December 17, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] S[redacted] T[redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, E[redacted] S[redacted] T[redacted] expatriated himself on February 13, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

In considering this appeal the Board must decide two issues: (1) whether appellant voluntarily obtained naturalization in Canada; and (2) if it be found that he did so, whether it was his intention to relinquish his United States citizenship. It is our conclusion that appellant became a Canadian citizen of his own free will and that he did so with the intention of terminating nis United States nationality. Accordingly, we will affirm the Department's determination that appellant expatriated himself.

I

Appellant became a United States citizen by birth at [redacted]. In 1965 he graduated from the University of Massachusetts. According to an affidavit appellant executed on July 6, 1983, he was classified by his local draft board as a conscientious objector after he had registered for Selective Service. In 1967 that status was changed to 1-A by the Massachusetts State Director of Selective Service. He states that he initiated an appeal from the State Director's decision, but became discouraged about his chances of regaining conscientious objector status following the experience of a close friend who held views similar to his own and was denied objector status. "It was at this point," he later explained to the Board,

---

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, . . .

"that I lost faitn in the fairness of the Selective Service System ana decided that I would go to Canada." He became a landed immigrant on August 5, 1967 (admitted for permanent residence).

In November 1968, appellant's 1983 affidavit continues, a notice to report for induction was forwarded to him in Canada, and he feared that he might be subject to deportation. In 1969 he was visited by an officer of the Royal Canadian Mounted Police who inquired about his status in Canada. Being concerned about possible pressure from the United States for his return (the RCMP officer conceded that his call had been prompted by a request from the FBI), appellant decided to apply for Canadian citizenship, He did so in 1972. On February 13, 1973 appellant was granted a certificate of Canadian citizenship under section 10(1) of the Canadian Citizenship Act of 1947 after he had subscribed to a declaration of renunciation of all other allegiance and an oath of allegiance to the British Crown. The declaration of renunciation read as follows:

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen. 2/

The text of the oatn of allegiance prescribed by the Second Schedule of the Canadian Citizenship Act 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 fulfil my duties as a Canadian citizen.

Appellant married a Canadian citizen in 1979. They have one child, born in 1981.

On January 17, 1983 appellant wrote to the United States Consul at Halifax to inquire how he might enter the United States to live permanently, indicating that he had become a Canadian citizen in 1973. The Consul responded on January 28, 1983 to inform appellant that by obtaining naturalization in Canada he might have expatriated himself. He was asked to complete a form for determining United States citizenship, and invited to visit the Consulate General to

---

2/ Section 19(1)(b) of the Canadian Citizenship Regulations prescribed the making of this declaration by all applicants for naturalization who were not British subjects. Section 19(1)(b) of the Regulations was held to be ultra vires by the Federal Court of Canada on April 3, 1973.

discuss his case with a consular officer. Appellant completed the form and returned it to the Consulate General in February 1983. Meanwhile, the Canadian Citizenship authorities confirmed to the Consulate General that appellant nab obtained Canadian citizenship.

Appellant was interviewed by a consular officer in March. On March 31, 1983 appellant executed an affidavit regarding his naturalization, and completed an application for registration as a United States citizen.

In compliance with the provisions of section 358 of the Immigration ana Nationality Act, the Consulate General prepared a certificate of loss of nationality in appellant's name on April 18, 1983. 3/ The Consulate General certified that appellant became a United States citizen at birth; that he obtained naturalization in Canada upon his own application: and concluded 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 April 28, 1983, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. An appeal was entered by letter dated May 30, 1983. Appellant requested an oral hearing which was held on July 12, 1984.

It is appellant's contention that his naturalization was involuntary and that he did not intend to relinquish his United States citizenship when he obtained the citizenship of Canada.

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

Section 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 reguiations 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.

II

Although the statute provides that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application, the Supreme Court has held that expatriation shall not result unless the proscribed act was performed voluntarily and with the intention of relinquishing United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980).

There is no question that appellant obtained Canadian citizenship upon his own application and thus brought himself within the purview of the applicable section of the statute. Our first inquiry therefore is whether his naturalization was voluntary.

By law one who performs a statutory expatriating act is' presumed to have done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was done involuntarily. 4/ To overcome this legal presumption, appellant must come forward with persuasive evidence that he obtained naturalization in Canada against his fixed will and intent to act otherwise.

Appellant submits that he obtained naturalization because of psychological duress. In a letter which constituted his reply brief he posited the following case for duress.

