November 17, 1983

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M[redacted] R[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, M[redacted] R[redacted], expatriated herself on January 27, 1976, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The issues presented on appeal are whether appellant obtained naturalization in Canada voluntarily and whether the act was accompanied by an intent to relinquish her United States citizenship. We conclude that appellant's naturalization was free and uncoerced, and that it was accompanied by the requisite intent to give up her American nationality. Accordingly, we will affirm the Department's determination of loss of citizenship.

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

Sec. 349. (a) Prom 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 --

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

I

Appellant was born at Los Angeles, California, on April 14, 1944, and thereby acquired United States nationality at birth. She grew up in New York City and received a bachelor of arts degree from Queens College in 1964. In contemplation of marriage, appellant moved to Canada in 1967, entering as a landed immigrant (alien admitted for permanent residence.) She married a Canadian citizen in 1967 from whom she was divorced in 1978. Appellant has resided in Canada since 1967.

Prior to her marriage, appellant sought and obtained employment with the Protestant School Board of Montreal, a public school body where she has been employed ever since. She teaches secondary level art at Mount Royal High School. For the academic years during the period from 1967 to 1976, appellant was granted annual teaching permits by the Department of Education of the Province of Quebec. In order to obtain a permanent teaching diploma appellant applied for naturalization as a Canadian citizen on September 15, 1975, and received a certificate of naturalization on January 27, 1976. She received a permanent teaching diploma from the Quebec Department of Education effective at the beginning of the 1976 academic year.

In May 1979, appellant obtained a Canadian passport in order to travel to Europe in the summer of that year.

On 'August 11, 1980, four years after her naturalization as a Canadian citizen, appellant executed an application for a passport and registration as a United States citizen at the Consulate General at Montreal. She also executed, at the request of the Consulate General, a citizenship questionnaire to assist the Department to determine her citizenship status, and was interviewed by a consular officer. The consular officer agreed to hold appellant's application for sixty days to enable her to submit further evidence regarding her intent in obtaining naturalization in Canada. The consular officer also suggested to appellant that she obtain a copy of her application for a Canadian passport to show whether she claimed dual national status. Appellant did not, however, submit any additional evidence before the agreed deadline. Accordingly, the consular officer prepared a certificate of

loss of nationality on October 21, 1980, as required by section 358 of the Immigration and Nationality Act. 2/

The Consulate General certified that appellant acquired the citizenship of the United States at birth; that she acquired the nationality of Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a) (1) of the Immigration and Nationality Act.

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

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

On October 21, 1980, the consular officer informed appellant that her case had been referred to the Department for determination of her citizenship status. The consular officer asked appellant to address certain questions regarding her intent. This appellant did in part by letter dated November 16, 1980. She did not then submit a copy of her Canadian passport application.

The Department approved the certificate on May 14, 1981, approval constituting an administrative determination of loss of nationality from which an appeal lies to the Board of Appellate Review. Appellant brought this appeal through counsel on May 11, 1982, and requested a hearing before the Board which was held on March 25, 1983. 3/

Appellant argues that her naturalization was involuntary in that she was forced to become a Canadian citizen in order to preserve her qualification as a teacher in the Province of Quebec. Appellant further contends that she did not intend to relinquish her United States citizenship by obtaining naturalization in Canada.

II

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 dispute that appellant applied for and obtained naturalization in Canada.

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3/ Following the hearing, the Board requested appellant to obtain a copy of her 1979 application for a Canadian passport. Appellant's counsel submitted a copy of her application by letter dated September 2, 1983.

The first issue presented is whether appellant performed the allegedly expatriating act voluntarily, for citizenship continues unless the actor is deprived of it by his voluntary action in accordance with applicable legal principles. Perkins v. Elg, 307 U.S. 325 (1939); Afroyim v. Rusk, 387 U.S. 253 [illegible]

Under section 349(c) of the Immigration and Nationality Act, a person who performs a statutory act of expatriation shall be presumed to have done so voluntarily. 4/ Such

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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.

presumption, however, may be rebutted upon a showing, by a preponderance of the evidence, that the act of expatriation was not performed voluntarily. Although appellant admits that she obtained naturalization in Canada upon her own application, she seeks to rebut the statutory presumption of voluntariness by alleging that her act was done under duress.

