January 16, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State that appellant, M[redacted] S[redacted] Bo[redacted], expatriated himself on August 7, 1978, under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Switzerland upon his own application. 1/

The principal issue to be resolved in this appeal is whether appellant became a Swiss citizen with the intention of relinquishing his United States citizenship. We conclude that his naturalization was accompanied with such an intent. In our opinion, the Department of State has satisfied its burden of proving that appellant intended to relinquish his citizenship. We will affirm the Department's determination of loss of nationality.

I.

Appellant, M[redacted] St[redacted] Bo[redacted] was born at [redacted] on D[redacted] and acquired United States nationality by virtue of his mother's naturalization in New York on December 7, 1953. He lived in the United States from 1953 to 1954, and since that time has resided with his family in Switzerland. His parents who are United States citizens acquired Swiss nationality in 1980.

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, . . .

Appellant registered for U.S. selective service on January 1970. In 1976, he obtained a U.S. passport and was registered a a United States citizen at the Consulate General at Zurich. In the same year, he also filed an application for naturalization i Switzerland.

In connection with his application for naturalization, appellant completed a citizenship questionnaire at the request c the Zurich Canton police authorities. He said in the questionnaire that he wished to acquire Swiss citizenship because he grew up in Erlenbach, Switzerland, intended to continue living there, and because Switzerland was his home. Subsequently, at an interview, appellant surrendered his United States passport to the Swiss authorities.

At some time prior to his naturalization, appellant signed declaration that all applicants for Swiss naturalization were required to sign. Under the declaration, an applicant undertake to refrain from taking any action to keep his present nationalit and to renounce his other present nationality. The declaration read:

> The undersigned candidate for Naturalization, was advised that in accordance with Article 17 of the Federal Law of September 29, 1952, on acquisition and loss of Swiss Nationality, he must refrain from taking any action in order to keep his present nationality, and he must renounce this nationality, if necessary. He is compelled to get his name cancelled from the Registry books of his country of origin, and he should not apply for re-acquisition of his former nationality, if this could be possible later on by a change in the legislation of the country of his origin. (Translation). 2/

2/ Article 17 of Federal Law of September 29, 1952, on acquisition and loss of citizenship stated that anyone who wanted to be naturalized must refrain from taking any action to keep his present nationality and must renounce it if renunciation can be reasonably expected from the applicant. United Nations Legislative Series, ST/LEG/SER.B/4., Laws Concerning Nationality, 445 (1954).

Appellant's counsel in his submissions to the Board concedes that appellant signed such a declaration.

Appellant was granted citizenship in the community of Erlenbach, and on the basis of that grant was granted, on August 7, 1978, citizenship in the canton of Zurich, and thereby acquired the nationality of Switzerland. It appears that, according to Swiss nationality law, a Swiss person's status has three components: "as a citizen of the federal state he is a Swiss national; simultaneously, he is a citizen of one of the 26 cantons (states) constituting the Swiss Confederation, and a citizen of one of his home canton's municipalities." 3/

Shortly after his naturalization in 1978, appellant obtained a Swiss passport. He used it for travel to the United States in 1980 and elsewhere.

At the time he was in the United States, appellant applied on December 29, 1980, to the Immigration and Naturalization Service, Department of Justice, for a certificate of citizenship. 4/ He claimed United States citizenship through both of his naturalized citizen parents. The matter, it is understood, is still pending.

In February 1982, appellant visited the Consulate General to discuss his citizenship case. According to the Consulate General, appellant explained that he was afraid that he might be asked to leave Switzerland at some future time, and therefore applied for Swiss naturalization to remain in that country. He

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3/ Information Statement on "Swiss Citizenship", Consulate General of Switzerland, New York, N.Y. March 1983.

4/ Section 341 of the Immigration and Nationality Act, 8 U.S.C. 1452, provides for the issuance of certificates of citizenship to persons, among others, who claim United States citizenship through the naturalization of a parent. Section 341 reads in part:

> A person who claims to have derived United States citizenship through the naturalization of a parent... may apply to the Attorney General for a certificate of citizenship. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this Act of a petitioner for naturalization, such individual shall be furnished by the Attorney General with a certificate of citizenship, but only if such individual is at the time within the United States.

also reportedly stated that he delayed requesting Swiss naturali zation until he reached 27 years of age to avoid Swiss military service, which he believed would result in the loss of his Unite States citizenship. He said that it was not his intent to lose his United States citizenship. With a view to determining his present citizenship status and his entitlement to consular services as a citizen of the United States, appellant executed, at the request of the Consulate General, an application for a passport and registration as a United States citizen, and completed a citizenship information form. Upon review of this material, the Consulate General issued on March 9, 1982, a certificate of loss of United States nationality. 5/

The consular officer certified that appellant acquired United States citizenship by virtue of his mother's naturaliza- tion in New York on December 7, 1953; that he acquired the nationality of Switzerland by naturalization; that he acquired Swiss nationality on August 7, 1978, at Erlenbach, Switzerland upon his application; and that he thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department, ofter obtaining additional information from the appellant and the Consulate General, approv the certificate of loss of nationality on April 21, 1983. Such approval constitutes the Department's administrative determinati of loss of United States nationality from which an appeal may be taken to this Board.

