January 29, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: I[redacted] C[redacted] [redacted] T[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, I[redacted] C[redacted] [redacted] T[redacted], expatriated herself on May 13, 1977, under the provisions of Section 349(a)(6), now Section 349(a)(5), of the Immigration and Nationality Act of 1952 by making a formal renunciation of her United States nationality at the American Embassy at Guatemala City, Guatemala. 1/ On July 13, 1977, the American Consul at Guatemala City executed a Certificate of Loss of Nationality which was approved by the Department of State on August 11, 1978. This Certificate of Loss of Nationality constitutes the Department's administrative holding from which this appeal lies to the Board of Appellate Review.

Appellant, I[redacted] C[redacted] [redacted] T[redacted], was born at [redacted], thus acquiring United States citizenship at birth. She resided in the United States until 1938 when she went with her parents to Guatemala where she married a Guatemalan citizen, raised a family and has resided ever since. Appellant acquired the nationality of Guatemala by virtue of her parentage.

1/ Section 349(a)(6), now Section 349(a)(5), of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 --
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> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of Section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of Section 349(a) as paragraph (5).

Until 1977, appellant, because of her dual nationality, possessed both United States and Guatemalan passports. Although she was aware that under Guatemalan law, the possession of two passports was illegal, appellant retained her United States passport and used it only when she was travelling outside Guatemala. Before April, 1977, she had always been able to obtain exit visas on her Guatemalan passport by presenting this passport to the Guatemalan Delegacion de Migracion. In April, 1977, however, when applying for such an exit visa on her Guatemalan passport to visit the United States for the purpose of joining her Guatemalan husband who was temporarily here on business, the Guatemalan authorities refused to issue her a visa. Having been notified by letter of April 15, 1977, from her travel agent that the General Office of Immigration of Guatemala suspected appellant of holding double passports and that it would therefore be necessary for her to appear before the Guatemalan authorities to clear up the situation, Mrs. T[redacted] was confronted with the dilemma of choosing between her two passports which led to her visit approximately a month later on May 13, 1977, to the American Embassy.

While at the American Embassy on May 13, 1977, Mrs. T[redacted] signed a formal Oath of Renunciation which in the form prescribed by the Secretary of State, stated in part, "...I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining." She also executed a Statement of Understanding which explains the consequences of the formal renunciation of her United States citizenship. By signing this Statement of Understanding, Mrs. T[redacted] expressly acknowledged that the serious nature of the act of renunciation had been explained to her and that she fully understood the consequences of the renunciation. This executed Statement of Understanding was signed by two witnesses who attested to the fact that the consular officer had explained the meaning of the Statement of Understanding after it had been read as well as the consequences of renunciation.

Although the Department approved the Certificate of Loss of Nationality in the name of I[redacted] C[redacted] T[redacted] on August 11, 1978, appellant contends that she did not learn of the Department's action until September, 1980, when

she engaged an American attorney to inquire into her citizenship status. This inquiry followed the kidnapping of Mrs. T[redacted]'s husband by a communist guerrilla group in Guatemala on June 24, 1980, and his subsequent release in August of that year. According to appellant's brief, the T[redacted] are in extreme danger in Guatemala and wish to return to the United States permanently. On December 17, 1980, appellant gave notice of appeal to the Board from the Department's administrative determination of loss of nationality made in 1978.

Counsel for appellant contends (1) that because Mrs. T[redacted] was not accorded the benefit of the procedures outlined in the Foreign Affairs Manual to insure that a citizen understands the drastic nature of committing an expatriating act, her renunciation is legally defective; and (2) that at the time of her allegedly expatriating act she was acting under duress created by her severe psychological depression and poor health, and that she therefore lacked the requisite intent to abandon her citizenship.

Specifically, with regard to procedural defects, counsel for appellant contends that contrary to the procedure prescribed in the Department's Foreign Affairs Manual for every case, the consular officer, after reading aloud the Statement of Understanding, did not explain in detail all of the consequences flowing from the intended renunciation. Another procedural defect cited was the obvious failure to comply with the Foreign Affairs Manual requirements that the would-be renunciant initial every phrase deleted from the Statement of Understanding preceding this signature; that the consular officer initial each deletion from the jurat paragraph immediately preceding his signature; and that each witness initial each deletion from the witnesses' attestation clause. Recounting the circumstances of her visit to the Embassy, it is noted in appellant's brief that Mrs. T[redacted] recalled signing many papers; that she did not have a lengthy conversation with the officer; was never advised to reconsider her actions; and that the whole visit was completed within an hour.

