July 27, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B[redacted] T[redacted] L[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, B[redacted] T[redacted] L[redacted], expatriated himself on April 11, 1974 under the provisions of section 349(a)(1) of the Immigration and Nationality Act 1/ by voluntarily obtaining naturalization in Canada upon his own application.

Since appellant has conceded that he obtained naturalization in Canada voluntarily, the sole issue presented by the appeal is whether appellant's performance of the proscribed act was accompanied by an intent to relinquish his United States citizenship. We conclude that appellant's naturalization as a Canadian, although voluntary, was not accompanied by the requisite intent to give up United States nationality. Accordingly, we will reverse the Department's determination of loss of citizenship.

I

Appellant was born in [redacted] thereby acquiring Unit[redacted]h. He resided in the United States until 1968 when, in his own words, he "immigrated to Canada" in the early spring of that year. He has remained abroad continuously ever since.

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

At the time appellant left the United States he was registered with his draft board, and appears to have had a student deferment. Sometime later in 1968 he was classified 1A, and on October 29, 1968 was ordered to report for induction, but declined to do so. A Federal Grand Jury indicted him on October 27, 1969 on one felony count drawn under 50 U.S.C. App. sec. 462. Appellant was aware of this indictment and that a warrant for his arrest had been issued. He did not return to the United States, while keeping in close touch with his family in the United States.

Appellant married a Canadian citizen, mother of a son by a previous marriage, Later, a daughter was born to the couple. He attended a Canadian university, and taught school while working- toward a Ph.D. degree at McGill University.

On April 41, 1974 in Vancouver, appellant was naturalizes as a Canadian citizen under section 10(1) of the Canadian Citizenship Act, after taking the following oath of allegiance:

> 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. So help me God.

In his ~~opening~~ brief, appellant states that soon after his naturalization he "began to explore more actively, through his ~~father,~~ the status of legal proceedings against him in the United States." It appears that sometime in 1974 appellant wished to visit his mother, who was ill, in Indiana. On May 6, 1974 the Director, Indiana State Headquarters Selective Service System, informed appellant's father that "the Selective Service System has no action pending against you at this tine." (Presumably the Director thought appellant had made the inquiry).

It seems strange that the Indiana Headquarters would have made such a statement, for the indictment against appellant war still in effect on that date. On June 13, 1974, through the good offices ~~of Representative~~ Lee H. Hamilton, appellant's father was ~~advised that~~ there was no indictment pending against appellant for a crime unrelated to appellant's draft evasion [evidently an erroneous report had been circulating to that effect.) The Congressman's office stated that a copy of the warrant for appellant's arrest would be sent to appellant's father by the U.S. Attorney for the Southern District of Indiana.

The indictment against appellant for draft evasion was dismissed on February 13, 1975 upon the motion of the U.S. Attorney. Appellant has acknowledged that he received formal notice of the dismissal in the Spring of 1975.

On February 20, 1979 appellant visited the United States Consulate General at Montreal. At the hearing on February 1, 1984 counsel for appellant said it was his understanding that appellant went to the Consulate General to

> determine what he would have to go through to obtain a passport and whether he was going to get a United States passport to travel on or a Canadian passport to travel on. He was informed by someone there at the desk that his citizenship was in jeopardy. 2/

2/ Transcript of Hearing in the Matter of B[redacted] [redacted] L[redacted], Board of Appellate Review, February 1, 1984 (hereinafter referred to as "TR".) 16.

Appellant stated in a supplemental affidavit executed April 2, 1984, that: "If I remember correctly, I visited the Montreal Consulate General in order to pick up an application for a United States passport."

The Consulate General reported to the Department on March 16, 1979, that appellant informed a consular officer on February 20 that he had been naturalized in Canada five years earlier; that he became a Canadian citizen due to a pending court action in the U.S.; and indicated that the day before his naturalization, he got word of the successful outcome of the court case, but did not attempt to delay or cancel the naturalization process.