A defense of duress is, of course, available to persons who have performed an act of expatriation. Perkins v. Elg, (supra); Nishikawa v. Dulles, 356 U.S. 129 (1958); Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971). For a defense of duress to prevail, the courts require proof that the circumstances surrounding performance of the expatriating act were extraordinary. As the court declared in Doreau v. Marshall, 170 F. 2d 721 (1948), unless a citizen was forced against his fixed will, intent, and efforts to act otherwise, the expatriating act cannot be considered to have been performed under duress. In later cases where duress was successfully pleaded the courts found that the actor had no choice but to perform an expatriating act if he were to cope with a situation that menaced his own safety, health or economic survival, or that of a close member of his family. Nishikawa v. Dulles, (supra); Stipa v. Dulles, 233 F. 2d 551 (1956); Mendelsohn v. Dulles, 207 F. 2d 37 (1953); Insogna v. Dulles, 116 F. Supp. 473 (1953); Ryckman v. Dulles, 106 F. Supp. 739 (1952).

In Jolley, the court reviewed with approval many earlier cases on the issue of voluntariness, noting that fear of financial burden has been rejected as a sufficient ground upon which to posit duress. The court also declared that the opportunity to make a decision based on personal choice is the essence of voluntariness.

In the case now before the Board, appellant argues that she acted because of economic duress; acquisition of Canadian citizenship was imperative if she were to preserve employment in her chosen profession.

At the hearing, appellant was asked by her counsel whether she had considered moving from Montreal to a jurisdiction where Canadian citizenship might not have been required to continue her teaching. She replied:

> No, there was no thought at all. We /she and her husband, also a teacher7

> had established, firmly established our place in Montreal. 5/

She conceded that she had not considered obtaining a job other than teaching that might not have required Canadian citizenship. 6/

In his summation, counsel for appellant advanced the following argument in rebuttal of the statutory presumption of voluntariness:

> It is true that the appellant chose Canada as a place to live. It is true that the appellant chose teaching as a profession, and thus put herself in a situation where to preserve her professional qualification, Canadian citizenship was required.
>
> The only argument that can in all honesty be addressed by the appellant in this ease, knowing the extent of the case law, is that those decisions are wrong; that there are circumstances which do exist which compel an individual to perform an act which is expatriating, but which are not entirely voluntary, even though those circumstances may have been self-generated to some extent. It is illogical, it is insulting to say that an educated and trained professional must accept employment in a position inferior in job satisfaction and economic compensation simply to avoid doing an act whish is expatriating if the individual is unaware that that act is expatriating. 7/

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5/ Transcript of Proceedings in the Matter of M[redacted] R[redacted] (Hereinafter cited as TR), pp. 27, 28.

6/ TR.p. 28.

7/ TR. pp. 58, 59.

Suffice to say, this Board is not in a position to disregard established judicial criteria for determining whether an expatriating act was performed under duress.

In appellant's case, it is difficult to find any extraordinary circumstances surrounding her naturalization. She acted out of concern for job security, clearly not economic survival. It is hardly conceivable that teaching in the Quebec school system was her only means of earning a living. She is well educated, competent if not fluent in French, and after having lived in Canada for eight years before becoming a Canadian citizen, was presumably oriented to Canadian life. She has not shown that she did not have an alternative. Indeed, as we have seen, she made plain at the hearing that she had not considered seeking a teaching position elsewhere or any position in a different field.

