October 8, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: W[redacted] J[redacted] C[redacted], [redacted]

This is an appeal from an administrative determination of the Department of State that appellant, W[redacted] J[redacted] C[redacted], [redacted] expatriated himself on May 20, 1983 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Australia upon his own application. 1/

Since, in our judgment, appellant duly performed a statutory expatriating act voluntarily and with the intention of relinquishing his United States citizenship, we will affirm the Department's determination that he expatriated himself.

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, . . .

I

Appellant was born of American citizen parents at [redacted] and so became a citizen of the United [redacted]s. [redacted] enlisted [redacted] he United States Army and served three years, receiving an honorable discharge in 1972. In 197'4 appellant went to Australia where he married an Australian citizen in 1975. Appellant and his wife lived in the United States from 1976 to 1978 when they returned to Australia. Before leaving the united States appellant obtained a certificate of United States citizenship at Austin, Texas.

Appellant obtained a United States passport at Perth on December 19, 1979 and registered his son (born in 1978) on the same day. Subsequently, appellant applied to become an Australian citizen. As required by Australian regulations, he surrendered his United States passport. On May 20, 1983 he was granted a certificate of Australian citizenship after making an affirmation of allegiance to the British Crown. 2/

2/ The oath or affirmation of allegiance prescribed by section 19 of the Australian Citizenship Act of 1973 reads as follows:

> I ... (name) ..., renouncing all other allegiance, swear by Almighty God /or "solemnly and sincerely promise and declare"7 that I-will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and.successors according to law, and that I will faithfully observe the laws of Australia and fulfil /sic7 my duties as an Australian citizen.

Appellant visited the United States Consulate General at Brisbane in December 1983, 3/ He completed a form for determining United States citizenship status in which he acknowledged that he had obtained naturalization in Australia and had made an affirmation of allegiance. On the strength of the foregoing evidence, the Consulate General executed a certificate of loss of nationality on January 14, 1984. 4/ The Consulate General

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3/ Appellant later informed the Board that after he had been naturalized, his wife told him that their marriage was beyond redemption, "My first action," he stated, "was to contact the U.S. Consulate to begin proceedings to return to the U.S."

4/ 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.

certified that appellant acquired United States nationality by birth abroad to United States citizen parents; that he obtained naturalization in Australia upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

Sometime after appellant's visit to the Consulate General in December 1983, it appears that he asked his parents to file a petition for his admission to the United States on a preference immigrant visa,

On May 29, 1984 the Department approved the certificate of loss of nationality that had been executed by the Consulate General. Approval is an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Appellant was sent, and has acknowledged receipt of, a copy of the approved certificate of loss of his nationality.

Later in 1984 after appellant came to the United States, he wrote to the Department to request that it reconsider its decision in his case. The Department informed appellant by letter dated August 20, 1984 that it was unable to reconsider his case because there did not appear to be any new evidence that would warrant doing so. If he wished to appeal the loss of his citizenship, the Department informed appellant, he should follow the procedures set out on the reverse of the certificate of loss of nationality. The appeal was entered on October 2, 1984. Appellant contends that he obtained naturalization involuntarily, having been forced to acquire Australian citizenship in order to save his failing marriage. He further maintains that he did not acquire Australian citizenship with the intention of relinquishing his United States nationality.

II

The statute (section 349(a)(1) of the Immigration and Nationality Act) provides that a citizen of the United States shall lose his citizenship by obtaining naturalization in a foreign state upon his own application. Citizenship shall not be so lost, however, unless it be proved that the citizen performed the expatriative act voluntarily and with the intention of relinquishing his citizenship. Vance v. Terrazas, 444 U.S. 252 (1980).

It is not disputed that appellant obtained naturalization in Australia upon his own application, and thus brought himself within the purview of the statute. The first issue for decision therefore is whether he acted voluntarily.

In law, a person who performs a statutory expatriating act is presumed to have done so voluntarily, but he may rebut the presumption upon a showing by a preponderance of the evidence that the act was involuntary. 5/

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

...Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Appellant submits that his act was involuntary because of the following factors:

> ,..my overriding and compelling intention at the time of naturalization as an Australian was to try and preserve my marriage to an Australian citizen and thus hold my family together....
>
> I urge the Board to consider the extreme emotional and psychological pressures placed on someone living in a foreign country, isolated from his family and confronted with possible dissolution of his marriage and family, Because of my desire to save my family, I took the steps I understood were available to me to try and convince my wife that we should preserve our marriage. I urge the Board to consider this the main and compelling reason for my action.