The consular officer further reported that appellant had said Be never inquired at the Consulate about the effect of naturalization a5 a Canadian on his U.S. citizenship, She noted that appellant declined to sign an affidavit of expatriated person; that he was informed of the possible applicability to his case of section 349(a)(1) of the Immigration and Nationality Act and of the Afroyim decision /Afroyim v. Rusk, 387 U.S. 253 (1967)/. She added that appellant had been given the forms necessary to apply for registration, but had not returned them, and might contest loss of citizenship through his attorney in Washington,

In his supplemental affidavit of April 2, 1984, appellant addessed certain comments made by the consular officer in her memorandum to the Department of March 16, 1979. He asserted: "I have never stated that I became a Canadian citizen 'due to a pending court action in the U.S.'" He added that he did not recall "the exact date on which I received news of the 'successful outcome' of the court case referred to here."

As to what point in time he had learned that the indictment might be dismissed, appellant stated in his supplementary affidavit as follows:

> I do recall first hearing of the likelihood of the dismissal of the indictment referred to from Mr. Michael Tigar who told me this in a telephone conversation. 3/ I do not

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3/ Mr. Tigar is senior partner of the attorney who represente appellant in this appeal, It appears that Mr. Tigar persuade? the United States Attorney for Indiana to move for dismissal o the indictment against appellant on the grounds that the Supre Court had declared in 1970 that the regulations upon which the type of indictment against appellant had been based were unconstitutional. Gutknecht v. United States, 396 U.S. 295 (197 a case Mr. Tigar argued before the Court.

> remember the exact date of this conversation but it must have been in the Spring of 1874. I received official word that the indictment had been dismissed some time after this telephone conversation and if I remember correctly, the letter in which this information came arrived about one month after the actual motion to dismiss had been effected. Unfortunately, I do not have this date available for entering in this affidavit at this time.

Appellant stated further in the aforementioned affidavit that he had "in fact inquired at the Consulate about the effect of naturalization as a Canadian on my U.S. citizenship." (It seems clear, however, from the context of the consular officer's memorandum, that she was referring to the fact that appellant had told her he had made no inquiries about the effects of naturalization prior to February 20.)

On December 9, 1981 Representative Lee H. Hamilton wrote the Department of State "on behalf of Mr. [redacted] formerly a resident of Indiana, who has contacted me regarding his citizenship." 4/ Mr. Hamilton stated that appellant had

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4/ In his supplemental affidavit of April 2, 1984, appellant states, however, that his father had contacted the Congressman, not he.

moved to Canada to evade the draft and had obtained Canadian citizenship, but would like to return to the United States. The Congressman requested advice as to what recourse appellant might have "to reinstate his citizenship."

The Department, on December 31, 1981, directed the Consulate General at Montreal immediately to communicate with appellant, to invite him to call at the Consulate to establish his claim to Citizenship. The Consulate did so by letter of January 6, 1982, forwarding a questionnaire, "Information Far Determining U.S. Citizenship," requesting that he complete it within thirty days. Not having heard from appellant by that time, the Consulate General prepared a Certificate of Loss of Nationality on February 10, 1982, as required by section 358 of the Immigration and Nationality Act, 5/ The Consulate

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

See. *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.

General certified that appellant had acquired citizenship of the United States at birth; had acquired Canadian citizenship on April 11, 1974 under section 10-1 of the Canadian Citizenship Act, as verified by the Canadian Citizenship Registration Branch: and concluded that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

On March 24, 1982 the Consulate General reported to the Department that appellant had requested that no action be taken on the certificate of loss of nationality, "as he intends to present evidence to overcome presumption /sic/ of intent to relinquish U.S. citizenship."

By letter of April 15, 1982 appellant returned the questionnaire, signed as of that date, explaining that the delay was due to his need to learn the nature of the oath he took upon acquiring Canadian citizenship. His responses to thequestionnaire emphasized particularly that he did not consider that, by becoming a Canadian citizen, he might lose U.S. citizenship because he was not required to renounce his U.S. citizenship and knew of other instances of dual U.S. and foreign nationality; that most of his family was in the U.S., that he owned real property in the U.S., and that his present wife also was a U.S. citizen.