Appellant had a choice -- to become naturalized and ensure continuation of an interesting and satisfying career, or to take another course of action in order to avoid placing her United States citizenship in jeopardy. She may have been unaware, as she contends, that naturalization in a foreign state is an expatriating act, but ignorance of United States law does not excuse her, nor does it make her act any less voluntary as a matter of law.

Under the provisions of section 349(c) of the Immigration and Naturalization Act, appellant bears the burden of rebutting by a preponderance of the evidence the statutory presumption that her naturalization was voluntary. In our opinion, her rebuttal testimony falls short of negating such statutory presumption. We conclude that her acquisition of Canadian citizenship upon her own application was a voluntary act of expatriation.

III

Although we find that appellant obtained naturalization in Canada voluntarily, there remains the question whether on all the evidence the Department has satisfied its burden of proof that her expatriating act was performed with the necessary intent to relinquish her United States citizenship status. It is the Government's bcrden to establish appellant's intent to terminate United States citizenship by a preponderance of the evidence. 8/ Such intent is to be determined as of

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8/ See note 4, supra.

the time the act of expatriation took place, and ascertained from appellant's expressions at the time or as a fair inference from her conduct. Vance v. Terrazas, 444 U.S. 252 (1980).

On the issue of intent, 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." Afroyim emphasized that loss of citizenship requires the individual's assent in addition to his or her voluntary commission of an expatriating act.

This holding was reaffirmed and clarified in Vance v. Terrazas, 444 U.S. 252 (1980). To establish loss of citizenship, the Supreme Court said, the Government must prove an intent to surrender or terminate United States citizenship, as well as the performance of the expatriating act under the statute. It is the Government's burden to prove by a preponderance of the evidence that the expatriating act was accompanied by an intent to relinquish United States citizenship, The Supreme Court further said that the requisite intent may be expressed in words or may be inferred from proven conduct.

In Vance v. Terrazas, the Supreme Court also spoke favorably of the administrative guidelines which the Attorney General set forth in his statement of interpretation of Afroyirn. 9/ The Attorney General pointed out that voluntary relinquishment of citizenship is not confined to a written renunciation but can also be manifested by other actions declared expatriative under the statute if such actions are in derogation of allegiance to the United States. Voluntary naturalization in a foreign state is considered highly persuasive evidence of an intention to relinquish citizenship. The Attorney General further stated that in each case the administrative authorities must make a judgment based on all the evidence in deciding whether the person comes within the terms of the expatriation provision and has in fact voluntarily relinquished his or her citizenship, The trier of fact, the Supreme Court said in Vance v. Terrazas, "must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship."

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

In this relation, 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," However, the Court said, "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, 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.

Appellant here first raised the issue of intent in August 1980 in her response to the Consulate General's citizenship questionnaire, which she executed in connection with her application for registration as a United States citizen. She stated in the questionnaire:

> I was unaware that obtaining Canadian citizenship would jeopardize my United States citizenship, and I certainly in no way regarded this act as a renunciation of my allegiance to the United States. I have always considered myself an American, and shall continue to do so.

In her testimony at the hearing, appellant also maintained that she had no intention or even thought of abandoning her United States citizenship when she obtained naturalization in Canada. 10/ There is however, no contemporaneous corroborative evidence to support appellant's declarations. There is nothing in the record by way of expressions of intent made by appellant at the time she acquired Canadian citizenship in 1976,

The evidence of record, however, discloses a pattern of conduct from which a fair inference as to her intent may properly be established, The record shows that appellant, after residing in Canada since 1967 in landed immigrant status, knowingly and willingly applied for Canadian naturalization on September 15, 1975, and obtained citizenship in 1976. In

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10/ TR. p. 46.

the process she took an oath to Queen Elizabeth the Second, her Heirs and Successors, and obligated herself to faithfully observe the laws of Canada and fulfill her duties as a Canadian citizen. Under the administrative guidelines of the Department of State and the Immigration and Naturalization Service, Department of Justice, which were favorably noted by the Supreme Court in Vance v. Terrazas, voluntary naturalization in a foreign state may be highly persuasive evidence of an intention to relinquish citizenship. As to the oath of allegiance taken by appellant it has been stated that the taking of such an 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).

