April 24, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This case is before the Board of Appellate Review on an appeal brought by [redacted] from an administrative determination of the Department of State that he expatriated himself on November 15, 1977, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/

The issues for decision are whether appellant voluntarily acquired Australian citizenship: and if he did so, whether it was his intention thereby to relinquish his United States citizenship.

It is our conclusion that appellant's acquisition of Australian citizenship was free and uncoerced, and that it was accompanied by an intention to terminate his allegiance to the United States. Accordingly, we will affirm the Department's holding of loss of appellant's nationality.

I

Appellant was born at [redacted], Pennsylvania on [redacted], thus acquiring United States nationality at birth. According to his own submissions, he grew up in Pennsylvania; registered for Selective Service at age

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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, . . .

eighteen in 1963, received a student deferment, and was not called for induction; received a bachelor of arts degree in history from Millersville State College. In August 1970 he obtained a passport for the stated intention of travelling to Australia. On his application appellant gave his occupation as "teacher", indicated that the purpose of his trip was "emigration", and that he proposed to stay in Australia for two years.

Appellant arrived in Australia in the summer of 1971. It appears that he attended the University of Sydney where he received a master of arts degree. Sometime in the spring of 1975 appellant petitioned to be naturalized as an Australian citizen. On July 31, 1975, he was interviewed by an examining officer of the Department of Immigration and Ethnic Affairs to whom he stated that he had never been married 2/, and that he was employed by the Department of Education—as a relief teacher. As proof of his United State citizenship and that he had resided in Australia since July 1971, appellant presented his United States passport bearing a local residence stamp. The passport was "sighted" and returned to him.

According to appellant's submission he met an Australian citizen, [redacted], in late 1976 to whom he became engaged in the winter of 1977. Both have stated that she insisted, as a condition precedent to their marriage, that appellant become an Australian citizen.

2/ In appellant's application for a United States passport in August 1970 he stated that he was last married on August 31, 1968, to one [redacted], and that the marriage had not been terminated.

At a public ceremony on November 15, 1977, appellant made the following oath or affirmation of allegiance to the British Crown, as prescribed by schedule 2 of the Australian Citizenship Act of 1948-69, as amended, in 1973:

> I, ..., renouncing all other allegiance, swear by Almighty God /solemly and sincerely promise and declare/ that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfill my duties as an Australian citizen. 3/

He became an Australian citizen as of the date of his oath or affirmation.

3/ Whether appellant swore an oath *ox* made an affirmation of allegiance to the British Crown is not shown by the record. However, when he had a citizenship interview in June 1975, he indicated that he wished to make an affirmation. In any event, there can be no dispute that in whatever form he did *so,* he made a meaningful declaration of allegiance to a foreign state.

The Australian Department of Immigration informed the Consulate General at Sydney of appellant's naturalization by letter dated January 26, 1978. On August 23, 1978, the Consulate General wrote to appellant, advising him that he might have expatriated himself and inviting him to submit evidence for consideration by the Department of State in making a determination of his citizenship status. The Consulate General's letter did not reach appellant, because he had evidently moved from his last known place of residence without leaving a forwarding address; it was returned to the Consulate General marked unclaimed by addressee. Neverthele in accordance with section 358 of the Immigration and Nationality Act, the Consulate General prepared a certificat of loss of nationality in appellant's name on November 6, 19 and forwarded it to the Department for approval. 4/

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

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

The Consulate General certified that appellant acquired United States nationality by virtue of his birth at [redacted] Pennsylvania: that he had acquired the nationality of Australia on November 15, 1977, upon his own application: and concluded that he thereby expatriated himself under section 349(a)(1) of the Immigration and Nationality Act.

The Department informed the Consulate General that it would hold appellant's case in suspense until such time as he could be located and offered an opportunity to present evidence.On June 12, 1979, when appellant appeared at the Consulate General allegedly to revalidate his passport, he was informed that the Consulate General considered that he had expatriated himself. He was invited to submit evidence about his naturalization for consideration by the Department. This, appellant did on August 24, 1979, by executing two questionnaires and submitting an unsworn, undated, "to whom it may concern" statement from Ms. [redacted] asserting that as a condition of their marriage she had insisted that appellant become an Australian citizen.

On October 4, 1979, the Department approved the certificate of loss of nationality that the Consulate General had prepared in appellant's name. The Consulate General forwarded a copy thereof to appellant by letter dated October 17, 1979. Approval of the certificate constitutes an administrative determination of loss of nationality from which an appeal may be brought to this Board. Appellant gave notice of appeal by letter dated November 28, 1979.