The Consulate forwarded appellant's letter and the completed questionnaire to the Department which approved the certificate of loss of nationality on December 22, 1982, such approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be brought to the Board of Appellate Review. Appellant initiated the appeal by letter of March 10, 1983, and later requested a hearing before the Board, held on February 1, 1984 at which he appeared by counsel.

Appellant acknowledges that his naturalization as a Canadian citizen was voluntary, but contends that he did not intend to relinquish his United States citizenship by obtaining naturalization in Canada.

II

Since appellant has conceded that he obtained naturalization in Canada voluntarily, the dispositive issue is whether his acquisition of Canadian citizenship was accompanied with an intent to relinquish his United States nationality.

Our determination of this issue is guided by the rule in Vance v. Terrazas. 6/ Therein, the Supreme Court held that even though a party fails to prove that he or she performed an expatriating act involuntarily, the question remains whether on all the evidence the Government has satisfied its burden of proof that the act was done with the requisite intent to relinquish citizenship. With respect to the standard of proof required of the Government, the Court said that under section 349(c) Of the Immigration and Nationality Act 7/, the Government must establish intent by a preponderance of the

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6/ 444 U.S. 252 (1980).

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

> Whenever the loss of United States nationlity 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,

evidence. Intent to surrender citizenship, the Court further said, may be ascertained from a person's words or found as fair inference from proven conduct. Citing its decision in Nishikawa **v.** Dulles, 8/ the Court noted that obtaining naturalization in a foreign state, like performance of the other enumerated expatriating acts, may be highly persuasive evidence of an intent to relinquish United States citizenship. An oath of allegiance to a foreign sovereign while also substantial evidence of intent, is insufficient, without more, to prove intent. Ring v. Rogers, 463 F. 2d **1188** (1972).

It is well settled that intent is to be determined as of the time the act of expatriation was done. 9/ Evidence of intent contemporaneous with the performance of the act is, of course, most probative of the party's intentions regarding United States citizenship. However, a United States Court of Appeals has said 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." 10/

8/ **356 U.S. 129 (19581.**

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

10/ Id., **288.**

The Department cites certain actions which, it contends, evidence appellant's intent to terminate United States citizenship: He became a landed immigrant on arrival in Canada; married a Canadian citizen and raised a family in Canada; continued his studies and obtained employment there; evaded the draft by departing the United States, knowing that a call for induction was imminent.

We do not consider that appellant's long residence in Canada, and his marriage, employment and studying there more likely than not evidence an intent to relinquish United States citizenship. A United States citizen is free to live abroad indefinitely in pursuit of business, family or other legitimate interests without being considered to have intended to abandon United States citizenship. This the Supreme Court made clear twenty years ago in Schneider v. Rusk, 377 U.S. 163 (1964).

Appellant asserts that his intention when he obtained naturalization in Canada was to become a citizen of the country where he had made his home, not to relinquish United States citizenship. His act of obtaining Canadian citizenship is, of course, presumptive evidence of an intent to transfer allegiance from the United States to Canada. But it is no more than that. Inasmuch as appellant was not required to make a declaration *of* renunciation *of* other allegiance when he became naturalized, his intent, as evidenced by that oath is ambiguous. 11/

11/ As a Federal District Court in California recently stated, an ~~oath of~~ allegiance to a foreign state which contains only an affirmation *of* loyalty to that state leaves ambiguous the intent of the utterer regarding his present nationality. Richards v. Secretary of State, CV 80-4150, slip op. C.D. Cal. (1982).

Of course, we recognize that his circumstances changed in certain material respects sometime after he acquired Canadian citizenship: his marriage to a Canadian-woman was dissolved; he married an American citizen; the indictment against him had been dismissed. Reasonable people may differ, however, about the inferences to be drawn from the fact that appellant attempted to establish his continued American citizenship after his civil status had so radically changed, thus leading to this appeal. Had he at the time of his naturalization really intended to relinquish United States citizenship and thereafter rested content in its loss, rueing it only later when altered circumstances moved him to try to regain it? Or, had he, as he claims, believed from the outset that he had never lost his citizenship because he never intended to surrender it? Can one answer the former question affirmatively with greater assurance than the other?

