December 8, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] A[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, J[redacted] A[redacted], expatriated himself on March 2, 1984 under the provisions of section 349(a)(5) of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Stuttgart, Federal Republic of Germany. 1/

For the reasons set forth below, we conclude that A[redacted] renounced his United States nationality voluntarily with the intention of relinquishing that nationality. We therefore affirm the Department's holding that he expatriated himself.

I

A[redacted] was born on [redacted] now the [redacted] 2/ He had a high school education and before the war worked as a highway supervisor. He served in the Polish Army from March 1939 until Poland capitulated, and allegedly was captured by the Russians, escaped and returned to Stolpce. Shortly thereafter he went to Latvia where he remained until 1941. When the Germans invaded Soviet-occupied Poland, A[redacted] returned to Stolpce.

1/ Section 349(a)(5) of the Immigration and Nationality Act 8 U.S.C. 1481(a)(5), 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 --
>
> . . .
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State,...

2/ Until he was naturalized as a United States citizen in 1959, he spelled his family name [redacted] Upon naturalization the spelling was changed legally to A[redacted]

In the fall of 1941 A[redacted] was appointed mayor of Stolpce by the German occupation authorities. He served in that capacity until 1944 when he left Stolpce ahead of advancing Soviet forces and went to Germany. After the war A[redacted] lived in the United States Zone of Occupation. He obtained a visa to immigrate to the United States under the Displaced Person's Act of 1948, and on April 4, 1950 entered the United States. He married in 1952. He and his wife have one child. A[redacted] petitioned for naturalization and on February 27, 1959 was naturalized before the United States District Court for the District of New Jersey.

Around 1980 the Office of Special Investigations of the Criminal Division, Department of Justice,(OSI) 3/ began an investigation into A[redacted] wartime activities as mayor of Stolpce.

3/ OSI was created by the Attorney General in 1979 to consolidate enforcement of immigration statutes and policy against persons suspected of assisting the Nazis in persecuting any person because of race, religion, national origin or political opinion. The Attorney General has assigned OSI "the primary responsibility for detecting, investigating, and, where appropriate, taking legal action to deport, denaturalize, or prosecute any individual who was admitted as an alien or was naturalized as a United States citizen and who had assisted the Nazis by persecuting any person because of race, religion, national origin or political opinion." OSI's usual practice

> has been to institute denaturalization proceedings under 8 U.S.C. sec. 1451(a) 5/ if an investigation reveals that a Nazi persecutor obtained United States citizenship fraudulently or illegally, and then to institute deportation proceedings under 8 U.S.C. sec. 1251(a)(19) upon successful completion of denaturalization proceedings. 6/ This process inevitably takes substantial time, effort, and resources, and its success depends in general on finding another country that is willing to accept the deported individual. 7/
> [Footnotes omitted]

Memorandum from the Office of Legal Counsel, Department of Justice, to the Acting Legal Adviser, Department of State, September 27, 1984, p.3.

At the request of OSI, the Department sent a telegram to the Embassy at Moscow in August 1980, instructing the Embassy to seek Soviet assistance in obtaining information and documentation about a number of Byelorussians who were believed to be war criminals. With respect to A[redacted]'s alleged collaboration with the Nazis, the telegram gave the following particulars:

> ...A[redacted] allegedly worked with Nazi Intelligence Services in Germany during 1939, was transferred to Warsaw in 1940, where he helped Scors and Tumash organize the white Ruthenian committee of collaborators who assisted the Wehrmacht and the Einsatzgruppen in the invasion of Bielorussia in 1941. The Nazis appointed him mayor of Stolpce and later Director of Niezwics Rayon under the supervision of his brother, Alexander, who was the National Deputy for the Slonim Province (Alexander's current whereabouts and status are unknown). J[redacted] A[redacted] worked for the SD in Baranovitsche, B.S.S.R., compiled lists of Poles to be executed, and participated actively in the mass execution near Gajki and in Niewswicz. The Polish underground sentenced A[redacted] to death, but he escaped to Berlin in 1944, where he worked for the collaborationist government-in-exile. During 1945-46, the Polish and Soviet radio and press were seeking him as a war criminal.

