applicants for naturalization in Panama must have resided in the country for five years. Appellant could not, he asserts, regularize his professional status before expiry of the transition period because he could not satisfy the requirement for naturalization that he have resided in Panama for five years. According to appellant, the Panamanian authorities denied his request that his long residence in the Canal Zone be deemed to satisfy the residence requirement. Furthermore, appellant allegedly was "very reluctant" to become naturalized in Panama, and "hoped some other remedy would arise."

After April 1, 1982, appellant continued to represent clients. He states that he formed two unsuccessful partnerships with Panamanian attorneys in the hope that "they would provide me with a form of security blanket in case I was accused of practicing law without a license."

Around June 1982, appellant began consulting the Consul General of the United States Embassy at Panama about his situation. Reportedly on the recommendation of the Consul General, appellant wrote to the Department (he addressed his letter to the "Director of Passports Office") on July 1, 1982, to request "any general guidelines which are utilized in cases such as this." Appellant's letter read in pertinent part as follows:

> After eleven years of practicing law in the old Canal Zone, the Carter-Torrijos Treaty has put me in a position where I must become a Panamanian citizen in order to continue my profession.
>
> I am facing a dilema [sic] which hopefully will not result in the loss

> of my U.S. citizenship. My fact situation is as follows:
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> 1. My wife and I arrived in Panama on May 20, 1970. We have resided here since this time, and for over 11 years I practiced law in the old Canal Zone.
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> 2. The Carter-Torrijos Treaty eliminated all criminal and civil jurisdiction of U.S. Courts in Panama as of April 1, 1982. I was able to finalize all of my U.S. Court cases during the 30 month transition period, which began on October 1, 1979.
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> 3. As of April 1, I am no longer able to practice law in Panama.
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> 4. Panamanian law requires that all attorneys, admitted to practice law in Panama, must be Panamanian citizens. I have invested too much time and effort in my practice here in Panama to abandon it now.
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> 5. I am bilingual and have developed a good law practice here in Panama, but must become a Panamanian citizen to continue practicing.

An official of the Bureau of Consular Affairs replied to appellant on September 10, 1982. The official wrote that appellant's letter was "an example of our need for a handout to be given to people who have questions like the ones you have," and enclosed a copy of "a draft of language presently under consideration by this office for use both as a handout for inquiries and for revision of the manual used by consular officers overseas." The official's letter continued:

> ...Therefore, it is not an official document, but in final form it should have few if any changes. I believe you will find it to be responsive to your questions.
>
> If you are in Panama at present, and have not already discussed your situation with one of the consular officers at the American Embassy, I suggest that you do so. As your letter is an expression of intent of

> the type described in the enclosure, I am sending the letter, with a copy of my reply, to the consular section at the Embassy.

The draft document enclosed in the official's letter was titled "The Effect of Naturalization in Canada or Other Foreign Country on United States Citizenship." Noting that naturalization in a foreign state is statutorially expatriative, the draft stated that under decisions of the Supreme Court, loss of citizenship would not result unless one performed the act voluntarily with the intent to relinquish citizenship. Obtaining foreign naturalization is not conclusive evidence of an intent to relinquish citizenship, the draft read. It continued that "the facts in each case must be evaluated with consideration being given to fair inferences drawn from one's conduct and statements, particularly those made immediately prior to or contemporaneous with the expatriative act." Until one performed an expatriative act, the draft further stated, it was impossible to state whether naturalization would result in loss of citizenship; nor were there any specific steps one might take in advance that would "definitely guarantee retention of citizenship."

> Nevertheless, a written statement submitted to the Embassy in advance, expressing an intent to maintain U.S. citizenship and to continue to respect the obligations of such citizenship notwithstanding one's plans to obtain naturalization in Canada would be accorded substantial weight in any loss of nationality proceedings that may subsequently be conducted in one's case. Other factors that would be taken into consideration as evidence of an intent to retain U.S. citizenship include continued use of a U.S. passport, continuing to file U.S. income tax returns as a citizen, voting in U.S. elections, etc.

The draft added, however, that "any statement made or signed in connection with a foreign naturalization that reflects renunciation of present citizenship would be considered strong evidence of intent to relinquish U.S. citizenship and support a finding of loss of U.S. citizenship."