Similarly, did his swearing an oath of allegiance to the British Crown in 1974, if in fact he knew that the indictment for draft evasion might shortly be dismissed, signify that he wished to end his United States citizenship? Or could it fairly be interpreted as signifying simply that he wished to have the citizenship of the country to which family ties then linked him and where he wished to pursue his studies? Can one answer the former question affirmatively with greater confidence than the latter?

We assuredly do not condone appellant's evasion of the U.S. military draft, but his having done so does not, ipso facto, indicate an intent to relinquish citizenship, even coupled with the performance of a statutory expatriating act five years later. Is it not conceivable that appellant left the United States, as did many young men in the 1960's, simply intending to escape military obligations which by his lights were onerous, even immoral -- not to terminate his United States citizenship? Draft. evasion long ago was ruled unconstitutional as a grounds for expatriation. Kennedy v. Martinez-Mendoza and Rusk, Secretary of State v. Cort, 372 U.S. 144 (1963). It would therefore seem questionable to impute an intent to terminate citizenship to one on the strength of his having departed the United States when called, or about to be called, for induction. As the Supreme Court said in Trop v. Dulles, 356 U.S. 86 (1958), "citizenship is not lost every time a duty of citizenship is shirked." At 92-93.

Moreover, we think it inappropriate to draw any particular inferences regarding appellant's intent to retain or relinquish United States citizenship from the fact that he had exceptionally competent legal counsel in the matter of his indictment for draft evasion, Me might or might wot have been offered, or have requested, advice at that time about his United States citizenship status.

We are not indifferent to the fact that appellant did nothing of record from 1974 when he became a Canadian citizen until 1979 to signify that he wished to re-establish or maintain ties to the United States. How conclusive is this inaction as a gauge of appellant's intent in 1974? At best, it would seem to be vague evidence. Need one parade citizenship in order to demonstrate that one intends to retain it? We think not. Furthermore, appellant was living in a country where he might not have considered he needed consular protection or documentation, or (wrongly, of course) that he ran no risk of losing United States citizenship by obtaining naturalization in Canada which officially sanctions dual nationality. From such inaction it is possible to draw more than one inference; appellant's intent is thus left in some ambiguity.

We do not argue that appellant's conduct leaves us in no doubt with respect to his intention to relinquish United States citizenship. It does. On the one hand, it could be argued that such apparent indifference toward the rights and duties of American nationality signals an intention to relinquish citizenship. Yet, such insouciance might not have sprung from an intention to transfer exclusive allegiance to Canada; and it would not be unreasonable to conclude that appellant may have lacked such intention,

Here the Department posits a theory that appellant "abandoned" his United States citizenship, basing its conclusion, in part, on appellant's admittedly incautious conduct. The implied analogy between loss of property through walking away from it and loss of citizenship through inaction is, in our view, unapt. Property and United States citizenship are of totally disproportionate relative values. Some explicit act, not a series of acts of omission, must, as we understand the case law, be proved before the trier of fact can with fair confidence conclude that the actor intended to surrender the priceless right of United States citizenship.

The controlling cases make clear, in our view, that intent to relinquish United States citizenship is to be proved by specific acts inconsistent with United States citizenship or acts clearly indicating an intention to transfer allegiance to a foreign state. Terrazas v. Haig, supra; King v. Rogers, supra, (1971); Richards v. Secretary of State, supra. We are not aware of any case where a finding of intention to surrender United States citizenship was based on conduct by a United States citizen that could objectively be described as ambiguous.

The Attorney General stated in the interpretation he issued after the Supreme Court's decision in Afroyim v. Rusk, supra, (an opinion noted with approval by the Supreme Court in Vance v. Terrazas, supra) that:

> In each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has voluntarily relinquished his citizenship. 12/

Here, we are not satisfied that on all the evidence appellant performed a statutory expatriating act with the intention of relinquishing his United States citizenship. The evidence that he might have had such an intent is at best equivocal, leaving us with uncertainty.

The courts have consistently characterized United States citizenship as "perhaps the most precious right known to man today; it is not easily granted nor should it be lightly taken away." Acheson v. Maenza, 202 F. 2d 453, 356 (1953).

