DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] M[redacted] C[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, E[redacted] M[redacted] C[redacted], expatriated himself on May 10, 1974 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 set forth below the Board will reverse the Department's holding of C[redacted]'s expatriation.

I

C[redacted] was born on [redacted] and so acquired United States citizenship. He lived in the United States until 1968 when, according to his opening brief, he moved to Canada to accept a position as psychologist in the Hospital for the Industrially Disabled in Downsview, Ontario. He states that he married a Canadian citizen in 1970 and has two children. [redacted] applied for naturalization in Canada: the record does not disclose when he made application or why he did so. After making the following oath of allegiance he was granted a certificate of citizenship on May 10, 1974:

1/ Prior to November 14, 1986, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read as follows:

> 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, . . .

The Immigration and Nationality Act Amendments of 1986, PL 99-653, approved November 13, 1986, amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

> I _____ swear that I will be faithful and bear true allegiance to her Majesty, Queen Elizabeth 11, 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. 2/

It appears that C[redacted]'s naturalization came to the attention of United States authorities in the autumn of 1984 when he called at the Consulate ("the Consulate") in Calgary. According to the Consulate's records, C[redacted] "orginally applied for immigrant visa, 3rd floor but was informed to [sic] by visa section to apply for det.. [determination] of citiz." It also appears that C[redacted] completed a "preliminary questionnaire" to determine his citizenship status. There is, however, no copy of that document in the record presented to the Board. In October 1984, at the request of the Consulate, C[redacted] signed a form authorizing the Canadian citizenship authorities to search their records and provide confirmation of his naturalization to the U.S. authorities.

After receiving confirmation of C[redacted] naturalization, the Consulate wrote to him on November 1, 1984 to state that by obtaining naturalization in a foreign state he might have lost his United States citizenship. He was asked to complete a form titled "Information for Determining U.S. Citizenship" and to return it within 30 days. If he did not reply, the Consulate wrote, the Department might make a determination of his citizenship status on the basis of all available information. He was offered an opportunity to discuss his case with the consular officer. A postal receipt signed "E. M. C[redacted]" indicates that the Consulate General's letter reached his place of residence on or about November 9, 1984. He did not reply to the letter; nor did he complete the enclosed form.

2/ There is no copy in the record of the oath of allegiance to which C[redacted] subscribed. However, the Canadian citizenship authorities informed the Consulate General at Toronto in 1984 that he had sworn the oath of allegiance prescribed by the Canadian Citizenship Act of 1946, as amended, which is the one quoted above.

On February 5, 1985, an officer of the Consulate General executed a certificate of loss of nationality in Chilton's name. 3/ The officer certified that C[redacted] acquired United States citizenship at birth; that he obtained naturalization in Canada upon his own application; and concluded that he 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 stated that:

> Mr. C[redacted] failed to respond to the Information for Determining United States Citizenship form sent to him on November 1, 1984. Enclosed is the signed postal receipt received by the Canadian postal authorities.
>
> Mr. C[redacted] intent to relinquish United States citizenship is, established as a fair inference from his failure to offer any evidence to the contrary despite having been afforded ample opportunity to do so. Accordingly, the Consulate General requests that the Certificate of Loss of Nationality be approved.

The Department approved the certificate on February 20, 1985. Approval of the certificate constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. Shortly after [redacted] received a copy of the approved certificate of loss of his nationality he attempted to cross the United States-Canadian border, apparently intending to move back to the United States. The records of the consulate give the following account of that incident:

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

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

> 7-12-85: Mr. J[redacted] M[redacted], INS Inspector at Thousand Island bridge, New York, called to inquire about case. [redacted] was attempting to move back into the U.S. as an American citizen. He claimed that he was born there, etc. Inspector said that he was not going to allow him in, despite the car, trailer and all his personal belongings. He would be classified as a 212(a)(20)--a person attempting to enter the **U.S.** without a proper immigrant visa. Drt [Consul's initials.] C[redacted] Atty. Ms. S[redacted] of New York, later called up to ask that ye issue him a Certificate of Identity for purposes of entry into the U.S. in order to fight his case. I told her I would find out from the Dept. what this was all about (I was originally confusing this with the Card of Identity & Registration). See 8 FAM Exhibit 277.6b, Form FS343a. This could be issued. 4/