Appellant contended that he was coerced into becoming an Australian citizen, and that although the oath of allegiance he took could be construed as renunciation of any other nationality, he did not specifically renounce his United States citizenship; his citizenship should not be "revoked" unless the oath and any subsequent acts were in effect attacks on or a repudiation of the United States.

Appellant and Ms. [redacted] stated that they terminated their engagement in 1979.

In January 1380, appellant travelled to Canada using an Australian passport, 5/ He called at the Consulate General in

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5/ At the hearing held on June 24, 1383, in answer to a question from the Board, appellant stated that he had travelled to Canada on an Australian passport. Transcript of Proceedings In The Matter of [redacted], Board of Appellate Review, June 24, 1983 (hereinafter referred to as "TR".) 20.

Vancouver on March 11, 1980, to inquire about the status of his citizenship appeal, returning on March 17th to leave the address of a local hotel where he was staying.

After informing both Vancouver and Sydney by telegram o the Board's contemplated action on appellant's case, the Chairman of the Board of Appellate Review wrote to appellant in care of the Consulate General at Vancouver on April 16, 1980, enclosing a copy of the Department's appeal brief. Th Chairman requested that if appellant returned to the Consulate General, he be given a copy of the Chairman's letter and the Department's brief, to which he had the right of reply. The Chairman's letter was undeliverable; the hote where appellant had been staying informed the Consulate General that appellant had departed March 22nd and had not left a forwarding address.

Neither the Consulate General at Vancouver nor at Sydne was able subsequently to trace appellant. Two years passed without the Board of Appellate Review or, to the Board's knowledge, any other U.S. official agency having received an communication from appellant about his citizenship appeal.

Accordingly, as provided by section 7.5(l) of title 22, Code of Federal Regulations 6/, the Board on May 14, 1982, terminated proceedings without prejudice to later reinstatem for good cause shown, and so advised the Department and the Consulates General at Vancouver and Sydney.

In June 1982 appellant wrote to the Board from Mayfield Pennsylvania to inquire about the status of his appeal. He subsequently retained counsel. After appellant had shown cause why he had not prosecuted his appeal, the Board reinstated the appeal on November 2, 1982. The oral hearing appellant requested was held on June 24, 1983. 7/

6/ Section 7.5(l), Title 22, Code of Federal Regulations, 22 CFR 7.5(l), provides as follows:

(1) Whenever the record discloses the failure of an ap to file documents required by these regulations, respond to notices or correspondence from the Board, or otherwise indic an intention not to continue the prosecution of an appeal, t Board may in its discretion terminate the proceedings withou judice to the later reinstatement of the appeal for good cau

7/ Following the hearing, the Board asked the Department to a copy of appellant's application for naturalization and any related material from the Australian authorities. This info: was received by the Board in January 1984.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a person shall lose his United States nationality by obtaining naturalization in a foreign state upon his own application. 8/ A person, however, shall not lose his citizenship thereby unless the act of naturalization was performed voluntarily, in accordance with applicable legal principles. Nishikawa v. Dulles, 356 U.S. 129 (1958), citing Perkins v. Elg, 307 U.S. 325 (1939).

There is no dispute that appellant obtained naturalization in Australia upon his own application, and thus brought himself within the reach of section 349(a)(1) of the Act. The first issue we must decide therefore is whether he performed the act voluntarily.

Section 349(c) of the Act presumes that a statutory act of expatriation was performed voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not performed voluntarily. 9/

8/ Note 1, supra.

9/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481, provides in relevant part:

. . .

...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.

Appellant maintains that the sole reason he obtained naturalization in Australia was to accede to the strong wish of his fiancee that he become an Australian citizen if they were to marry. He argues that the pressure she exerted on him to become naturalized was, in effect, emotional duress that rendered his doing the expatriating act involuntary. We disagree.

The record shows that appellant apparently did not apply for naturalization because of Ms. [redacted] importuning, for he initiated the process in 1975 more than a year before he allegedly met Ms. [redacted]. That she may have insisted he complete the naturalization process after they had become engaged is, however, plausible,

Many persons contemplating marriage pose conditions that their prospective spouse may consider unreasonable or onerous. Appellant's dilemma therefore could not be called extraordinary within the meaning of the case of Doreau v. Marshall, 1970 F. 2d 721 (1948) wherein the court stated:

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country.