Appellant states that until enactment of Law 9 of April 18, 1984 (see below), Panamanian law was somewhat nebulous about exactly what constituted the "practice of law." He

relied on "this gray area" to continue his practice. He allegedly tried to influence Panamanian legislation to make provision to recognize legal consultancies, thus permiting him to continue to practice law without becoming a Panamanian citizen. In this he was unsuccessful. Enactment of Law 9 closed the door, appellant said, to his practicing without a license. On June 14, 1984 the National College of Attorneys issued a communique to publicize Law 9, made it clear that one who practiced law without a license would be guilty of a crime. 2/ After issuance of the communique, appellant sought the advice of an officer of the College who reportedly had been instrumental in the passage of Law 9. The officer "warned me that the law could be interpreted against me and recommended that I legalize my status by becoming a Panamanian."

Appellant applied for naturalization a few months later. On September 25, 1984 a certificate of Panamanian citizenship issued in his name. On October 17, 1984 appellant appeared before the governor of the province of Panama. On that occasion, the governor asked appellant whether he renounced absolutely and forever all his legal and political ties to the United States, and at the same time asked him if he was declaring under oath that he promised to renounce all the rights and privileges of United States citizenship. After appellant took the oath, and answered in the affirmative all the questions presented to him, he promised that in his capacity as a naturalized Panamanian citizen he would obey and comply with the National Constitution and the laws of the

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2/ The Communique read in pertinent part as follows:

> 3. In accordance with the terms of Article nine of the law in question, anyone, who has not complied with the terms of first Article of this law, has not obtained a certificate of eligibility from the Supreme Court and membership in the National College of Attorneys, and who announces or represents himself or herself as an attorney, or who offers personal services that require the intervention of an attorney, or who negotiates without legal authorization, has committed the crime of unlawfully practicing law.

Translation by R.D. Minton, certified public interpreter, Panama.

republic of Panama. He became a citizen of Panama with effect from October 17, 1984.

Appellant claims that after naturalization he was concerned about his United States citizenship, but shied away from addressing the issue for a while. When his United States passport expired in December 1985, he decided it was finally time to consult the Embassy. It appears that after his passport expired, he had used a Panamanian one, which the Embassy visaed for several trips to the United States.

In June 1986 appellant applied for a United States passport and completed a form titled "Information for Determining U.S. Citizenship." He was also interviewed by a consular officer. On August 12, 1986, the consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as prescribed by section 358 of the Immigration and Nationality Act. 3/ The officer certified that appellant acquired United States nationality by virtue of his birth in the United States; that he acquired the nationality of Panama upon his own application; and that he thereby expatriated himself under the provisions of sections 349(a)(1) and (2) of the Immigration and Nationality Act (obtaining naturalization in a foreign state and making an oath of allegiance to a foreign state.) The Department approved the certificate on November 13, 1986, but later informed the Embassy that the CLN should not have listed both sections of the Immigration and Nationality Act as grounds for loss of nationality. It instructed the Embassy to execute a new CLN

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

showing loss of citizenship only under section 349(a)(1). The Embassy executed a new CLN on August 4, 1987 which the Department approved on August 12, 1987, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review.

A timely appeal was entered. Oral argument was heard on February 10, 1989, appellant appearing pro se.

II

The statute prescribes that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing that nationality. Section 349(a)(1) of the Immigration and Nationality Act. Neither party disputes that Pierce duly obtained naturalization in Panama upon his own application and thus came within the purview of the statute. Our first inquiry therefore is whether he became a citizen of Panama voluntarily.

In law it is presumed that one who performs a statutory act of expatriation does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 4/ Appellant therefore must prove that he was forced to become a citizen of Panama against his will.

4/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads as follows:

> (c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Appellant submits that he was compelled to obtain naturalization by extraordinary circumstances that he did not create and was made to control. Those circumstances were created by the Panama Canal Treaty of 1977 and left him no reasonable alternative but to obtain naturalization, if he were to be able legally to meet his ethical duty to continue to provide competent legal services to a large number of United States citizens living in Panama. He could not, he asserts, "desert" hundreds of clients without violating the canons of ethics and possibly laying himself open to censure by the Nebraska Bar of which he was a member. In the transition period he had disposed of all his cases pending before the Federal District Court of the District of the Canal Zone. However, many cases, although litigated, remained, because of continuing jurisdiction, and new clients came to him after April 1, 1982. Thus, there was a clear need for his professional services beyond that date. Central to appellant's contention that he was forced to obtain naturalization, is his allegation that after April 1, 1982, he was virtually the only American-trained lawyer in Panama with expertise in diverse fields of United States law; few were as able as he to serve the legal interests of United States citizens in Panama. He acknowledged that thirteen English-speaking Panamanian lawyers on the Embassy's List of Attorneys have degrees from United States universities. But only four, he asserted in an affidavit executed August 8, 1988, have any experience practicing U.S. law. He continued:

> ...There is a tremendous experience gap between the actual practice versus the study of law. The four attorneys, experienced in U.S. law, all have their offices in Panama City, isolated from potential Canal Area clients. Their law practices mainly involve Panamanian legal matters and most of them are not interested in U.S. tax, labor, military and administrative law issues that are my speciality. In effect, over 25,000 U.S. citizens in the Canal Area have

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4/ Cont'd.