The consular officer involved, stated, in an affidavit executed on April 16, 1981, that he did not recall the renunciation case of Mrs. T[redacted]. He volunteered, however, that he has handled fifteen or so renunciations and that in

none of them had he ever failed to explain carefully the gravity of the contemplated act. He also stated that he invariably informed such American citizens that they were free to make a statement regarding their reasons for renouncing, encouraged them to think the matter over, and to delay their decision.

With respect to the allegations that the consular officer did not advise Mrs. T[redacted] to reconsider her decision to renounce, nor did he explain in detail the consequences of her renunciation or the meaning of the Statement of Understanding, the Board recognizes that a presumption of regularity attaches to compliance with procedural requirements by officers of the Government in the conduct of their responsibilities. Boissonnas v. Acheson, 101 F. Supp. 138 (1951). The consular officer's sworn statement regarding his practice in the relatively large number of renunciations he handled supports this presumption.

Apart from the effect of this presumption of regularity, appellant's attorney contends that violation of these procedural requirements, as alleged, renders the renunciation legally defective. Section 349(a)(5) of the Immigration and Nationality Act specifies the only legal criteria for a valid renunciation. This statutory criteria is that a formal renunciation of nationality be made "before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State". Mrs. T[redacted]'s renunciation fully met these conditions, and is thus considered by the Board to be legally valid. The legislative history of Section 349(a)(5) of the Immigration and Nationality Act indicates that Congress in its recognition of the right of expatriation as a fundamental principle of the Republic intended that there be little administrative discretion in the matter of renunciation of nationality. 2/

2/ Section 1, Chapter 249 of Act of July 27, 1968, 15 Stat. 223 (codified as a note to 8 U.S.C. Sec. 1481) states:

> "Any declaration...opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. ...".

The procedures specified in the Department's Foreign Affairs Manual were not intended to confer rights on the renunciant. Renunciation is itself a right. Recognized as such by law and by the formally published regulations of the Department, which adhere closely to the language of the statute (22 CFR 50.50), the functions of a consular officer in this matter are in no way adversarial to the exercise of the right of renunciation. The act of renunciation is, therefore, not of a nature to require regulatory protection from adverse, arbitrary action of an officer of the Department. The procedural requirements in the Department's Foreign Affairs Manual, regarded as internal guidelines to assist consular officers in processing renunciations, have never been published in either the Code of Federal Regulations or in the Federal Register, and, therefore, do not rise to the stature of binding law or regulation. The body of case law supports the distinction in terms of binding effect between formally published procedural safeguards designed to protect persons from arbitrary governmental action and procedural requirements not formally published and not intended as a protection from adversarial, arbitrary official actions. 3/ The Board is agreed that noncompliance with the procedural requirements in the Foreign Affairs Manual, if, as alleged, would not, standing alone, render a voluntary renunciation legally invalid.

Appellant's counsel, raises the additional argument that at the time of Mrs. T[redacted]'s renunciation, she was acting under duress created by severe psychological depression and poor health, and that appellant therefore lacked the requisite intent to relinquish her citizenship.

3/ Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); and Vitarelli v. Seaton, 359 U.S. 535 (1959) support the principle that regulations formally published by a government agency are binding upon it as well as the citizens. Morton v. Ruiz, 415 U.S. 199 (1974), on the other hand, supports the conclusion that a government agency's manual contents, not formally published, are not legally binding.

Under Section 349(c) of the Immigration and Nationality Act 4/, a person who performs a statutory act of expatriation, such as taking an oath of renunciation, is presumed to have done so voluntarily. This presumption is rebuttable by a preponderance of evidence that the act was not done voluntarily.

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 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.