After OSI's investigation of A[redacted] had been underway for about one and a half years, an attorney of that office interrogated A[redacted] on several occasions in March 1984. As OSI later informed the Office of Legal Counsel, Department of Justice:

> ...in accordance with its standard practice, it [OSI] conducted investigations of A[redacted] and R... that included questioning of those individuals under oath by OSI attorneys. After OSI completed its investigations [toward the end of 1983], it contacted lawyers for A[redacted] and R... and advised them that their respective clients were serious targets for denaturalization and deportation because of their wartime activities on behalf of the Nazi regime. According to OSI, after reviewing the evidence against their clients the lawyers for those individuals asked OSI how potential litigation could be avoided. They were advised that

> OSI would refrain from litigating only if it could secure all the relief to which it would be entitled through denaturalization and deportation proceedings.
>
> After further discussions between OSI and counsel for A[redacted] and R ..., separate agreements were reached and executed by A[redacted], on January 4, 1985 [sic - January 5, 1984] and by R... on .... Each agreement was also executed by their respective counsel, and by representatives of OSI and the Criminal Division. 4/

On January 5, 1984, in the law offices of A[redacted] el at Irvington, New Jersey, an agreement was execu[redacted] A[redacted] and the Director, OSI, and attested by A[redacted] counsel. The statements [redacted] made and the undertakings he gave read in pertinent part as follows:

> ...
>
> 2. In July 1941, while Byelorussia was under Nazi occupation, I became the Rayonburgermeister of the Stolpce Rayon of Byelorussia. As Rayonburgermeister, I carried out the orders of the Nazi occupation authorities. It is true that during this period virtually all of the Jews of Stolpce Rayon were murdered, as were many Polish civilians under the Nazi regime.
>
> 3. I am familiar with the allegations made by the Office of Special Investigations of the United States Department of Justice that I am subject to denaturalization and deportation because of my activities between 1941 and 1944 and because of my misrepresentations and concealments made to United States immigration and naturalization authorities.
>
> 4. I concede that, because of material misrepresentations and concealments I made when immigrating to the United States and seeking naturalization as a united States citizen, my U.S. citizenship was illegally procured under 8 U.S.C. sec. 1437(a)(1), and that I am therefore subject to denaturalization pursuant to 8 U.S.C. 1451(a). Were I a non-U.S. citizen, I

4/ Id. p.5.

concede that I would be deportable under 8 U.S.C. sec. 1251(a)(19), 1251(a)(1), and 1251(a)(2).

5. I agree permanently to depart the United States by February 28, 1984, at my own expense. I agree not to reenter the United States under any circumstances.

...

7. On or before March 9, 1984, I shall formally renounce my United States citizenship before an appropriate U.S. official at a United States consulate or embassy.

...

9. I agree not to reapply for United States citizenship under any circumstances.

...

11. I hereby waive any right to any application for discretionary relief, any appeal, . . .

12. I have entered into this Agreement freely and voluntarily upon consultation with my counsel.

In turn, the United States, by its counsel, the Director, OSI, made the following commitment:

13. If J[redacted] A[redacted]...complies with the terms of his statement and commitment, supra, the United States agrees that it will commence no litigation seeking A[redacted]'s denaturalization as a United States citizen or his deportation from the United States.

14. It has been the policy of the Office of Special Investigations to commence no litigation seeking the revocation of United States citizenship of any members of a subject's family whose citizenship is derived from that of the subject. The Government will follow that policy with respect to the A[redacted] family.

15. The United States recognizes that, in the event that A[redacted] complies in full with the terms of this agreement, there is no basis under U.S. law for limiting in any way A[redacted] receipt of Social Security benefits.

Shortly after signing the foregoing agreement, A[redacted] left the United States and went to the Federal Republic of Germany where he took up residence with his brother near Stuttgart. On March 1, 1984 he visited the United States Consulate General at Stuttgart with his niece, stating that he wished to renounce his United States citizenship. The consular officer who interviewed him suggested that he not return to the Consulate to renounce his citizenship unless he received assurance from the German authorities that if he renounced he might be naturalized as a German. However, he returned the following day, alone, without apparently having ascertained whether he could be naturalized in the FRG, and insisted that he wished to renounce his citizenship even though it would leave him stateless. After following the prescribed preliminary procedures, a consular officer administered the oath of renunciation to [redacted] on March 2, 1984.

A report the Consulate General made to the Department a few days later describes the events of March 2, 1984:

> ...During this second visit, Mr. A[redacted] showed CONOFF for the first time an agreement signed by Neal M. Sher, Director, Office of Special Investigations, Criminal Division, U.S. Department of Justice, and himself....
>
> In the presence of the Vice Consul and two witnesses, Mr. [redacted] stated that he was renouncing his U.S. citizenship because of the agreement between the U.S. Department of Justice and himself. CONOFF notes that paragraph seven of the agreement specifically requires that Mr. [redacted] 'formally renounce his U.S. citizenship before an appropriate U.S. official at a United States consulate or Embassy.' Post leaves it for Departmental determination whether in view of this agreement Mr. [redacted] renunciation should be considered voluntary.
>
> Each item of the Statement of Understanding was discussed in detail with Mr. [redacted] He confirmed that he had read and understood all the documents he

> was signing. He stated that he was aware that he would not be able to return to the United States and that he would become stateless upon his renunciation. He affirmed that he was aware of the consequences of renouncing, that he wanted to renounce and that he was renouncing of his own free will.
>
> He gave his reason for renouncing: 'Because I did not fully disclose the circumstances of my previous activities that would have affected my naturalization, I signed an agreement to avoid a hearing and possible deportation, and I voluntarily renounced U.S. citizenship.'...

