December 13, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R[redacted] H[redacted] M[redacted], [redacted]

R[redacted] H[redacted] M[redacted], [redacted] appeals an administrative determination of the Department of State that he expatriated himself on February 14, 1973 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

For the reasons stated below, it is our conclusion that appellant voluntarily acquired Canadian citizenship, with the intention of relinquishing his United States nationality. Accordingly, we affirm the Department's holding of loss of his nationality.

I

[redacted]d States citizenship by birth at [redacted]

According to appellant, he served in the United States Air Force from 1956 through 1959, and for three years was Director of the Information Center for American Travellers to the Soviet Union. In 1966

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,...

he moved to Toronto, Canada, for reasons he elucidated as follows:

> After completing graduate School, I had written fifty-five letters to various American Universities and Colleges, applying for a teaching job in my field. In virtually every case the recipients had been very complimentary about my qualifications, but said that no position was available. (At just about that time the Title Six funds under the National Defense Foreign Languages Act were being directed away from Russian - my specialty - and towards other strategic languages.) Many Russian Departments in the USA were starting to cut staff as a result. In the end I received two concrete offers, one from Northwestern in Evanston, Illinois, and one from the University of Toronto. My decision to come to Toronto was based on two things. The salary and benefits were markedly better, and, I would be able to teach in precisely my own field from the outset, without having to spend several years as a teacher of first-year Russian language. In short, monetarily and professionally, Toronto was the clear choice and I was actively courted by the staff here.

In the early 1970's M[redacted] applied for Canadian citizenship, motivated by the following [redacted]erations:

> I believed that to refuse to do so would very likely result in my being denied tenure at the University of Toronto, and, soon thereafter, in losing my job. In the early seventies there was a great deal of agitation against foreign (read American) professors taking up jobs which might otherwise be taken by qualified Canadians....A certain Prof. Mathews had authored a report proposing that the numbers of foreign professors in Canadian universities be drastically reduced, starting with those who did not have tenure.' This report was widely publicized and many university administra-

> tors were very intimidated by it. I personally was regularly queried by the chairman of my department and the Dean of the Faculty of Arts and Science concerning my plans relative to Canadian citizenship. The forthcoming decision on my tenure was always directly and overtly linked to this discussion.

He was granted a certificate of Canadian citizenship on February 14, 1973, after making the following oath of allegiance:

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen.
>
> 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 fulfill my duties as a Canadian citizen, so help me God.

Ten years later appellant approached the United States Consulate General at Toronto to inquire about his citizenship status, at which time he apparently informed that office that he had become naturalized in Canada. The Canadian citizenship authorities subsequently confirmed to the Consulate General that appellant became a Canadian citizen in 1973. As requested by the Consulate General, he completed a form for determining United States citizenship in July 1983. (The record is not clear whether he was also interviewed by the consular officer.) On the basis of the foregoing evidence, a consular officer executed a certificate of loss of nationality in appellant's name on July 13, 1983. 2/ The consular officer certified that

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2/ 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 offcer 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 acquired United States nationality at birth; that he obtained naturalization in Canada upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

In forwarding the certificate to the Department, the consular officer offered the following comments on appellant's case:

> Mr. M[redacted] states that he became a Canadian citiz[redacted]r 'severe duress...I came here to teach at the University of Toronto in 1966. But 1972 teaching jobs were very tight. My chairman, as well as the Dean, informed me that I could not stay in my job without tenure and that I could only insure that I would receive tenure if I became a Canadi[redacted] While we bear in mind that Mr. M[redacted] became a Canadian citizen for profe[redacted] and financial reasons, these reasons do not in themselves constitute sufficient countervailing evidence of inten[redacted]tain United States citizenship. Mr. M[redacted] was not concerned enough to seek [redacted]ional alternatives to avoid performing the act.
>
> In examining Mr. M[redacted]s entire course of conduct during his prolonged residence in Canada, it is noted that he has maintained no formal ties to the United States...,.

The Department approved the certificate on August 2, 1983, approval constituting an administrative determination of loss of nationality from which an appeal, properly and timely filed, may be taken to the Board of Appellate Review.

Immediately after he[redacted]ed a copy of the approved certificate of loss of nationality, M[redacted] appeared at the Consulate General to discuss an appeal, whi[redacted]ntered by letter to the Board dated January 30, 1984. He contends that he was forced to obtain naturalization in order to protect and advance his career, and that he did not intend to relinquish his United States citizenship by obtaining naturalization in Canada.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality "by obtaining naturalization in a foreign state upon his own application,..."

