DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J C C

This is an appeal from an administrativ et tion of the Department of State that appellant, J C C expatriated himself on May 1, 1964, under the p s of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

In claiming that expatriation has occurred, it is the Government's burden to prove by a preponderance of the evidence that the expatriating act was performed with the intent to relinquish citizenship. We find upon a review of all the evidence that the Department has not satisfied its burden of showing that appellant had the requisite intent to give up his United States citizenship when he acquired Canadian citizenship by naturalization. Accordingly, we will reverse the Department's determination of loss of nationality.

I

Appellant was born at Pasadena, California on January 13, 1943, and acquired ship at birth. His name at birth was . Following the death of his mothe a birth, an p in the s parents, C F C and who were Ca c ns, a n to On October 8, 1943, his maternal grandparents formally adopted him. Appellant's name was also

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1/ Section 349(a)(1) 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application, . . .

changed at the time to J C C . In 1948, he was re-adopted by his natural uncle. , a citizen of Canada, and his wife, .

Appellant was raised and educated in Canada. In 1959, while a high school student, he joined the Canadian Army Militia (Reserve) and served until **1962.** Subsequently, he became interested in employment in the Royal Canadian Mounted Police. He states that he was told at the time that in order to apply for entrance to the **Royal** Canadian d Police he had to have Canadian citizenship status, C applied for naturalization and became **a** Canadian citizen on May 1, 1964.

Appellant apparently abandoned his interest in the Royal Canadian Mounted Police, and enlisted instead in the Canadian Armed Forces (Air). He served in the air force from **June** 26, **1964,** until he **was** honorably released on May **23, 1974,** a period **of** approximately ten years. He then found employment with Xerox of Canada, Ltd. in Vancouver,

On May 29, 1978, the Xerox Corporation selected C for an assignment at its International Center for Trai and Management Development in Leesburg, Virginia. Xerox petitioned **the** Immigration and Naturalization Service **(here-**after "the Service"), U.S. Department of **Justice,** for a temporary L-1 nonimmigration visa (intra-company transferee) for appellant and his family. **2/**

C received his visa at Lynden, Washington, at the time of his entry into the United States on June 12, 1978. **Xerox** obtained an extension of the **visa** in 1979, and in March 1980, C applied **to** the **Service** in **Washington, D.C. for** an exte f his and his **family's** temporary stay **in the** United States. After completing his assignment **in** the United States, he returned to Canada on December **29, 1980.**

2/ A visa of this category may be granted an alien **who has been** employed continuously for one year and who seeks to enter the United States in order to continue to render his **or** her services to the same employer or a subsidiary or affiliate thereof in a managerial. or executive capacity or in a capacity which involved specialized knowledge.

Throughout his two and a half years stay in the United States, Campbell stated in an affidavit dated May 27, 1982, he maintained that he was a dual national, a citizen of the United States and a citizen of Canada. He believed that he still retained his United States citizenship status, and sought to clarify the matter with the Service and the Department of State. In April 1980, pursuant to a suggestion of a Department employee, he applied for a U.S. passport at the Washington, D.C. Passport Agency. In this manner, he was informed, his claim to American citizenship could be determined.

I dering the application, the Department determined that C was naturalized as a Canadian citizen in 1964; that h een admitted to the United States in L-1 non-immigrant status, and that the Service had determined he was an alien at the time of his admission to the United States in 1978. The Department, consequently, disapprov October 6, 1980, the passport application, and referred C to the Service for "any further adjudication" of his citiz status while residing in the United States. Thereafter, C requested an adjudication from the Service regardin laim to United States citizenship. On January 5, 1981, the Service informed him that he had lost his United States citizenship as a result of his naturalization in Canada,

Subsequently, upon advice of Washington counsel, C filed a new application for a U.S. passport at the American Consulate General at Toronto on November 5, 1981, as a means to have his claim to United States citizenship adjudicated by the Department ssist in the determination of his citizenship status, C later submitted completed citizenship questionnaires ted by the Consulate General.

On January 11, 1982, in accordance with section 358 of the Immigration and Nationality Act, the Consulate General prepared a ,certificateof loss of United States nationality. 3/

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

> 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.