As required by law, the consular officer who administered the oath of renunciation to A[redacted] executed a certificate of loss of nationality in A[redacted]'s name on March 2, 1984. 5/ Therein she certified that A[redacted] acquired United States nationality by virtue of naturalization; that he made a formal renunciation of his United States nationality on March 2, 1984; and thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

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

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.

The Department approved the certificate on October 2, 1984, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. [redacted] filed an appeal pro se on March 26, 1985.

II

The statute prescribes that a national of the United States shall lose his nationality by making a formal renunciation of his nationality before a consular officer of the United States in a foreign state in the form prescribed by the Secretary of State. 6/ There is no dispute that [redacted] renounced his United states nationality in the [redacted] and form prescribed by law and the Secretary of State. Nationality shall not be lost, however, unless the statutory expatriating act was performed voluntarily with the intention of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

In law it is presumed that if an American citizen performs one of the enumerated statutory expatriating acts, he does so voluntarily, but the presumption may be rebutted by the actor upon a showing by a preponderance of the evidence that the act was not voluntary. 7/

[redacted] case that his renunciation was involuntary rests on his contention that the agreement he entered into with OSI was coerced. At the time he entered the appeal he summed up his position as follows:

6/ Text supra, note 1.

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

> ...
>
> ...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.

> ...if my wife and I had not been physically ill and under tremendous emotional stress caused by the officials from the Office of Special Investigation, I certainly never would have signed the Agreement to surrender my citizenship and forego all rights to a hearing or an appeal. I was forced to yield to pressure and sign the Agreement against my true desre [sic] and will. 8/

Specifically, A[redacted] argues that his agreement with OSI should be invalidated on the following grounds:

> In 1983, the Office of Special Investigations of the Department of Justice began the proceedings against me and accused me of illegal entry into the U.S.A. and as a result demanded the surrender of my American citizenship. Here I wish to point out that the Office of Special Investigations did not take any notice of the fact, that in 1957 when applying for citizenship I fully disclosed all the details of my past, and was granted the American citizenship and given the Certificate of Naturalization No.8077921, Petition No.105271, issued on 24th February 1959 by the District Court in Newark, N.J. and that for more than 30 years I lived in America where I married an American citizen and I have a daughter born in America. Despite all that, the Office of Special Investigations obtained the inhuman sentence of separating me from my wife and daughter without the right to see them even in case of emergency (in case of death).
>
> Here I have to mention that the representatives of the Office of Special Investigations used every possible threat, like deportation to the Soviet Union, picketing my apartment, publicity in the press to compromise my family, etc. All these threats put us under such a stress that I developed a heart condition, and I and my wife, were on the verge of a nervous breakdown. Then the Office of Special

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8/ Notice of Appeal, July 8, 1985.

> Investigations, through my solicitor Mr. Olesnicki, demanded that I agree voluntarily to leave the U.S.A. and to surrender my American citizenship giving us a very short period of time to consider the proposition. In case we disagreed, the Office of Special Investigations threatened me with court proceedings and the deportation wherever they may choose, and that I may never see West Germany where my brother lives. To go to court I had no financial resources and being exhausted physically and mentally at the age of 79 years, I agreed to the forcible leave of the U.S.A.
>
> On the 5th of January 1984, I was called into the office of my solicitor, Mr. Olesnicki, where the terms of the agreement as fabricated by the Office of Special Investigations between me and the Department of Justice, were read to us. It took no more than 15 minutes despite the fact that my English is limited. I was surprised by the arrival of Mr. Neal M. Sher, the Director of the Office of Special Investigations, from Washington, whom I never met before and who demanded that I sign the proposed agreement. After so many threats and all my moral and physical experiences in order to save myself and my family from complete nervous break-down, I was at that moment ready to sign any sort of agreement. 9/

In challenging his agreement with OSI, [redacted] also defended his conduct during the war as Rayonbuergermeister of Stolpce against charges that he was guilty of war crimes.