In addition to the above acts, appellant voted regularly in Canadian elections, 11/ and, in 1979, obtained a Canadian passport which she used for travel to France. In her citizenship questionnaire, appellant said that she obtained a Canadian passport, rather than a United States passport, "because, as a Canadian citizen residing in Canada, it seemed a simpler procedure than to seek a United States passport for a United States citizen residing in a foreign country." However, in her application for the passport, appellant answered "no" to the question: "Have you the citizenship of another country in addition to Canadian?" This response, a denial of United States citizenship status, is totally inconsistent with her later declarations in the citizenship questionnaire and at the hearing that she did not intend to relinquish or abandon United States citizenship.

Although not determinative by itself of the issue of intent to give up or abandon citizenship, we consider appellant's failure to obtain competent advice from the Consulate General as to the effect of her proposed naturalization on her United States citizenship significant. Notwithstanding her living and working in Canada as a teacher since 1967, it was not until her visit to the Consulate General in August 1980, several years after she applied for naturalization, that appellant expressed concern or interest in her citizenship status, Appellant stated in her citizenship questionnaire that she did not previously consult any United States official about her naturalization because at the time her preoccupation was exclusively with the practical concerns of securing her status as a teacher in the Province

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11/ TR. p. 29.

of Quebec and by her personal expectations about remaining in Canada as the wife of a Canadian citizen. She further stated in the citizenship questionnaire that she was not aware of the possible loss of her United States citizenship, and therefore "it did not occur to me to seek advice on such an eventuality."

This apparent lack of concern or indifference as what effect naturalization in Canada may have on her United States citizenship status is further expressed in her testimony at the hearing. She testified that she gave no thought whatsoever to the effect of naturalization on her American citizenship, 12/ that she gave no thought as to whether she was or was not an American citizen after her naturalization; 13/ and, that it never occurred to her to be concerned about her United States citizenship status. 14/

Appellant doubtless could have easily obtained an official view from the Consulate General concerning the consequences of her contemplated naturalization in Canada. It is obvious, however, that appellant sought no advice in the matter and relied on her own judgment. At he time appellant may have perhaps preferred to retain her United States citizenship status. It is beyond dispute, nonetheless, that she willingly and knowingly chose to acquire Canadian citizenship and accept the legal consequences thereof, rather than risk the loss of a permanent teaching authorization in the Province of Quebec.

As noted above, Afroyim and Terrazas require that the record support a finding that appellant's naturalization was accompanied by an intent to terminate United States citizenship. Appellant's statements in her 1980 citizenship questionnaire and at the hearing concerning her lack of intent to give up or abandon her United States citizenship are unsupported by any contemporaneous evidence at the time she sought and acquired Canadian citizenship. Moreover, these subjective statements as to her intent, made several years after her naturalization, are self-serving,

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12/ TR. p. 24.

13/ TR. p. 26.

14/ TR. p. 42.

and are contravened by her conduct. Appellant voluntarily and willingly applied for naturalization, took an oath of allegiance to Queen Elizabeth the Second, and declared her intent to faithfully observe the laws of Canada and fulfill her duties as a Canadian citizen.

Furthermore, as we have seen, appellant in applying for a Canadian passport in 1979, solemnly declared, according to her passport application, that she did not have the citizenship of any other country than Canada, This would suggest a belief on her part that she no longer retained United States citizenship. Appellant also made it clear that she intended to make Canada her home for an indefinite time and to participate in Canadian affairs, 15/

We concur with the Department's contention that, even if it were conceded that the sole reason for appellant's naturalization was employment security, "she went beyond that." 16/ In sum, appellant's affirmative acts were, in our view, inconsistent with United States citizenship and manifested a transfer of allegiance from the United States to Canada, and an abandonment of United States citizenship. We are persuaded that the record when considered in its entirety supports a finding that appellant's naturalization was accompanied by an intent to relinquish her United States citizenship.