In his reply to the Department's brief, appellant presented the following additional arguments for the involuntariness of his act:

> The Department cites Nakashima v. Acheson, 98 F. Supp. 11, 12 (D.C. Col. 1951.) to define the nature of a voluntary act as one "proceeding from one's own choice or full consent, unimpelled by the influence of others." It further seeks strength with "It is a decision based upon personal choice." Jolley v. Immigration-and-Naturalization Service , 441 F. 2d 1245, 1250, cert. denied 404 v.s. 946 (1971). Neither of these statements appears to require that a person have, figuratively speaking, a loaded gun at his head, or be in fear of life, health or safety, either to himself or a close relative, for that person to be impelled "by the influence of others." It may be that "consciously performed acts are presumed voluntary," Nishikawa v. Dulles, 356 v.s. 129 (1958). The key to this statement is presumption, an appearance of voluntary action

> not proof of the same, I did consciously naturalize as an Australian citizen, however, that this was a voluntary act unimpelled by the influence of others is" another matter. 1 have repeatedly stated that I took this step to preserve and stabilize my marriage and family, Throughout my entire life I have been counseled by my parents and society that marriage is a step which is permanent in nature until dissolved by death, Thus, I was not "unimpelled by the influence of others." I felt, to the contrary, strongly impelled to take all steps possible to save my marriage. I maintain that a conscious act is not arbitrarily a voluntary act and that the presumption it is cannot be controlling.

In short, appellant argues that a compelling sense of marital devotion forced him to perform an expatriative act against his will to act otherwise,

The established facts in appellant's case, however, do not show that he was, as a matter of law, coerced to become an Australian citizen. It is well settled that marital or filial devotion may, in extraordinary circumstances, be legally sufficient to render performance of a statutorily proscribed act involuntary. See Mendelsohnv. Dulles, 207 F. 2d 37 (D.C. Cir. 1953) and Ryckman v. Acheson, 106 F. Supp, 739 (S.D. Tex. 1952). In those cases, the courts found that a husband (Mendelsohn) and a daughter (Ryckman), who had not complied with a statutory provision for retention of United States citizenship by naturalized citizens, had acted involuntarily because they were morally restrained by devotion to stay with and care for a seriously ill wife and mother, respectively.

In appellant's case, however, we see quite different circumstances, He appears to have decided that if he were to acquire his wife's nationality, he might be able to rescue a failing marriage, What reason he had to believe that if he became an Australian citizen all might be well with his marriage, we do not know, for he has adduced no evidence to show, for example, that his wife demanded his naturalization as a condition to continuing to be his wife.

It seems clear that appellant made a personal decision to seek naturalization, hoping that doing so would bring him and his wife together. We do not presume to speculate what other course he might have taken to patch up his marriage, but there

is little doubt that as a matter of law he had a choice between obtaining naturalization and some other way of attempting to be reconciled with his wife. His dilemma, if indeed there was a dilemma, was in a sense self-generated. There is not the slightest evidence that another forced him to become an Australian citizen. The choice to do so or not was plainly his. Where one has an opportunity to make a personal choice, say the courts, there is no duress. Jolley v. Immigration and Naturalization Service, 441 F. 2d 1245, 1250 (5th Cir. 1971).

We therefore conclude that appellant has not rebutted the statutory presumption that his naturalization in Australia was an act of his free will,

111

Even though we have found that appellant became an Australian citizen voluntarily, we must still determine whether when he obtained naturalization he intended to relinquish his United states citizenship. Vance v. Terrazas, 444 U.S. at 261, In holding that loss of citizenship may not result from the performance of a voluntary expatriative act unless the citizen willed loss of that citizenship, the Supreme Court stated that it is the Government's burden under the statute, 6/ to prove a party's intent by a preponderance of the evidence. 444 U.S. at 267.

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

(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.

Intent, the Court said, may be proved by a person's words or found as a fair inference from his proven conduct. 444 U.S. at 260. The intent the Government must prove is the person's intent at the time the statutory expatriating act was performed. Terrazas v. Haig, 653 F. 2d. 283, 285 (7th Cir. 1981).

