November 24, 1981

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: P[redacted] H[redacted] M[redacted]

The appeal in this case is taken from an administrative holding of the Department of State that appellant, P[redacted] H[redacted] M[redacted], expatriated himself on August 31, 1967, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/

Appellant, P[redacted] H[redacted] M[redacted], was born at [redacted], and, therefore, acquired United States citizenship at birth. He resided in the United States until October 1944 when he moved to Canada with his parents. There he received all of his formal and legal education, married a Canadian citizen and entered into the practice of law.

With respect to his admission to the Canadian Bar, M[redacted], in a letter of October 11, 1966, to the Director of the Bar Admission Course, asked for confirmation that his status as an American citizen with Canadian Landed Immigrant Status was satisfactory to enable his call to the bar. In a written reply of October 12, 1966, he was informed that he was not eligible for call to the bar or admission as a solicitor

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1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), reads:

> 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, ...

in the province of Ontario while he was an American citizen. In answer to a subsequent inquiry by M[redacted], dated November 22, 1966, asking the reason for the requirement that all members of the Ontario Bar be British subjects, the Secretary of the Law Society of Upper Canada explained in a letter of January 18, 1967, that as an officer of Her Majesty's Court, a barrister and solicitor must be one of her subjects.

M[redacted], in his letter of November 22, 1966, had also asked whether his swearing an oath of allegiance to the Queen or to the Canadian Government would suffice. On this point, the Secretary, in his reply of January 18, 1967, noted that the swearing of an oath of allegiance to the Queen of Canada was part of the process of becoming a Canadian citizen. The Secretary of the Law Society of Upper Canada also expressed doubt whether the swearing of an oath of allegiance could be done effectively apart from that process and then stated: "...I am not sure that you would not be in difficulties with your own Government if you were to swear allegiance to a foreign power." Thus in order to qualify for admission to the Canadian Bar and thereby to practice the profession for which he was trained, M[redacted] became a naturalized Canadian citizen on August 31, 1967, having taken the required oath of allegiance.

On December 17, 1976, appellant applied to the United States Consulate General at Toronto, Canada for a United States passport and registration. Meretsky also signed a Citizenship Questionnaire form in which he provided the information that during the year 1976 he had applied for a visa at which time be became aware in definite terms that he might be a United States citizen. Upon learning that M[redacted] was naturalized in 1967, the Consulate General on August 17, 1976, requested from the Canadian authorities confirmation of his acquisition of Canadian citizenship. Certification that Canadian naturalization had been granted to P[redacted] H[redacted] M[redacted] under Section 10(1) of the Canadian Citizenship Act, effective as of August 31, 1967, the same date the Oath

of Allegiance was taken, was received by the American Consulate on August 27, 1976. It does not appear from the record that M[redacted] had prior to 1976, appeared at the Consulate General during his residence in Canada since 1944.

As required by Section 358 of the Immigration and Nationality Act, the Consulate General at Toronto prepared a Certificate of Loss of Nationality on January 13, 1977, in the name of P[redacted] H[redacted] M[redacted]. 2/ The Department of State's approval of the Certificate of Loss of Nationality on December 4, 1979, constitutes the Department's administrative determination of loss of nationality from which this appeal was taken to the Board of Appellate Review.

Appellant's counsel gave notice of appeal on January 31, 1980. Appellant admits that he voluntarily took the Canadian Oath of Allegiance by which he obtained naturalization in Canada. Appellant's counsel contends, in his brief, that the economic and social pressures

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

> 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.

confronting appellant at the time he took the Canadian oath, while not properly a reflection on the issue of voluntariness, are nevertheless properly facts to be considered in assessing whether appellant intended to relinquish his United States citizenship. With reference to appellant's correspondence with authorities in the Canadian Bar in 1966, appellant's counsel concludes that the Department, if it relies on the actions appellant took at the time he acquired Canadian citizenship, could never meet its burden of proving by a preponderance of the evidence, that appellant intended to relinquish United States citizenship. He argues that since M[redacted] never intended any renunciation of United States citizenship, the Certificate of Loss of Nationality should be revoked.