> ...the conduct of these authorities [the OSI] is as reprehensible as the acts I am falsely supected [sic] of having committed. At no time have I ever been informed of any specific acts or deeds which I alleged to have committed in my capacity as Rayonburgermeister. This lack of notice of specific charges is an injustice itself.

9/ Id.

> It must be understood, however, that I did nothing more than hold title to the office of Rayonburgermeister, and that not by choice. I had absolutely no authority or power to speak or act. Our village was occupied by heavily armed troops, and there was absolutely no means to carry out poicies [sic] contrary to theirs. 10/

In his reply to the Department's brief, A[redacted] amplified his criticism of the way the agreement with OSI had been "extracted" from him:

> I took these steps because I was physically and emotionally exhausted and forced to do so as a result of the Justice Department's officials telling my wife that if I did not agree to their proposal, that 'I would never see West Germany' in the event the Justice Department succeeded in denaturalization proceedings, implying under those circumstances that I would not be deported to the country of my choice, but I could only conclude, to the Soviet Union. If they did not succeed, I was told that there were powerful groups who would make it their business to pursue me and my family and to make things very unpleasant for us. (The Board is of course, aware of recent incidents of terrorism and bombing). Thus, to avoid the prospect of such threats being carried out against me I was forced to agree to the proposal of the Justice Department.
>
> ...
>
> I want it to be completely clear that after the Department of Justice proposed an agreement, I was under severe and continuous pressure to agree to their accusations or face an expensive, well beyond my means, law suit and even if I had won I would face the persecution of nameless powerful groups as the Department of Justice official warned my wife in the presence of my attorney.

10/ Id.

> I also would like to state that first version of the agreement and later ones only slightly modified were presented to be executed the way such things are done in totalitarian countries, where one is given fabricated confessions and then told to sign or else. The final version I saw for the first time on about January 5, **1984** when my attorney asked me to see him at 5:00 o'clock in his office. He said, I could come alone and did not need to bring my wife. When I and my wife arrived he informed us that Mr. Sher the Director of the Office of Special Investigations was there to take the signed agreement. Then he gave me the five page typewritten document, which I had not seen before, and left us in a room to read the agreement. My understanding of English is extremely limited, and my wife and I were exhausted by then and in a state of shock, I felt I was completely without choice and faced with dire consequences if I did not sign the agreement. I therefore did the only thing I thought available to me, and signed the agreement without any clear understanding of what was stated in the document. I was then given a deadline of February **28**, 1984 to leave the United States notwithstanding earlier assurances that I could have six months to put my affairs in order nor our pleading for an extension of the earlier promised six months. 11/

Following review of the written submissions, the Board found that it could not, on the basis of the material before it, fully comprehend the basis of [redacted] claims of coercion or OSI's assertion that [redacted] had engaged in activities other than those revealed by him at the time of his naturalization and presumably found at that time to present no bar to naturalization as a United States citizen. This being the case, the Board asked the Department of State to obtain the views of OSI

11/ Letter to the Chairman, Board of Appellate Review, December 31, **1985.**

on A[redacted]'s claims of coercion. The Board also requested that it have an opportunity to review the citizenship file on A[redacted] that INS developed when he applied for naturalization.

By letter dated May 6, 1986 to the Director, Office of Citizenship Appeals and Legal Assistance, the Department of State, the Director, OSI, transmitted [redacted] citizenship file and commented as follows on A[redacted]'s allegations:

> ...I appreciate this opportunity to respond to and unequivocally deny Mr. A[redacted]'s assertion, that his formal renunciation of United States citizenship was not voluntary due to the purported pressure and coercion exerted on him by Office of Special Investigations' (OSI) representatives.
>
> I assume you are familiar with the history of this case and the detailed discussions which took place between the Departments of Justice and State prior to the resolution of that case. As you know, the Department of State asked the Office of Legal Counsel of the Department of Justice to render an opinion, pursuant to 28 U.S.C. sec. 512 and 8 U.S.C. sec. 1103(a), on whether A[redacted]'s renunciation of United States citizenship was voluntary. On September 27, 1984, the Office of Legal Counsel rendered a 25-page opinion to the effect that the renunciation was voluntary. A copy of that opinion is attached. I would note in this regard that under these sections of the immigration law the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.' The purpose of the State Department's request for an opinion under this section was to obtain such a controlling determination. In our view, that ruling should resolve any questions regarding the validity of the renunciation. Nevertheless, we will address the baseless claims raised once again by [redacted]
>
> It would appear, on the basis of A[redacted]'s recent submission (of which I have received only excepts), that [redacted] has once again claimed that he was coerced into signing the renunciation agreement.

