November 20, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: V[redacted] P[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, V[redacted] P[redacted], expatriated herself on November 17, 1967 by obtaining naturalization in the Federal Republic of Germany upon her own application. 1/

The sole issue for determination is whether the Department has met its statutory burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship when she acquired German nationality. For the reasons set forth below, it is our conclusion that the Department has not carried its burden of proof. Accordingly, we reverse the Department's determination that appellant expatriated herself.

Mrs. P[redacted], nee Navascues, acquired United States citizenship by birth [redacted] Her father, [redacted] was naturalized as a United States citizen in 1942, [redacted] is Spanish nationality by operation of law. Her mother was a native-born American citizen. Appellant was reared and received her elementary education in the United States.

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

> 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 --
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> (1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as a result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one

In 1960 appellant's father returned to Spain, taking appellant's mother, appellant and another minor child with him. In her opening statement appellant gave the following description of the family's move to Spain and its aftermath.

> So, in 1960, when I was 14 years old, I was more or less forcibly taken to Spain, much against my will; but at that age, there was nothing I could do about it. Once in Spain, my father's depression did not get better and he became very biased against the USA, as though the American system were responsible for his plight....
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> In order to recover his old post [appellant states that her father had worked for the Ministry of Commerce before he emigrated to the United States], he had to become Spanish again, which he did. But, in his mental state, he went one step further and applied for the Spanish nationality for all of his minor children. I don't remember exactly when this happened, but I think it must have been about 1961 or 62, I was more or less informed that, since we were now living permanently in Spain, and were not going back to the US ever (we were even sent to Spanish schools to acclimatize sooner), we were now to become Spaniards. I don't really remember if I was informed before or after the fact, but I was offered no option.

The Department's dossier on Navascues contains a note verbale from the Ministry of Foreign Affairs to the United States Embassy at Madrid dated February 26, 1964, responding to an inquiry of the Embassy, which reads as follows:

> ...on February 15, 1964, the Ministry of Justice informed this office that Mr. Luis J[redacted] N[redacted] A[redacted] declared his desire to regain his Spanish nationality before

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1/ Cont'd.

> years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday,...

> the Clerk of the Office of Vital Statistics for the Buenavista District, Madrid, at 1 p.m. on July 22, 1961, in accordance with the provisions of Article 24 of the Civil Code, 2/ as indicated by the notations in the margin of the birth certificates of his children Juan Carlos and Virginia Navascues Howarb [sic], in volume 24 (births), book 435, folios 244 and 245. 3/

In March 1964 the Embassy executed a certificate of loss of nationality in N[redacted]' name and forwarded it to the Department under cover of the following memorandum.

> As the Certificate of Loss of Nationality states, Mr. N[redacted] committed the first act to cause the loss of U.S. citizenship on July 22, 1961, when he formally re-acquired Spanish nationality under Article 24 of the Spanish Code, a copy of which has previously been forwarded to the Department. According to Spanish law, when note is made of a former Spanish national's intent to regain his Spanish nationality, this notation being made by a competent registrar, the date of reacquisition is the date on which the notation is made of his intent.
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> Mr. N[redacted] has also accepted a position with the Spanish Government, and has not appeared at the Embassy in response to

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2/ Article 24 of the Civil Code as amended by Act No. 504 of 15 July 1954, provided that:

> If a person loses Spanish nationality under article 22, [i.e., by virtue of acquiring the nationality of a foreign state] he may recover it by returning to Spanish territory and declaring his desire to do so before a civil registrar of the place of residence which he elects, so that the appropriate records may be made, and by renouncing his alien nationality.

United Nations Legislative Series, Supplement to "Laws Concerning Nationality, 1954." ST/LEG/SER. B/9 (1954).

3/ English translation, Division of Language Services, Department of State, LS no. 120681, Spanish (1986).

> call letters requesting that he complete renunciation of U.S. citizenship forms, expatriation forms, or a questionnaire, though his children have informed the Embassy of his intent to remain in Spain. He has also lived more than three years in Spain, but both the above actions which would cost him his U.S. citizenship took place subsequent to July 22, 1961, the date he reacquired Spanish citizenship by his own request.

