July 25, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] N[redacted] V[redacted]

This case is before the Board of Appellate Review on an appeal brought by [redacted] N[redacted] V[redacted] from an administrative determination of the Department of State that he expatriated himself on January 27, 1982, under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

Two issues are presented: (1) whether appellant voluntarily declared his allegiance to Mexico, and (2) if his act be found to have been voluntary, whether it was accompanied by an intention to relinquish his United States citizenship.

It is our conclusion that appellant acted freely, without any duress being exerted upon him, and that his declaration of allegiance to Mexico was accompanied by an intention to surrender his United States nationality. Accordingly, we will affirm the Department's holding of loss of appellant's United States citizenship.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481 (a)(2), provides:

Section 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 --

. . .

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof....

I

Appellant was born in [redacted] of a United States citizen father on [redacted] thus acquiring the nationality of both the United States and Mexico at birth.

Except for brief periods of residence in the United States, he lived in Mexico from birth to 1978.

On January 23, 1978 appellant obtained a passport from the United States Embassy at Mexico City, and a week later enlisted in the United States Army at San Antonio on January 31. He served for nearly three years with an artillery unit in Germany. Judging by the numerous commendations and fitness reports of his commanding officers, appellant was an outstanding soldier. He renewed his passport at Munich in April 1981, and was issued a certificate of United States citizenship on June 8, 1981.

After having been honorably discharged from the Army in the Summer of 1981, appellant returned to Mexico where he "enrolled in school" in the Fall of 1981.

On January 4, 1982 appellant applied for a certificate of Mexican nationality which was issued to him on January 27, 1982, a fact the Department of Foreign Relations confirmed to the United States Embassy at Mexico, D.F. on February 24, 1982. 2/

In the application for a certificate of Mexican nationality, appellant expressly renounced his United States citizenship as well as his allegiance to the United States, and formally declared his allegiance to Mexico, in conformity with the requirements of Mexican law for issuance of such certificates.

2/ Diplomatic Note No. 7000423, February 24, 1982, Department of Foreign Relations to the United States Embassy at Mexico, D.F.

It appears that in the Spring of 1982 the Embassy communicated with appellant to inform him that by making a formal declaration of allegiance to Mexico he might have expatriated himself. At the Embassy's request, he completed a questionnaire on April 2, 1982 to facilitate the determination of his citizenship status.

In compliance with the provisions of section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name on June 22, 1982. 3/ The Embassy certified that appellant was a national of both the United States and Mexico from birth; that he had made a formal declaration of allegiance to Mexico; and thereby expatriated himself under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The Department approved the certificate on July 27, 1982, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

Appellant entered the appeal on July 22, 1983. He maintains that since he was under great stress at the time he applied for the certificate of Mexican nationality, his act was involuntary. Further, he asserts that although he pledged allegiance to Mexico, he had no intention of relinquishing his United States citizenship.

3/ 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.

II

Section 349(a)(2) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by making a formal declaration of allegiance to a foreign state.

There is no dispute that appellant made such a declaration to Mexico, and thereby brought himself within the purview of the relevant section of the Act.

American citizenship shall not be lost, however, unless a citizen performs an expatriating act voluntarily and with the intention of relinquishing that citizenship. 4/

The first issue to be determined is whether appellant declared his allegiance to Mexico of his own free will.

Under law, a person 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 involuntary. 5/

4/ Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

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

...Except as otherwise provided in subsection (b), any perso 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 presumpti may be rebutted upon a showing, by a preponderance of the evidenc that the act or acts committed or performed were not done voluntarily.

In the questionnaire appellant completed at the Embassy on April 2, 1982, he signed a statement that he voluntarily made a formal declaration of allegiance to Mexico with the intention of relinquishing his United States citizenship. He also wrote in the questionnaire that he had to take an oath to Mexico because he was "now residing in Mexico. I have to work and to study." In another part of the questionnaire he stated that: "The act was done voluntarily. I knew what I was doing." At the same time, however, he stated that he had acted "because of necessity." 6/

In his submissions on appeal, however, appellant affirmatively pleads duress, alleging that circumstances forced him against his will to make a formal declaration of allegiance to Mexico so that he could obtain a certificate of Mexican nationality to continue to reside and study in Mexico.