Pub. L. No. 99-653, 100 Stat. 3655 (1986), repealed subsection (b) of section 349, but did not redesignate subsection (c), or amend it to delete reference to subsection (b).

only my office to look for when they need specialized help in U.S. legal matters.

Appellant contends that he explored every conceivable alternative before concluding that he had no choice but to apply for naturalization. In support of this contention, he cited the fact that he had endeavored before 1979 (presumably working through the Canal Zone Bar Association) to have American lawyers practicing in the Canal Zone "grandfathered" into the Panamanian legal system, but without success. He had lobbied to have enacted in Panamanian law a provision authorizing legal consultancies, again without success. He had explored with his American partner, who returned to the United States in 1983 to start a practice in Florida, the possibilities of moving to the United States and starting practice there. He rejected the idea, however, mainly because of his perception that his services were sorely needed in Panama and also because of the emotional wrench of uprooting his family after having lived so long in Panama; because of his age (he was 40 years old in 1982); had made a recent heavy investment in his office; and because ten employees, who could demand substantial severance pay if he were to cease practice, depended on him.

In support of his contention that naturalization in Panama was forced upon him, appellant submitted affidavits executed by a number of United States citizens who held important positions in the United States public service in Panama and who knew him well before and after he obtained naturalization. In general, these affiants submitted that after 1982 there remained in Panama only a handful of English-speaking attorneys licensed in Panama and qualified in United States law who were able to provide adequate legal services to the thousands of United States citizens living in Panama. In their opinion, appellant was uniquely qualified to serve the legal needs of these Americans. Appellant therefore had no alternative but to become a Panamanian citizen, these affiants stated, for he could not ethically leave clients who relied upon him.

The Board takes note that the coming into force of the Panama Canal Treaty undoubtedly confronted appellant with a dilemma that he did not create. We are not persuaded, however, that the situation in which he found himself left him powerless to resist performing an expatriative act.

The cases hold that if one performs an expatriative act because one was forced to do so by "extraordinary circumstances," the act cannot be considered voluntary. Doreau v. Marshall, 170 F.2d 721 (3rd Cir. 1948); Schioler v. United States, 75 F. Supp. 353 (N.D. Ill. 1948). Inherent in the concept that extraordinary circumstances may render an

expatriative act involuntary, however, is the notion that such circumstances must be so compelling that they leave the citizen with no viable alternative to performing the proscribed act. In the range of cases after Doreau and Schioler which hold that duress nullifies an expatriative act, plaintiffs had no alternative, in the opinion of the court. The circumstances in which they found themselves were such as to overcome their natural tendency to protect their citizenship. Nishikawa v. Dulles, 356 U.S. 129 (1958); Stipa v. Dulles, 233 F.2d 551 (3rd Cir. 1956); Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953); Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953); Ryckman v. Acheson, 106 F. Supp. 739 (S.D. Tex. 1952).

It is our opinion that appellant has not established that prior to April 1982 he could not have left Panama honorably and started afresh in the United States. A decision to return to the United States might have entailed difficult financial, professional and family adjustments, but he has not shown that the difficulties he would have faced in leaving Panama were so acute that they rose to the level of legal duress.

It is not evident to us from appellant's submissions that he would have violated the canons of legal ethics by withdrawing legal assistance from those who had retained him, provided, of course, that he ceased legal representation in the accepted manner. He needed no leave of court to do so, for he had, he said, litigated all his cases pending before the District Court for the Canal Zone by April 1, 1982. And we take note that lawyers honorably give up practice or move elsewhere by making sure that their erstwhile clients are referred to other competent counsel.

It might have been expensive for appellant to close his law office, but he has not shown that he could not sell his property, including his law library, to Panamanian attorneys, or make other satisfactory disposition of his holdings. Most importantly, we cannot accept that appellant alone was competent to provide legal advice and assistance to American residents in Panama. As we have seen, there are other English-speaking attorneys in Panama who were trained in the United States; perhaps they lacked appellant's expertise in United States law, but they have not been shown to be incompetent; nor can it be assumed that appellant's absence would not have been filled by the market place.