In connection with M[redacted]'s completion of a Citizenship Questionnaire of the American Consulate General, sworn to on December 16, 1976, appellant referred to his separate letter of November 16, 1976, in which he explained his reasons for his Canadian naturalization and addressed the question of his intention with respect to his allegiance to the United States as follows:

> "On the 31st August, 1967, I was naturalized as a citizen of Canada. In so doing, I was not aware that it would or might prejudice my U.S. citizenship. In so doing it was not and has never been my intention to relinquish or prejudice my birth right nationality.
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> "After I had completed law school in Ontario and sometime during the year 1967 it was brought to my attention, for the first time, that being a Canadian citizen or a British subject was a pre-requisite for licensing to practice law in Ontario. This legal requirement for the purpose of being called to the Bar in Ontario was set forth in Section 2 of both the Barristers Act and of the Solicitors Act.
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> "At that time, I had satisfied all academic requirements and fulfilled all other qualifications to practice law, but was being distinguished from my fellow class mates solely on the basis of my citizenship.

"Prior to making application for Canadian citizenship, I initiated two appeals to the Law Society of Upper Canada, the governing body for lawyers in Ontario, to be relieved of the Canadian citizenship requirement, but to no avail.

"In the circumstances I was being discriminated against on the basis of citizenship. For the purpose of satisfying this technical requirement of the Law Society and for that limited reason alone did I apply for Canadian citizenship. In a very real sense, I was coerced by circumstances; in that, after having satisfactorily completed many years of schooling and satisfied the academic requirements to embark upon the practice of law and being an adult with a wife, financial responsibilities and no financial resources, a legal impediment existed which prevented me from practicing my calling - my citizenship.

"As stated, I never intended to prejudice my U.S. citizenship. I have at all times considered myself to be a U.S. citizen and have, both before and after May [sic] 31, 1967, proudly represented myself as such...."

It is not disputed that appellant voluntarily acquired Canadian citizenship for personal and professional reasons. His disavowal, however, of an intent to relinquish his United States citizenship is less clear and constitutes the basic issue to be decided by the Board.

In Afroyim v. Rusk, 387 U.S. 253 (1967), the United States Supreme Court held that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." Although the Court did not explain what conduct would constitute a voluntary relinquishment of citizenship, it nevertheless made the loss of citizenship contingent upon evidence of an intent to relinquish it. The Attorney General, in a Statement of Interpretation of Afroyim, noted that once the issue of intent is raised in a citizenship case, the burden of proof is on the party asserting that expatriation

has occurred and that this burden is not easily satisfied by the Government. 3/

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court reaffirmed the Court's emphasis in Afroyim on the individual's assent to relinquish citizenship and stated that such an intent must be shown by the Government, whether "the intent is expressed in words or is found as a fair inference from proven conduct." The Court, in Terrazas, also upheld the statutory requirement that such intent to expatriate, as well as the expatriative act itself, be established by a preponderance of the evidence. 4/

Further, with respect to the matter of intent, the U.S. Court of Appeals, Seventh Circuit, in Terrazas v. Haig, 653 F.2d 285 (1981), stated: "Of course, 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."

3/ Attorney General's Statement of Interpretation, 42 Op. Att'y. Gen. 397 (1969).

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

> (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 resumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

In support of the contention that appellant did not intend to relinquish his United States citizenship, appellant's counsel places considerable weight on the alleged absence of any explicit or implicit renunciation of United States citizenship in the language of the Canadian Oath of Allegiance said to be required of applicants in 1967. In this relation, appellant's counsel offered a letter, dated December 14, 1979, from a member of the Canadian Bar quoting the oath reportedly required to be taken in 1967.