> I was under considerable psychological pressure because even though I had gone to an alien place, the U.S. authorities, apparently the FBI, were working to return draft resisters. The methods, it seemed were not all legitimate. I, and others in similar circumstances received insinuating phone calls that we feared were attempts to frame us. I don't know, truly, who made those calls but I do know that the FBI asked the RCMP to question me because the officer who came to my address in New Brunswick admitted so. I did not by then feel any real security in my status as a landed immigrant. I no longer had any great faith that the authorities would abide by the laws and felt that I might be summarily

4/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads in pertinent part as follows:

(c) ...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.

> deported not because I had broken the laws of Canada but because the FBI had. If this seems a magnified fear consider my age at the time, and the tone of suspicion and polarization of that period.

We must inquire whether appellant's fear of deportation to the United States amounted to legal duress, rendering his naturalization void for having been obtained against his will. We are not required to determine whether appellant's fear of being deported had a rational basis or not. We will accept his contention that fear of deportation motivated him to seek Canadian citizenship, and thereby shield himself from possible deportation.

Appellant admittedly went to Canada, however, to evade a duty of citizenship. In order to ensure that he would not be returned to the United States against his will to face a charge of draft evasion, he chose to seek Canadian citizenship. Any compulsion he felt to become naturalized in a foreign state was thus patently self-generated. Appellant's expatriating act was not compelled by law. As the court said in Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245, 1250 (1971), "He /Jolley, a U.S. citizen who went to Canada to avoid the draft and there formally renounced his United States citizenship because of his moral abhorrence of the Selective Service System/ had the alternative to obey the dictates of the Selective Service System, an alternative he found impossible because of his own moral code. His renunciation was therefore the product of personal choice and therefore voluntary."

In the case before us appellant had an opportunity in 1972-1973 to make a personal choice - to return to the United States and possibly pay a penalty for draft evasion, or to perform an act that could result in loss of his United States citizenship. He chose the latter course. As the court said in Jolley, "the opportunity to make a personal choice is the essence of voluntariness." At 1250.

Appellant has failed to advance a persuasive case that he involuntarily performed an expatiating act.

We thus conclude that his obtaining Canadian citizenship was an act of his own volition, not the product of legal duress.

III

Even though we have found appellant's naturalization in Canada to nave been voluntary, it must still be determined whether he became a Canadian citizen with the intention of relinquishing his United States citizenship.

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. Although Afroyim did not define what conduct constitutes "voluntary relinquishment" of citizenship, it nevertheless made loss of citizenship dependent upon evidence of an intent to transfer or abandon allegiance.

The Supreme Court affirmed and clarified this holding on intent in Vance v. Terrazas, supra. The Court said that the Government must prove an intent to surrender United States citizenship, as well as the performance of the expatriative act under the statute. The Court stated that an intent to relinquish United States citizenship must be shown by the Government, whether "the intent is expressed in words or is found as a fair inference from proven conduct." The Court made it clear that it is the Government's burden to establish by a preponderance of the evidence that the expatriating act was accompanied by an intent to terminate United States citizenship. 5/

The Supreme Court in Terrazas favorably noted the administrative guidelines set forth in the Attorney General's Statement of Interpretation of Afroyim. 6/ The Attorney General said 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. The Court also pointed out in Terrazas, that although any of the specified statutory acts of expatriation "may be highly persuasive evidence in a particular case of a purpose to abandon citizenship," 7/

5/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), reads in pertinent part:

(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.

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

7/ Quoting from Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), (Black, J., concurring.)

the trier of fact must in the end conclude whether the citizen not only voluntarily committed the expatriating act, "but also intended to relinquish his citizenship."

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. But, circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship.

The intent to be proved is appellant's intent at the time he performed the expatriative act. Terrazas v. Haig.

That appellant obtained naturalization in a foreign state, swore an oath of allegiance to the British Crown and made a declaration of renunciation of all other allegiance is convincing evidence of an intent to relinquish his United States citizenship.

The case law makes quite clear what the consequences are for an American citizen who, in acquiring foreign nationality or pledging allegiance to a foreign state, expressly renounces his allegiance to the United States, or all other allegiance.

In United States v. Matheson, 400 F. Supp. 1241, 1245 (1975); Aff'd. 532 F. 2d 809 (1976), the court stated:

> an oath expressly renouncing United States citizenship...would leave no room for ambiguity as to the intent of the applicant.

The court's holding in Matheson was cited in Terrazas v. Haig, supra, where plaintiff had expressly renounced his 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 Richards v. Secretary of State, CV80-4150, slip. op. (C.D. Cal. 1982) plaintiff, like appellant here, took an oath of 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 only evidence of record bearing on appellant's intent regarding retention or relinquishment of his United States citizenship that dates from 1972-1973 are the words of the oath of allegiance and the declaration of renunciation he subscribed on February 13, 1973. Ten years later appellant contends that he did not intend to relinquish his United States citizenship in 1973. He bases this contention largely on an assertion that he did not knowingly subscribe to the declaration of renunciation of all other allegiance required of applicants for naturalization in Canada in 1973.