Whether appellant, then being a minor, acquired Spanish nationality in 1961 simply by virtue of her father's reacquisition of Spanish nationality or whether she was required to take further action upon attaining her majority to perfect a claim to Spanish citizenship is not clear from the record in her or her father's cases. The issue is, of course, one that only the relevant Spanish authorities are competent to decide. But we note that when the Embassy reported to the Department that appellant's father had expatriated himself, it made no mention of legal consequences his action had or might have for appellant. Furthermore, there is no documentation in appellant's dossier or that of her father attesting that she acquired Spanish nationality automatically in 1961 or that she later applied to be documented as a Spanish citizen.

Nonetheless, appellant asserts that she believed that she had, without more, become a Spanish citizen. "From then on," she has stated, "it was sort of drilled into me that I became accustomed to the idea; I was a Spaniard. I was not an American. That chapter of my life was closed." 4/

From 1960 to 1966 appellant lived with her parents in Madrid. She left her parents' home in 1966 and moved to Bilbao to be near her fiance, [redacted] a citizen of the Federal Republic of Germany. Early in 1967, appellant states, her mother told her to go to the Consulate General at Bilbao to claim an inheritance from her grandfather. She described that visit as follows:

4/ As appear below, the Embassy in 1985 considered that Mrs. [redacted] would have expatriated herself in 1970 under the first proviso of section 349(a)(1) of the Act (by not establishing a permanent residence in the United States by age 25) had she not earlier expatriated herself in 1967 by becoming a citizen of Germany. See note 1, supra.

> ...(I can't remember if they gave me the check upon identification or exactly what the details were. I just recall I had to sign a document in the presence of the Consulate official whom I assumed to be the Consul.) This gentleman did not inform me that I was not an American citizen, but neither did he point out to me that I might possibly still be an American, as he might have done. At that time, I took this lack of information as a confirmation that I was, irreparably, a Spaniard. In view of this gentleman's brusqueness, I didn't dare to ask.

Appellant married P[redacted] on October 12, 1967. She states that when they went to the German Consulate at Bilbao to register their marriage, an official of the Consulate suggested that she might wish to obtain German citizenship, since doing so would facilitate her living in Germany, as she and her husband had decided to do. She filed a petition for German citizenship on October 18, 1967. A certificate of citizenship was issued to her on November 17, 1967. According to a letter the German Consulate General at Bilbao addressed to appellant's husband on December 1, 1983:

> ...Naturalization was granted [to Mrs. [redacted]] under paragraph 6 of the Imperial Law and of Citizenships, in force from Aug. 24, 1957 to Dec. 31, 1969. According to this Law an alien woman who married a German citizen was entitled to be naturalized as a German citizen, provided that the marriage existed and the husband held German nationality....

A second letter to her husband from the Consulate General dated February 6, 1984, states that: "When given the certificate, she did not have to take any oath of allegiance. Furthermore, according to German law, she was not obliged to renounce her former nationality."

Appellant and her husband moved to Germany in January 1968 and lived there until 1973 when they returned to Spain where she has lived since. She obtained at least one German passport according to the record, namely in 1979, which she renewed twice. She states that in 1983 "I was made aware of my possible American citizenship." It seems that she had gone to the Embassy to obtain a visa to visit the United States and was informed that

The official certified that appellant acquired United States nationality by virtue of her birth in the United States; that she was naturalized as a German citizen upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act, (INA). In recommending that the Department approve the certificate, the consular officer commented as follows:

> ...At the time [when she became a German citizen] Mrs. [redacted] the question of possible U.S. citizenship never came up. Mrs. [redacted] emphasizes that she thought of herself as a Spanish citizen because her father told her she was. However, Mrs. [redacted] states that in 1967 she went to the U.S. Consulate in Bilbao in connection with her father's estate, but apparently never consulted with a Consular Officer regarding her possible U.S. citizenship. In fact she never pursued the issue until it was brought up to her in 1983.
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> In the questionnaire, Mrs. [redacted] stated that she assumed that she had lost her (U.S.) citizenship upon becoming a Spaniard and later a German. In June 1983, when she applied for a non-immigrant visa she was informed that she might be a U.S. citizen. Since she never returned to the United States, the question of U.S. citizenship never came up, although she never renounced it in any written document or even orally.
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> Consular Officer believes that Mrs. [redacted] lost her U.S. nationality under two parts of Section 349(a)(1) of the INA: obtaining naturalization in a foreign state upon her own application when she was over 21; and failing to establish a permanent residence in the United States. [redacted] obtained German citizenship by her express petition; it did not come gratis through marriage. The theory of "unawareness" is not pertinent because Mrs. [redacted] was born in the United States and had United States citizenship. Therefore, Mrs. [redacted] lost her U.S. nationality on November 17, 1967 when she voluntarily became naturalized

intent. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 365U.S. 129, 139 (1958) (Black, J. concurring.) It is recognized that a party's specific intent to relinquish citizenship rarely will be established by direct evidence, but circumstantial evidence surrounding commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship. Terrazas v. Haig, supra, at 288. In other words, a party's words and proven con——at times other than the crucial moment may shed light on his or her state of mind when the expatriating act was done.