Nor do we think that appellant's alleged emotional duress rises to the level of that pleaded successfully in actions to recover United States citizenship because of performance of an expatriating act occasioned by true emotional duress. The courts have insisted that plaintiffs who plead a defense of emotional duress demonstrate that the health or safety of a close family member would have been endangered had they not done an act that placed their citizenship in peril. Mendelsohn v. Dulles, 207 F. 2d 37 (1953); Ryckman v. Dulles, 106 F. Supp. 739 (1953). Furthermore, appellant and Ms. [redacted] were not yet man and wife.

If a citizen is able to make a free, unfettered choice between jeopardizing citizenship and taking an alternate course of action, there is no duress. Jolley v. Immigration and

Naturalization Service, 441 F. 2d 1245 (1971). As the court said in Jolley, "the opportunity to make a personal choice i the essence of voluntariness."

In the case before the Board, no one forced appellant t propose marriage to Ms. [redacted]. Having proposed and been accepted on condition that he become an Australian citizen, appellant still remained free, as a matter of law, to accept Ms. [redacted]' terms or not. He may have found the necessity for choice between losing Ms. [redacted] and acquiring a new nationality uncomfortable, but his dilemma arose from proposing marriage in the first place. Naturalization was not forced upon him by circumstances over which he had no control. Whatever the compulsion he felt to acquiesce in Ms. [redacted]' demands, it falls far short of legal duress.

Appellant has failed to overcome the statutory presumpt that his act of acquiring Australian citizenship was done voluntarily. We conclude therefore that he became an Austrs citizen of his own free will.

III

Even though appellant's naturalization in Australia was voluntary, it must still be determined whether it was accomp by an intent to relinquish his United States nationality. I the Supreme Court held in Vance v. Terrazas, 444 U.S. 252 (1 if a person fails to prove that his act of expatriation was involuntary, the question remains whether on all the evidenc the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intention relinquish citizenship.

In Terrazas, the Supreme Court held that under section 349(c) of the Immigration and Nationality Act 10/, the Government must establish by a preponderance of the evidenc that the actor intended to divest himself of United States citizenship; intent may be ascertained from a person's word or found as a fair inference from proven conduct. It is to determined as of the time the expatriating act was done. Terrazas v. Haig, 653 F. 2d 285 (1981).

10/ Section 349(c) of the Immigration and Nationality Act provides in pertinent part as follows:

Whenever the loss of United States nationality is put 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 up the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence....

Obtaining naturalization in a foreign state, like performance of the other acts enumerated in section 349(a) of the statute, may be highly persuasive evidence of an intent to surrender United States citizenship, but it is not conclusive evidence of such intent, Vance v. Terrazas, citing Nishikawa v. Dulles, supra.

Thus, naturalization in a foreign state standing alone will not supply evidence of the requisite intent. King v. Rogers, 463 F. 2d 1188 (1972). The Government may prove intent, the Court stated in King, by acts inconsistent with United States citizenship or acts clearly manifesting an intent to transfer allegiance from the United States to a foreign state.

The position of the Department is that the Australian naturalization process has long required that applicants swear or affirm allegiance to the British Crown and explicitly renounce all other allegiance; that applicants are made aware of the meaning and implications of the oath before taking it; that the import of the oath is unequivocal; and therefore that appellant's solemn declaration is conclusive with respect to his intent. Furthermore, appellant's subsequent conduct amply confirms his intention to relinquish his United States citizenship in 1977 when he became an Australian citizen.

The Department bases its contention that appellant had adequate notice that his naturalization would entail renunciation of any other allegiance upon an official communication from an official of the Australian Department of Immigration and Ethnic Affairs at Canberra to the United States Consulate General at Melbourne on July 28, 1978, eight months after this appellant acquired Australian citizenship. 11/

11/ The letter of the Department of Immigration responded to a letter written by the Consulate General, on instruction from the Department, to inquire about the procedures for naturalization in Australia. As the American Consul wrote: "The Department of State indicated that it desired the information and material so that its precedents file and records may be brought up to date rather than in connection with any specific individual."

The letter stated that Australian procedures require that applicants for naturalization have a preliminary citizenship interview. When the interview is arranged the applica is asked to bring his passport and surrender it at the interview. At the interview applicants are informed of the reasons they were asked to surrender their passports. They are also informed that acquisition of Australian citizenship might cause the loss of their present nationality. They are further informed that they must renounce all other allegiance and make oath or affirmation of allegiance to the British Crown. The letter concluded by noting: "It has always been the practice to counsel applicants at the citizenship interview in regard to the implications of the form of words of the oath or affirmation of allegiance."