Technically Section 349(b) of the Immigration and Nationality Act applies to appellant. Section 349(b) provides that "Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the State in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act." However, the Department has, in the absence of a judicial review of the constitutionality of Section 349(b), chosen not to rely on this section with its conclusive presumption standard, in its determinations of loss of nationality. The Board, barred under 22 C.F.R. Section 7.5(j) from considering the constitutionality of any law, has chosen to apply the rebuttable presumption test of Section 349(c) to the issue of voluntariness presented in this case.

It is well established that proof of duress or involuntariness is a valid defense to the expatriative act of a formal renunciation of United States citizenship. It is the very essence of expatriation that it be voluntary. Perkins v. Elg, 307 U.S. 325 (1939); Doreau v. Marshall, 170 F. 2d 721 (1948); Nishikawa v. Dulles, 356 U.S. 129 (1958); Afroyim v. Rusk, 387 U.S. 253 (1967); Jolley v. Immigration and Naturalization Service, 441 F. 2d. 1245 (1971). The Court of Appeals stated in Jolley, what has since become an acceptable criterion on voluntariness, that the opportunity to make a decision based upon personal choice is the essence of voluntariness. 441 F. 2d. at 1250.

In order for the defense of duress to prevail, it must be shown, as stated in Doreau v. Marshall, 170 F. 2d. 271 at 274 (1948), that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course of action against his fixed will, intent, and efforts to act otherwise. The expression "voluntary act" has been defined as an act proceeding from one's own choice or full consent unimpelled by another's influence. Nakashima v. Acheson, 98 F. Supp. 11 (1951). In cases of formal renunciation of nationality, it has been held that a higher degree of evidence of duress is required to rebut the presumption of voluntariness. Kuwahara v. Acheson, 96 F. Supp. 38, 42 (S.C. Cal. C.D. 1951).

In light of these judicial guidelines, the basic question to be decided by the Board is whether appellant was forced against her will to renounce her United States citizenship and whether she, in her claimed state of emotional impairment, proceeded from the basis of her full consent unimpelled by another's influence. These criteria while developed in cases not involving emotional or mental duress, require the Board to be satisfied that appellant, who pleads emotional duress, acted rationally and was capable of comprehending the meaning of renunciation.

The Board is sympathetic with the emotional stress which Mrs. Tejada apparently suffered at the time of her decision to renounce her United States citizenship. It is understandable that this stress was compounded by her poor health, suffering, and the urgency she must have felt to join her husband who was in the United States at the time. In the Board's view, however, requisite evidence to

show that appellant did not act rationally, or comprehend the meaning of renunciation, or was compelled to act against her will, or was impelled to renounce by another's influence, is lacking.

Evidence that Mrs. T[redacted] could act rationally at the time of making her decision to renounce is drawn from the statement in the letter of November 25, 1980, from appellant's psychiatrist, who was treating her at the time. He characterized Mrs. T[redacted] as being "conscious, oriented in time, space and personality". His additional observation in the same letter that appellant was "depressed, feeling despondent, and experiencing difficulty in making decisions", does not, in the Board's judgment, substantiate a claim of incapacity to act rationally. The fact that nearly a month transpired between the time Mrs. T[redacted] realized as a result of her travel agent's letter of April 15, 1977, that she had to choose between her Guatemalan and United States passports, and her visit to the Embassy on May 13, indicates a time of deliberation about her impending choice. The fact that she chose, after approximately a month's duration of living with the dilemma, to renounce her United States citizenship and retain her Guatemalan citizenship indicates a rational preference in terms of her continuing residence in Guatemala, her husband's nationality as well as that of her family, and her concern that Guatemalan authorities would discover that she illegally held a United States passport. Moreover, apart from her signature on the Statement of Understanding by which she expressly acknowledged that she understood the serious nature of the act of renunciation as well as the consequences, Mrs. T[redacted]'s testimony at her hearing persuades us that she was capable at the time of comprehending the meaning of renunciation and in fact did understand it.