It certified that appellant acquired United States nationality by virtue of his birth in the United States; that he acquired the nationality of Canada by virtue of his naturalization in that country on May 1, 1964; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on February 3, 1982. The certificate constitutes the Department's administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to the Board of Appellate Review,

On March 31, 1982, appellant gave notice of appeal through counsel. Appellant contended that he lacked the requisite intent to relinquish his United States citizenship when he obtained naturalization in Canada. He argues that the Department has not met its burden of showing by a preponderance of the evidence that his naturalization in Canada was accompanied by an intent to give up his United States citizenship,

A hearing was held before the Board on February 17, 1983.

II

Before proceeding with the merits of the appeal, we must clarify the Board's jurisdiction to hear the appeal, notwithstanding the prior determination of loss of nationality made by the Immigration and Naturalization Service. As we have seen, appellant resided In the United States from June 1978, until December 1980. The Service officially determined that he was an alien at the time of his admission to the United States, On the basis of that determination, the Department of State disapproved his initial passport application that he filed at the Washington, D.C. Passport Agency in April 1980. The Department stated:

> ...the Immigration and Naturalization Service officially determined that you were an alien at the time of your admission....any further adjudication of your current citizenship status while you are in the United States can only be made by the INS.
>
> ...
>
> In view of the fact that you were determined by INS to be an alien, you cannot be considered a United States citizen at this time. Your application for a U.S. passport is disapproved.

Furthermore, in response to appellant's request for an adjudication of his citizenship status, the Service provided appellant on January 5, 1981, "with a decision" on his claim to United States citizenship. The Service letter setting forth the decision was signed By John F. Gossart, Jr., General Attorney (Nationality). The Service found that appellant lost his United States nationality as a consequence of his naturalization in Canada on May 1, 1964, and that, by appellant's course of conduct, "there exists highly persuasive evidence of an intent to relinquish your United States citizenship and that in fact you have relinquished United States citizenship." Gossart added "that this decision may be challenged in a court of law and therefore is not the final authority."

The authority of the Service to determine appellant's citizenship status during his stay in the United States is found in section 103(a) of the Immigration and Nationality Act, Under that section, the Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, except insofar as the Act and such other laws relate to powers, functions, and duties conferred upon the Secretary of State. 4/ The Attorney General has delegated to the Commissioner of the Service, authority to direct the administration of the Service and enforce the Act and all other laws relating to immigration and naturalization, except certain authority delegated to the Board of Immigration Appeals. 5/

4/ Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. 1103, reads in part:

> Sec. 103. (a) The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling....

5/ 8 C.F.R. 100.2.

It would appear that the Service properly exercised its jurisdiction under section 103 of the Immigration and Nationality Act and that its adverse decision of-loss of nationality in appellant's case was dispositive. Indeed, this was the position taken by the Department in 1980, when it disapproved appellant's passport application.

Nonetheless, in November 1981, following his return to Canada, appellant, upon advice of legal counsel, made a new application at the Consulate General at Toronto for a U.S. passport, The Department had earlier advised the Consulate General that appellant would take such action "as the vehicle for a Bept /sic/ adjudication of his claim to U. ality." The Consulate General thereafter executed a certificate of loss of nationality on January 11, 1982, in appellant's name: the Department approved it on February 3, 1982. The Department thus made an independent determination that appellant expatriated hlmseff on May 1, 1964, by obtaining naturalization in Canada upon his own application, This action was taken under section 104(a)(3) of the Immigration and Nationality Act, which confers jurisdiction upon the Secretary of State to administer and enforce all nationality laws relating to "the determination of nationality of a person not in the United States. 6/

6/ Section 104 (a)(3) of the Immigration and Nationality Act 8 U.S.C. 1104, reads:

> Sec. 104. (a) The Secretary of State shall be charged with administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to... (3) the determination of nationality of a person not in the United States....

Since the Service had jurisdiction over appellant's citizenship status while he was within the United States, and concluded that he was not a citizen of the United States, the question arises whether the Department is thereby precluded by the prior Service determination from acting under its authority when appellant is "not in the United States." In other words, is the Service's determination of loss of nationality binding on the State Department, and, if so, does it render the Department's subsequent determination of loss of nationality null and void?

We do not find it necessary, however, in the instant case to consider the effect of the Service's prior determination of loss of nationality. By letter dated May 10, 1983, the Service informed the Department that the Gossart letter of January 5, 1981, addressed to appellant, stating that he lost his United States nationality by his naturalization in Canada, was not a determination and ruling by the Attorney General within the meaning of section 103(a) of the Immigration and Nationality Act. It further stated that the opinion set forth in the Gossart letter is not Binding on the Service or any other agency, that it was not a final administrative determination, and that it was "an advisory opinion."