Entertaining doubt about this appellant's intent with respect to his United States citizenship, we must resolve those doubts, as the Supreme Court has enjoined, in favor of the citizen. Nishikawa v. Dulles, 356 U.S. 129 (1958); Schneiderman v. United States, 320 U.S. 118 (1943).

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

It is therefore our opinion that the Department has not sustained its burden of proving by a preponderance of the evidence that appellant intended to terminate his United States citizenship.

III

Upon consideration of the foregoing and after careful examination of the entire record, we conclude that although appellant voluntarily obtained naturalization in Canada, that act was not accompanied by the requisite intent to relinquish his United States citizenship. Accordingly, appellant's United States nationality

Department of State's holding of loss

Alan G. James, Chairman

George Taft, Member

Dissenting Opinion

I respectfully dissent from the majority decision reversing the Department of State's administrative determination of loss of appellant's United States nationality.

The majority decision in this case rests essentially on two propositions, with regard to the determinative issue of appellant's intent to relinquish United States nationality at the time he became a Canadian citizen on April 11, 1974. The first proposition is that the Department of State "posits a theory that appellant 'abandoned' his United States citizenship," in an "implied analogy between loss of property through walking away from it and loss of citizenship through inaction", which analogy the majority opinion categorizes as "unapt". The second proposition is that appellant's course of action since his naturalization as a Canadian citizen, his "apparent indifference toward the rights and duties of American nationality", are "at best, ambiguous, leaving us in doubt" -- in which circumstances, the issue of appellant's intent to abandon his U.S. citizenship must be resolved in his favor.

This Board has regularly found itself in a practical dilemma, when seeking to decide appeals in those cases where the statutory expatriating act, leading to the Department of State's administrative determination of loss of United States nationality, derived from naturalization as Canadian or as British citizens, when the oath of allegiance or circumstances surrounding that oath did not call for specific renunciation of pre-existing (U.S.) nationality. The Board's dilemma has been how to reach a clear decision: when the assumption of foreign nationality normally occurred many years ago; there is little or no evidence contemporaneous with the oath assuming foreign nationality of the appellant's real attitude towards his United States citizenship; and there are actions taken or not taken over the years which could be evaluated as bearing to some degree on how the appellant regarded his or her United States nationality. The Supreme Court has not left the Board with clear, or at least unambiguous, guidelines on which to base its interpretation of these indicia of intent.

While Yance v. Terrazas, 444 U.S. 252 (1980) has established the principle, as a matter of protection of constitutional rights, that the Department of State must show by a preponderance of the evidence that appellants in these cases had the intent to

terminate United States citizenship at the time of taking the oath of allegiance to a foreign state, the Supreme Court also said that "expatriation depends on the will of a citizen as ascertained from his words and conduct" (emphasis added). In this last respect, the Court in Vance Q. Terrazas took favorable note of the Attorney General's interpretation regarding acts reasonably manifesting an individual's transfer or abandonment of allegiance *to* the United States (42 Op. Atty. Gen. 397, 1969) and of the Department *of* State's guidelines evincing a similar position on intent (8 FAM 224.20, now rendered current in CA-1767, August 27, 1980). Both the Attorney General's interpretation and the Department's guidelines note that actions subsequent to the time the expatriating act took place are relevant only to the extent they tend to show what the citizen's state of mind was at the time of committing the act; and that there is no mechanical formula to be applied but there are indicia of intent which may be relevant Among these indicia are continued respect for the obligations of U.S. citizenship, such as, filing U.S income tax returns registering for military service, continuing to use a U.S. passport, requesting citizenship documentation for children born subsequent to the expatriating act, participating in political activity in the United States or, of course, the contrary indications given by failure to maintain the obligations of United States citizenship.

It is pertinent, in these respects, as the majority decis herealso observes, to note that the U.S. Court of Appeals for the Seventh Circuit, in Terrazas v. Haig, 653 F. 2d 285 (1981) said that a party's specific intent to relinquish citizenship rarely will be established by direct evidence: that circumstantial evidence surrounding the commission of a voluntary ac of expatriation may establish the requisite intent to relinqui and cited, with approval, an earlier decision in which the Secretary of State was enabled to prove intent by acts inconsi with United States citizenship or affirmatively manifesting a decision to accept foreign nationality.