It is not disputed that appellant obtained naturalization in Canada upon his own application, and so brought himself within the purview of an applicable section of the Act. The Supreme Court has held, however, that citizenship shall not be lost unless the expatriating act was performed voluntarily and with the intent of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967); Nishikawa v. Dulles, 356 U.S. 129 (1959); Perkins v. Elg, 307 U.S. 325 (1939).

It is appellant's burden to prove that his naturalization was involuntary. For in law, it is presumed that any one of the expatriating acts enumerated in section 349(a) of the Act was done voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was performed involuntarily. 3/

3/ 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.

Appellant contends that his naturalization was involuntary because it was forced on him by economic circumstances, specifically, his need to obtain tenure at the University of Toronto and thus ensure continued employment, and because in 1973 he was nearly forty years old, married, and the father of three small children. He also submits that:

> By the time I finished my doctoral thesis (a few years after coming to Toronto), and considered returning to the United States, the job situation there was far worse than it had been in 1966 when I left. All my efforts turned up not a single vacancy, though I had several major publications at the time and was willing to go anywhere in the country.

A defense of duress to performance of an expatriating act has long been available to petitioners in loss of nationality cases. Doreau v. M[redacted]l, 170 F. 2d 721 (3rd Cir. 1948). The criteria established the courts to determine whether a citizen was subjected to true duress, are, however, stringent. As the court stated in Doreau:

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is no authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country. On the other hand it is just as certain that the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress. 170 F. 2d at 724.

In order to sustain a defense of economic duress, [redacted] must show that his economic survival was at stake, that perfo of the expatriative act was dictated by dire economic hardship. See Stipa v. Dulles, 233 F. 2d 551 (3rd Cir. 1956) and Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953). In those cases, petitioners alleged that their expatriative conduct was compelled literally by the

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instinct for self-preservation in the economic chaos of wartime and post-war Italy. In both cases, the courts found that the petitioners accepted proscribed employment in a foreign government (Italy) in order to subsist, if not to survive. Stipa v. Insogna, although decided thirty years ago, remain valid for the proposition that genuine economic harship must be proved to excuse performance of an act that places one's United States citizenship in peril. 4/

For the reasons stated below, we do not think [redacted] has made a case of economic duress.

First, he has not persuaded us that he would have been dismissed from the university had he not acquired Canadian citizenship. His case rests on unsupported allegations.

Second, to sustain a defense of economic duress, he must show that he attempted, without success, to find an alternative to naturalization. See Richards v. Secretary of State, infra, note 4. In holding that appellant Richards voluntarily acquired Canadian citizenship, the court noted in part that:

> ...Moreover, it does not appear that, upon becoming aware that he would have to renounce his United States citizenship in order to acquire Canadian citizenship, Richards made any attempt to obtain employment that would not require him to renounce his United States citizenship. Nor does it appear, based on his past employment history in Canada, that such an attempt would have been futile. 752 F. 2d at 1419.

4/ Cf. Richards v. Secretary of State, 752 F. 2d 1413 (9th Cir. 1985). There, appellant Richards contended that he became a Canadian citizen-under economic duress - the need to find employment. The court agreed with appellant that an expatriating act performed under economic duress is not voluntary, citing Stipa and Insogna. The issue before the Ninth Circuit, however, was whether the district court had erred in holding that Richards was under no economic duress when he became naturalized. The Ninth Circuit distinguished Stipa and Insogna from Richards' case, noting that conditions of economic duress had been "found under circumstances far different from those prevailing here." The court found it unnecessary, however, to decide whether economic duress "exists only under such extreme circumstances." It simply ruled that some economic hardship must be proved to support a plea of involuntariness, and found that the district court had not erred in finding that Richards was under no economic duress. 752 F. 2d at 1419.

The record does not show that [redacted] explored any alternatives to naturalization. True, he alleged to find a position in the United States around the time he applied for Canadian citizenship but was unsuccessful. He says nothing, however, about having tried to find alternative employment in Canada. It appears his only consideration was holding on to his university post and that he would go to any lengths - even jeopardizing his United States citizenship - to retain it. He has not shown that alternative employment was unobtainable either in his own field or in another that would not have required Canadian citizenship. Since he is evidently well-educated and experienced, we are not prepared to speculate that his efforts to find alternative employment would have been futile.