Appellant maintains that he did not intend to relinquish his United States nationality. He stresses that he saw no inconsistency between holding both Australian and United States citizenship; that he had never been informed of the implications of naturalization for his United States citizenship; that the statement of allegiance he made to the British Crown did not mention renunciation of allegiance to the United States specifically; and that the declaration of allegiance is too equivocal to support a holding of intent to surrender United States citizenship.

Australian procedures for naturalization are clear and specific. Without any evidence to the contrary save appellant latter day statements, we must assume that appellant was given the customary citizenship interview on July 31, 1975, and was informed at that time of the implications of acquiring Australian citizenship. 12/ And we note from the record of the interview that it was conducted by an examining officer, n as appellant stated at the hearing, by a clerk who merely checked over the forms. 13/ That appellant was not asked at the interview to surrender his U.S. passport, raises no

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12/ The acts of the examining officer of the Department of Immigration may be presumed to have been correct, evidence to the contrary being absent. This is so because the official acts of officers of foreign government, as well as those of American officials are presumed to have been carried out according to law, regulations.and their instructions. Boisson v. Acheson, 101 F. Supp. 138 (1951).

13/ TR 9.

questions about the completeness or correctness of interview. Appellant informed the officer that he anticipated he would have to travel outside Australia on a family emergency in October 1975. It is not, therefore, unreasonable to assume that the examining officer allowed him to retain his passport so that he might make the projected trip.

Furthermore, appellant was not summoned to attend a naturalization ceremony until more than two years after his July 1975 interview; during that period he had ample time to inform himself about the consequences of naturalization for his United States citizenship. Forms in the record obtained from the Australian authorities show that he correctly petitioned to change his name at the time of his naturalization. That he did not take similar pains to learn, either from Australian or American authorities, what effect naturalization might have on his American nationality, is not easy to understand.

The language of the declaration of allegiance is solemn and crystal clear. An educated man like appellant cannot be heard to say that he thought pronouncing it a mere formality. 14/ It matters not whether the declaration did not specifically mention appellant's United States nationality; appellant had only one "other allegiance."

The case law is unambiguous about the consequences for an American citizen who in acquiring foreign nationality or pledging allegiance to a foreign state expressly renounces his allegiance to the United States.

In United States v. Matheson, 400 F. Supp. 1241 (1975), Aff'd. 532 F. 2d 809 (1976), the court stated:

> an oath expressly renouncing United States citizenship as is required by the 1949 amendment /to the Mexican Law of Nationality and Naturalization/ would leave no room for ambiguity as to the intent of the applicant.

The court's decision in Matheson was echoed in Terrazas v. Haig, supra, where plaintiff had expressly renounced his

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14/ TR 10, 30.

United States citizenship at the time of pledging allegiance to Mexico. There the court stated:

> Plaintiff's knowing and understanding taking an oath of allegiance to Mexico and an explicit renunciation of his United States citizenship is a sufficient finding that plaintiff intended to relinquish his citizenship.

In the recent case of Richards v. Secretary of State, CV80-4150, slip. OD. (C.D. Cal. 1982) plaintiff took an oath allegiance to Canada and declared that he "renounced all allegiance and fidelity to any foreign sovereign or state". The court held that, by making such a declaration, plaintiff intended to relinquish his United States citizenship. The Court said that taking an oath that contains both an express affirmation of loyalty to a country where citizenship is sought and an express renunciation of loyalty to the country where citizenship is maintained "effectively works renunciation of American citizenship because it evinces an intent by the citizen to so renounce." At 5.

The record shows that only twice during the nine years appellant lived in Australia did he evince any interest in h United States citizenship. In June 1979 he went to the Unit States Consulate General at Sydney - his first visit to any official U.S. establishment since arriving in Australia eigh years before - to revalidate his passport. Later that year, shortly after he was informed of the Department's holding of loss of his nationality, he entered the appeal.

Neither act, in our view, mitigates or neutralizes appellant's unambiguous declaration of allegiance to Austral and his express renunciation of "all other allegiance" - act patently inconsistent with an intention to retain United States citizenship. Furthermore, appellant obtained an Australian passport and travelled on it to Canada in 1980.

We find that the Department has proven by a preponderar of the evidence that appellant intended to terminate his United States citizenship when he obtained naturalization ir Australia.

IV

Upon consideration of the foregoing, it is our conclusion that appellant voluntarily obtained naturalization in Australia with the intention of relinquishing his United States citizenship. Accordingly, we affirm the Department's holding to that effect.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member