It may also be observed in this connection, as the U.S. Court of Appeals, District of Columbia Circuit, pointed out in Cartier v. Secretary of State, 506 F. 2d 191 (1974), that "from the bifurcation of responsibilities" under the Act, the Service and the Department of State will be called upon to address similar issues in different contexts and that neither has considered itself bound by a previous determination of nationality made by the other. The Court found it "unwise" in the context of the Cartier proceedings to attempt to resolve the scope of the Attorney General's power to make controlling determinations of law under the Immigration and Nationality Act, and the applicability of the doctrine of res judicata to determinations of nationality made by the Attorney General and Secretary of State pursuant to that Act,

III

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. In applying the statutory provisions on expatriation, the Supreme Court has held that loss of citizenship shall not occur unless the

expatriating act was performed voluntarily and with the intention of relinquishing United States nationality, Afroyim v. Rusk, 387 U.S. 253 (1967); Vance v. Terrazas, 444 U.S. 252 (1980).

There is no dispute that appellant voluntarily applied for and obtained Canadian citizenship. Appellant admitted. that his naturalization was free and uncoerced.

The dispositive issue therefore is whether appellant had the intention of relinquishing his United States nationality when he obtained naturalization in Canada.

In Afroyim v. Rusk, the Supreme Court rejected the idea that Congress could take away an American's citizenship without his assent, and declared that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." After the Afroyim decision, the Attorney General issued an interpretive statement to guide Executive agencies in handling expatriatic cases. The Attorney General stated in part:

> ...Afroyim leaves it open to the individual to raise the issue of intent. Once the issue of intent is raised, the Act makes it clear that the burden of proof is on the party asserting that the expatrfation has occurred. 7/

He added: "Afroyim suggests that this burden is not easily satisfied by the Government."

In 1980, in Vance v. Terrazas, the Supreme Court affirm and clarified its decision in Afroyim, stating that a citize "assent" to loss of his citizenship can mean nothing less th an intent to relinquish citizenship. An intent to relinquis United States citizenship, the Court held, must be shown by Government whether "the intent is expressed in words or is found as a fair inference from proven conduct." The Court declared that it is the Government's burden to establish by

7/ Attorney General's- Statement of Interpretation, 42 Op. A Gen. 397 (1969).

preponderance of the evidence that the expatriating act was accompanied by an intent to terminate United States citizenship. 8/ This requirement of proving intent adds a constitutional element to loss of citizenship that is not found in the statute.

Appellant explained the circumstances surrounding his naturalization in a citizenship questionnaire he filled out in connection with his application for a passport at Washington, D.C. on April 29, 1980:

> I was told I could not attempt to join the R.C.M. Police without Canadian citizenship. This was not intended to get away from or with something, only to get into the R.C.M.P. If I had known that by joining the Amy, or Air force; or taking Canadian citizenship could cause me to lose my American citizenship, I never would have done any of these things.

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

He elaborated his reasons for seeking Canadian nationality in a citizenship questionnaire executed on January 8, 1982, at the American Consulate General at Toronto.

> I was influenced by adopted father, who had served in the Canadian Military Forces to join the Canadian Military Reserve, to seek employment in the Royal Canadian Mounted Police, and since it was necessary for such employment, to become naturalized as a Canadian citizen, and thereafter to join the Royal Canadian Air Force. However, each of these acts was performed by me voluntarily. My intention at all times was to pursue a career. It was my belief, at the age of 17, that my service in the Canadian Military and thereafter in the Royal Canadian Military Police would help me become a matured and responsible adult. I enlisted in the Royal Canadian Air Farce in order to obtain employment as well as vocational training but none of these acts to /sic/ undertaken to disavow United States citizenship. Since Canada and the United States have always been allies, I saw no inconsistency in being both a Canadian as well as an American citizen.

While conceding that he voluntarily obtained naturalization for personal and career purposes, appellant contends that he did not intend to give up his United States citizensh At the hearing he testified that when he filed his applicati with the Royal Canadian Mounted Police he listed his nationality as "dual"; he said: "I thought I was an American and thought I was a Canadian at the same time." 9/ He also testified that when he was told he had, to acquire Canadian citizenship in order to obtain employment with the Royal Canadian Mounted Police, he was informed by the Canadian

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9/ Transcript of Proceedings In the Matter of John Charles Campbell, Department of State, Board of Appellate Review, February 17, 1983 (hereinafter cited as TR), at 28.