It seems to us that appellant remained in Panama at his own risk. He should have realized well before 1982 that he would undoubtedly have to qualify under Panamanian law in order to continue to practice in that country. Only 40 years old in 1982, with nine years of varied practice in United States law and presumably some Panamanian law, appellant

arguably would have had much to offer if he had returned to the United States to practice. But he remained in Panama, determined to practice only there. Thus it appears to us that he enjoyed a choice between staying in Panama and taking the more difficult but not impossible alternative to return to the United States and protect his United States citizenship.

Since it is settled that opportunity to make a decision based upon personal choice is not duress, it follows that appellant has not rebutted the presumption that he obtained naturalization in Panama voluntarily. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

III

Finally, we must determine whether the Department has satisfied its burden of proving that appellant intended to relinquish his United states nationality when he obtained naturalization in Panama upon his own application.

In loss of nationality proceedings, the government bears the burden of proving that a United States citizen who performed an expatriative act did so with the intention of relinquishing his citizenship. Vance v. Terrazas, 444 U.S. 252, 261 (1980). Intent may be proved by a person's words or found as a fair inference from proven conduct. Id. at 260. It is settled that the intent the government must prove is the former citizen's intent when he or she performed the expatriative act. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department submits that the oath of allegiance appellant made to Panama in which he also expressly renounced his United States nationality is substantial evidence of an intent to relinquish his United States nationality. The Department further asserts that appellant acted knowingly and intelligently when he obtained naturalization and made the requisite oath of allegiance. Finally, the Department submits that although appellant contends that many factors in his case demonstrate he lacked the requisite intent, the evidential value of those factors should be substantially discounted, for they are insufficient to outweigh the categoric declaration he made renouncing his United states citizenship.

The case law is clear that performing a statutory expatriative act may be highly persuasive evidence of an intent to relinquish United States nationality, but it is not conclusive evidence of such a will and purpose. See Vance v. Terrazas, supra:

> ...it would be inconsistent with Afroyim to treat the expatriating

> acts specified in sec. 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course,' any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring)." But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

444 U.S. at 261.

The evidence of intent to relinquish citizenship becomes even more compelling if an American citizen who performs an expatriative act also renounces United States citizenship. Richards v. Secretary of state, 752 F.2d 1413, 1421 (9th Cir. 1981): "...the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to relinquish United States citizenship." Similarly, Meretsky v. U.S. Department of Justice, et al., No. 86-5184, memorandum op. (D.C. Cir. 1987). See also United States v. Matheson, 400 F.Supp. 1241, 1245 (S.D.N.Y. 1975); aff'd. 532 F.2d 809 (2nd Cir. 1976); cert. denied 429 U.S. 823 (1976): "An oath expressly renouncing United States citizenship,..., would leave no room for ambiguity as to the intent of the [actor]."

In addition to proving that appellant manifested a renunciatory intent by performing an expatriative act and simultaneously declaring that he renounced United States citizenship, it is also incumbent upon the Department to prove that appellant acted knowingly and intelligently when he obtained naturalization in Panama and made an oath of allegiance to that state that included renunciation of United States nationality. Terrazas v. Haig, supra at 288; and United States v. Matheson, 532 F.2d 809 (2nd Cir. 1976); cert. denied 429 U.S. 823 (1976).

We have no quarrel with the Department's argument that appellant is "an experienced and able lawyer, [who] understood the significance of and knowingly and intelligently took the oath." The record so amply demonstrates that appellant performed the proscribed act with his eyes wide open that we need not belabor it.

It is not enough, however, for the Department to establish that appellant voluntarily, knowingly and intelligently performed an expatriative act in the course of which he expressly renounced United States nationality. It remains to be determined, as the Department points out in its brief, citing Richards v. Secretary of State, supra, and Terrazas v. Haig, supra, whether there are any factors or variables that would justify our concluding that appellant probably did not intend to relinquish United States citizenship, despite the fact that upon obtaining naturalization in Panama he renounced United States nationality. In our opinion, there are a number of variables in this case which must be carefully and sympathetically examined, for they introduce an element of doubt about appellant's probable state of mind in October 1984.