6/ Appellant stated in his initial submission to the Board that:

> I was told /at the Embassy after it had learned he had taken an oath of allegiance to Mexico/ to fill out the forms to determine my U.S. citizenship. I remember very clear that I had filled out one set explaining very briefly what I am writing here, but then filled out another set, why I can't recall. Then a lady called me. She revised the form and said (referring to item 12b of the forms to determine U.S. citizenship) /I2(b) requests that the citizen describe whether the act was done voluntarily/ write down that the act was done voluntarily -- that will speed up the process and you can get a permanent visa to go in and out of the U.S. (after the resolution) and become a citizen again.

After returning to Mexico in the Summer of 1981, appellant states that he lived there on a temporary visa which was renewed at least once. In early November 1981, shortly before his visa was to expire, he applied for a two-month extension. He bought travellers checks to prove he had funds to reside in Mexico temporarily, and allegedly met the other requirements for an extension. He was given a control number and informed that an extension would be issued within 15 to 30 days. By early December he had received neither an extension of his visa nor any official explanation for the delay in its issuance. At that point, appellant states that:

> I was scared. I thought that they were checking on me or something, why that visa extention /sic/ never arrived I'll probably never know. I was afraid to even ask or go to their offices. I even though/t/ that any day somebody would approach me and tell me that I was illegally in the country and put me in jail.

On January 4, 1982 appellant applied for a certificate of Mexican nationality "to protect myself from the government, police or whatever." "So," he asked, "how could I have applied for the certificate voluntarily?"

A defense of duress to performance of a statutory expatriating act is, of course, always available to an appellant in loss of nationality proceedings. We must therefore determine whether the compulsion appellant allegedly felt to make a formal declaration of allegiance to Mexico meets judicially settled standards of legal duress.

In our opinion it does not.

For a plea of duress to prevail, "extraordinary circumstances" must have forced a citizen against his will to perform an expatriating act. Doreau v. Marshall, 170 F. 2d 721 (1948). Here, the position in which appellant found himself bears none of the hallmarks of "extraordinary circumstances." On the contrary, his were the circumstances of numerous individuals holding the nationality of the United States and Mexico and who wish to continue to reside in Mexico. As is well known, such dual nationals must under Mexican law make a choice after age eighteen between their Mexican and other nationality.

Nor do we consider that performance of the expatriating act was forced on appellant by influences over which he had no control.

His reticence to ask the Mexican authorities why there was a delay in the promised issuance of an extension of his residence permit does not, on the basis of the record, appear to have been well founded. Assuming, arguendo, that he had some valid reason for not approaching the Mexican authorities, we fail to see why he did not consult the United States Embassy at Mexico City to ascertain whether there was some way out of his dilemma. As the record shows, he was no stranger to that Embassy or unbriefed on citizenship matters; as noted above, earlier in 1981 he obtained a certificate of United States citizenship. Had appellant sought the advice of the Embassy, he would have learned (as he later did when he was called to the Embassy in April 1982) that dual nationals must, under Mexican law, make a choice between their two citizenships; and that if he wished to retain his United States nationality, there was a procedure whereby he could do so and be granted official permission to reside in Mexico as a foreigner.

As a matter of law, appellant had freedom to choose between a course of action that would jeopardize him his United States citizenship, and one which, although probably less convenient and would have entailed some interruption of his studies, would have ensured preservation of his United States nationality. That he appears to have panicked and taken a course of action without weighing the consequences may not excuse him. Where one has a free choice between two alternatives, there is no duress. Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245 (1971).

We conclude therefore that appellant has failed to rebut the statutory presumption that his act of making a formal declaration of allegiance to Mexico was done voluntarily.

