January 29, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: W[redacted] R[redacted] D[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, W[redacted] R[redacted] D[redacted], expatriated himself on April 2, 1974, 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, W[redacted] R. D[redacted], was born at [redacted], [redacted], and acquired United States citizenship at birth. He attended Beckley Junior College in West Virginia from 1963 to 1965, and the University of West Virginia from 1966 to 1967.

D[redacted] went to Canada in 1967, admittedly, to evade the draft because of the United States involvement in Vietnam. He lived in Montreal approximately a year, and then returned to the United States. On June 12, 1968, he was inducted into the U.S. Army. After serving little more than three months, he left the Army without authorization in protest against the war in Vietnam, and returned to Canada.

D[redacted] worked with the Protestant School Board of Greater Montreal in 1968, and continued his college studies at Sir George Williams University in Montreal,

---

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, . . .

receiving a Bachelor of Arts degree in 1972. After graduation, he was employed by the Ministry of Community and Social Services of the Province of Ontario from February 1972 to March 1974, and thereafter by the Ministry of Health of the Ontario Provincial Government until December 1975. He then was employed by a Canadian investment firm.

In 1974, after a five-year waiting period required by law, D[redacted] applied for naturalization in Canada. He took the required oath of allegiance on April 2, 1974, and received his certificate of Canadian citizenship. He acquired a Canadian passport on April 29, 1974, which he apparently never used. D[redacted] married a United States citizen in Toronto on May 4, 1974.

In September of 1974, President Ford issued a proclamation and certain executive orders establishing a program for the return of Vietnam era draft evaders and military deserters. 2/ This program, in part, permitted military deserters not yet convicted or punished to return to American society without risking criminal prosecution or incarceration for qualifying offenses provided they acknowledged their allegiance to the United States and satisfactorily served a period of alternate civilian service. Army absentees were directed to seek instruction by writing to the U.S. Army Deserter Information Point, Fort Benjamin Harrison, Indiana.

On September 27, 1974, D[redacted] wrote to the Army authorities at Fort Benjamin Harrison seeking clarification of his standing under the program. He informed the Army that he was now a citizen of Canada, that he was unable "to re-affirm" his allegiance to the United States because of his Canadian citizenship, that he did not fall "into the categories referred to in the proclamation", and that the program seemed to apply only to American citizens. In response, the Army authorities requested him to submit proof of his citizenship status.

2/ Weekly Compilation of Presidential Documents, Monday, September 23, 1974, Vol. 10, No. 38, pages 1149-1155, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408.

D[redacted] thereafter submitted a copy of his certificate of Canadian citizenship and a Canadian identification card. On December 12, 1974, the Army informed him that he was charged with desertion from the United States Army on October 15, 1968, and that he would be discharged "by reason of misconduct (desertion)". He received his discharge in January of 1975, and subsequently took an appeal to the United States Army Discharge Review Board. The Board denied his appeal in 1979.

In May of 1979, D[redacted] visited the American Consulate General at Toronto to apply for a visa to the United States. Upon learning of his earlier naturalization in Canada, the Consulate General sought and obtained from the Canadian authorities verification of his Canadian citizenship status.

As required by section 358 of the Immigration and Nationality Act, the Consulate General executed a certificate of loss of United States nationality. 3/ It certified that appellant acquired United States nationality by virtue of his birth in the United States on February 7, 1943; that he acquired the nationality of Canada by virtue of his naturalization on April 2, 1974; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department of

---

3/ 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.

State approved the certificate of loss of nationality on December 12, 1979. The certificate constitutes the Department's administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

On November 17, 1980, appellant's counsel gave notice of appeal and requested a hearing before the Board, which was held on September 25, 1981. Counsel contended that appellant lacked the requisite intent to relinquish his United States citizenship when he obtained naturalization in Canada, and, accordingly, the Department erred in finding that he expatriated himself. Appellant's counsel further contended that, in the absence of such an intent, appellant's oath of allegiance in connection with his Canadian naturalization was not expatriative conduct, and, therefore, the Department could not invoke section 349 (a)(2) of the Immigration and National Act. 4/ The latter argument, however, is not relevant here because the Department's determination of loss of nationality is grounded on section 349(a)(1) of that Act, that is, obtaining naturalization in Canada upon his own application.