5/ 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 Depart- ment 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.

Appellant gave timely notice of appeal on April 17, 1984. He contends through counsel that he did not intend to relinquish his United States citizenship when he obtained naturalization in Switzerland. Appellant does not assert that his naturalization was an involuntary act.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a person who is a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application. There is no question that appellant here voluntarily applied for and obtained Swiss citizenship. In the citizenship information form, which he executed at the Consulate General, appellant admitted that he "performed the act of naturalization voluntarily for the sole purpose of securing permanent residence rights in Switzerland." The Swiss authorities also confirmed his naturalization.

Furthermore, under section 349(c) of the Immigration and Nationality Act, a person who performs a statutory act of expatriation is presumed to have done so voluntarily. 6/ Such presumption, however, may be rebutted upon a showing by a preponderance of the evidence, that the act of expatriation was not done voluntarily. Appellant here does not seek to rebut that statutory presumption.

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

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

III

Although appellant does not dispute that he obtained naturalization in Switzerland voluntarily upon his own application, he maintains that the performance of this act lacked the requisite intent to relinquish his United States citizenship. He argues that the Department has failed to prove, by a preponderance of the evidence, that he intended to give up his citizenship at the time he became a Swiss citizen. We are, thus, confronted with the issue whether appellant's naturalization was accompanied by an intent to relinquish his United States citizenship.

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. The Court rejected the view that Congress has any general power, expressed or implied, to take away an American citizen's citizenship without his or her assent. 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.

In Vance v. Terrazas, 444 U.S. 252 (1980), the Supreme Court affirmed and clarified the holding on intent in Afroyim. The Court said that the government must prove an intent to surrender United States citizenship, as well as the voluntary performance of the expatriative act under the statute. Such an intent, the Court stated, may be expressed in words or may be 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 performed with the necessary intent to relinquish citizenship. 7/

7/ See note 6, supra.

The Supreme Court in Terrazas favorably noted the administrative guidelines set forth in the Attorney General's Statement of Interpretation of Afroyim. 8/ The Attorney General said that "voluntary relinquishment" of citizenship is not confined to a written renunciation; it can also be manifested by other actions declared expatriative under the statute if such actions are in derogation of allegiance to the United States. In Terrazas, the Court pointed out 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," 9/ the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act, "but also intended to relinquish his citizenship."

It should be noted, as the U.S. Court of Appeals, Seventh Circuit, observed in Terrazas v. Haig, 653 F. 2d 285 (1981), "a party's specific intent to relinquish his citizenship rarely will be established by direct evidence." The Court went on to say, however, that "circumstantial evidence surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." The Court referred to an earlier Ninth Circuit decision in King v. Rogers, 364 F. 2d 1188 (1972), in which the latter court stated that the Secretary of State may prove intent by acts inconsistent with United States citizenship or by affirmative acts clearly manifesting a decision to accept foreign nationality. Such proof need be only by a preponderance of the evidence.

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

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

We must decide, therefore, in this case whether appellant intended to relinquish his United States citizenship at the time he obtained naturalization in Switzerland. Such intent, as noted above, is to be determined as of the time the act of expatriation took place and may be ascertained from his words and conduct. Vance v. Terrazas and Terrazas v. Haig, above. Appellant applied for Swiss citizenship in 1976 and obtained naturalization in 1978.

The first expression of appellant's intent in the record appears in the questionnaire he completed for the Zurich Canton police authorities at the time he applied for Swiss citizenship. He stated in the questionnaire that he wished to acquire Swiss citizenship because Erlenbach, the community where he grew up and intended to live, was the focal point of his life, and because Switzerland was his home. This response in the questionnaire by itself does not, of course, constitute a sufficient finding of an intent to give up his United States citizenship; it does, however, entail an element of intent. It evinces a desire at the time to acquire a Swiss nationality status encompassing his undivided allegiance.

Also, as we have seen, appellant prior to his acquisition of Swiss nationality signed a declaration by which he undertook essentially to renounce his present nationality and to refrain from taking any action to preserve it. Appellant does not deny signing the declaration. Neither does he show any mitigating circumstances. It is understood that if an applicant for Swiss naturalization wishes to retain his nationality of origin, naturalization is refused. 10/ It is further understood that if a person, after being naturalized, fails to renounce his or her former nationality, such person risks loss of Swiss citizenship.

10/ Letter of Division of Federal Police, Federal Department of Justice and Police, Bern, dated February 19, 1979, to Consulate of United States, Geneva.

11/ Communication of Federal Department of Justice and Police, Bern, dated March 5, 1979, to American Embassy, Bern.

Appellant's counsel maintains that an intent to relinquish citizenship may not reasonably be inferred from appellant's signing of the Swiss declaration because it does not expressly require relinquishment of foreign citizenship. Counsel is not entirely correct. The declaration requires an applicant to renounce his foreign nationality, if necessary, as well as to refrain from taking any action to retain his foreign nationality.

