March 10, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This case is before the Board of Appellate Review on the appeal of J[redacted] C[redacted] from an administrative determination of the Department of State, dated January 27, 1987, that he expatriated himself on March 13, 1964 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon the application of a parent on September 15, 1959 while under the age of twenty-one and thereafter failing to establish a permanent residence in the United States prior to his twenty-fifth birthday. 1/

1/ In 1964, 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, 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 the 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 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: And provided further, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a

After pleadings had been completed, the Department requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality. The Board grants the request.

I

Appellant became a United States citizen by birth at [redacted]. He lived in the United States until **1946** and later in Europe. In **1953** he moved with his family to Canada.

Appellant entered college in Vermont in **1956.** At age **18,** he registered for United States Selective Service with a local board in Vermont, and later was classified l-A. On September **15, 1959,** aged **20** years and **6** months, appellant obtained naturalization in Canada under section 10(5) of the Canadian Citizenship Act of **1946,** as amended. Section 10(5) provided that the competent minister might grant a certificate of Canadian citizenship to a minor child of a person to whom a certificate of citizenship had been granted under the Act. Appellant's parents apparently obtained naturalization in Canada before or at the time he did.

1/ Cont'd.

> parent or parents, may, within one year from the effective date of this Act, apply for a visa and admission to the United States as a non quota immigrant under the provisions of section 101(a)(27)(E);...

Pub. L. No. **99-653, 100** Stat. **3655** (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".

Pub. L. No. **99-653** also amended paragraph 1 of subsection (a) of section **349** by striking **out** ", 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" and all that followed through "section 101(a)(27)(E)" and inserting in lieu thereof "or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years".

Late in 1959 the U.S. Consulate General (Consulate) at Montreal, where appellant was then living, learned that appellant had acquired Canadian citizenship, and accordingly requested confirmation from the Canadian authorities. Appellant executed an affidavit of expatriated person at the Consulate on December 21, 1959 in which he declared that he voluntarily obtained naturalization in Canada "upon my own application." Shortly thereafter the Canadian authorities confirmed that appellant acquired Canadian citizenship. The Canadian statement merely noted, however, that appellant had been granted a certificate of Canadian citizenship; it did not cite the provision of law under which he acquired citizenship. The Consulate was thus led to assume that appellant had obtained naturalization upon his own application, as he had stated in the affidavit of expatriated person.

In January 1960, in compliance with section 358 of the Immigration and Nationality Act, a consular officer executed a certificate of loss of nationality in appellant's name. 2/ The officer certified that appellant acquired Unite6 States nationality by birth therein; that he acquired the nationality of Canada on September 15, 1959 by naturalization upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, provides that:

> 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.

In February 1961 the Department concluded that it was not the intent of Congress that a minor should have the capacity to expatriate himself by obtaining foreign naturalization upon his own application. Accordingly, the Department did not approve the certificate. The Department also informed the Vermont Selective Service Director that appellant remained a United States citizen. The Selective Service Director had inquired about appellant's citizenship status, having learned that he had become a Canadian citizen.

On March 13, 1964 appellant became 25 years of age. As far, as can be ascertained from the record, he had not established a permanent residence in the United States prior to that date.

Appellant was again classified l-A on November 17, 1965, He had been classified 2-S (deferred because of study) between 1962 and 1965.

On November 22, 1965 appellant wrote from Quebec to the local board in Vermont to state that: "I am no longer a citizen of the U.S.A., having been granted Canadian citizenship on 16 [sic] September 1959, Furthermore, I have voted in two Canadian elections; the general election of 1962...3/ and the general election of 8 November 1965...I believe this carries an automatic Loss of citizenship. 4/ I trust this ends the question of my citizenship status."

The local board responded to appellant on December 14, 1965. It had verified that "you lost your claim to United States citizenship in 1962 when you first voted in a Canadian election." He was informed, however, that he was still a selective service registrant "and you must give the information requested by this local board even though you have lost your United States citizenship status." He was told that his case would be taken up at

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3/ According to the Canadian Embassy, Washington, D.C., the "Canada Yearbook" records that a general election was held on June 18, **1962.**

4/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), provided that:

> 349(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall loss his nationality by --

an early meeting of the Board for reclassification to 4-C (alien who has departed from the United States). On January 3, 1966 appellant was classified 4-C. He married a Canadian citizen later that year.