Third, coercion implies absence of choice. On all the evidence, [redacted] made a succession of personal choices: first, to go to to optimize his professional and economic opportunities, rather than remain in the United States and accept the position he states he was offered by Northwestern University; later, to jeopardize his United States citizenship, without first exploring alternatives, rather than risk his position at the University of Toronto.

We do not deny that he confronted a dilemma. Changing employment or possibly abandoning his chosen field would have been difficult. As he has conceded, he knew from discussions he had had with the Consulate General prior to his naturalization that naturalization could put his citizenship at risk, yet he proceeded. No one forced him to risk his United States citizenship instead of trying to find another way of satisfying his economic and professional requirements. Where one has the opportunity to make a free choice, the mere difficulty of the choice is not deemed to constitute duress. See Prieto v. United States, 298 F. 2d 12 (5th Cir. 1961), and Jubran v. United States, 255 F. 2d 81 (5th Cir. 1958). Similarly, Jolley v. Immigration and Naturalization Service, 441 F. 2d 1241, 1245 (5th Cir. 1971): "But the opportunity to make a decision based upon personal choice is the essence of voluntariness."

To choose foreign citizenship for economic reasons that objectively fall far short of dire necessity cannot be considered to be involuntary. [redacted] has failed to show that naturalization was forced upon him by factors he could not control. Accordingly, we conclude that he became a Canadian citizen of his own free will.

III

Even though we have concluded that appellant voluntarily obtained naturalization in Canada, "the question remains whether on all the evidence the Government has satisfied its burden of proof that

the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, 444 U.S. at 270. Under the Statute, 5/ the Government must prove a person's intent by a preponderance of the evidence, 444 U.S. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

The intent the Government must prove is the person's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981).

Performing a statutory expatriating act may be highly persuasive evidence of intent but it is not conclusive evidence thereof, and it is impermissible to presume from performance of the act that the citizen intended to relinquish citizenship, Vance v. Terrazas, 444 U.S. at 268. Thus, although appellant's actions in obtaining Canadian citizenship may strongly evidence an intent to abandon United States citizenship, something more must be proved to sustain the conclusion that appellant intended to expatriate himself.

Terrazas v. Haig, supra, and Richards v. Secretary of State, supra, applied the general principles laid down by the Supreme Court in Vance v. Terrazas.

5/ Section 349(c) of the Immigration and Nationality Act. Text supra, note 3.

In Terrazas v. Haig, plaintiff made an oath of allegiance to Mexico, simultaneously renouncing his United States citizenship and all fidelity to the United States. The Seventh Circuit agreed with the district court that the plaintiff intended to renounce his United States citizenship shen he willingly, knowingly, and voluntarily obtained a certificate of Mexican nationality. Plaintiff, the Court noted, was of age, well educated and fluent in Spanish at the time he executed the document which contained an oath of allegiance and the renunciation of United States nationality.

He subsequently informed his draft board that he was no longer a United States citizen, Finally, plaintiff executed an affidavit in which he swore that he had taken an oath of allegiance to Mexico and had done so freely and with the intention of relinquishing United States citizenship. "We cannot conclude," the court said, "that the district court improperly found that the government had established by a preponderance of the evidence that plaintiff intended to relinquish his United States citizenship." 653 F. 2d at 289.

Plaintiff in Richards v. Secretary of State, a native born United States citizen, became a legal resident of Canada in 1965. In 1971, in order to meet the citizenship requirements for employment by the Boy Scouts of Canada, he obtained naturalization. Like appellant in the case at bar, Richards swore an oath of allegiance to the British Crown and expressly renounced "all other allegiance and fidelity." He returned to the United States in 1971 on a Canadian passport for graduate study registering as a foreign student. In 1973 he returned to Canada to teach, and later did free-lance work. He received a new Canadian passport and used it to travel abroad. After his naturalization had come to the attention of the United States authorities, Richards stated in a form he completed to determine hie citizenship status that: "I did not want to relinquish my U.S. citizenship but as part of the Canadian citizenship requirement I did so." The Ninth Circuit agreed with the district court that Richards knew and understood the meaning of the words in the renunciatory declaration, and said that: "the voluntary taking of a formal oath of allegiance that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship." 752 F. 2d at 1421. It found no factors that would justify a different conclusion. Id.