Appellant, in our view, mistakenly relies on the U.S. Court of Appeals', Second Circuit, interpretation of a 1944 Mexican declaration in United States v. Matheson, executor of the Estate of Dorothy Gould Burns, 532 F. 2d 809 (1976). In Matheson, the particular declaration made by the decedent in her application for a certificate of Mexican nationality contained: a declaration of allegiance to Mexico, an express renunciation of protection foreign to laws and authorities of Mexico and any right which treaties or international law grant to foreigners, and an agreement not to invoke as to the government of Mexico any right inherent in her nationality of origin. The Court did not consider the renunciatory language in the declaration a renunciation of nationality of origin. It interpreted the declaration to be "merely a subscription to a basic principle of international law governing dual nationality: that a national of one country (e.g., United States) may not look to it for protection while she is in another country (e.g., Mexico), of which she is also a national." The Court concluded that the declaration "amounted to nothing more than a statement of dual nationality."

The declaration, which appellant here subscribed to, obligated him to refrain from taking any action in order to keep his present nationality and to renounce it if necessary. The language of the declaration is hardly ambiguous as to what a declarant is expected to do. Unlike the Mexican declaration in Matheson, appellant's declaration is not a statement of dual nationality, as appellant's counsel asserts. On the contrary, it is a statement of an undertaking to renounce former citizenship when possible. The Swiss authorities, in effect, are granting him citizenship with the understanding that he will terminate his other nationality.

Indeed, appellant admitted that he was cognizant of the requirement to renounce his citizenship. The Consulate General reported that during a discussion in July 1982, appellant stated that the Swiss authorities told him that he would need to renounce any other nationalities before his naturalization and that he had a telephone conversation with a consular officer about his reluctance to renounce his citizenship.

In addition to the above statements of intent, the record shows that appellant surrendered his U.S. passport to the Swiss authorities before he was naturalized, that he knowingly and willingly sought and obtained Swiss citizenship, and that he obtained immediately thereafter a Swiss passport.

Appellant's surrender of his U.S. passport to the Swiss authorities, we view, as of less significance than his act of voluntarily seeking Swiss citizenship. The questionnaire of the Zurich Canton police required applicants for naturalization to submit certain documents, including a foreign passport. The questionnaire also stated that the documents would be returned t the applicants. Appellant recalled surrendering his U.S. passpo to a clerk who "unexpectedly failed to return it." Nonetheless, appellant made no attempt to retrieve his U.S. passport or to seek the assistance of the Consulate General at Zurich. He did, however, promptly after his naturalization in August 1978, obtai a Swiss passport, which he used later for travel to the United States.

That appellant knowingly and willingly sought and obtained naturalization in Switzerland appears unquestionable. Under the administrative guidelines of the Attorney General, which, as not above, were favorably mentioned by the Supreme Court in Terrazas voluntary naturalization in a foreign state may be highly persuasive evidence of an intention to relinquish citizenship. The Supreme Court in Terrazas also recognized that any of the specified acts of expatriation in section 349(a) of the Immigration and Nationality Act may, in a particular case, be highly persuasive evidence of a purpose to relinquish citizenship.

It is also clear that appellant gave his full consent to accept Swiss nationality with the knowledge that he might lose h United States citizenship. He was aware of the exclusive nature of Swiss nationality. In the citizenship information form that he executed at the Consulate General, he stated that he became aware of the fact that he might lose his citizenship "during the final stage of the naturalization act in Switzerland." Appellant doubtless did not desire that consequence; nonetheless he acted, by his own admission, with the knowledge that it would or probably would follow from his Swiss naturalization. He assented to the loss of his citizenship.

During the period appellant sought Swiss citizenship, it appears that he made no attempt to seek competent advice from th Consulate General. Appellant could have easily obtained an official view concerning the legal effect of his impending natur

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any steps to keep his United States nationality and to renounce it if necessary, his acquisition of a Swiss passport, his representation of himself as an alien in applying for a visa to the United States and his belief that he had lost his United States citizenship as a consequence of his naturalization. Appellant's subsequent actions taken in 1980 and thereafter to assert his United States citizenship status are not strictly relevant with respect to assessing appellant's intent during the period from 1976 to 1978, when he applied for and was granted Swiss citizenship by naturalization.

Taking into account the facts and circumstances surrounding appellant's naturalization in Switzerland, and based upon a revie of the evidence of record, we are of the view that appellant's ow statements and conduct at the time establish an intent to give up citizenship. In our judgment, the Department has satisfied its burden of proof by a preponderance of the evidence that appellant naturalization was performed with the intent to relinquish Unitec States citizenship.

IV

On consideration of the foregoing, we conclude that appellar expatriated himself on August 7, 1978, by obtaining naturalizatic in Switzerland upon his own application, and, accordingly, affirr the Department's administrative determination of April 21, 1983, to that effect.

Alan G. James, Chairman

Edward G. Misey, Member

Frederick Smith, Jr., Member