Immigration office at Vancouver and his adoptive father that his naturalization in Canada would not affect his American citizenship status (TR 30 and 31).

The Department argued that, although there are no statements of appellant in the record which are contemporaneous with his naturalization, the record nevertheless shows conduct from which an intent to relinquish citizenship may be inferred. The Department considered that appellant's service in the Canadian Army Reserve before his naturalization and his service in the Canadian Air Force after he became a Canadian citizen demonstrated "an orientation to Canada and to his new citizenship," The Department found other elements of appellant's conduct bearing on the question of his intent in his failure to inquire at an American Consulate about the effects of his naturalization on his United States citizenship, the fact that he obtained and traveled on Canadian passports, that he did not inquire about a U.S. passport until 1980, that he came to the United States in 1978 as a nonimmigrant alien and remained in that status until his return to Canada in December 1986. The Department's position is that all the above-mentioned elements "when viewed together, reflect that Mr. C[redacted] had directed his life to Canada, decided to become a Canadian citizen, and that when he became a Canadian, he believed he had relinquished his United States nationality."

The essential question the Board must answer is whether appellant intended to relinquish his United States nationality when he became naturalized, or whether he intended to add Canadian citizenship to his American citizenship.

It is well established that obtaining naturalization in a foreign state is highly persuasive evidence of an intent to relinquish United States citizenship. It is also firmly settled that taking an oath of allegiance to a foreign state or sovereign is substantial proof of an intention to transfer one's allegiance from the United States to that foreign state. In themselves, however, such acts are insufficient to establish an intent to surrender United States nationality. King v. Rogers, 463 F. 2d 1188 (1972); Baker v. Rusk, 296 F. Supp. 1244 (1969).

An oath that contains only an express affirmation of loyalty to the country where citizenship is sought leaves "ambiguous the intent of the utterer regarding his present

nationality." Richards v. Secretary of State, CV80-4150 (C.D.CAL. 1982). 10/

The relevant time for ascertaining whether appellant harbored an intent to relinquish or to retain his citizenship is the time of the expatriating conduct; his words or conduct at other times under certain conditions might shed light on his state of mind when he performed an act of expatriation. Evidence of later conduct, however, is of lesser probative value. Here, contemporaneous evidence of appellant's intent in May 1964 regarding retention of United States citizenship is virtually non-existent.

In cases where a person's intent at the time of performance of the expatriating act is evidenced only by acceptance of naturalization and the swearing of a simple oath of allegiance, subsequent conduct must confirm, as more probable than not, that the actor intended to forsake United States nationality at the relevant time. King v. Rogers. (supra.)

Under the rule in Terrazas, such an intention may be found as a fair inference from proven conduct. As we understand the Supreme Court's holding, "a fair inference" means that the trier of fact must be satisfied that the actor, more likely than not, willed relinquis nt of his citiz ship. If subsequent conduct is reaso y susceptibl either of two contradictory inferences -- to retain or to relinquish -- the trier of fact could not, in our view, conclude that a relinquishment of citizenship was intended.

In essaying its burden of proving that appellant intende to relinquish his United States citizenship, the Department relies heavily on appellant's service in the armed forces Canada and his use of Canadian passports.

10/ According to the Canadian authorities, the oath appellar took read:

> 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,

With respect to appellant's military service, we are not satisfied that the Department has shown how such service by itself establishes appellant's intent to abandon his United States citizenship status. Appellant has stated, albeit in written submissions after 1978 and at the hearing, that he enlisted to obtain vocational training and pursue a career: that he had been told he could serve without renouncing his United States citizenship; and that he understood that many United States citizens served in the Canadian armed forces during World War II without losing their United States citizenship. Appellant argued that he had no doubts that he could serve in the Canadian armed forces without diminishing his allegiance to the United States, and at the same time maintain his United States citizenship.