The Department undertakes to carry its burden of proving th. Mrs. P[redacted] intended to relinquish her United States citizenship by advancing the following arguments.

> Mrs. P[redacted] naturalization in Germany is the initial evidence of her intent to abandon her United States citizenship. This intent is corroborated by her behavior.
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> Mrs. P[redacted] has asserted that at the age of 14 she was opposed to her move to Spain but of course she had no choice. When her father naturalized has as a Spaniard, she states that she assumed her U.S. nationality was gone. Appellant was born a U.S. citizen and as a citizen she has the responsibility of maintaining her nationality status.
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> She contends that in 1967 she went to the Embassy [sic] to fill out papers for her inheritance from her grandfather. Mrs. P[redacted] fails to tell us if she inquired at that time as to her status, but she complains that the consular officer did not inform her that she was an American citizen. It is not the responsibility of the officer to verify the citizenship of everyone who comes to his office. If she were concerned with her citizenship, the Department feels that she would have checked and made inquiries at that time. Her lack of concern and interest clearly demonstrates her intent to relinquish.
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> Appellant has said that she naturalized as a German in order to facilitate her future and permanent life in Germany. She did not want the bother of getting work and residency papers. The intention was there to be a

German, not a citizen of another nation. Her disinterest exhibits her intent.

Mrs. P[redacted] asserts that she could not have intended to relinquish her United States citizenship. She believed she had already lost her United States citizenship "because of what my father had done."

As discussed above, it is not clear whether, as a matter of law, appellant acquired Spanish citizenship in 1961. Nonetheless, in her submissions she has consistently maintained that it was her perception that she had automatically lost United States citizenship years before she obtained German nationality. "There could be no intention on my part to relinquish my Us citizenship," she has stated, "because of my total and utter conviction that it had been irreparably relinquished by my father 7 years before. I see now that I was much too naive and trusting, but I cannot alter those facts now." (Emphasis in original.)

We grant that Mrs. [redacted] would have been prudent to have inquired about her citizenship status in 1967 when she visited the United States Consulate General at Bilbao. Similarly, she ought to have raised the issue before she applied for German citizenship. We cannot, however, accept that her failure to do the prudent thing attests to an intent to relinquish United States citizenship. In 1967 she may indeed have felt cowed by the consular officer to whom she spoke when she went to the Consulate to claim an inheritance. Furthermore, if it was her perception that she had already lost United States citizenship, she might well, as she argues, have seen little point in raising the matter officially. Certainly her not doing so because of a perception that she had lost citizenship is not an implausible explanation. We cannot accept that citizenship may be lost through non-actions that are satisfactorily explainable on grounds of lack of prudence or foresight or ignorance. But the central question is whether Mrs. P[redacted] has established that she was unaware that she held United States citizenship when she obtained naturalization in Germany.

It is settled that if one can prove that he was unaware at the time an expatriating act was done that he had a claim to United States citizenship, expatriation will not result. As the court said in Rogers v. Patokoski, 271 F.2d 858, 861 (9th Cir. 1959):

> Accordingly, we agree with the ruling of the Trial Court that
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> > The plaintiff could not expatriate himself or lose or abandon his United States of America citizenship by taking an oath of allegiance to the

> Finish Government or by serving in the Finnish Army or by voting in a Finnish election because he did not know he was a citizen of the United States of America when he did those things, and the plaintiff has not expatriated himself or lost or abandoned his United States of America citizenship by doing those things with such lack of knowledge. 7/

Has Mrs. P[redacted] established she did not know in 1967 that despite her father's actions in 1961 she was still a United States citizen? We have not had opportunity to see or examine Mrs. P[redacted] to tes[redacted]r credibility. In the circumstances, however, we think Mrs. P[redacted] had made a believable case that she was convinced she was not a United States citizen when she applied for and obtained German citizenship. The statements she has made under oath that she believed in 1967 she was not a United States citizen have the ring of sincerity and plausibility. Note in particular the following excerpt from her reply brief:

> As I have said repeatedly, I was convinced from the age of 15 that I had already lost my US citizenship. You do not seem to realize the impact this had at that time and under the circumstances in which it occurred. Try, for one moment, to imagine the emotional turmoil that was going on inside that 15 year-old. I had been uprooted from my homeland, taken from a happy childhood in a small rural town and transplanted overnight to a large foreign city, having to learn the language in record time (for I did not know Spanish then), break practically all my ties with the US (I never saw my grandparents again), adjust to a completely different school system; not to mention the normal adolescent emotional upheavals. Also, at that time there was a repressive dictatorship in Spain, which was another cultural shock to me: I learned that rebellion against Authority - even unjust

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7/ See also Perri v. Dulles, 206 F.2d 586 (3rd Cir. 1953). There, appellant, a non-resident United States citizen, acquired foreign citizenship through his parents' naturalization. The court held that the two-year limitation period to preserve citizenship prescribed by the Nationality Act of 1940 did not begin to run until the appellant learned he had a claim to United States citizenship under the same statute.

> Authority - was accompanied by the risk of prison. This feeling generalized to not questioning my parents' decisions.
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> Under the above circumstances, I was fighting for my psychological survival, though it may sound melodramatic to an outsider.
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> Therefore, when I read, '...she has the responsibility of maintaining her nationality status', I don't know whether to laugh or cry from exasperation.
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> So again I emphasize that it was not lack of interest and concern on my part which made me refrain from making inquiries when I went to the US Consulate in Bilbao, but the complete conviction that there was nothing to inquire about. (I did not mean to complain about the officer's omission, but was simply comparing him with the officer in Madrid, who did see fit to inform me of my possible rights, though he also had no responsibility to do so.)

Appellant's mother and husband have made sworn statements in support of Mrs. P[redacted]'s claim that she was not aware in 1967 that she was a United States citizen. Granted, those individuals could hardly be described as wholly disinterested. Nonetheless, their statements strike us as believable. In any event, the Department has adduced no direct evidence to disprove Mrs. [redacted]'s averments. The Department simply argues that she knew she had been born in the United States and as a citizen had a responsibility to verify her actual citizenship status.

Assume, arguendo, however, that Mrs. P[redacted] has failed to prove she was unaware in 1967 that she was a United States citizen. Even so, we still think the Department has not proved that she intended to relinquish United States citizenship when she became a German citizen. Naturalization and obtaining a German passport apart, the record discloses no act or words on her part that evidence an express intent to abandon United States citizenship. Upon obtaining German citizenship she did not make a renunciatory declaration; she did not even swear an oath of allegiance to the German state.

Mrs. P[redacted]'s conduct post-naturalization with respect to United States citizenship was essentially passive. She did nothing between 1967, when she became a German citizen, and 1983, when she was told she might have a claim to United States citizen-

ship, to show that she intended to remain a United States citizen. 8/ Passive conduct with respect to United States citizenship does not, however, in our opinion, warrant inferring intent to relinquish United States citizenship. Non-action about citizenship could be as readily explained by considerations totally unrelated to an intent to relinquish citizenship as by a will and purpose to abandon citizenship. And the cases make clear that "conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such." United States v. Matheson, 532 F.2d 809, 814 (2nd Cir. 1976). See also Terrazas v. Haig, supra. A preponderance of the evidence must show that the citizen willingly, knowingly and voluntarily intended to renounce United States citizenship. Here it does not.

In Mrs. P[redacted]'s case scienter clearly is missing, if one accepts her claim that she was not aware until 1983 that she had a claim to United States citizenship. Even if one were to take the position that she knew or should have known in 1967 she was a United States citizen, the evidence is insufficient to show that she made a knowing and intelligent waiver of her constitutional right to remain a United States citizen when she obtained German citizenship.

We conclude that the Department has failed to prove by a preponderance of the evidence that Mrs. P[redacted] intended to divest herself of United States citizenship when she became a citizen of the Federal Republic of Germany in 1967.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that Mrs. P[redacted] expatriated herself

Alan G. James, Chairman

J. [illegible] emb

G. Jonathan Greenwald, Member

8/ Her use of a German passport might be considered inconsistent with United States citizenship, but, in the circumstances of her case, it does not, in our opinion, justify inferring an intent to relinquish United States citizenship. Since she had married a German national and lived in Germany for a number of years, her us of a German passport seems to have been more of a matter of convenience than an indication that she intended to relinquish United States citizenship, which under the unawareness theory, she thought she had already lost.