III

Even though appellant voluntarily performed a statutory expatriating act, the question remains whether on all the evidence he did so with the intention of relinquishing his United States citizenship. 7/

7/ Vance v. Terrazas, note 4, supra.

It is the Department's burden to prove by a preponderance of the evidence that appellant intended to relinquish his United States citizenship when he made a formal declaration of allegiance to Mexico. 8/ Intent may be shown by appellant's words or found as a fair inference from proven conduct. 9/ Intent is to be proved as of the time the alleged expatriating act was performed - in this case, 1982. 10/

Asserting that it was not his intention to relinquish his United States citizenship when he applied for a certificate of Mexican nationality, appellant maintains that he applied for the certificate solely to protect himself, not to give up his United States citizenship. He adds:

> ...the certificate is of no moral value to me, I felt proud of being an American and extremely proud of having served the armed forces always acting in the best interest of the U.S. government, the Army and my unit. If I /sic/ wasn't for the circumstances which I found myself in, I would have never, this would have never occurred. As you can see there is no other reason that could have influenced my wrong decision on the steps I took.

8/ Id.

9/ Id.

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

To carry its burden of proof, the Department submits that:

> Appellant's intent was clearly demonstrated when he voluntarily signed the declaration of allegiance contained in the application for a Certificate of Mexican Nationality. The declaration of allegiance contained language to the effect that appellant expressly renounced his United States nationality and his obedience and fidelity to all foreign governments, especially the United States. The declaration also contained a statement of allegiance to the laws and authorities of Mexico.
>
> Two blanks in the Mexican application must be completed by the applicant indicating the nationality and the foreign allegiance which the applicant is renouncing. Obviously, an applicant would have to read the declaration is /sic/ order to know how to fill in these blanks.
>
> Except for his service in the Army, appellant has lived all of his life in Mexico. His family is there, he attends school and he is employed in Mexico. In the questionnaire on page 5, question number 14, appellant stated that he planned to live in Mexico for a long time. In his appeal he states that he wants to rejoin the United States Army and live in the United States. These conflicting statements were made just a little over a year apart.

The courts have long held that taking an oath of allegian to a foreign state and simultaneously expressly renouncing one' allegiance to the United States works expatriation, for performing such an act clearly evidences an intent to relinquish United States citizenship. United States v. Matheson, 400 F. Supp. 1241 (1975), aff'd. 523 F. 2d 801 (1976).

Where a plaintiff, who instituted an action in Federal court to regain his citizenship, and, like appellant in the ca now before the Board, made a voluntary declaration of allegian to Mexico and expressly renounced his United States citizenship, the Court of Appeals for the Seventh Circuit held that:

> 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. 11/

Appellant here evidently acted hastily and without thinking through the consequences of his actions. It is unfortunate that before applying for a certificate of Mexican nationality he made no inquiries about the effect of such act on his United States citizenship. Nevertheless, the words in the application to which he put his signature should have conveyed to him the gravity of the step he was taking. As a matter of law, appellant must be held accountable for the legal consequences of his actions. He was a competent soldier and had at least an average level of education for a person of his age. In brief, the evidence supports a conclusion that appellant knowingly and understandingly made a formal declaration of allegiance to Mexico.

Careful examination of the record fails to disclose any reason for us to doubt that appellant's intent, objectively perceived, was to choose Mexican nationality and forswear United States citizenship.

The Board reaches this conclusion with regret, particularly since appellant served honorably and with distinction in the United States Army. And we are not indifferent to appellant's expressions of regret for doing the expatriating act. But under the controlling case law we have no alternative, absent words or conduct sufficiently probative to call into question the intent

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11/ Terrazas v. Haig, note 9, supra.

he made clear by making a formal declaration of allegiance to Mexico and expressly renouncing his United States citizenship and all fidelity to the United States of America.

The Department has carried its burden of proving that appellant intended to divest himself of United States citizenship.

IV

Upon consideration of the foregoing, the Board affirms the Department's administrative determination of loss of appellant's United States nationality.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member