Contrary to the implications of the majority decision regarding the incorrectness of an interpretation that we may not consider appellant to have "abandoned" his United States citizenship, instead of affirmatively by evidenced intent renouncing it, the Supreme Court has induced this Board to examine an appellant's course of action or inaction, after becoming a citizen of a foreign country, in order to see whether action or inaction provide reasonable indications of h likely intent years earlier, at the time the statutory expatriating act was taken. If the appellant's indifference toward

his rights and duties as an American are sufficiently ambiguous of his intent so as to leave this Board uncertain, then the issue of intent should be resolved in appellant's favor, but that is not the situation in the instant appeal, given appellant's particular circumstances.

This Board has regularly taken note, if only as background to arguments presented in these appeals, of somewhat personal practical circumstances which clearly bore on or might reasonably have been likely to bear on an appellant's intent in comparable cases, of which a representative selection is, for example: youth and immaturity (appeal of K. E. M., March 16, 1983); comments by contemporaries that appellant, in two foreign countries, had over many years indicated or said specifically she considered herself to be an American, long after also becoming a British citizen (Appeal of A, K. H., March 1, 1984); maturity and pattern of conduct giving fair inference of intent to act as Canadian and to abandon United States citizenship (Appeal of M. R., November 17, 1983).

In this particular case, appellant is a well-educated young man, who was over nineteen years of age when he departed the United States for Canada; was attending University in Canada when he became a Canadian citizen at the age of twenty-four; was regularly in communication with an obviously concerned father during all his years abroad: and had, from at least 1974 on, access to and benefits from very competent legal advice.

Appellant has not proferred any concrete evidence regarding his intent-to maintain United States citizenship which was contemporaneous with his act of becoming a Canadian citizen on April 11, 1974. His responses to the Questionnaire, Information for Determining U.S. Citizenship, Were formulated on April 15, 1982, and state his recollection of that intent eight years later, at a time when his personal circumstances had changed in material respects, such as the dissolution of his marriage to a Canadian citizen, marriage to an American citizen, and expungement from the record of an indictment in the Federal Courts in the United States. Appellant says that, as he had made Canada his home, he thought it would be advisable to acquire full citizenship; that he was not required by Canada to renounce his U.S. citizenship; and that he knew it was possible to hold two citizenships as a U.S. citizen. A reasonably recent comprehensive examination of the law on expatriation, 1/ however, observes

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1/ "Expatriation Under the Immigration and Nationality Act: Terrazas and Its Aftermath", Vol. 1, Nos. 9 and 10, February and March 1982, Immigration Law Report, p. 75.

that statements regarding intent to retain U.S. citizenship, made after the expatriating act, are not **probative** of such intent when they "are basically self-serving, i.e., when made to consular officers after an investigation has begun on the citizen's intent

We are led, therefore, to examine whether there were any steps taken ***to*** evince concretely that appellant regarded himself as an American as well as a Canadian citizen.

Appellant described himself as having "emigrated" to Canada in the Spring of 1968. He knew that he had been indicted by a Federal Grand Jury for failing to report on October 29, 1968, for induction in the United States military services. 2/ **He** was advised directly that this indictment **was** properly invalid befor

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2/ The issue here is not, **as** the majority opinion in this appeal appears to assume, whether evasion of the U.S. military draft, ipso Facto, indicates an intent to relinquish citizenship. The issue is whether appellant's knowledge he had been indicted for failure to report for induction constitutes a reasonable indication of **his** intent, his attitude, towards his United States citizenship at the time, five years later, when he became a Canadian citizen. The Attorney General's and the Department of State's Guidelines, cited earlier, both specify as a valid indication **of** this intent willingness or unwillingness to enter on military service **as** part of the obligations of U.S. citizenship. It **is** not, per se, determinative, but it is part of that network of circumstantial evidence surrounding the commission of a voluntary act of expatriation which, **as** Terrazas **v.** Haig observed may help to establish the requisite intent to relinquish citizenship.