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15/ TR. p. 47.

16/ TR. pp. 72, 73.

IV

Upon consideration of the evidence of record and taking into account the facts and circumstances surrounding appellant's naturalization in Canada, it is our judgment that she obtained naturalization voluntarily and that the Department has satisfied its burden of proving by a preponderance of the evidence that her expatriating act was performed with the intent to relinquish United States citizenship. Accordingly, we conclude that appellant expatriated herself on January 27, 1976, by obtaining naturalization in Canada upon her own application, and affirm the Department's administrative determination of loss of nationality made in this case on May 14, 1981.

Edward G. Misey, Member

J. Peter A. Bernhardt, Member

Dissenting Opinion

I dissent from the majority decision affirming the Department of State's administrative determination of loss of appellant's United States citizenship.

Although I agree with my colleagues that appellant voluntarily became a Canadian citizen, I am not persuaded that the Department has carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her American nationality. Entertaining doubts about appellant's intent, I would resolve them in favor of retention of citizenship.

I

As the majority points out, naturalization in a foreign state is highly persuasive evidence of an intent to divest oneself of United States citizenship 1/; standing alone, however, it is not conclusive evidence of such intent. 2/

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1/ Vance v. Terrazas, 444 U.S. 252 (1980).

2/ Id.

In a recent case, Richards v. Secretary of State, CV 80-4150, D.C. C.D. Cal. (1982), the Court declared that an oath taken upon naturalization in a foreign state that is merely declaratory of a person's allegiance to the state where citizenship is sought leaves ambiguous the intent of the utterer. In the case before the Board, I note that appellant swore a simple oath of allegiance to the British Crown; she did not renounce, nor was she required to renounce, her present nationality.

Here, there is no evidence contemporary with appellant's naturalization in **1976** (the relevant time for determining a person's intent 3/) to enlighten us on her intent when she performed the expatriating act. The record shows that she first stated her lack of intent in August **1980** when she visited the United States Consulate General at Montreal to clarify her citizenship status. In completing a citizenship questionnaire at that time appellant stated:

> My decision to apply for Canadian citizenship was governed by distinctly practical concerns....I was unaware that obtaining Canadian citizenship would jeopardize my United States citizenship, and I certainly in no way regarded this act as a renunciation of my allegiance to the United States.

From August 1980 through the hearing on March **25, 1983,** appellant maintained that she lacked the requisite intent to give up her United States citizenship.

It has been held that intent will rarely be established by direct evidence, but circumstantial evidence surrounding the performance of an expatriating act may establish such intent. 4/

In Terrazas v. Haig, **653** F. 2d **285** (1981), the court cited the decision in King v. Rogers, **463** F. 2d **1188** (1972), wherein **the** court had stated that the Government may prove a person's intent by acts inconsistent with United States citizenship, or acts clearly manifesting an intention to transfer allegiance from the United States to a foreign country. The question arises

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3/ Terrazas v. Haig, 653 F. 2d **285** (1981).

4/ Id.

therefore whether this appellant's acts, taken as a whole, were inconsistent with retention of United States citizenship, or clearly manifested an intention to transfer her allegiance to Canada, Applying that test, I maintain that appellant's words and conduct do not so clearly demonstrate an intention to relinquish United States citizenship that I could conclude she expatriated herself when she became a Canadian citizen.

The Department of State bases its contention that appellant expatriated herself on a theory of abandonment of United States citizenship.