Appellant's explanation of his reasons for enlisting is on its face plausible. Considering the country whose forces he joined, his service is a dubious index of an intention to relinquish his United States citizenship, The Department's assignment of substantial weight to appellant's service as indicative of an intention to transfer his allegiance to Canada is not supported by its own guidelines for the handling of cases involving service in the armed forces of a friendly or non-hostile country. Those guidelines, 8 Foreign Affairs Manual, 224.20(b)(2), make clear that the Department does not consider service in the armed forces of a state not engaged in hostilities against the United States to be in the category of acts that are highly persuasive evidence of an intent to give up United States citizenship, In cases where the act performed does not constitute highly persuasive evidence of intent to relinquish United States citizenship, the Department

> ...considers the ability of the Government to sustain its burden to prove intent to relinquish U.S. citizenship is most unlikely in all .but the most clear cut cases.,.

The guidelines conclude with the observation that

> Although these cases /service in the armed forces of a-foreign state not engaged in hostilities against the United States, and other specified acts7 were not covered by the Attorney General's Statement /note 7, supra7 or the guidelines-of the Departments of State and Justice, it is considered that loss of nationality will not occur in such cases in

> the absence of a preponderance of the evidence establishing both intent not to return to the United States **and** intent to relinquish U.S. citizenship. /Emphasis in original/

We do not find appellant's use on two occasions of Canadian passports convincing evidence of an intent to relinquish his United States citizenship. He explained at the hearing that although his Canadian Air Force identification would have sufficed, he obtained a Canadian passport in 1964 because he is a souvenir hunter and wanted to collect the stamps of the different countries in Europe he might visit. (TR 51). With respect to his second use of a Canadian passport, counsel for the Department asked appellant: "In 1978 you got a passport to come to the United States?" Appellant replied:

> No, it was just the fact that again we needed a passport because I knew that my wife would need identification and my daughter would travel on my wife's passport. And I thought well, I will get one at the same time, The company paid for it. (TR 10).

It is as reasonable to assume that appellant used Canadian passports on both occasions as a matter of convenience as it is to assume that he intended thereby to indicate a transfer of his allegiance to Canada. There is nothing in the record to show that, his choice of one passport over another could fairly be construed as derogation of his citizenship of the country whose passport he did not hold or did not use. Using a Canadian passport is consistent with his assertion that he believed himself to be a dual national, and is no more than ambiguous evidence of an intent to relinquish United States citizenship. (See Peter v. Secretary of State, 349 F. Supp. 1035 (1972).

We are unpersuaded by the Department's argument that appellant's intentions are revealed by his failure to consult any U.S. official on the effect of his prospective naturalization upon his United States citizenship. Believing himself to be an American citizen and relying on the assurances of Canadian authorities and his adoptive father that he would not lose his American nationality if he became naturalized, appellant might reasonably have perceived no compelling need to seek an official U.S. view.

Similarly, appellant's failure to apply for a U.S. passport until 1980 does not suggest an intent in 1964 to give up United States citizenship. In the absence of evidence to the contrary, he is entitled to be believed that he had no reason to obtain a U.S. passport until 1980 when he applied for one at Washington, D.C. in order to clarify his citizenship status, Nothing in U.S. law requires a citizen to obtain a passport, and nothing in U.S. law requires a person claiming dual nationality to obtain indicia of citizenship in duplicate.

The circumstances surrounding appellant's acceptance of an L-1 visa are insufficiently clear to have any significant bearing on the issue of his intent to relinquish or retain his citizenship. At the hearing he testified that he had questioned the necessity of obtaining a visa when informed by Xerox that he should apply for one. (TR 41). He also maintained that he had been advised by the Consulate at Vancouver that if he were, as he asserted, a United States citizen, he would not need a visa -- and could not obtain one. (*Id.*) Further, he had, he testified, informed Xerox, when asked for information to permit them to apply for a visa on his behalf, that he was a dual national. (TR 42.) Upon arrival at the border crossing point, on June 12, 1978, he had been advised by the Service that he could not enter the United States without a visa, which was offered on the spot. He accepted it. (TR 43.) His contention that he accepted the visa principally as a condition of obtaining and keeping employment with Xerox and that his renewal of it in 1980 was due to the insistence of Xerox that he maintain an L-1 immigration status raises doubts that he intended to give up United States citizenship. This conclusion is given weight by his uncontradicted assertion that from 1978 to 3980 while in the United States he <u>continually tried to</u> assert his United States citizenship. 11/

11/ A fellow employee of appellant, Fred Butler, supports appellant's contention that he considered himself to be an American citizen and that appellant looked forward to clarifying his status when he entered the United States in 1978 to work for Xerox. In an affidavit executed on February 8, 1983, Butler stated in part:

> I have known J[redacted] C[redacted] for many years. During 1977 we re[redacted] g together in the Xerox office in Vancouver. Approximately in the fall of 1977 J[redacted] C[redacted] and I travelled to the Xerox training facilities in Leesburg, Virginia....
>
> I particularly remember a conversation between Mr. C[redacted] and myself when we were returning to Vancouver from Leesburg in which we discussed, not for the first time, that he /Campbell/ was an American citizen. As I recall, Mr. C[redacted] was particularly enthusiastic about the job /prospective temporary duty with Xerox at Leesburg/ because it would give him an opportunity to resolve his citizenship status,,,.

In informing all diplomatic and consular posts of the implications of the Supreme Court's decision in Terrazas, the Department of State noted that the foreign country involved and the degree of a person's understanding of U.S. citizenship law and his own citizenship status may be in- portant in determining what weight should be given to particular indicia of intent. 12/

Appellant's naturalization in Canada, coupled with subsequent conduct that is suggestive of an intent to trans- fer his allegiance from the United States to Canada, may not be summarily dismissed. But these acts must be viewed in the context of the situation in which appellant found himself and against the backdrop of the country where the acts occurred,

Appellant had been adopted by Canadian citizens immediately after his birth in the United States. He grew up and was educated in Canada, believing, he has maintained, he was at all times an American citizen, It is arguable that one who lived in an evironment basically compatible with that of the United States, and believed himself to be a citizen of both countries, would not consider that becoming natura- lized in Canada, serving in the Canadian armed forces and using a Canadian passport would jeopardize his United States birthright.

We find no evidence in the record of any specific action that unambiguously demonstrates appellant's intention to deny his United States citizenship and present himself solely as a Canadian, He did not, as did appellant in King, (supra) cap naturalization in a foreign state by subsequent words and actions bespeaking repudiation of United Stakes citizenship. Nor did he, as did plaintiffs in Terrazas (supra) and Richards (supra), take an oath to a foreign state and simultaneously renounce his previous nationality.

12/ Department of State, Circular Airgram No. 1767, August 27, 1980.

We are not indifferent to the fact that appellant's first recorded statements that he lacked the requisite intent to relinquish his United States citizenship were made a number of years after the time of his naturalization in Canada. But we do not find his assertions that he continuously considered himself to be a dual national of both countries to be inherently inconsistent; nor are they contradicted by any hard evidence put forward by the Department.

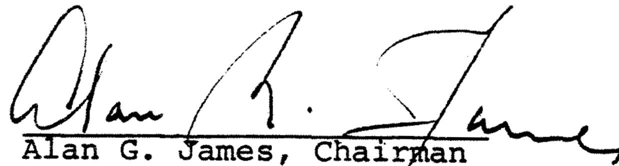
In surveying appellant's entire behavior beginning with his naturalization we find that his words and conduct are as susceptible of a fair inference to retain United States citizenship as they are of the contrary inference of an intention to forsake it.

The Supreme Court has required that the Government demonstrate intent to relinquish citizenship by a preponderance of the evidence, and it has ruled that in actions instituted for the purpose of depriving one of the precious right of citizenship the facts and law should be construed as far as reasonably possible in favor of the citizen. Nishikawa v. Dulles, 356 U.S. 129 (1958); Schneiderman v. United States, 320 U.S. 118 (1943).

In our view, the Department has not sustained its burden of proving by a preponderance of the evidence that appellant intended to relinquish his citizenship. We must therefore resolve any and all doubts in favor of appellant's retention of citizenship.

IV

On consideration of the foregoing and on the basis of the entire record before the Board, we are unable to conclude that the Department's determination that appellant expatriated himself on May 1, 1964, by obtaining naturalization in Canada upon his own application is supportable as a matter of law. Accordingly, we reverse the Department's administrative determination of February 3, 1982.



Alan G. James, Chairman

Mary E. Hoinkes, Member

DISSENTING OPINION

I dissent from the decision reached in the above majority opinion reversing an administrative determination made by the Department of State that appellant, John C. Ca[redacted], expatriated himself under the provisions of se[redacted] 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/ In my judgment, the record supports a finding that the expatriating act was accompanied by the requisite intent to give up or abandon United States citizenship, I would affirm the Department's determination of loss of United States nationality.