Section 349(a)(1) of the Immigration and Nationality Act provides that a person who is a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. There is no question that appellant, D[redacted], voluntarily applied for and obtained Canadian citizenship. The Canadian authorities also confirmed that appellant was naturalized on April 2, 1974.

4/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(2), provides:

> 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 --
>
> . . .
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; . . .

Appellant explained the reasons for his naturalization in his letter of September 27, 1974, to the Army regarding President Ford's program. He stated that he acquired Canadian citizenship after giving the matter "due consideration" and after taking into account a number of factors. These included, he said, the fact that he was married, that he was employed in a responsible position with the Ontario Ministry of Health, and that he was convinced that "there would be no amnesty granted -- ever" to military deserters. He gave the same explanations in his answers to a citizenship questionnaire of the Consulate General at Toronto that he executed on July 5, 1979, five years later. He believed that there was practically no likelihood of his returning to the United States in light of President Nixon's reported opposition to amnesty for draft evaders and military deserters. He also thought that the acquisition of Canadian citizenship would enable him to better support his new family "by opening new doors" for him "in the sphere of Government activity".

Although it is clear, as appellant admits, that he voluntarily acquired Canadian citizenship for personal reasons and career objectives said to be due in large part to a mistaken belief "that he would never be allowed back" in the United States, he contends that he did not intend to relinquish his United States citizenship when he became a Canadian citizen. He declared in a form which he completed for the Consulate General on June 22, 1979, that he did not think that becoming a Canadian citizen would cause him to lose his United States citizenship and that he "never knowingly" signed any document that indicated that he wished to give up his United States citizenship. In his citizenship questionnaire of July 5, 1979, he stated that if he had known that his naturalization in Canada would result in the loss of his citizenship, he would not have become a Canadian.

The Supreme Court declared in Afroyim v. Rusk, 387 U.S. 253 (1967), that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." The Supreme Court rejected the view that Congress has any general power, expressed or implied, to take away an American citizen's citizenship without his assent. While Afroyim did not explicitly provide guidance on the question of what conduct would constitute a voluntary relinquishment of citizenship, it nevertheless made loss of citizenship dependent upon

evidence of an intent to relinquish citizenship. The Attorney General in his Statement of Interpretation of Afroyim observed 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. 5/

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court reaffirmed and clarified its holding in Afroyim. In order to establish loss of citizenship, the Court said that the Government must prove an intent to surrender United States citizenship, as well as that an act of expatriation was committed. The Court referred to Afroyim's emphasis on the individual's assent and stated that an intent to relinquish United States citizenship 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 made it clear in Terrazas that it is the Government's burden to establish by a preponderance of the evidence that the expatriating act was accompanied by an intent to terminate United States citizenship. 6/

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

6/ 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 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.

It should be noted, as the U.S. Court of Appeals, Seventh Circuit, observed in Terrazas v. Haig, 653 F. 2d 285 (1981), "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence." The Court went on to say, however, that "circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." The Court referred to an earlier Ninth Circuit decision in King v. Rogers, 463 F. 2d 1188 (1972), in which it was pointed out that the Secretary of State may prove intent by acts inconsistent with United States citizenship or by affirmative acts clearly manifesting a decision to accept foreign nationality. Such proof need be only by a preponderance of the evidence.

Thus, the issue that we are confronted with in this case is whether or not appellant intended to relinquish his United States citizenship at the time he obtained naturalization in Canada upon his own application. Such intent is to be determined as of the time the act of expatriation took place and may be ascertained from his words or as a fair inference from his conduct. Vance v. Terrazas, 444 U.S. 252 (1980).

It appears that appellant first raised the issue of his intent in 1979 in his response to a question on a form of the Consulate General as to whether he intended to relinquish his United States citizenship when he was naturalized in Canada. Appellant answered "no". This occurred five years after his naturalization in Canada and four years after his discharge from the U.S. Army. There is nothing in the record by way of statements made by appellant concerning his intent prior to or at the time he obtained naturalization in Canada in April of 1974. We have, however, in the record appellant's correspondence with the Army during the period from September to December 1974, shortly after his naturalization, which we find significant.