At the hearing, appellant indicated that after applying for naturalization he had some misgiving that he might be required to renounce United States citizenship. 8/ He went to the naturalization ceremony on February 13, 1973 "very nervous at this time because I had to prepare inyself to excuse myself awkwardly if it came up that they were going to ask people to swear an oath of renunciation." 9/ When he heard that his fellow applicants for naturalization were only asked to swear an oath of allegiance to the British Crown, "I was greatly relieved that this was so...." 10/ When his turn came, he repeated the oath of allegiance.

At the hearing, appellant submitted an affidavit executed by his wife on July 3, 1984. Mrs. T[redacted], who said she was a close friend of appellant in February 1973, deposed that:

8/ Transcript of hearing in the Matter of E[redacted] S[redacted] T[redacted] Board of Appellate Review, July 12, 1984, (hereafter referred to as "TR".) 13.

9/ TR 15.

10/ Id.

> 1) When I saw E[redacted] immediately after the ceremony of his becoming a Canadian citizen, he remarked on how glad he was that he didn't have to say anything in the oath about renouncing his American citizenship. His description of the ceremony was that he had to swear allegiance to the Queen and to Canada.. ..
>
> 2) E[redacted] had declared before the ceremony that if they tried to make him renounce his American citizenship at the Canadian naturalization ceremony that he would not do it. I remember this clearly because as a Canadian citizen I thought he was not being grateful enough to Canada for accepting him, although at the same time I admired his loyalty to a country which, as far as I could see, had not been fair to him.

Shown a copy of his application for citizenship at the hearing, appellant said: "It seems that the application on it had a written note. It had the oath of allegiance and it had written on it a clause of renunciation after the oath of allegiance." 11/ He continued:

> NOW, the only thing that I remember about this application is that we were asked to check and see if our address was right on it because that is where our certificate would be sent and perhaps within the month waiting period between earlier applying and this ceremony people would have moved....
>
> I did not read it apparently. Certainly I did not read the fine print. And if I had, I might have wondered what this meant because the only oath taken was the oath of allegiance. In any case, I felt that what I was swearing to was the oath of allegiance. 12/

On cross-examination, appellant reiterated that:

11/ TR 16.

12/ Id.

> I told you I was prepared to waik out and excuse myself, however awkward, if I was asked to take an oath of renunciation. What we were asked to do was to come to the front and sign this application and then go to the judge and take our oath.
>
> I was quite worked up at this time and I went up and I checked my address. I remember being instructed to do that. And that is all that I saw on the application. I did not look at the application or consider it a consequential document. I was focused with tunnel vision on the oath that was being taken. 13/

The record makes clear, and appellant concedes, that on February 13, 1973 appellant signed both an oath of allegiance to the British Crown and a declaration renouncing all allegiance and fidelity to any foreign sovereign or state. He was at the time 29 years of age, and had received a university education. In contemplation of law he must, in these circumstances, be presumed to have acted knowingly and understandingly.

Appellant's case rests solely on testimony he and his wife have offered ten years after he performed a statutory act of expatriation. The Board does not question the sincerity of appellant and his wife, and we accept that appellant ardently wishes to recover his United States citizenship. It is an elementary rule of evidence that the probative value of statements made many years after an event rarely may be entitled the weight of unchallenged evidence dating from the time of the event in question. The contemporary evidence of appellant's intent with respect to his United States citizenship snows that he subscribed to a categoric statement of renunciation of his nationality of origin, and did so, as far as one can discern, wittingly and without any recorded reservation at the critical time.

Upon examination of the entire record, we find no shred of evidence that would impeach the explicit declaration of renunciation appellant signed in 1973. While the Board is not persuaded that appellant's post-naturalization conduct necessarily confirms

---

13/ TR 35.

or reinforces his putative intent in 1973, it is our opinion that his conduct fails to demonstrate an affirmative will or purpose to retain his United States nationality.

It is our conclusion therefore that appellant's words at the critical moment manifested an intent to forswear allegiance to the United States and transfer his exclusive loyalty to Canada. The Department has carried its burden of proving, by appellant's own words, that he intended to relinquish his United States Citizenship.

IV

Upon consideration of the foregoing, the Board hereby affirms the Department's determination that appellant expatriated himself in 1973 when he obtained naturalization in Canada.

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member