C[redacted] entered the appeal through counsel on December 20, 198

II

The statute provides that a national-of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state upon his own application with the intention of relinquishing United States nationality. 5/

There is no dispute that appellant obtained naturalization in Canada upon his own application and thus brought himself within the purview of the Act. Furthermore, he concedes that he acted voluntarily. The single issue for decision therefore is whether appellant's naturalization was accompanied by an intent to surrender his United States citizenship.

4/ C[redacted]'s attorney later stated (memorandum of January 27, 1987) that:

> On July 12, 1985 I was told by the U.S. Consul in Toronto that under no circumstances would Mr. C[redacted] be issued a Certificate of Identity. Neither I nor Mr. [redacted] were ever again contacted after the 'confusion' was cleared up to inform us that such a Certificate could be issued.

5/ Section 349(a)(1) of the Immigration and Nationality Act. Text supra, note 1.

The statute 6/ places the burden on the Government to prove an intent to relinquish citizenship; this it must do by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252 (1980). Intent may be expressed in words or be found as a fair inference from proven conduct. Id. at 260. The intent the Government must prove is the party's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 298 (7th Cir. 1981).

The only evidence of record of [redacted] intent contemporaneous with his naturalization is the fact that he obtained Canadian naturalization and swore a concomitant oath of allegiance. Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 456 U.S. 129, 139 (1958) (Black, J. concurring.) Similarly, making an oath of allegiance to a foreign sovereign or state while providing substantial evidence of intent to relinquish citizenship, alone is insufficient to prove such intent. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). An oath of allegiance that contains only an express affirmation of loyalty to the country whbse citizenship is being sought leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV80-4150 (memorandum opinion, C.D. Cal 1980) at 5.

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. Since the direct evidence in this case is meager and per se insufficient to support a finding of intent to relinquish citizenship, we must examine appellant's conduct to determine whether, as the Department contends, it manifests a renunciatory intent.

The Department argues that appellant manifested an intent to relinquish his United States citizenship by obtaining naturalization in a foreign state, which, as noted above, may evidence an intent to abandon citizenship. Furthermore, the Department submits that:

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

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....

> ...since his naturalization Appellant has never given any indication other than that he intended to divest himself of U.S. citizenship. He has never documented himself with a U.S. passport, never filed U.S. income tax returns, never voted in U.S. elections, never registered his children as U.S. citizens. He has acted in all things as a Canadian citizen. In fact, until this recent appeal appellant never indicated anything other than his exclusive allegiance to Canada.
>
> In his recent brief Appellant offers no explanation for his actions in 1974 or his inaction in 1984, but rather has announced that the Department has not a "scintilla" of evidence to make out a case of expatriation. On the contrary, Appellant's naturalization, his acts demonstrating sole allegiance to Canada, and his purposeful failure to respond to any Departmental queries provides that evidence. Appellant has attempted to avoid the consequences of his act by refusing to complete the questionnaire and thus provide any additional evidence of his intent. But the Department maintains that despite Appellant's attempts to hide this additional evidence of intent, the evidence we have provided is enough to demonstrate Appellant's relinquishment of United States citizenship and his attachment to Canadian citizenship. If the Board does not agree based on the evidence supplied, the Department would hope that the Board would require Appellant to complete the questionnaire "Information for Determining U.S. Citizenship" as he was requested to do in 1984.

On December 23, 1986 when the Department submitted to the Boa the passport and nationality card that the Consulate had maintain on [redacted] it commented as follows about [redacted] attempt to re-enter the United States.