As the majority opinion points out, the principal issue to be resolved in this appeal is whether appellant intended to relinquish his United States citizenship at the time he voluntarily obtained naturalization in Canada. Such intent may be ascertained from his words or inferred from his conduct. Vance v. Terrazas, 444 U.S. 252 (1980).

In Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court stated that every Unfted States citizen has a constitutional right to remain a citizen unless he voluntarily relinquishes that citizenship. Although Afroyim did not define what conduct constituted "voluntary relinquishment" of citizenship, it nevertheless made loss of citizenship dependent upon evidence of an intent to transfer or abandon allegiance,

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1/ Section 349(a)(1) 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 --

(1) obtaining naturalization in a foreign state upon his own application, . . .

The Attorney General in his Statement of Interpretation of Afroyim concluded that "voluntary relinquishment" can be manifested by other acts declared expatriative under the law, if such acts are in derogation of allegiance to the United States. Yet, even in those cases, the Attorney General said, "Afroyim leaves it open to the individual to raise the issue of intent." 2/ He further said that, once the issue of intent is raised, the burden of proof is on the party asserting that expatriation has occurred, and that this burden "is not easily satisfied by the Government."

Pursuant to the Attorney General's suggestion in his Statement of Interpretation, the Department of State and the Immigration and Naturalization Service agreed on certain guidelines to avoid conflicts in interpretation. Under these guidelines, voluntary naturalization in a foreign state is considered highly persuasive evidence of an intention to relinquish citizenship and will normally result in expatriation. 3/ However, as the Attorney General pointed out, "in each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriative provision and has in fact voluntarily relinquished his citizenship."

The above administrative guidelines of the Department and the Service were favorably noted by the Supreme Court in Vance v. Terrazas, 444 U.S. 252 (1980). The Court stated that the State Department's guideline "evidences a position on intent quite similar to that adopted here...". In Terrazas, the Supreme Court reaffirmed its holding on intent in Afroyim. To establish loss of citizenship, the Court said, the Government must prove an intent to surrender United States citizenship, in addition to the voluntary commission of an expatriating act, whether such intent "is expressed in words or is found as a fair inference from proven conduct." This understanding of Afroyim, the Court further observed, "is little different from that expressed by the Attorney General in his 1969 opinion explaining the impact of that case."

2/ Attorney General's Statement Of Interpretation, 42 Op. Atty. Gen. 397 (1969).

3/ Department of State Circular Airgram, CA-2855, dated May 16, 1969, to all American diplomatic and consular posts.

In this connection, it should be noted, as the U.S. Court of Appeals, Seventh Circuit, observed in Terrazas v. Haig, 653 F. 2d 285 (1981), that "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence." The Court pointed out, however, that "circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." The Court of Appeals referred to an earlier Ninth Circuit decision in King v. Rogers, 463 F. 2d 1188 (1972), in which it was stated 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. 4/

The record here is devoid of any statements or declarations of appellant expressing his intent at the time he applied for and obtained naturalization in Canada in 1964. Apart from appellant's 1980 and 1982 citizenship questionnaires, his affidavit of May 27, 1982, and his testimony at the hearing, the record is bereft of any contemporaneous corroborative evidence to support his allegations that he did not intend to relinquish his United States citizenship.

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 suck 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.

5/ A difficulty presented by statements made sixteen years more after the expatriating conduct occurred is set forth ir the affidavit of February 26, 1983, of Mrs. Agnes M. Campbe: appellant's adoptive mother. After reciting in general tern her recollection of discussions that allegedly transpired between appellant and his adoptive father concerning Canadi: citizenship and a military career, she said: "After 20 yea: I no longer recall any specific conversations regarding the: events."

The evidence of record, however, discloses appellant's actions and conduct at the time he was naturalized from which a fair inference as to his intent may properly be drawn. The record shows that appellant voluntarily sought and obtained naturalization in Canada upon his **own** application, took an oath of allegiance to Queen Elizabeth the Second, her Heirs and Successors, and obligated himself to faithfully observe the laws of Canada and fulfill his duties as a Canadian citizen, He gave his full consent to accept a foreign nationality. Under the administrative guidelines of the Department and the Service, which, as noted above, were favorably mentioned by the Supreme Court In Terrazas, voluntary naturalization in **a** foreign state may be highly persuasive evidence of an intention to relinquish citizenship. In Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), Justice Black in his concurring opinion declared that the voluntary performance of any of the specified statutory acts of expatriation "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." As to the oath of allegiance taken by appellant, it has been stated that the taking of such oath, while alone insufficient to prove a renunciation of United States citizenship, "provides substantial evidence of intent to renounce citizenship." King v. Rogers, **463** F 2d 1188 (1972).