At her hearing Mrs. T[redacted] was questioned repeatedly as to her understanding of the meaning of renunciation at the time she renounced. Initially, she answered that she didn't think that she understood the words regarding having a right to renounce and deciding voluntarily to do it, because she was so heavily medicated. 5/ Subsequently, it appeared in the context of questioning about her son's renunciation of his United States citizenship in 1963, that she

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5/ Transcript of Proceedings In the Matter of I[redacted] C[redacted] T[redacted] (hereinafter cited as TR), p. 47.

fully comprehended that he gave it up. 6/ And when asked when she first became aware that one could renounce his citizenship, she replied that it was before she married when she went to the Consulate to inquire whether she could keep her dual citizenship. 7/ Mrs. T[redacted] further testified to telling the secretary at the Consulate that she wanted to renounce; that she went there to renounce and obtain a visa; and that after having done it and receiving the visa, she felt very badly and confused but knew she was not a United States citizen. 8/ Appellant also at a still later point at the hearing testified that she knew that she was renouncing or giving up her citizenship "in a certain way" but didn't think she knew what she was really getting into. 9/ It appears that she must have realized the consequences when her husband responded angrily to the news of her renunciation. 10/ The fact that she did not inquire or discuss her citizenship status with the Embassy during the time between her renunciation in May, 1977 and 1980, when the circumstances of her husband's kidnapping rendered their continued residence in Guatemala dangerous, indicates that she knew and accepted the fact that she had given up her United States citizenship. She confirmed at her hearing that she indeed did know that she had given up her citizensnip and that no further action was required. 11/

No evidence has been offered to indicate that Mrs. T[redacted] was forced against her will or even influenced by another to choose to give up her United States citizenship. Mrs. T[redacted] herself testified that she did not consult her husband, members of her family or any one else as she contemplated and then executed the act of renunciation.

6/ TR. p. 53.

7/ Ibid.

8/ TR. p. 48.

9/ TR. p. 55.

10/ TR. p. 49.

11/ TR. p. 55.

It is conceded that appellant may have wanted to keep her United States citizenship, as evidenced by her long-standing retention of her United States passport, and that she may have believed that she was compelled by Guatemalan law to renounce her United States citizenship. We are, however, unable to conclude, that this compulsion is tantamount to an involuntary renunciation as a matter of law. The dilemma Mrs. T[redacted] faced derived from her admittedly illegal retention of a United States passport, and intentional circumvention of Guatemalan law for many years. These were circumstances of her own making which were bound ultimately to force a choice. The difficulty of the choice which confronted appellant does not render her renunciatory action involuntary as long as she was free to make the choice and could comprehend its meaning. Appellant's emotional stress and impairment, in so far as we can determine from the record as well as testimony at the hearing, was not sufficient to deprive Mrs. T[redacted] of the exercise of either her freedom to make the choice or her capacity to rationally comprehend the meaning of her renunciation.

In our opinion, appellant has failed to meet the burden, specified in Section 349(c) of the Immigration and Nationality Act, of rebutting by a preponderance of the evidence the statutory presumption that her renunciation was voluntary. 12/

With respect to the question of whether or not appellant had the intention to voluntarily relinquish her United States citizenship, we are persuaded that appellant voluntarily renounced her United States citizenship with the intention of relinquishing her United States citizenship. This intention was inherent in the difficult choice Mrs. T[redacted] was forced to make. This intention is further reflected in the language of the renunciatory form she signed which stated "...I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

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

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12/ See note 4 supra.

relinquishes that citizenship." In Vance v. Terrazas, 444 U.S. 252 (1980) the Supreme Court reaffirmed Afroyim's emphasis on the individual's assent to relinquish citizenship and the requirement that the record support a finding that the expatriating act was accompanied by an intent to relinquish United States citizenship. Formal renunciation of United States citizenship, in the manner provided by law, is considered the most unequivocal and categorical of all expatriating acts, and demonstrates an intent on the part of the renunciant to relinquish citizenship. The intent to relinquish is implicit in the act of renunciation. In the Board's judgment, appellant assented to the loss of her United States citizenship by her formal renunciation.

On consideration of the foregoing and on the basis of the record before the Board, we conclude that appellant expatriated herself on May 13, 1977, by making a formal renunciation of her United States citizenship before a consular officer of the United States in the form prescribed by the Secretary of State. We, accordingly, affirm the Department's administrative holding of August 11, 1978.

Julia W. Willis

Julia W. Willis, Chairman

Edward G. Misey

Edward G. Misey, Member

Warren E. Hewitt

Warren E. Hewitt, Member