> The Department maintains that Mr. [redacted] has been less than forthcoming in his recent submissions to the Board. His actions from 1974 to 1985 are clearly consistent with the acts of one who does not believe he is a U.S. citizen. (His attempt to enter the U.S. with the knowledge that he had been issued a CLN was not an act of one who believes he is a U.S. citizen. Mr. [redacted] had already been told he

> was not a U.S. citizen at that point and his attempt to enter the United States was in knowing violation of U.S. immigration laws.) [Emphasis in original.]

We begin our inquiry into the issue of [redacted] intent by examining the Consulate's disposition of his case. [redacted]y inferring that [redacted] intended to relinquish United States nationality from only two facts - his naturalization and subsequent failure to respond to the Consulate's request that he present evidence in his own behalf - the Consulate was, for all practical purposes, presuming that [redacted] had waived his constitutional right to remain a United [redacted]s citizen.

It is settled that a citizen may waive citizenship or other constitutional rights, but waiver must conform to well-established principles. See Johnson v. Zerbst, **304** U.S. **458 (1938):**

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of constitutional rights 12/ and that we 'do not presume acquiescence in the loss of fundamental rights,' 13/ A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused.
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> 12/ Aetna Ins. Co. v. Kennedy, **301** U.S. **389,** Hodges v. Easton, **106** U.S. **408, 412.**
>
> **13/** Ohio Bell Telephone Co, v. Public Utilities Comm'n. **301** U.S. **292, 307.**

304 U.S. at **464.**

Similarly, Barber v. Page, **390** U.S. **719 (1968);** and Brookhart v. Janis, **384** U.S. 1, **4** (1966). See also United States v. Matheson, 532 F.2d **809** (2nd Cir. **1976):**

> Afroyim's requirement of a subjective intent reflects the growing trend in our constitutional jurisprudence toward the principle that

> conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such. Surely the Fourteenth Amendment right of citizenship cannot be characterized as a trivial matter justifying departure from this rule. Accordingly, there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen.

533 F.2d at 814.

In our opinion, the Consulate made an unwarranted assumption that [redacted] silence constituted assent to loss of his nationality For one thing, there is no legal requirement that a citizen who has performed an expatriative act shall complete the form titled "Information for Determining U.S. Citizenship," that has been prescribed by internal guidelines of the Department of State. For another, why [redacted] did not respond to the Consulate's form letter is not *so* free of ambiguity that one could maintain with confidence that his inaction constituted a knowing and intelligent forfeiture of his constitutional right to remain a citizen, "[T]he rights of citizenship are not to be destroyed by ambiguity." Iuichi Inouye v. Clark, 75 F. Supp. 100, 1002-1003 (C.D. Cal. 1947), citing Perkins v. Elg, 307 U.S. 325 (1939).

With nothing less at stake than [redacted] constitutional right to remain a citizen unless or until h[redacted]arily relinquished it (Afroyim v. Rusk, 387 U.S. 253, 268 (1967)), the Consulate should, we submit, have made a further effort to elicit information from [redacted] before it proceeded. The Consulate's failure to do *so* is especially difficult to understand in light of the fact that in 1984 [redacted] completed what the Consulate called a "preliminary questionnaire" (not in the record) and expressly authorized the Consulate to ask the Canadian citizenship authorities to search their record to confirm his naturalization.

Having concluded that [redacted] refused to submit evidence on his own behalf, the consular officer executed a certificate of loss of nationality and submitted it to the Department with a recommendation that it be approved, The only evidence the consular officer submitted to the Department to support his recommendation was the statement of the Canadian authorities confirming [redacted] naturalization and a copy of the Consulate's unanswered letter to [redacted] with a signed postal form acknowledging its receipt, The consular officer thus could hardly be said to have developed the issue of [redacted] intent fully and in detail, as mandated by

Departmental guidance for consular officers. See Circular Airgram to All Diplomatic and Consular Posts, no. 1767, August 27, 1980, which reads in pertinent part as follows:

> With respect to the cases described in 8 FAM 224.20(b)(1), Procedures, the question of intent is very much in issue, and the facts will have to be brought out in considerable detail, These cases should continue to be processed as provided in 8 FAM 224.20(c)(1), Procedures.
>
> We have concluded, however, that a revision of 8 FAM 220 is warranted to streamline its provisions, to emphasize the importance of the citizen's intent,.,.