It is settled that the intent the government must prove is a person's intent when the expatriative act is done. In determining a person's probable state of mind at the crucial time, the trier of fact must balance not only what the person said and did at the time of the expatriative act but also all other facts and circumstances that purport to throw light on the issue of his intent. In a word, the facts and circumstances operative at the time of the expatriative act, although entitled to significant evidential weight, are not solely dispositive of the issue of intent. Plainly, it would be inconsistent with Vance v. Terrazas, supra, to contend that a loss of nationality case should turn on a single act such as making an oath of allegiance to a foreign state that contains a renunciation of United States nationality. 5/

5/ In Vance v. Terrazas, the Supreme Court noted with approval the opinion of the Attorney General explaining the impact of Afroyim v. Rusk, 387 (1967). 42 Op. Atty. Gen. 397 (1969). The Court stated that:

> Even in these cases, however, [where a U.S. citizen formally renounces U.S. citizenship or performs another act in derogation of allegiance to the United States] the issue of intent was deemed by the Attorney General to be open; and, once raised, the burden of proof on the issue was on the party asserting that expatriation had occurred. Ibid. [42 Op. Atty. Gen. at 400.] 'In each case,' the Attorney General stated, 'the Administrative authorities must

And concluding its opinion in Terrazas, the Court said that if the citizen fails to prove that he performed an expatriative act involuntarily, the question remains whether on "all the evidence" the government has satisfied its burden of proof. Id. at 270. In Terrazas v. Haig supra, for example, the court did not rest its decision that appellant intended to expatriate himself solely on the fact that he made a formal declaration of allegiance to Mexico and expressly renounced United States nationality. "Of course," the court said "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship...." 653 F.2d at 288. The court concluded, after examining all the facts, that there was "abundant" evidence that the plaintiff intended to relinquish his citizenship. He made no effort to halt the process of his application for a certificate of Mexican nationality after he was free of an allegedly domineering father who reportedly forced him to apply for the certificate. He informed his draft board he was no longer a United States citizen after being informed by a consul he might have lost his citizenship. And he made an affidavit attesting that he voluntarily made an oath of allegiance to Mexico with the intention of relinquishing United States nationality.

In the case before the Board, as in Terrazas v. Haig, supra, the citizen made an oath of allegiance to a foreign state that included an express renunciation of United States nationality. The instant case, however, is notably distinguishable from Terrazas v. Haig by the fact that this appellant's conduct before and after he performed the expatriative act manifests consistent concern, interest and, inferentially, intent to retain his United States citizenship.

A number of persons who held or hold high positions under the United States government in Panama (among them the United States Ambassador, 1978-1982; the present Chairman of the Panama Canal Commission; the last United States District

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5/ (cont'd.)

> make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship.' Id. at 401. [Emphasis added.]

444 U.S. at 262.

Judge for the District of the Canal Zone) have attested to appellant's outstanding contributions, professional and personal, to the United States military and civilian communities in Panama both before and after his naturalization. These affiants state that appellant was and continues to be active in the Navy League, the Rotary Club, the American Society, the American Chamber of Commerce, the YMCA and since 1983 he has been co-chairman of United States Republicans Abroad in Panama. In short, "a patriotic American" is the way nearly all affiants describe appellant. In other respects, appellant has shown a sense of civic responsibility. He continued to file U.S. tax returns after naturalization and travelled on a United States passport until it expired in December 1985, more than a year after his naturalization.

An obvious weakness in appellant's case that he did not intend to relinquish U.S. citizenship is the fact that after December 1985 he travelled on a Panamanian passport which the Embassy visaed apparently twice for trips to the United States, consular officers the while urging him to resolve his citizenship status. Appellant applied for a new United States passport in June 1986 at which time loss of nationality proceedings were started by the Embassy. During oral argument he explained as follows why he delayed addressing the issue of his citizenship status:

> I must admit that after becoming a Panamanian citizen -- some people react in different ways, and this is something I'd like to bring out to the Board because -- and in reading the law, I noticed that the time period is a factor. In other words, if a person makes what they feel is a mistake or if they're concerned about something, that their reaction times is important, sometimes the Board considers that as being an important consideration: how quickly they react to correct the situation. Well, some people are like that. I mean, when they make an error, they react quickly. I don't feel that I made an error. I feel that what I did was the only thing I could do. However, it did traumatize me very much, and I reacted in a different way. And I guess I'm the type of person that when something sad occurs, whether it be a divorce or whether it's an expatriation, that they kind of go back into a shell and they don't want to address the problem for a while. And that's basically, I think, what I did.

> I was concerned about what had happened. And until I really had to address the problem when my passport expired, I didn't. 6/

It would, of course, have strengthened appellant's case had he pressed his citizenship claim immediately after obtaining naturalization. That he did not do so is not, in our opinion, however, a consideration that is entitled to significant weight. That he acted as he did could have been precisely because he felt as he said he did, rather than because he intended in October 1984 to relinquish United States citizenship.

On balance, appellant's proven conduct before and after naturalization which shows active involvement in public affairs important to the United States and its citizens in Panama strongly suggests that it was not his intention to relinquish United States citizenship, despite a one-time act in derogation of United States citizenship.