he became a Canadian citizen. He was kept informed, through his father, that other possible criminal indictments did not exist, in May and June 1974, and, then, that the pending invalid indictment had been expunged from the record in February 1975. He apparently knew of the Amnesty issued by President Carter early in 1977, restoring civil rights to those convicted for refusal to comply with the Selective Service Act. 3/ In all this time, although appellant had ample opportunity, or even incentive, to demonstrate his interest in placing on the record his United States citizenship, he did not act until February 20, 1979, when he made inquiries at the United States Consulate General in Montreal, regarding registration of such citizenship. At that time, however, he did not fill out the forms to apply for registration, but instead, through his father, initiated an approach to the Office of Congressman Hamilton, to see what could be done to "reinstate his citizenship." Appellant explains the delay between receipt of the forms at the Consulate in Montreal in February 1979 and the approach to Congressman Hamilton's office evidenced by the Congressman's letter of December 9, 1981, by saying "I felt incompetent to pursue the matter without legal advice and as I was unable at that time to obtain such assistance I postponed the matter until such time as it became possible for me to acquire professional expertise." However, the record shows that, at various times earlier -- in 1974 and 1975, as regards the invalidity of the then pending indictment against him and its subsequent formal dismissal -- appellant and his family benefitted from competent legal advice, and it is not reasonable to rest this last delay of over two and a half years on lack of available professional expertise. 4/

3/ See remarks of Appellant's Counsel, TR, pages 33 and 34.

4/ Appellant's supplemental affidavit of April 2, 1984, para. 3.

The facts recited above; the repeated opportunities offered to appellant to register his maintenance of United States citizenship both before he had official indications, commencing in 1979, that his citizenship might be in question and afterwards, until he at last filled out the questionnaire on April 15, 1983; and the attitude presumably conveyed by his father in asking help from Congressman Hamilton's office in reinstating citizenship -- all lead reasonably to the interpretation that appellant considered he had taken steps which amounted to renunciation of that citizenship,

What about other indicia of intent to retain or renounce citizenship, as set forth in those State Department guidelines, footnotted in Vance v. Terrazas? Appellant did not register his daughter as an American citizen; did not file income taxes in the United States, although he does own property here; paid Canadian taxes, although he says he did not vote in Canadian elections. There *is* little to show he considered himself to be a United States citizen, and much more in both his words and his life to show he acted as a Canadian,

In the end, we are left, as counsel for appellant stated, with the balance of the burden of proof. Appellant voluntarily applied for naturalization as a Canadian. He took an oath of allegiance to Queen Elizabeth II, of faithful observance to the laws of Canada, and of fulfillment of his duties as a Canadian citizen. He brought up his family as Canadians. He paid Canadian taxes. He remained outside the United States, knowing until 1974 that his evasion of the draft would bring in its wake a felony indictment, and that he could not return without penalty. His conduct, and at least that evinced to the office of his congressman, indicates a belief that he was no longer an American citizen. He had many Opportunities to show that he still considered himself to be a United States national, being advised repeatedly through the efforts of eminent counsel of steps taken to remove pending or allegedly pending indictments, and he did nothing from 1974 until 1979 to indicate interest in registering his citizenship.

Should this Board continue to adopt the position taken by the majority decision, given the particular circumstances of this appeal, it will substantially eliminate the practical possibility of sustaining the Department of State's administrative determination of loss of nationality through voluntary naturalization in countries not requiring renunciation of prior nationality as an element of their naturalization process -- unless the appellant has put on the record concretely that he did intend to abandon his United States citizenship, an unusual occurrence. I do not believe that the Court decisions, cited by the majority decision in this appeal, intended to have that effect.

For the reasons I have stated above, I believe the evidence of the record supports the Department's contention that appellant intended to transfer allegiance from the United States to Canada, and to abandon United States citizenship. In my judgment, the Department's holding of December 22, 1982, should be affirmed, that appellant expatriated himself on April 11, 1974, by obtaining naturalization in Canada upon his own application.

Howard Meyers

Howard Meyers, Member