The certificate of loss of nationality reached the Department on February 20, 1985. It was approved the same day. There is nothing of record to indicate what factors (if any) the approving officer weighed in deciding to accept the recommendation of the consular officer that the certificate be approved. Instead of accepting the consular officer's recommendation on what manifestly was insufficient evidence of [redacted] intent, the Department should, in our judgment, have instructed the Consulate to make a further effort to communicate with [redacted] and so to lay a firmer foundation for making a determination of C[redacted]'s citizenship status. In our view, the Department lacked sufficient information in February 1986 to make a fair determination that [redacted] knowingly and intelligently forfeited his citizenship. To proceed without probing the issue of C[redacted]'s intent more meticulously clearly was error.

When [redacted] appealed, the Department defended its original decision by reiterating that intent to relinquish citizenship nay be inferred from C[redacted]'s failure to respond to the Consulate's letter. The Department also submits that certain additional considerations support the finding of loss of citizenship, to wit, C[redacted]'s non-exercise of a number of rights and duties of United States citizenship and his attempt in July 1985 to enter the United States with knowledge that the Department had determined he expatriated himself.

With respect to [redacted] non-response to the Consulate's letter, the Department's case is flawed for the reasons stated above. Its position is not bolstered by conclusory statements that have no demonstrable foundation in the record. True, as the Department points out, [redacted] has not explained why he obtained naturalization or why he did not respond to the Consulate's letter in 1984. However, the burden of proof rests upon the Department, not appellant, to prove the issue of intent. As we have said, he had no legal duty to reply to the Consulate's letter or to complete the form sent to

him, although he was ill-advised not to have done so. How can the Department be so sure that [redacted] attempted to avoid the consequences of his act by "[redacted] to respond to the Consulate's letters? What basis has the Department for making the assertion that [redacted] was "hiding" additional evidence of his intent? With respect to the Department's request that the Board "require" [redacted] to complete the citizenship questionnaire, we would simply point out that it is not the Board's responsibility to make the record in a loss of nationality proceeding.

The Department's insistence that [redacted] non-response to the Consulate's letter manifests an intent to relinquish citizenship not only is not supportable as a matter of law but also is inconsistent with the position the Department took in a case not dissimilar to [redacted] In re B.A.R., decided by the Board on October 29, 1982. There, appellant obtained naturalization in Canada in 1974, Not long afterwards his naturalization came to the attention of the Consulate at Toronto. In 1976 the Consulate executed a certificate of loss of nationality. The Department refused to approve it, however because appellant had not been given opportunity to explain the circumstances surrounding his naturalization. For two years the Consulate endeavored to locate appellant to offer him opportunity to furnish information to enable the Department to make a determination of his citizenship status. In 1978 counsel for appellant responded to one of the Consulate's letters by stating that his client had instructed him to state simply that he never intended to relinquish his citizenship. Despite repeated attempts by the Consulate to elicit specific information from appellant relative to his intent, appellant did not reply to the Consulate's letters. In 1981 the Department finally approved the certificate. On appeal, however, it requested that the Board remand the case for the purpose of vacating the certificate of loss of nationality, stating that:

> It is therefore clear from the sparse record that the Department is unable to meet its burden to prove that Mr. R. had an intent to relinquish his United States nationality when he became a naturalized Canadian citizen.

