August 25, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: V[redacted] W[redacted] v[redacted] d[redacted] H[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, V[redacted] W[redacted] v[redacted] d[redacted] H[redacted], expatriated himself on August 13, 1980, under the provisions of section 349(a)(5) of the Immigration and Nationality Act (hereinafter "the Act") 1/ by making a formal renunciation of his United States nationality before a consular officer of the United States at Stuttgart, Federal Republic of Germany.

I

Appellant, V[redacted] W[redacted] v[redacted] d[redacted] H[redacted], and his wife, [redacted] both native-born American public of Germany in 1979. A letter to the Board written on July 21, 1981, by Elizabeth and signed by them both, explains why they went to Germany:

> He /V[redacted] had for a long time felt personally compelled to pursue his future in Germany, be the outcome happy or not. His overwhelming desire to stay in Germany stemmed from a death-bed promise he made to his grandfather who was his primary caretaker to return to the land of his grandfather's birth. He chose to relocate to Germany partially to seek out more information about his grandfather's family....

1/ 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 of naturalization, shall lose his nationality by --
>
> (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; . . .

There is no evidence in the record before us to corroborate appellant's words or conduct between the date of his arrival in Germany and August 13, 1980, when he renounced his United States citizenship. We have therefore only the undocumented joint submission of appellant and his wife, written eleven months after the event, from which to reconstruct what transpired in the period preceding appellant's renunciation.

As set forth in the joint letter, appellant became a student at the University of Freiburg in the spring of 1979. His wife supported them both by taking full-time employment.

It appears that some time in the spring of 1980 appellant faced an examination to determine whether he could continue at the University. Purportedly he was greatly concerned he might not pass the examination and thus would be required to give up his studies and leave Germany. It also appears that around that time the German authorities were tightening the regulations governing residence in Germany of foreign nationals.

The joint letter describes the couple's concerns about this development;

> Because we were expecting a child and I /Elizabeth/, the wage earner, would after a while be unable or nearly unable to be employed full-time, and because my husband was not allowed to work himself, the administration in charge of issuing visas to foreign nationals in Germany told us that we would be forced to leave Germany before my husband could finish his studies.....So even if he were to have successfully completed the examination on the first try -- which he later did -- he was nevertheless still threatened with being forced to give up what he had, with great effort and much labor, started.

In casting about for a way to remain in Germany, appellant apparently sought no authoritative advice. For example, we see no evidence that he made any inquiries of the United States Consulate General at Stuttgart, no great distance from Freiburg. He states that he consulted a personal friend who advised him to seek the status of a stateless person; the friend had reportedly done so and had been able to remain in Germany. A

tax consultant allegedly told appellant that he would have no great problem if he were to become a stateless person.

Appellant alleges that he approached the Interior Ministry of Baden-Wuerttemberg regarding the possibility of becoming a naturalized German citizen. There is, however, no indication in the record when such an approach was made: nor are there copies of any correspondence on the subject between appellant and the Ministry. Appellant asserts that through a misunderstanding in an exchange of letters, he mistakenly believed that because the Ministry had permitted him to submit an application for naturalization, it would be accepted and acted on immediately and that "any tampering on his own part with the citizenship of his birth would have only slight consequence, if any at all." What we assume appellant is saying is that he made an effort to become a naturalized German citizen (and thus remove the threat of being forced to leave the country), but that when his application for naturalization was turned down, or not acted upon, he saw no alternative to renouncing his citizenship to avoid a forced departure from the country.

Thus, in the apparent expectation that he would thereby be permitted to remain in Germany, appellant decided that he and Elizabeth should become stateless. On August 13, 1980, appellant and his wife appeared at the United States Consulate General at Stuttgart and requested that they be permitted to renounce their citizenship. There, before a consular officer and two witnesses, both took the oath of renunciation. They also signed statements attesting to their understanding of the implications of their act, and surrendered their passports. In this connection, we again note that the record is regrettably sketchy: it does not disclose whether the Consulate General submitted a report on Mr. and Mrs. v[redacted] d[redacted] H[redacted] renunciation, recording the consular officer's impressions of their demeanor and the circumstances surrounding their act on that day.

As required by section 358 of the Act, 2/ the Consulate General on August 13, 1980, executed a certificate of loss of nationality in the name of appellant (as well as one in the name of his wife). The Consulate General certified that appellant was born at Indianapolis, Indiana, on July 28, 1944, that he acquired the nationality of the United States by virtue of his birth therein: that he made a formal declaration of renunciation of his United States nationality on August 13, 1980; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

The Department approved the certificate on September 29, 1980, an administrative determination of loss of nationality from which an appeal may be taken to this Board.

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 part III of this subchapter, 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.

The record contains no evidence of any further material development in this case until on March 7, **1981**, when appellant's wife informed the Consulate General that the German authorities at Freiburg had advised the couple that they "must appeal for return of our citizenship.'' She inquired how they might make such an appeal, and was informed of the proper procedure by the Consulate General. On May 7, 1981, the Landratsamt of Breisgau-Hochschwarzwald informed the Consulate General that appellant was residing illegally in Germany. In reply to the Landratsamt's queries, the Consulate General on August 7, **1981**, referred the Landratsant to its letter of May 13 to that office which had answered the same inquiries regarding Elizabeth. The Consulate General's May 13 letter had stated that Mrs. V[redacted] d[redacted] H[redacted] might not revoke her oath, she might, however, appeal; that the United States would not assume responsibility for her; and that inquiries about issuance of an immigration visa to her should be directed to the Consulate General at Frankfurt.