I also find significant appellant's voluntary military service in the Canadian armed forces. Although military service in the armed forces of a foreign state, not engaged in hostilities against the United States, does not necessarily evidence an intent to relinquish United States citizenship, such service entered into shortly after naturalization in a foreign state may constitute objective evidence of a person's intent to abandon his United States citizenship, Here, appellant **was** naturalized in Canada on May 1, 1964, enlisted in the Canadian Air Force the next month, and served continuously for the next ten years. Appellant, moreover, took "a required military oath" when he entered the Canadian Air Force. It can scarcely be doubted that in these circumstances his military conduct was in derogation of unqualified allegiance to the United States, and, in my opinion, reasonably manifested an intent to transfer or abandon allegiance. Appellant's belated' statements in 1980 and thereafter, more than sixteen years after the event, that he believed he could serve in the Canadian armed forces without diminishing his allegiance to the United States without intending to relinquish his United States citizenship, and that he was never informed "by anybody at any time" that he would be jeopardizing his United States citizenship by acquiring Canadian citizenship and

serving in the Canadian armed forces are of slight weight. There is nothing in the record by way of contemporaneous evidence to support appellant.

It does not appear from the record that appellant was seriously concerned about his United States citizenship status until prospects of an assignment in the United States developed in 1978. Prior to and following his naturalization in Canada in 1964, appellant sought no advfce from the U.S. consular ofices in that country as to the effect naturalization in Canada would have on his United States citizenship. Indeed, until his visit to the Consulate General in Vancouver in 1978, to inquire about a visa to the United States, appellant did not visit any U.S. consular office. He did. not seek registration as a United States citizen nor did he seek any documentation as an American. Appellant's counsel argued in his brief that because appellant believed that he could be a United States citizen and join the Canadian armed forces without danger to his United States citizenship, and because appellant lived and worked in Canada, he had no need or occasion to assert his United States citizenship until he accepted employment in Leesburg, Virginia in May of 1978. It is clear, nonetheless, tbat appellant preferred to rely ow his own understanding of the law rather than obtain advice from a U.S. consular office in Canada. In any event, appellant proceeded at his own risk in acquiring Canadian. citizenship, and must bear the legal consequences. As a general rule, a person is not excused from his or her expatriating conduct on account of his or her mistake of the law.

En light of the Supreme Court decisions in 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. 6/ Appellant's

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6/ The Department in reaching its determination with respect to the issue of intent gave, I believe, undue weight to the fact that appellant accepted an L-1 nonimmigrant visa in 1978 at the border crossing In Lynden, Washington, that he remained in the status of an alien throughout his stay in the United States until his return to Canada in December 1980, and that in applying for an extension of his L-1 visa, he stated that he was a Canadian citizen. While these elements are not without some significance, I do not consider them determinative of what his intent was in 1964, when he acquired Canadian citizenship by naturalization.

subsequent self-serving statements made more than sixteen years after the event to the effect that he did not intend to give up his United States citizenship are contravened by **his** voluntarily applying for naturalization in Canada, by taking an oath of allegiance to Queen Elizabeth the Second, and by declaring his intent to faithfully observe the laws of Canada and fulfill his duties as a Canadian citizen. Moreover, there is the fact of appellant's enlistment in the Canadian armed forces within a few weeks of his naturalization, and his continuous military service of ten years -- ten years of demonstrated allegiance to Canada. The record also shows that appellant obtained Canadian passports in 1964 and 1978.

Upon consideration of the facts and circumstances surrounding appellant's naturalization in Canada, and based upon a review of all the evidence, I am persuaded that the record supports a finding of an intent to transfer OK abandon allegiance to the United States. His expatriative conduct was clearly in derogation of **his** allegiance to the United States and reasonably manifested a relinquishment of that allegiance. In my judgment, the Department has satisfied its burden of proof by a preponderance of the evidence that appellant's naturalization was accompanied by an intent to relinquish his United States citizenship.

Edward G. Misey, Member