In granting the Department's request for remand, the Board deplored appellant's refusal to cooperate, but concluded that the record would not support a finding of intent to relinquish citizenship

> The record before the Board is very sketchy. There is no evidence of appellant's contemporaneous-or subsequent words or conduct which would show clearly intent (or lack of intent) to relinquish his native nationality by obtaining Canadian nationality. His averment through his Canadian counsel made four

> years after obtaining naturalization that he never had such an intent, stands uncontradicted.
>
> Upon review of the record before the Board and in light of Afroyim v. Rusk, 387 U.S. 253 (1967) and Vance v. Terrazas, 444 U.S. 252 (1980), we concur that the evidence of record fails to support a finding that appellant's expatriating act was accompanied by an intent to divest himself of his United States citizenship. We are, therefore, agreeable to the Department's request that the case be remanded for the purpose of vacating the certificate of loss of nationality issued in appellant's name.

The Board and the Department have consistently agreed that decisions of the Board are not precedential. So we cite In re B.A.R. simply to illustrate that in circumstances quite similar to those in [redacted] case, the Department, upon subsequent review, perceived that its agents in Toronto and Washington had erred in the way they handled the case, and later rectified the error. 7/

Possibly [redacted] did not, as the Department submits, do the things that it done would have shown an intent to preserve United States nationality despite naturalization in Canada. The record is so meager, however, that without putting too fine a point on the matter, one might note that no proof has been adduced that [redacted] did not do the things the Department alleges he did not do. would have been prudent to have divulged information, of course, and we can appreciate the Department's irritation over his unresponsiveness, but the burden lies on the Department to prove his intent, not on [redacted] to prove lack of intent. 8/

7/ See also In re S.J.N.B., decided June 18, 1982. There appellant repeatedly and categorically refused to submit information relative to her intent to the Embassy at London. Consequently, the record was very sketchy. The Department approved the certificate of loss of nationality but on appeal requested that the case be remanded because it could not prove intent. The Board granted the request.

8/ It is regretable that the "preliminary questionnaire" to determine citizenship [redacted] completed in June 1984 is not in the record. Possibly that form contained information that would have shed some light on his intent. We might also observe that it is not implausible that having completed one form, [redacted] would have seen no need to complete the one sent him in the fall of 1984.

Finally, the Department contends that [redacted] attempt to enter the United States in the summer of 1986 in violation of immigration laws is further evidence that he no longer considered himself a United States citizen and thus showed that he intended to forfeit United states citizenship in 1974 when he became a Canadian citizen. [redacted] attorney vehemently disagreed with the interpretation the Department placed on this incident:

> The Department's construction of Mr. C[redacted] attempt to resume residence in the U.S. as a 'Knowing violation of U.S. immigration laws' is an outrageous attempt to discredit the Appellant, as is the unsupported, baseless allegation that he has been 'less than forthcoming in his recent submissions to the Board.' Mr. C[redacted] made a legal request for entry into the Untited [sic] States and, in fact, one that indicates his interest over the issue of his citizenship. I trust that the Board will not give these irresponsible comments any consider-ation.

While we do not necessarily share counsel's characterization of the Department's interpretation of this attempt of C[redacted] to gain entry into the United States, we are unable to see that it is relevant to his intent twelve years earlier. The evidence is too sketchy to permit one to draw comfortable conclusions from the incident. For one thing, it may or may not have been a bona fide if ill-advised effort to position himself better to contest the Department's determination of loss of his citizenship.

Having carefully reviewed the sparse record presented to us, we are unable to conclude that [redacted] knowingly and intelligently waived his constitutional right to remain a United States citizen until or unless he voluntarily relinquished that citizenship. We are therefore of the view that the Department has not met its burden of proving by a preponderance of the evidence that [redacted] intended to relinquish his United States citizenship when he obtained naturalization in Canada upon his own application.

III

Upon consideration of the foregoing, we hereby reverse the Department's administrative determination holding that appellant expatriated himself.

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member