V[redacted] d[redacted] H[redacted] and his wife took an appeal from the Department's determination of loss of their United States citizenship on July 21, **1981**, in a letter which, as previously mentioned, was written by his wife and signed by them both. This letter constitutes appellant's brief. He submitted no reply brief, although informed of his right to do so on November 16, 1981, when the Board sent him a copy of the Department's brief. Since that date appellant has not replied to any communication sent him by the Board, nor has he indicated an intention to prosecute his appeal. Nevertheless, since he has not withdrawn his appeal, the Board believes that it is proper to proceed in the matter and to adjudicate his case on the basis of the record before us. 3/

It appears that appellant (and his wife) took this appeal at the instigation of the German authorities. In the afore-mentioned joint letter, they stated that they "had been asked by the Foreign Office here in Germany to apply for return of our American citizenship" and that they were "happy to comply with this request."

3/ Section 7.2, Title 22, Code of Federal Regulations, 22 CFR 7.2, provides in part:

> "The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it."

To this joint letter, von der Heydt appended a "personal declaration" in which he asked the Board to consider his wife's appeal separately from his own because, he asserted, he had forced her against her will into renouncing her citizenship.

II

The Department's administrative determination that von der Heydt expatriated himself by making a formal renunciation of his United States citizenship may be sustained only if it be proved that a statutory act of renunciation was performed in the form prescribed by the Secretary of State; that it was voluntary and accompanied by intent to relinquish his United States citizenship.

There can be no dispute that appellant performed a statutory act of renunciation; the oath itself and the statement of understanding which he executed at the time he took the oath confirm that fact. Nor is there any question that the act was performed before a consular officer of the United States in a foreign state, in accordance with the form prescribed by the Secretary of State, in the presence of two competent witnesses, and by means of a document in the form prescribed for such an act.

The decisive issue in this case is whether appellant voluntarily took an oath of renunciation of his United States nationality.

Appellant makes a vague and less than forceful plea of duress. Essentially, he rests his case on the following statement in the joint letter of July 21, 1981:

> Perhaps it is clear to [the Board] that my husband took the steps he did because he did not know what to do, where to go, or to whom to turn for help. His actions were not calculated but rather were fear reactions as a result of personal stress and in response to what he perceived as a threat to his real happiness.

Appellant seems to be arguing that the threat of an early, forced departure from Germany (which would frustrate his wish to continue to reside there and thus honor his promise to his grandfather) left him no choice but to opt for renunciation of his native citizenship. It is on the basis of this unsupported statement that we must attempt to assess whether appellant's act of renunciation was voluntary or not.

Under section 349(c) of the Act 4/, a person who performs a statutory act of expatriation is presumed to have done so voluntarily. This presumption may, however, be rebutted by a preponderance of the evidence. Thus, appellant bears the burden of proving that his renunciation of his native citizenship was involuntary.

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). As the Court stated in Jolley, 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 at 724 (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.D. Cal. C.D. 1951).

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, .

Applying these judicial principles to appellant's case, we do not consider that the circumstances in which he found himself constituted true duress. Assuming the facts are as stated by appellant and his wife, v[redacted] o[redacted] H[redacted] had at least one clear alternative (probably more) to renouncing his United States citizenship, namely, returning to the United States to complete his studies. However strongly he may have felt about the moral obligation arising from his promise to his grandfather, there were, surely, ways in which he could honorably discharge it other than by relinquishing his birthright citizenship. Appellant has not shown that continuing to reside in Germany was an imperious necessity. He, therefore, had an opportunity to make a decision based on personal choice unimpelled by another's influence.

That he received ill-informed advice, did not know where to turn for authoritative guidance and acted hastily are at best weak excuses, and do not, in our view, render his act of renunciation involuntary. These are lapses which simply show that he failed to exercise the care of a reasonably prudent man before taking one of the gravest decisions of his life.

Furthermore, appellant's own words confirm the voluntariness of his act of renunciation. He so affirmed in the statement of understanding he executed on August **13**, 1980, wherein he stated: "I understand that: **1. I** have a right to renounce my United States citizenship and that **I** have decided voluntarily to exercise that right." His "personal declaration" appended to the joint letter of July **21**, 1981, in effect also concedes the issue **of** voluntariness, Therein he stated, inter alia,:

> **I** placed before her /Elizabeth/ the choice of either having to support my own priorities by signing a declaration relinquishing her own American citizenship or of incurring such bad feelings that it would have severely interferred with a normal family life**....I** really did push her very forcefully into making a decision in which she did not want to participate**....**

Accordingly, we conclude that appellant has failed to overcome the statutory presumption that his oath of renunciation of his United States citizenship was a voluntary act.

Finally, we reach the issue of whether appellant's renunciation of United States nationality was accompanied by an intent to forsake his allegiance to the United States. 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." In Vance v. Terrazas, 444 U.S. 252 (1980) the Supreme Court reaffirmed Affroyim'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.

We are persuaded that appellant clearly had such an intent. Intent is inherent **in** the choice he made. It is further reflected in the language of the renunciatory form he signed on August 13, 1980:

> 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.

Formal renunciation of United States citizenship, in the manner prescribed by law, is the most unequivocal and categorical of all expatriating acts, and ipso facto demonstrates an intent on the part **of** the renunciant to relinquish citizenship. In the Board's judgment, appellant assented to **loss** of his United States citizenship by his formal renunciation.

III

On consideration of the foregoing and on the basis of the record before the Board we conclude that appellant expatriated himself on August 13, 1980, by making a formal renunciation of his United States citizenship before a consular officer of the United States in a foreign state and

in the form prescribed by the Secretary of State. Accordingly, we affirm the Department's administrative determination of September 29, 1980, to that effect.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

James G. Sampas, Member