The Board finds it difficult to reconcile this version of the oath submitted by appellant's counsel with the fact that Canadian citizenship Requlations in effect August 31, 1967, the date appellant took the Canadian Oath of Allegiance, required for applications pursuant to Section 10(1) of the Canadian Citizenship Act, the following oath:

> "I hereby renounce all allegiance and fidelity to any foreign person or State of whom or which I may at this time be a subject or citizen. I swear that I will be faithful and bear true allegiance to her Majesty, Queen Elizabeth the Second, Her Heirs and successors according to law and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian Citizen so help me God." 5/

5/ Section 19(1)(b) of Canadian Citizenship Regulations P.C. 1968-1703 of August 28, 1968. This renunciatory Clause was deleted from the Oath on April 30, 1973. See Bulletin 73-1, April 30, 1973. Text of Oath in effect under Canadian Law on August 31, 1967 confirmed by Canadian authorities. See American Embassy, Ottawa to Secretary of State, tel. 6999, November 13, 1981.

In King v. Rogers, 463 F. 2d 1188 (1972), the Ninth Circuit Court of Appeals stated that "The Secretary [of State] may prove this subjective intent [to renounce citizenship] by evidence of an explicit renunciation,... acts inconsistent with United States citizenship,...or by affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality."

The record contains a number of contradictions and inconsistences in statements made by appellant that in the view of the Board reflect adversely on the credibility of appellant's disavowal of intent to relinquish his United States citizenship. In the Citizenship Questionnaire, sworn to by appellant on December 16, 1976, [redacted] states in response to the question as to when he first became aware that he might be a United States citizen that "I always felt it was a possibility; however, during the year 1976 when inquiring as to a visa and making application therefore I became aware in definite terms." In answer to the very next question whether he had informed officials of a foreign state that he was a United States citizen, appellant replied in the affirmative explaining that it was on his Canada-U.S. border crossings from time to time. Counsel for appellant stated in his brief that [redacted] often used in these border crossings his U.S. birth certificate and Selective Service Registration card for identification purposes. Certainly, these assertions and use of documentary identification as a United States citizen is not consistent with his reply in the Questionnaire that he thought his United States citizenship was a possibility. Rather, it establishes that he was definitely aware that he possessed United States citizenship all along. Therefore, it was something that could be lost in 1967 when he naturalized in a foreign country. This conclusion could not be as easily drawn had he not believed that he possessed United States citizenship when he naturalized.

In his letter of November 16, 1976, as we have seen above, M[redacted] stated "I have at all times considered myself to be a U.S. citizen and have, both before and after May [sic] 31, 1967, proudly represented myself as such." This statement contradicts his explanation in the Questionnaire that during that same year, 1976, he had applied for a visa - which means that he represented himself as an alien.

In answer to question 3 as to whether he had ever taken an oath of allegiance to a foreign state, his reply was "No." He then wrote "I have taken no such oath and made no such declarations because of my birth right interest in and allegiance to the United States. I do not recall the obligation to oath taking arising whereby I had to resist in an active way." This reply and explanation is, of course, inconsistent with the Canadian Oath of Allegiance he took nine years before on August 31, 1967. His further admission in his answer to question 5 that he thought that an oath of allegiance was required for his employment in the Canadian customs office in the summer of 1960 is also inconsistent with his categorical denial of taking an oath of allegiance to a foreign state.

A more pertinent contradiction derives from appellant's statement in his letter of November 16, 1976, that he was not aware that becoming a naturalized citizen of Canada "would or might prejudice my U.S. citizenship". The record, however, contains a copy of a letter to appellant from the Secretary of the Law Society of Upper Canada of January 18, 1967, referred to above, which included the statement "I am not sure that you would not be in difficulties with your own Government if you were to swear allegiance to a foreign power.".

There is nothing in the record by way of contemporaneous evidence to indicate an intention on the part of appellant either to relinquish his United States citizenship or to retain it. His correspondence with the authorities of the Canadian Bar simply illustrates his reluctance to give up his United States citizenship prior to confirmation from them that it was statutorily required in order to enter upon the practice of his chosen profession in Canada.