[redacted] first allegation in support of his claim is that OSI representatives told him that if he did not renounce his citizenship, 'there are powerful groups who would make it their business to pursue [him] and [his] family and to make things very unpleasant for [them]. (The Board is, of course, aware of recent incidents of terrorism and bombing). Thus, to avoid the prospect of such threats being carried out against him, I was forced to agree to the [renunciation] proposal of the Justice Department.' This allegation of blackmail by OSI is utter nonsense. OSI contacts with Mr. [redacted] and his family were conducted through a lawyer selected by Mr. [redacted] At no time was that lawyer, Mr. [redacted] or his family threatened in any way by OSI representatives. Moreover, the bombings of OSI subjects (Soobzokov and Sprogis) occurred after the execution of [redacted] January 5, 1984 agreement with the Department of Justice, and thus could not have served as a basis for coercing [redacted] ratification of that agreement.

As to the other allegations made by Mr. [redacted] which appear on page four of his reply, I will simply reiterate what was contained in my May 15, 1984 letter to Ms. [redacted] [then Acting Director, Office of Citizens Consular Services, Department of State] (copy enclosed). [redacted] entered into the agreement only after full consultation and discussions with his freely chosen counsel. He signed the agreement in my presence after his lawyer had asked him if he understood the terms and consequences of that agreement and after he signed it freely and voluntarily. Moreover, [redacted] allegation that he did not understand English at the time of his execution of that agreement is meritless. After all, [redacted] had by that time resided in the United States for over 30 years and had become a United States citizen. It was clear to me that at the time of his renunciation [redacted] understood precisely his course of [redacted]n -- a course which he voluntarily chose. I would again

> emphasize that all negotiations regarding this agreement were conducted through Mr. A[redacted] English-speaking attorney who also signed the agreement in my presence.
>
> In sum, A[redacted] current appeal of his renunciation is bereft of factual support and should be rejected by the Board of Appellate Review. A[redacted]'s renunciation has been considered time and again and should be put to rest. Nothing has been advanced to show that this renunciation was a product of official intimidation or other misconduct.

Thereafter the Board asked the Department to obtain from OSI certain additional information, specifically, the evidence OSI had developed between 1980 and 1983 purporting to support its position that A[redacted] was vulnerable to denaturalization and deportation proceedings.

On September 8, 1986 OSI made available to the Board transcripts of the interviews it conducted with A[redacted] in March 1982 and a number of associated documents. In transmitting this material the Deputy Director, OSI, wrote to the Director, Office of Citizenship Appeals and Legal Assistance, Department of State, as follows:

> As you know, the State Department some time ago asked the Justice Department's Office of Legal Counsel (OLC) for an opinion as to the voluntariness of J[redacted] A[redacted]'s renunciation of citizenship. After careful study, OLC concluded that A[redacted]'s actions, including his renunciation, were voluntary; a copy of the OLC opinion is attached. In our view, the OLC's opinion should have finally resolved this matter.
>
> Notwithstanding this view, we are submitting the enclosed materials to assist the Board of Appellate Review in carrying out its functions under 22 C.F.R. A review of the transcript of interviews of Mr. A[redacted] will reveal that he was not at any time coerced or threatened, as he now apparently claims. He also was vigorously represented by his own attorney thoughout the interviews. These interviews, along with the other documentary evidence, established that A[redacted], as a Rayon Burgermeister, collaborated with the Nazis and assisted

in the persecution of innocent civilians during the war. He also willfully misrepresented his wartime employment to State Department officials when he applied for his visa to enter the United States. Under very similar facts, a collaborationist mayor in Lithuania was ordered denaturalized and deported. United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984); Matter of Palciauskas, No. A7 149 053 (Immigration Court, Tampa, Fla., July 9, 1986), appeal to BIA pending.

We must emphasize that although we are providing the Board with investigative materials relating to violations of 8 U.S.C. secs. 1451, 1251(a)(19), we believe the interpretation of those provisions of the Immigration and Nationality Act are beyond the purview of the Board's jurisdiction. We also point out that the documents being provided include internal Justice Department investigative materials which have not been made public; in our view, release of this material would constitute breaches of the Freedom of Information Act and the Privacy Act. We accordingly ask that this material be utilized by the Board solely for its own internal purposes and not be released outside the Department without first consulting with this office.

III

The Board believes two observations are in order at the outset.