Appellant submits that an additional factor demonstrating his intent to retain United States nationality is the letter he wrote to the State Department in 1982 in which "I stated clearly that I was in a dilemma and that I did not want to lose my United States citizenship." 7/ His understanding of the Department's reply was that a prior expression of intent to retain citizenship would "bear substantial weight in any future consideration of my United States citizenship." 8/ Appellant relied, he stated, on the Department's evident acceptance of his letter as an expression of intent to keep his citizenship. 9/

The Department, however, asks us to discount the evidential significance of appellant's letter. It was not, the Department's counsel said at the hearing, a contemporaneous statement of intent to retain citizenship. Appellant's statement was tentative and very preliminary;

6/ Transcript of Hearing in the Matter of M C P before the Board of Appellate Review, February 10, 1989 (hereafter referred to as "TR".) 73.

7/ TR 73.

8/ TR 69.

9/ Id.

basically, counsel stated, appellant merely expressed the hope he would not lose his citizenship. 10/

In our opinion, appellant's letter and the Department's reply are evidentially important, even though the exchange occurred two years before appellant performed the expatriative act, and even though the guidance enclosed in the Department's letter was only a draft. Obviously, the Department's communication was an official one, and it assured appellant that the draft would probably not be changed when formally issued. Although the draft did state that making a declaration renouncing United States citizenship would be considered strong evidence of an intent to relinquish citizenship, it also stated that a prior expression of intent to preserve citizenship would be accorded substantial weight in any determination of loss or retention of citizenship. This, then, was a statement on which appellant was entitled to place some reliance. Of course, he should have made inquiries whether the draft had become an official guideline. And he would be in a stronger position had he executed a formal statement of intention to retain United States citizenship immediately before he obtained naturalization in Panama. But the essential importance of appellant's letter lies in the fact that it is not an isolated event in the history of this case; it is a fact which is part of a pattern of conduct on appellant's part showing not just a hope but a will and purpose to retain American citizenship.

Appellant has further documented his professed lack of intent to relinquish United States nationality by the declarations of a number of people prominent in United States officialdom in Panama who, in addition to attesting to his patriotism and community consciousness, address the issue of his specific intent.

During oral argument, counsel for the Department contended that the declarations appellant submitted should not be accorded substantial weight. For one thing, one did not know the context of appellant's conversations with the affiants. Nor did one know what appellant said to the affiants beyond protesting that he did not want to relinquish his citizenship.

We are not of the Department's view. Plainly, this impressive, widely-based testimony from obviously responsible people is competent and relevant, for it tends to shed light on the matter in controversy - appellant's probable state of

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10/ TR 80.

mind in October 1984 when he obtained naturalization in Panama. The affidavits attest to appellant's claim that he had extensive discussions about his citizenship dilemma with the affiants to whom he expressed concern about keeping his citizenship, if he were forced to obtain Panamanian citizenship in order to be able to continue to dischcarge his professional obligations. The affidavit of Harold R. Gross, United States Consul General in Panama from August 1980 to July 1984 is particularly pertinent. Gross declared in part that:

> In 1982, Mr. P brought his problem to the attention of the Department of State, the Ambassador and me. [Former Ambassador Ambler Moss. Moss stated that appellant raised his citizenship problem with him in 1980 and that appellant told him in 1984 both before and after his naturalization that he intended to retain his U.S. citizenship.] During the next two years, he and I had several detailed conversations about his citizenship situation. On each of these occasions, Mr. P made it absolutely clear to me that he did not want to lose his American citizenship. Based on my knowledge of Mr. P , his background and his character, I have no hesitancy in stating that I believe that he did not become Panamanian with the intention of relinquishing his American citizenship but rather to continue his law practise [sic] and earn his livelihood. Indeed, one might ask that if it had been Mr. P 's intention to relinquish his American citizenship, why would he have sought counsel from the Department of State, the Ambassador and the Consul General about how to retain that citizenship.
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> I would also question the voluntary nature of Mr. P 's expatriating act. In order to continue his professional practise, he had no choice but

> to become Panamanian. A force beyond his control, the Panama Canal Treaties, dictated this fate for him. In my opinion, had there been no Panama Canal Treaties, the possibility of Mr. P 's becoming a Panamanian citizen is so remote as to be non-existent.

There are incongruities in this case which distinguish it from many cases appealed to the Board where the appellant obtained naturalization in a foreign state and made a pledge of allegiance that included renunciation of United States nationality. On the one hand, appellant P obtained naturalization in Panama voluntarily, willingly and intelligently and declared that he renounced United States nationality. On the other hand, he has demonstrated consistent loyalty to the United States, and respect for American citizenship with its rights and duties, and made determined efforts to avoid performing the expatriative act. On these facts, the Board must make an obviously difficult determination whether the Department has shown that it is more likely that appellant intended to relinquish United States citizenship than it is that he formed no such intent.