On September 20, 1967 the Consulate at Montreal wrote to appellant to inform him that the certificate of loss of nationality it had sent to him by letter dated December 3, 1965, certifying that he expatriated himself under section 349(a)(5) of the Immigration and Nationality Act (voting in a foreign election), was invalid in view of the decision of the Supreme Court in Afroyim v. Rusk, 387 U.S. 253 (1967). (See Note 4, supra). Appellant alleges that neither he nor his parents received the certificate referred to by the Consulate. The Department stipulated that its "records of this certificate and possible associated documents have not been located.''

In its letter of September 20, 1967, the Consulate advised appellant that in order to determine whether he had retained his citizenship he should call at the Consulate. Pending a decision on his nationality status, he was cautioned not to perform any of the acts set forth in an enclosed circular listing statutory expatriating acts. There is no indication in the record whether appellant responded to the Consulate's letter, which it appears he received, or visited that office to have his citizenship status determined.

Correspondence exchanged between appellant and the local board in Vermont in the spring of 1969 indicates

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4/ Cont'd.

> **(5)** voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory: or....

On May 29, 1967, in Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court declared a similar provision of the Nationality Act of 1940 (section 401(e), 54 Stat. 1169) unconstitutional. The effect of Afroyim was to invalidate section 349(a)(5) of the Immigration and Nationality Act as well.

Pub. L. No. 95-432, 94 Stat. 1046 (1978) repealed section 349(a)(5) of the Immigration and Nationality Act.

that the board continued to carry appellant as an alien living outside the United States: obviously he had not informed the board that he had not lost his citizenship because he voted in Canada in **1962.**

Seventeen years later, in **1986,** appellant applied **for** a passport at the U.S. Consulate General in Calgary. In his application he acknowledged that he had obtained naturalization in Canada. This time, in confirming that appellant acquired Canadian citizenship, the Canadian authorities specified that he acquired citizenship under section 10(*5)* of the Canadian Citizenship Act, which provided that a minor might be naturalized upon the petition of a parent who had been naturalized in Canada. (Note 1, supra.) A consular officer executed a certificate of loss of nationality in appellant's name on July **2, 1986,** in compliance with law. (Note 3, supra.) Therein he certified that appellant acquired United States nationality by virtue of his birth therein; acquired the nationality of Canada while a minor by naturalization on September 15, **1959;** that he failed to establish a permanent residence in the United States by age twenty-five; and thereby expatriated himself on March 13, **1964** under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department approved the certificate on January 27, 1987, 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, *An* appeal was entered through appellant's counsel on January **21, 1988.**

II

After pleadings had been completed, the Board asked the Department and counsel for appellant to submit a memorandum of law on certain issues that the Board considered were raised by the rather unusual facts of the case. After summarizing the facts set forth above in this opinion, **the Board** noted that:

> On March 13, **1964** [redacted] became **25** years old. Prior to that date he had not entered the United States to establish a permanent residence, as he was required by law to do to preserve his citizenship. On March 13, **1964,** however, [redacted] was not a United States citizen, having previously lost his citizenship by voting in Canada, as the Department later decided.

> It would appear therefore that he could not have lost citizenship on March 13, 1964.
>
> On May 29, 1967 the Supreme Court decided Afroyim v. Rusk, holding unconstitutional the statutory provisions that prescribed expatriation by voting in a foreign political election. The effect of Afroyim was automatically to render null and void all prior determinations of loss of nationality made under the statutory provisions for loss of nationality by voting in a foreign election. Thus, [redacted] expatriation for voting in a Canadian political election in 1962 was a nullity.

The Board asked the parties to address the following issues:

> Beyond rendering null and void [redacted]'s loss of citizenship for voting in Canada in 1962, what legal consequences did Afroyim have for [redacted]'s citizenship status? Did Afroyim, for example, retroactively make him a citizen of the United States on May 13, 1964 and thus, nunc pro-tunc, result in his expatriation because he had not prior to that date established a permanent residence in the United States? Or should Afroyim be given less far-reaching effect? That is to say, while accepting that Afroyim rendered null and void [redacted] loss of citizenship for voting in Canada, might it be asserted that Afroyim did not and could not erase the fact that between 1962 and 1967 [redacted] was not a U.S. citizen, and, therefore, lacking that status on March 13, 1964 could not have expatriated himself by failing to enter the United States to establish

a permanent residence prior to his 25th birthday?