In these circumstances, where the specific intent to relinquish United States citizenship cannot be established by direct evidence, the Board, relying on Terrazas v. Haig, looks to the circumstantial evidence surrounding the commission of appellant's voluntary act of expatriation, by obtaining naturalization in Canada upon his own application, to establish the requisite intent to relinquish citizenship.

One of the principal elements is the Oath of Allegiance appellant was required to take at the time of his naturalization in Canada which, according to Canadian authorities, included a declaration of renunciation of allegiance to the foreign state of which the appellant was a citizen.

Appellant's declaration of renunciation of all allegiance to any state of which he may be a citizen is certainly unequivocal and categorical and demonstrates an intent on the part of the renunciant to relinquish his citizenship. This intent to relinquish is implicit in the declaration of renunciation. The Board's judicial notice of Canadian law in effect on August 31, 1967, and the consequent presumption of compliance therewith satisfies the criterion in Terrazas v. Haig of circumstantial evidence of an intent to relinquish United States citizenship. In thus satisfying this requirement, the criterion outlined in King v. Rogers, "evidence of an explicit renunciation" is also met.

Apart from this circumstantial evidence of an explicit renunciation of United States citizenship, the Board believes that the record contains additional evidence that meets still another test enunciated in King v. Rogers, "affirmative voluntary acts clearly manifesting a decision to accept [foreign] nationality."

Appellant applied to the American Consulate General for a visa during 1976 - prior to his application in December of that year, for a passport. Manifest in this action is appellant's intention to be documented as an alien for admission into the United States. The Board finds that this is "an affirmative voluntary act clearly manifesting a decision to accept [foreign] nationality."

At the time appellant signed the Canadian Oath of Allegiance, he had been forewarned by authorities in the Canadian Bar that in so doing he might be in difficulty with his own Government if he were to swear allegiance to Canada. In apparent disregard of this warning, appellant never contacted the American Consulate General to inquire about the effect of his impending naturalization on his United States citizenship. The Board is persuaded that appellant was fully aware at the time that he was a citizen of the United States, having represented himself as such in his correspondence with the Canadian Bar Admission authorities, and having relied on his United States birth certificate and Selective Service Registration card in his U.S.-Canada border crossings. The Board believes that in these circumstances M[redacted]s failure to inquire of American authorities as to the effect of his plan to naturalize in Canada on his acknowledged status as a United States citizen argues against an intent to retain United States citizenship.

Appellant has sought to persuade the Board on the basis of his own subjective and self-serving statement in his letter of November 16, 1976, that he did not intend to relinquish his United States citizenship or prejudice it by his naturalization in Canada on August 31, 1967. In the light of Afroyim and Terrazas, it is a person's conduct at the time the expatriating act occurred which is to be considered in determining his intent to relinquish citizenship.

The belated assertion that appellant did not intend to relinquish his United States citizenship is negated by his voluntary application for naturalization in Canada, his explicit renunciation of all allegiance to the United States, his failure to inquire of United States authorities of consequences to his United States citizenship notwithstanding a forewarning of possible difficulties, his representation of himself as an alien

in applying for a visa, and his course of conduct as an adult choosing to establish his family, social and professional life solely in Canada. We are persuaded that the record supports a finding that appellant's naturalization was accompanied by an intent to relinquish his United States citizenship.

Taking into account the complete record before the Board, it is our judgment that the Department has satisfied its burden of proof by a preponderance of the evidence that the expatriating act was performed with the intent to relinquish citizenship. Accordingly, we conclude that appellant expatriated himself on August 31, 1967, by obtaining naturalization in Canada upon his own application, and affirm the Department's administrative holding of December 4, 1979, to that effect.

Julia W. Willis
Julia W. Willis, Chairman

Edward G. Misey
Edward G. Misey, Member

Gerald A. Rosen
Gerald A. Rosen, Member