In that correspondence, as we have seen, he informed the Army that he was unable to reaffirm his allegiance to the United States, and that, if he were not a Canadian citizen, he would no doubt return to the United States under President Ford's program. These statements are inconsistent with an intent to retain his United States citizenship. It is hard to escape the conclusion that such statements, almost contemporaneous with his naturalization, manifested his intent to give up his United States

citizenship. Furthermore, after being informed that he would be discharged from the U.S. Army, appellant asked the Army on December 20, 1974, to answer "one very important question":

Am I now free to travel through and within the United States, without fear of being detained or arrested?

It is obvious from the foregoing that appellant in 1974 did not consider himself to be a United States citizen and that his conduct demonstrated an intent to relinquish his citizenship. Appellant voluntarily sought Canadian citizenship, and took and subscribed to an oath of allegiance. The oath, according to Canadian authorities, required appellant to swear that he will be faithful and bear true allegiance to Queen Elizabeth the Second, her Heirs and Successors, and that he will faithfully observe the laws of Canada and fulfil his duties as a Canadian citizen. It has been stated in King that the taking of an oath of allegiance, while alone is insufficient to prove a renunciation of citizenship, "provides substantial evidence of intent to renounce citizenship."

We also find relevant as bearing on the question of his intent to transfer allegiance to Canada, the fact that he sought naturalization to advance his career in Canada and to escape the criminal consequences of his desertion from the U.S. Army. Also, according to the record, throughout appellant's stay of more than ten years in Canada, he did not register himself as a United States citizen.

There is no indication of record that he considered himself to be a United States citizen after he acquired Canadian nationality. Indeed, in his letter of September 27, 1974, to the U.S. Army, he stated that he was unable to reaffirm or acknowledge his allegiance to the United States because of his Canadian citizenship. Also, when appellant visited the Consulate General in 1979, he applied for a visa to the United States. Such action presupposes the absence of United States citizenship.

Appellant testified at the hearing held before the Board that he had known people who had dual citizenship status, that of the United States and of Canada, and that he had been informed by the Canadian citizenship office

that "they accepted dual citizenship. 7/ Appellant could have easily obtained an official view from the Consulate General concerning the legal effect of his contemplated naturalization in Canada, but did not do so. In the questionnaire concerning intent, which he completed on July 5, 1979, he stated that he did not consult any official of the United States concerning the effect of his naturalization in Canada. He said that it never occurred to him "to contact anyone" and that he felt he was persona non grata. In any event, he must be held to have proceeded at his own risk in acquiring Canadian citizenship. His mistaken belief as to his dual nationality status, being a mistake of law, does not excuse appellant's act in obtaining naturalization in Canada.

In light of Afroyim and Terrazas, it is a person's conduct at the time the expatriating act occurred that is to be looked at in determining his or her intent to relinquish citizenship. The assertion made by appellant in 1979 that he did not intend to relinquish his United States citizenship is negated by his voluntarily applying for naturalization in Canada, by taking an oath of allegiance to Queen Elizabeth the Second, by declaring his intent to faithfully observe the laws of Canada and fulfill his duties as a Canadian citizen, and by his conduct at the time he sought naturalization and thereafter. His correspondence with the Army in 1974 attested to the acceptance of a new allegiance, which, he stated, prevented him from acknowledging or giving continued and undivided allegiance to the United States. 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 entire record before the Board, we are of the opinion that appellant's own words and conduct at the time of expatriation establish the requisite intent to give up citizenship. It is our judgment that the Department had satisfied its burden of proof that appellant's expatriating act was performed with the intent to relinquish United States citizenship.

7/ Transcript of Proceedings in the Matter of W[redacted] R[redacted] D[redacted], Department of State, Board of Appellate Review, September 25, 1981, at page 26.

On consideration of the foregoing and on the basis of the record before the Board, we conclude that appellant expatriated himself on April 2, 1974, by obtaining naturalization in Canada upon his own application and, accordingly, affirm the Department's administrative determination of December 12, 1979, to that effect.

Julia W. Willis, Chairman

Edward G. Misey, Member

Alan G. James, Member