First, the Board has never asserted or intimated that it would be proper or within its jurisdiction for it to evaluate the evidence OSI collected which OSI contended would support initiation of denaturalization and deportation proceedings against [redacted]. The Board was persistent in asking for the documentation of the Justice Department and **OSI** in [redacted] case simply to get the fullest possible picture of the p[redacted]y which **OSI** confronted [redacted] with its conclusions. Federal regulations authorize the Board to take such action as it considers necessary and proper to the disposition of cases appealed to it. 22 CFR 7.2(a). The Board may require supplemental statements on issues presented to it. 22 CFR 7.6(b). The Board was not prepared to

accept the conclusions of either the Department of State or OSI that A [redacted] voluntarily renounced his citizenship without probing as deeply as seemed fitting and proper.

Second, the OSI representatives presume rather too much when they assert that the opinion of the Office of Legal Counsel should dispose of the issue of whether [redacted] made a voluntary renunciation of his citizenship. That opinion, cited supra note 3, was prepared at the request of the Acting Legal Adviser of the Department of State. "You are concerned," the memorandum began:

> ...that the formal renunciations of citizenship made by [redacted] and R.... may not meet the constitutional requirement that expatriation be a voluntary act, 3/ because of the direct and substantial involvement of the United States Government in encouraging and facilitating the renunciations. Accordingly, you have asked this Office to review the background of these cases and to advise you whether the renunciations would be considered voluntary under applicable law. [Footnote omitted.]

The Office of Legal Counsel did not claim that the opinion should be considered dispositive of the issue of voluntariness. Note how circumspectly the opinion is presented:

> We believe it would be inappropriate, and indeed impossible, for this Office to provide you with a definitive answer as to whether these particular renunciations were in fact voluntary. We obviously cannot undertake any independent investigation of the underlying facts, and are not competent to resolve any factual disputes or contradictions that could conceivably arise in the course of such an investigation. Accordingly, our advice here focuses on the underlying legal standards and precedents that we believe should be applied to determine whether these renunciations were voluntary, and how we believe a court would apply those standards, based on the facts presented to us.

Plainly the opinion of the Office of Legal Counsel was not intended to be a final statement by the administrative authorities of the law in [redacted] case. Nor, in our view, does it preclude the Board from making an independent assessment of whether [redacted] performed the expatriative act voluntarily.

Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. 1103(a), does declare that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." The courts have not yet ruled definitively, however, on whether an opinion of the Attorney General or his designee is binding on the Board of Appellate Review in proceedings arising from a determination of loss of nationality made by the Secretary of State pursuant to authority granted to him under section 103(a) of the same statute. In this respect the citizenship case of Claude Cartier is relevant. In In re Claude Cartier, decided August 7, 1972, the Board concluded that appellant's formal renunciation of United States nationality was involuntary. Accordingly, the Board reversed the Department's determination that he expatriated himself. The Department subsequently refused to issue Cartier a passport and the Immigration and Naturalization Service (INS) refused to return his certificate of naturalization. The matter was referred to the Attorney General who ruled that the Board's decision was wrong as a matter of law and that Cartier was not a United States citizen. His decision, the Attorney General said, was binding on all agencies of Government. Cartier sought a writ of mandamus to compel the Secretary of State to issue him a passport and INS to hand over his naturalization certificate. The district court ordered the two agencies to give Cartier the relief he sought. Cartier v. Secretary of State, et. al., 356 F.Supp. 460 (D.D.C. 1973). The Court said: "The Attorney General has never before attempted an appellate review over a quasi-judicial decision of the Board of Appellate Review, acting pursuant to its authority, ...and this Court finds no such power in the statute." Upon appeal by the Government, the Court of Appeals did not reach the issue of whether an opinion of the Attorney General in nationality proceedings is binding on all agencies of government. It reversed the decision of the district court on procedural grounds and remanded the cause without prejudice to renewal of the action as one for a declaratory judgment rather than mandamus. Cartier v. Secretary of State, 506 F.2d 191 (D.C. Cir. 1974); cert. denied. 421 U.S. 947 (1975). Cartier died shortly thereafter.

IV

A voluntary act is an act that arises from one's free choice or full consent unimpelled by the influence of another. Nakashima V. Acheson. 98 F.Supp. 11, 12 (S.D. Cal. 1951). To determine whether [redacted] formal renunciation was made as a matter of free choice, the Board, as trier of fact, must "examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion of others." Id. And, it must be borne in mind, the means of exercising duress is not confined to force or the threat of force, but may take more subtle forms,

such as threat of loss of a right or privilege or material benefit. Inouye v. Clark, 75 F.Supp. 1000, 1004 (S.D. Cal. 1947).