As the Supreme Court has declared, if the citizenship claimant fails to establish that he acted involunarily, "the question remains whether on all the evidence the government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, 444 U.S. at 270. Thus Terrazas makes it clear that no single act will suffice to resolve the issue of the party's intent, 11/ a fact the Department has recognized in its guidance to consular and departmental officials for handling loss of nationality proceedings. "It is necessary to consider the person's entire course of conduct, particularly that contemporaneous with the

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11/ See Kahane v. Shultz, 653 F. Supp. 1486, 1493 (E.D.N.Y. 1987):

> This court would be reluctant to hold that any act standing alone, conclusively bespeaks its intent. Recognizing the unpredictability of human behavior and its limitless vagaries, the possibility that such a case may arise may be conceded. Another court, on another day, may be called upon to evaluate the intent behind an act 'inherently inconsistent' with citizenship, especially if that act

expatriating act. No single items of evidence will necessarily control in making a determination." 7 Foreign Affairs Manual 1217.3 (d). (1984).

Conceptually, one may make a declaration which on its face is categoric and unequivocal, yet not mean what is sworn to. One may do the act with mental reservations, or under the perception that he is being compelled against his will to make the oath.

Appellant asks us not to construe his swearing allegiance to Panama and renouncing United States citizenship as expressive of his state of mind in October 1984. He contends that he made the oath merely in order to satisfy a Panamanian requirement so that he might be able to continue to discharge his professional obligations to clients. As he perceived his situation in 1984, he claims he was coerced to obtain naturalization. "People sign documents," he said at the hearing. "They do things when they don't mean it....sometimes....people are forced to do things they don't intend to do. And this is my situation. I had no choice." 12/ Although we hold that appellant's naturalization in Panama was voluntary as a matter of law, his perception that he was acting under duress, a perception which has been amply documented by many affiants, lends substance to his claim that he did not mean what he swore to in October 1984.

Balancing the probabilities, we believe it more likely than not that appellant lacked the requisite will and purpose to relinquish United States citizenship. While the evidence to which the Department attaches importance suggests that appellant intended for one fleeting moment to relinquish United States citizenship, his conduct from 1971 to the present to which responsible citizens bear witness raises

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11/ (cont'd.)

> is accompanied by contemporaneous protestations that by committing it, the actor does not intend to relinquish his citizenship. This is not such a case. If the act stands alone, with no proof of intent adduced by either side, a court may conclude that the preponderance of the evidence shows an intent to relinquish citizenship. When the act is accompanied by evidence of intent, either direct or circumstantial, the situation seems to this court somewhat different.

12/ TR 89.

doubt that such a person is likely to have formed the requisite intent in 1984 to forfeit his citizenship. Entertaining doubt whether appellant intended to relinquish citizenship, we must resolve that doubt in favor of retention of citizenshp. Nishikawa v. Dulles, 356 U.S. 129 (1958). We therefore conclude that the Department has not met its burden of proving that appellant intended to relinquish United States citizenship when he obtained that of Panama.

IV

Upon consideration of the foregoing, the Board hereby reverses the Department's determination that appellant expatriated himself when he obtained naturalization in Panama upon his own application.

Alan G. James, Chairman

Howard Meyers, Member

DISSENTING OPINION

I cannot join in the Board's opinion reversing the Department's holding of loss of appellant P 's nationality. I disagree strongly with that part of the opinion which discusses P 's intent when he obtained naturalization in Panama.

In my view, P 's intent at the time he performed the expatriative act is abundantly clear on the basis of the evidence in the record. There is no doubt that he agonized long and hard over taking the critical step of acquiring Panamanian citizenship. There is no doubt that, although he decided to take the step with great reluctance, he finally did intend to acquire Panamanian citizenship. He knew beforehand what that step entailed; it entailed a renunciation of United States citizenship. P 's intent to acquire Panamanian citizenship comprehended his intent to relinquish his United States nationality. This intent was clearly established by the declaration made under oath to Panamanian authorities on October 17, 1984.

Well over a year subsequent to that date P appears to have had a change of heart. Now he argues that he didn't mean the oath he took; in effect, he affirms that he swore falsely. Given the clear and unequivocal terms of the oath, an assertion of having sworn falsely is probably the only way to establish his contrary intent on October 17, 1984. But is all that he has asserted in writing and orally since these proceedings were begun in August 1988 to be given more credibility now than the oath he took on October 17, 1984?