The Department argues that [redacted] intent to transfer his allegiance to Canada is shown by both his words and actions. "First, his naturalization in Canada was accompanied by an oath of allegiance which contained language which specifically renounced all allegiance and fidelity to any foreign sovereign or state of which he was a citizen." The Department's brief continues:

> Second, Mr. [redacted] intent is corroborated by his behavior while in Canada. Although he voted in the 1968 Presidential election and filed U.S. tax returns when he first lived in Canada, since his acquisition of Canadian nationality in 1973, he has acted in all things as a Canadian citizen and has not exercised the rights of United States citizenship nor acted in any way to indicate that he retained his allegiance to the United States. He has not voted as an absentee, has not filed income tax returns, has not registered at the Consulate, and has not renewed his U.S. passport. His entire conduct reflected in the record, including the fact that after naturalization he obtained and used a Canadian passport to enter and leave the United States, supports the Department's finding that Mr. M[redacted] abandoned his United States citizenship.

In opposition to the Department's contention appellant contends that when he obtained naturalization he did not intend to relinquish his United States citizenship. In his letter of August 2, 1985 to the Board he asserted that:

> ...I was never told nor did I believe that my action would abrogate my U.S. nationality. I remember as clearly as if it were yesterday that the young woman at the Consulate said nothing more than that 'I might jeopardize my status as a U.S. citizen.' In sum, I did not consciously will or intend the relinquishing of my U.S. citizenship. Much later I learned that the situation might be more serious than I had expected and it was at that point that I initiated the current investigation. I was encoraged /sic/ in this by two colleagues whose situation was virtually identical to my own; the happy outcome in their cases gave me reason to hope that my appeal might be favorably considered and the damage repaired.

...

> ...the Canadian oath of allegiance may well contain the limitation of allegiance to which the State Department brief refers, but it has always been clear here that the Canadian government has no objections to dual citizenship, I asked the judge at the time of my swearing in if I could retain my U.S. citizenship and she said Canada had no reservations on the subject.

The only evidence of appellant's intent with respect to his United States citizenship dating from the crucial time (1973) is found in his obtaining naturalization and swearing a renunciatory oath of allegiance to the British Crown.

Against that direct clear evidence of his intent appellant presents no evidence of countervailing weight.

Appellant's prior submissions leave little doubt that he was well aware that his naturalization in Canada put his status as a United States citizen in jeopardy. As we have noted above, appellant stated: "...I knew it was frowned upon and even that there was some risk, but my job was (or certainly seemed to be) on the line. Similarly, in giving notice of appeal to the Board, appellant contended that: "...the people at the Consulate...told me that I would risk jeopardizing my status as an American by taking out Canadian citizenship." Moreover, he later reiterated that: "Again, I know that I took a calculated risk in taking out Canadian citizenship, but it was a risk I felt compelled to take out of concern for my family and my chosen career,"

Appellant can not now be heard to claim that he was unaware of the consequences of obtaining naturalization in Canada. He was over forty years of age in 1973 and an educated man. Having been informed before completing the naturalization process of its possible adverse effects on his United States citizenship, appellant must be deemed to have subscribed to the renunciatory oath of allegiance to the British Crown knowingly and intelligently.

As noted above, the cases make clear that such action ordinarily is sufficient evidence of an intent to abandon United States citizenship. Terrazas v. Haig, supra, and Richards v. Secretary of State, supra. Both cases, however, require that the trier of fact consider other factors to determine whether a different conclusion might be warranted.

Having examined the record, we find no factors that would all into question the intent appellant showed in 1973 to abandon nited States citizenship. There are no affirmative acts that how a positive will to remain a United states citizen. On the ontrary, he travelled on a Canadian passport, and did not renew is United States passport issued in 1967 when it expired. For en years did nothing to assert a claim to United States citizenhip.

We do not question appellant's professed attachment to the Inited States or the strength of his wish to continue to be a Inited States citizen. These commendable but latterly expressed sentiments cannot, however, offset the intent he manifested in 1973 :o cast his lot with Canada. Whatever his inner feelings may have >een in 1973, the overt expression of his rejection of allegiance :o the United States speaks eloquently of a renunciatory intent.

It is our conclusion that the Department has carried its ourden of proving by a preponderance of the evidence that appellant intended to relinquish his United States citizenship when he obtained naturalization as a citizen of Canada.

IV

Upon consideration of the foregoing, the Department's determination that appellant expatriated himself on February 14, 1973 is hereby affirmed.

Alan G. James, Chairman

Mary E. Hoinkes, Member

G. Jonathan Greenwald, Member