In law, A[redacted] bears the burden of proving his allegations that representatives of OSI "made every possible threat" to induce him to sign the agreement in which he undertook to renounce his United States citizenship. Briefly stated, these allegations are in the main that OSI threatened to deport him to the USSR; to picket his apartment; stimulate adverse publicity in the press; to make things unpleasant for him. From the record, it appears that A[redacted] did not know of OSI's interest in him until early in 1982 when OSI requested that he appear before one of its attorneys to be questioned about his wartime activities. As noted above, he was interviewed several times in March 1982. Thereafter OSI continued its investigation without, evidently, having further contact with A[redacted]. When its investigation was completed, presumably around the end of 1983, OSI communicated with the attorney who had represented A[redacted] at the March 1982 interrogations. A choice was then posed to A[redacted] through his counsel: surrender your United States citizenship in return for certain tangible benefits, or face denaturalization and deportation proceedings. A brief interval (possibly one week) apparently ensued before A[redacted] signed the agreement on January 5, 1984. If OSI exerted pressure on him to sign the agreement it would most likely have been between late 1983 and January 5, 1984. We have carefully reviewed the record presented to us and find in it no evidence of coercion by OSI on A[redacted]. Indeed, there is no evidence that OSI had any communication with A[redacted] from late 1983 to January 5, 1984 except through his attorney.

The records submitted to the Board by both the Department of State and OSI make it clear that A[redacted] was accorded due process of law from the time OSI requested that he submit to being interviewed in 1982 through the signing of the January 5, 1984 agreement. A[redacted] made clear in 1982 that he submitted voluntarily to questioning by an attorney of the OSI. Furthermore, at each of the March 1982 sessions he was represented by counsel; had notice of the charges OSI leveled against him; and was afforded an opportunity to controvert or acquiesce in those charges.

It is not clear from the record precisely how the agreement signed on January 5, 1984 evolved. A[redacted] implies that there were several drafts of the agreement and that he was confronted with the final draft on January 5, 1984 which he had little time to study. He did not, he has stated, have "any clear understanding of what was stated in the document."

From the record it does not appear that A[redacted] was confronted on January 5, 1984 for the first time with the alternative of

agreeing to surrender his United States citizenship or face denaturalization and deportation proceedings. It seems clear that after OSI communicated with his attorney late in **1983** the latter reviewed the position with [redacted] and explained to him the options he had. So, prior to [redacted] **5, 1984** [redacted] undoubtedly had opportunity to consider, with benefit of professional legal assistance, the pros and cons of agreeing to surrender his citizenship.

[redacted] has not expressly contended that the involvement of the United States Government in influencing and facilitating his agreement to surrender his citizenship constituted duress. We do not think that in the absence of evidence of coercion OSI's role per se constitutes duress and we are in general agreement with the position of the Office of Legal Counsel, Department of Justice, in its memorandum to the Acting Legal Adviser, Department of State, dated September 27, **1984** on the issue. On this issue the memorandum summarized its conclusion as follows:

> ...For the reasons set forth below, we believe that a court would not conclude that a formal renunciation of citizenship is involuntary solely because it was undertaken pursuant to such an agreement. We do not believe that the involvement of United States prosecutors in influencing and facilitating such decisions necessarily amounts to duress or coercion that would vitiate the voluntariness of the choice faced by those individuals [[redacted] and another similarly situated] -- i.e., whether to renounce citizenship or to face the denaturalization and deportation proceedings. In reaching this conclusion, we find highly relevant judicial consideration in the criminal context of similar voluntariness questions raised by plea bargaining. The analogy is not exact, but we believe it is apt, and the reasoning used by the courts in evaluating the voluntariness of plea bargains is quite similar to that used in determining the voluntariness of expatriating acts under **8** U.S.C. sec. **1481.**

Without passing judgment (which it is beyond our province to do) on whether the evidence OSI developed would have been sufficient to result in his denaturalization and deportation, we note that it was [redacted] who placed himself in the position of having, in the end, an election forced upon him. Given the mission with which OSI is charged by law and the circum-

stances of A[redacted]'s case, he was almost inevitably a fair subject of investigation. When OSI completed its investigation it confronted A[redacted] with certain charges which, it appears, were disclosed to him during the interrogations of March 1982. OSI proposed a way for him to avoid the potentially serious consequences of judicial proceedings. True, the choice presented to him involved either surrendering his constitutional right to remain a citizen or defending an onerous denaturalization action. But every United States citizen has a "natural and inherent right" to relinquish citizenship, the exercise of which may not be denied. 13/ Avdzej may have faced an unenviable choice, but clearly in the circumstances it was a fair choice - an opportunity to elect between two courses of action on the basis of his own estimate of the relative advantage or disadvantage to him of each alternative. The difficulty of the choice, the fact that choosing either course presented an agonizing dilemma, does not per se make the choice involuntary. 14

13/ Act of July 27, 1868, Ch. 249, 15 Stat. 223.