Asked at the hearing whether her conduct represented abandonment of her United States Citizenship, appellant replied:

> It certainly doesn't. I mean, the facts are the facts. I did leave the United States and I moved to Montreal, and so on and so forth. All the facts are correct. But the interpretation, I feel, is very wrong. I had no intention or ever thought of abandoning American citizenship. I was an american citizen living in Canada, and I took up life there, yes, fully, same as I probably would have anywhere else, and established a life for myself there, but I don't consider that as abandonment of my American citizenship. I have always considered myself as an American and I probably always will. 5/

Before applying for naturalisation in Canada appellant did not seek official advice about its possible effect on her United States citizenship. She did not, in fact, conduct any official

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5/ Transcript of Proceedings In The Matter of M[redacted] R[redacted], Board of Appellate Review, (hereinafter cited as TR) p. 46.

business with any United States establishment in Canada from the date of her arrival in **1967** until **1980**. Only after **a** friend and fellow teacher warned appellant that naturalization in Canada could jeopardize her United States citizenship did appellant visit the Consulate General at Montreal in August **1980** to register as a United States citizen. 6/

In the questionnaire she completed in August 1980 appellant observed that she had never registered or otherwise documented herself as a United States citizen because

> ...I am a United States citizen by reason of birth, and saw no reason therefore to seek additional registration and/or documentation other than my birth certificate.

In a supplemental questionnaire she explained why she had not consulted United States officials before applying for naturalization,

> At the time of my decision to seek Canadian citizenship my preoccupation was exclusively with the practical matters described in the previous questionnaire /obtaining naturalization to protect her teaching position/. Since I was not aware of the possible loss of United States citizenship it did not occur to me to seek advice on such an eventuality.

Appellant was incautious in not seeking prior official advice about the effects of naturalization on her United States citizenship. She was also ill-advised not to have documented herself as an American citizen at a United States establishment in Canada long before she finally attempted to do so in 1980. I am unable, however, to see in such acts of omission clear evidence of an intention to abandon her United States citizenship. Residence abroad even for a protracted period does not in itself give rise to an inference of an intent to abandon United States citizenship. Schneider v. Rusk, **377** U.S. **163 1964).**

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6/ TR pp. 26, 27, 42, 43.

And by analogy living abroad for a long period of time without maintaining contact with a United States diplomatic or consular office does not, in my view, have much to do with a person's intentions regarding his or her American citizenship.

At the hearing appellant stated that after her naturalization she gave no thought to whether she was or was not a United States citizen. She had assumed she was. 7/ It had never occurred to her that naturalization might result in loss of her American nationality, 8/

She also testified at the hearing that she saw nothing inconsistent about taking an oath to Canada. 9/ "Most people might say that there is very little difference-between Americans and Canadians," she stated. 10/ Asked by her counsel if she felt that way, appellant replied:

> I feel very strongly that way. Our way of life is so similar and our values and our systems of government are so much, alike that it was the most natural thing in the world to become a part of Canadian life, as easy as participating in the United States. 11/

However imprudent appellant may have been to have taken for granted the continuation of her American nationality and to have believed that there was no reason for her to have attempted to clarify her status officially for so many years, the explanation she has offered for not doing so is not irrational. As far as one's intention regarding retention or relinquishment of United States citizenship is concerned, it does make a

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7/ TR p. 26.

8/ TR p. 37.

9/ TR p. 49.

10/ Id.

11. Id.

difference where an American citizen is living. The Department acknowledged this in its guidance to all diplomatic and consular posts after the Supreme Court's decision in Vance v. Terrazas. In a Circular Airgram (no. 1767, August 27, 1980), the Department stated that in determining a person's intent, the country where the expatriating act was performed is a factor to be taken into account. One need not necessarily agree with appellant that there is very little difference between Americans and Canadians in order to concede that the two peoples share a range of fundamental values, Canada is hardly a hostile or exotic country. That someone like appellant could live there for thirteen years and not doubt that she remained a United States citizen, despite acquisition of Canadian citizenship, is neither unnatural nor unusual.