I am particularly troubled with the Board's interpretation of language in Vance v. Terrazas as supporting its refusal to accord major weight to the express renunciation by P of his United States nationality and its determination to look for other factors or variables in order to justify a finding of lack of intent. I do not read Vance v. Terrazas as meaning that a formal renunciation is just one piece of evidence to be given roughly equal weight along with other facts and circumstances that purport to throw light on the issue of his intent. In determining the intent of the individual at the time he performed the expatriative act a statement of renunciation made under oath is the best evidence, which is of much more probative value than other facts or circumstances not contemporaneous with the expatriative act from which only inferences as to intent at the critical moment can be drawn. Such a voluntary oath of explicit renunciation "is ordinarily sufficient to establish a specific intent to renounce United States citizenship." (Richards v. Secretary of State).

"An oath expressly renouncing United States citizenship ... will leave no room for ambiguity as to the intent..." (United States v. Matheson) In the face of this best evidence the Board relies on a letter to the Department written by P two years previous to the expatriative act and upon several affidavits submitted by friends or supporters of P several years after the expatriative act to support its conclusion that P had a contrary intent when he performed the expatriative act. No bit of this "evidence" relates directly to the singular fact of P 's express renunciation under oath. The evidence suggests only Pierce's general state of mind during a period of years. The evidence establishes nothing about P 's specific intent at the time he performed the expatriative act. I do not find any inconsistency at all with Vance v. Terrazas in contending that this case can essentially turn on the single oath of renunciation. There are numerous precedents in the Board's previous decisions for just such a result. Not only is this act the only evidence that directly establishes the requisite intent, but it is borne out by several supporting facts and circumstances: viz. P 's travel on a Panamanian passport, his long delay in addressing the issue of his citizenship status, his failure formally to record a contrary intent immediately before he obtained naturalization in Panama through renouncing his United States citizenship.

The Board itself makes the signal admission that the evidence suggests that "appellant intended for one fleeting moment to relinquish United States citizenship." Whence comes this doctrine of the "fleeting moment," which first appears in this opinion of the Board? It is only relevant that the intent to relinquish accompanied the expatriative act. How long the intent was maintained is completely beside the point. It is perfectly clear that appellant has since regretted his intent, and asks that what he asserts now be believed, rather than what he swore to in 1984.

The most distressing aspect of the Board's opinion, to my mind, lies in the Board's acceptance of an act of perjury to explain always P 's oath of renunciation. To my knowledge this is the first opinion of the Board in which this question is so starkly presented, without any extenuating factors bearing directly upon the renunciation. The circumstantial evidence of intent contained in all those affidavits to which the Board chooses to give full credence should not be allowed by a quasi-tribunal, such as is the Board of Appellate Review, to subvert the effect of a formal declaration made under oath. One of the most disturbing assertions of position in the record is contained in appellants reply to the State Department's brief, dated January 11, 1989. In Section IV, B, paragraph 6 of that document the appellant, said to be a practicing lawyer, raised the issue of perjury and described his remarkable view of the

facultative nature of compliance with an oath. Appellant, Mr. P , further explained his viewpoint of this same issue during the Hearings (pp. 88-92). He stated his lack of respect for Panamanian law, which apparently excused his perjury, and he described, as a further excuse, how many Panamanians do the same thing, in his view at least.

The issue of intent in most cases considered by the Board is consistently the most difficult issue to decide, mainly because of the usual dearth of evidence available bearing upon the appellant's intent at the time the expatriative act is performed. The best evidence has to be a statement made by the appellant in connection with the performance of the expatriative act which reveals his intent at that time. In my experience, until this case the Board has regularly attributed predominant weight to sworn statements of renunciation such as has figured in the present case. Reliance upon such statements as best evidence of intent has constituted an element of predictability in the Board's jurisprudence. Now a precedent has been established which signals a change in the Board's evidentiary standards. Future appellants will be expected to take advantage of the evidential confusion which the Board's opinion introduces.

It is all the more to be regretted that such an unfortunate precedent has been set by the Board in this case when one recalls that a precedent already exists which could well have guided the Board in settling the issue of intent. Under the facts of this case the rule of Richards v. Secretary of State, was clearly applicable: "[T]he voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship"

752 F.2d 1413, 1421 (9th Cir. 1985)

> [T]he cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.
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> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other

> context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carries it out, the choice must be given effect.

752 F.2d at 1421-22

The above language states the rule which should have determined the present case.

Warren E. Hewitt, Member