The Department argues that both appellant's words and proven conduct evidence an intent to terminate United States citizenship. First, it submits that the renunciatory language of the affirmation of allegiance to which appellant subscribed - "I,..., renouncing all other allegiance...." - is strong evidence of an intent to relinquish his united States citizenship. And it further argues that appellant's proven conduct confirms such a renunciatory intent.

Obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish United States citizenship, but it is not conclusive evidence of such intent, Vance v. Terrazas, 444 U.S. at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), Black, J., concurring.

If appellant's naturalization in Australia alone is not sufficient to prove an intent to relinquish United States citizenship what additional evidence must be adduced to prove such intent?

When appellant obtained naturalization he expressly relinquished "all other allegiance."

The case law states clearly the legal conclusions that may reasonably be drawn from making an express renunciation of one's United States citizenship or one's allegiance to the United States.

In Terrazas v. Haig, 653 F. 2d at 288, the court said that there was ample evidence that plaintiff intended to renounce his United States citizenship when he pledged allegiance to Mexico. The court stressed the fact that when plaintiff executed the application for a certificate of Mexican nationality he not only pledged allegiance to Mexico but also renounced United States citizenship. And the court found other "abundant" evidence of plaintiff's intent in his subsequent conduct.

In the recent case of Richards v. Secretary of State, 752 F. 2d 1413, 1421 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit upheld the decision of the District-Court which

had concluded that plaintiff, who had renounced "all allegiance and fidelity to any foreign sovereign or state," intended to relinquish United States citizenship. "We agree with the district court," the Court of Appeals said, "that the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship. We also believe that there are no factors here that would justify a different result.'' **752** F. 2d **at 1421.**

The Department further contends that there are no other factors that would justify a different result in appellant's case, asserting in its brief that through his actions appellant has shown that he believed he was no longer a United States citizen:

> Appellant relinquished his U.S. passport to Australian authorities after naturalization. He never registered as a U.S. citizen after naturalization. Finally, when he decided to return to the U.S., he applied to enter as an immigrant, not as a U.S. citizen. These acts are uniformly consistent and clearly indicate an abandonment of U.S. citizenship.
>
> ...Appellant has acknowledged that he was aware that his naturalization in Australia could result in his loss of U.S. citizenship. He stated on his Questionnaire, dated December 9, 1983, "...the officers of the Australian Department of Immigration and Ethnic Affairs informed me that I would have to surrender my U.S. passport and that I might lose U.S. citizenship." Yet Appellant chose to naturalize in Australia.

We need not necessarily agree with the Department that the conduct it describes shows a positive will on appellant's part to relinquish United States citizenship. But we look in vain in the record for any indication that appellant took any steps, save, perhaps, the timely filing of this appeal, to demonstrate that his intention in 1983 was not to relinquish United States citizenship, but to retain it. There is no affirmative act close to the relevant time sufficient to overcome the very strong inference of an intent to forfeit United States citizenship to be drawn from appellant's taking an oath of allegiance which included an express renunciation of his allegiance to the United States.

Appellant was 32 years of age when he obtained Australian citizenship and plainly is an intelligent person. Nothing in the record indicates that he made the affirmation of allegiance to the British Crown and renounced all other allegiance inadvertently or under mistake of fact. The compelling conclusion that emerges from his actions is that he knowingly and intelligently exchanged United States nationality for that of Australia.

Appellant submits that:

> I did consciously naturalize in Australia but had no actual intent to voluntarily relinquish my U.S. citizenship. I believed I was no longer a citizen of the United States when I applied for immigrant status because I was told such was the case by Department personnel, not because it was my intent to not be one.

The Board cannot penetrate the recesses of an appellant's mind. It must deal with objective evidence of his probable intent. Perhaps appellant did not wish to relinquish United States citizenship, but his words (express renunciation of his allegiance to the United States) and conduct (absence of positive acts to show an objective will and purpose to keep United States citizenship) speak louder than later professions of lack of intent.

It is therefore our conclusion that the Department has carried its burden of proving that in 1983 appellant intended to relinquish United States nationality when he obtained naturalization in Australia.

IV

Upon consideration of the foregoing, we affirm the Department's determination that appellant expatriated himself.

Alan G. James, Chairman

Mary E. Hoinkes, Member

James G. Sampas, Member