Appellant conceded that she had voted regularly in Canadian elections, because, as she stated at the hearing:

> ...If I established life in Canada then I feel it would be important to participate, the same as I did when I was eligible to do so when living in the United States, and I think I would participate anywhere I established myself. 12/

She does not belong to a political party or make contributions to one. 13/

Voting in foreign elections has not since 1967 been an expatriating act. I do not see therefore how it can in itself be considered indicative of an intention to abandon United States citizenship, even if viewed as an element in a pattern of conduct.

The Department's argument that appellant's failure to pay United States income taxes or to vote in United States elections after her arrival in Canada -- in short, that she did not exercise the rights or duties of a United States citizen -- is not persuasive on the issue of abandonment of United States citizenship. Although doing these things is often probative of a person's intent to retain United States citizenship, non-performance can hardly be deemed to show an intent to give up

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12/ TR p. 57.

13/ TR p. 29.

American nationality. The failure of Americans living abroad to exercise these rights and duties is so prevalent as to render non-performance a dubious criterion of an intention to transfer allegiance to a foreign state.

In May 1979, three years after her naturalization, appellant obtained a Canadian passport for travel abroad. She appears to have used it only once - in the summer of 1979 for a trip from Montreal to Paris and return. She thought it simpler, she has stated, to obtain a Canadian than a United States passport. (She has never held a passport of the United States.) 14/

Using a foreign passport is evidence of an intent to hold oneself out as a citizen of that country. Further, to obtain a passport in Canada one must state on the application whether one holds the nationality of any other country. At the hearing appellant informed the Board that she could not remember how she had answered the question about having another nationality.

After the hearing the Board asked appellant to submit a copy of her passport application - something she had told the consular officer at Montreal in 1980 she would do (but did not) after the consular officer suggested that her passport application might have some bearing on her intent regarding retention of United States citizenship. On September 3, 1983, counsel for appellant submitted a copy of the passport application which showed that appellant answered "No" to the question whether she had another citizenship.

I cannot, of course, dismiss lightly the fact that appellant denied to foreign authorities that she had any citizenship but that of Canada. This is a glaring inconsistency in her testimony that she never doubted that she remained an American even after becoming a Canadian citizen. But it was made three years after she became naturalized. And we do not know why appellant answered "No". But that she did seems to me to be an equivocal indication of her intention regarding retention of U.S. citizenship or surrender of three years earlier. Granted appellant weakened her case by not producing the document earlier and not explaining why she did not indicate on the application that she had American citizenship as well as Canadian. Yet, I note that one year later when she executed a sworn questionnaire at the U.S. Consulate General at Montreal appellant stated that she did not consider her naturalization and accompanying oath of allegiance to be a "denial or even contradition of my allegiance to the United States."

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14/ TR pp. 30, 31, 49, 50.

After the hearing the Board also asked appellant to obtain an affidavit from the friend who she said had cautioned her in 1980 about possible loss of her American citizenship, thus leading appellant to visit the Consulate General to find out about her citizenship status. Counsel for appellant submitted an affidavit of the friend, Ms. Joan E. Wasserman, dated August 17, 1983.

Ms. Wasserman, who states she too was required to obtain Canadian citizenship in order to obtain a permanent teaching certificate in the Province of Quebec, deposed in part as follows:

> ...
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> 3. In the spring of 1980 I had a conversation with M[redacted] R[redacted], a friend and fellow teacher whom I knew as an American citizen who had become a Canadian citizen to obtain a permanent teaching certificate.
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> 4. During the course of this conversation, I told [redacted] that an American citizen might jeopardize his or her American citizenship by obtaining Canadian citizenship, and [redacted] told me she was unaware that she may have put her own U.S. citizenship in jeopardy.

Ms. Wasserman's statement lends support to appellant's contention that before 1980 she never thought she might have lost her American citizenship by becoming a Canadian citizen, and, inferentially, that she lacked the intent to relinquish her United States citizenship.