14/ See Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (n. 10) (5th Cir. 1971):

> 10. This conclusion [that appellant's renunciation was voluntary] is even more manifest in light of analogous decisions which have considered claims of duress by aliens barred from citizenship because they sought exemption from military service. See 50 U.S.C.A. App. Sec. 454(a); 8 U.S.C.A. Sec. 1426. Pressures beyond moral considerations, such as fear of retaliation or financial burden, have been rejected as sufficient grounds upon which to posit duress. E.g., Prieto v. United States, 5 Cir. 1961, 289 F.2d 12; Jubran v. United States, 5 Cir. 1958, 255 F.2d 81: Petition of Skender, 2 Cir. 1957, 248 F.2d 92, Cert. denied, 355 U.S. 931, 78 S.Ct. 411, 2 L.Ed.2d 413; Savoretti v. Small, 5 Cir. 1957, 244 F.2d 292. In each case
>
> > it was concluded that the alien had a free choice, that he chose to forego military service and must endure the consequences, and that there was no coercion in contemplation of law. The mere difficulty of this choice is not deemed to constitute duress. If the alien made a free and deliberate choice to accept benefits, he will be bound by his election.
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> Gordon & Rosenfeld, Immigration Law and Procedure, Sec. 2.49d. at 2-239 (1970).

Furthermore, there was no legal bar to [redacted] contesting OSI's charges in court, although he states that he was deterred from doing *so* by fear of the enormous expense entailed. We do not know whether he could have obtained pro bono counsel, however, for he has not alleged that he tried to retain such representation but was unsuccessful. Contesting the charges might also have entailed incurring the opprobrium of the community in which [redacted] lived. However, if as he contends, he was *so* sure he was [redacted] might he not have sought to gain approbation through judicial vindication? While it would be impermissible for us to infer guilt from his choosing not to go into court, we merely note that as a matter of law he could have stood his ground but chose not to do *so.* We find no evidence that [redacted] action represents anything other than exercise of a free and intelligent choice. see Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971): Opportunity to make a personal choice is the essence of voluntariness. See also Prieto v. United States, 289 F.2d 12, 14 (5th Cir. 1961):

> ...The appellant was not misled in any respect. He was fully aware of the consequences of taking the exemption. He made an election and the making of it was deliberate and after seeking advice. He made his voluntary election against his better judgment but having made it and having had the benefit of it he must be held to the result that Congress has imposed. Jubran v. United States, 5 Cir., 1958, 255 F.2d 81; Kahook v. Johnson, 5 Cir. 1960, 273 F.2d 413.

Upon consideration of the foregoing, we conclude that [redacted] has not rebutted the statutory presumption that he renounced his United States nationality of his free will, unimpelled by the invluence of another.

V

Finally, we must determine whether [redacted] formal renunciation of his United States nationality was accompanied by an intention to relinquish that nationality, for the Supreme Court has held that even if the citizen fails to prove that he performed a statutory expatriating act involuntarily, the question remains whether on all the evidence the Government has satisfied its burden of proving by a preponderance of the evidence that the expatriative act was performed with the necessary intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. 253, 270 (1980). A person's intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

Formal renunciation of United States citizenship in the manner mandated by law and the form prescribed by the Secretary of State is the most unequivocal of all statutory expatriating acts. "A voluntary oath of renunciation is a clear statement of desire to relinquish United States citizenship." Davis v. District Director, Immigration and Naturalization Service, 481 F.Supp. 1178, 1181 (D.D.C. 1979). Intent to abandon citizenship is inherent in the act. The words of the oath of renunciation literally proclaim A[redacted]'s specific intent:

> I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

Our sole inquiry therefore is whether A[redacted] knowingly and understandingly executed the oath of renunciation. The record leaves no doubt that he did so. He signed a statement on the day he renounced in which he acknowledged that the serious consequences of renunciation had been explained to him by a consular officer and that he fully understood them. Although 79 years old when he renounced his United States nationality, A[redacted] was unquestionably competent to realize what a momentous act he was performing. Nothing of record suggests he acted inadvertently or due to mistake of law or fact. In brief, appellant's voluntary forfeiture of his United States nationalit was accomplished in due and proper form with full consciousness of the gravity of the act.

The Department thus has sustained its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he formally renounced that nationality.

VI

Upon consideration of the foregoing, we conclude that appellant expatriated himself on March 2, 1984 by making a forma renunciation of his United States citizenship before a consular officer of the United States at Stuttgart, Germany, in the form prescribed by the Secretary of State. Accordingly, we affirm the Department's administrative determination of October 2, 1984 to that effect.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Mary E. Hoinkes, Member