The Department concedes that each one of appellant's acts of commission and omission when considered in isolation, is susceptible of a number of inferences, some favorable to the appellant, some to the Department. But, as counsel for the Department argued at the hearing:

> When they are considered in toto they show a clear pattern of conduct which would support the Government's assertion that they have established by a preponderance

> of the evidence an intent on the part of appellant to abandon her United States nationality. 15/

I do not agree.

I do not see in appellant's conduct a clear pattern of intent to abandon American nationality. Purpose and intent are severable and may be mutually exclusive. Appellant's allegedly sole purpose in becoming a Canadian was to obtain tenture in the school system of the Province of Quebec. Such conduct is not to be equated with an intention to relinquish United States citizenship. Inasmuch as appellant had nothing discernible to gain by giving up her United States citizenship, it appears to me that appellant's intention was just as likely to add Canadian citizenship to her United States citizenship as it may have been to divest herself of the latter when she gained the former.

The applicable case law, which is limited and to my knowledge offers no case directly in point, does not appear to support the Department's theory that this appellant's intent to relinquish her citizenship is shown by conduct tantamount to an abandonment of her American nationality. The few reported cases where the Government successfully proved a petitioner's intent to relinquish citizenship have been decided on grounds less equivocal than abandonment.

In Terrazas v. Haig, supra, the court found that appellant's understanding, willing and voluntary formal declaration of renunciation of his citizenship when he pledged allegiance to Mexico was in itself sufficient to support a finding of intent to relinquish U.S. citizenship. Nevertheless the court went on to make clear that appellant's later conduct confirmed his intention at the time he performed an expatriating act. As the court stated: "Here there is abundant evidence that plaintiff intended to renounce his United States citizenship." The court noted that appellant sought to inform his draft Board that he was no longer a U.S. citizen, and executed a sworn affidavit stating that his act was voluntary and performed with the intention of relinquishing his citizenship.

In King v. Rogers, supra, the petitioner took a simple oath of allegiance to the British Crown; he was not required to renounce his present nationality, But after naturalization he informed his draft board that he was no longer a U.S. citizen, and informed the consulate concerned that If necessary to establish that he had given up his U.S. citizenship, he was willing to renounce it.

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15/ TR pp. 73-74.

In Richards v. Secretary of State, supra, plaintiff swore an oath to the British Crown and simultaneously declared that he renounced his present nationality. Although the court held that his declaration of renunciation alone was a sufficient finding that plaintiff intended to relinquish his citizenship, the court examined his subsequent conduct and found that he confirmed his intent. He had used two Canadian passports, one to travel to the United States on a U.S. visa; and had made a sworn statement at a U.S. consulate that although he had done so reluctantly, he had to relinquish his U.S. citizenship in order to comply with the Canadian naturalization regulations.

II

I believe that appellant's conduct, including even her denial of any but Canadian citizenship in the application she made for a Canadian passport, taken as a whole is as susceptible of the inference that she intended to retain her United States citizenship as it is of the contrary. Having taken the position that appellant's other acts do not indicate an intent to give up United States citizenship, I would not wish to see her case turn on the fact that she answered "no" when required to state to the Canadian authorities whether she held any other citizenship. (I hasten to note that the majority does not single out the foregoing matter as decisive in her case, but merely sees it as one facet of a series of acts that in their judgment indicate an intention to relinquish United States citizenship.) On balance I remain in doubt that she intended to surrender her United States citizenship when she became a Canadian. Consistently with the holding of the Supreme Court in Nishikawa v. Dulles, 356 U.S. 129 (1958) and Schneiderman v. United States, 320 U.S. 118 (1943), I would resolve my doubts in favor of retention of United States citizenship.

In my judgment, the Department has not sustained its burden of proving by a preponderance of the evidence that appellant intended to abandon her United States citizenship. Accordingly, I would reverse the Department's holding of May 14, 1981, that appellant expatriated herself on January 27, 1976, when she obtained naturalization in Canada upon her own application.

Alan G. James, Chairman