The Department responded to the Board's request by memorandum dated January 9, 1989. 5/ Having reviewed the facts in the case, the Department stated it concluded that it could not carry its burden of proof that appellant intended to relinquish his United States nationality when he failed to establish a permanent residence in the United States prior to his 25th birthday on March 13, 1964. 6/ The Department therefore requested that the Board remand the case so that it might vacate the certificate of loss of appellant's nationality (CLN).

The Department deemed the dispositive issue in the case to be "whether, as a matter of law, Mr. [redacted] can be shown to have formed an intent to relinquish U.S. citizenship when he remained outside the U.S. thus failing to establish a residence here before his 25th birthday." The Department noted that appellant was not a United States citizen on March 13, 1964, since he had expatriated himself in June 1962 by voting in a political election in Canada. The certificate of loss of nationality that was approved in appellant's name for voting in a foreign political election was rendered null and void, however, by the decision of the Supreme Court in Afroyim v. Rusk, supra. "[A]fter a CLN is cancelled for whatever reason," the Department stated,

> ..., to the extent possible, on equitable grounds, the cancellation is considered nunc pro tunc as well, so that, for example, children born between the performance of the expatriating act and the cancellation of a CLN are documented as U.S. citizens as of the date of birth

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5/ Counsel for appellant also submitted a memorandum responding to the Board's request. Given our disposition of the case, there is no need to summarize counsel's analysis of the issues, however.

6/ In loss of nationality proceedings, the government bears the burden of proving by a preponderance of the evidence that the citizen claimant intended to relinquish his United States nationality when he or she performed a statutory expatriating act. Section 349(c), Immigration and Nationality Act, 8 U.S.C. 1481(c); Vance v. Terrazas, 444 U.S. 252 (1980).

> if they otherwise qualify. See Rocha v. INS, 450 F.2d 946 (1st Cir. 1971).

While implying that the effect of Afroyim was to wipe the slate clean and restore appellant to United States citizenship during the period between his voting in a Canadian political election and May 31, 1969, the date of the Supreme Court's decision in Afroyim, the Department nevertheless believed,

> ...given the subjective nature of intent to relinquish 4/, that there must be a link between the expatriating act and relinquishment of citizenship; that proving a nexus between Mr. [redacted] manifest intent not to be considered a U.S. citizen and the fact of his failure to establish a residence in the U.S. would be extremely difficult. Although the Department considered him to be a U.S. citizen until well beyond his 25th birthday, he clearly, though incorrectly, believed himself not to be a U.S. citizen after his naturalization in 1959; he held the same belief after voting in a Canadian election in 1962, which belief was finally' confirmed in 1965.
>
> Because the link or relation between the expatriating act and the manifest intent is here tenuous, the Department believes the better view in this case would be to be guided by the individual's contemporaneous belief concerning his citizenship and to hold that no intent to relinquish could be formed during the period when he thought himself not a U.S. citizen.

4/ Richards v. Secretary, 752 F.2d 1413 (1985); U.S. v. Matheson, 532 F.2d 809 (2nd Cir. 1976).

Having thus re-analyzed the case, the Department decided that it could not in the end meet its burden of proof on the issue whether appellant intended to relinquish United States nationality on March 13, 1964

when he failed to comply with the statutory condition subsequent to retain his nationality.

III

The Board takes no position on the rationale on which the Department bases its request that the case be remanded. Nonetheless, since the Department now believes that the certificate of loss of appellant's nationality should be vacated, the Board considers it proper to accede to the Department's request, perceiving no overriding interest that would warrant denying the request. Accordingly, the case is hereby remanded for further proceedings. 7/

Alan G. James, Chairman

James, Chairman

Warren E. Hewitt, Member

7/ Section 7.2(a) of Title 22, Code of Federal Regulations, 22 CFR 7.2(a), provides in part that: "The Board shall take any action it considers necessary and appropriate to the disposition of cases appealed to it."

Dissenting Opinion

For the reasons set forth below, I must dissent from the decision of the majority to grant the January 9, 1989 request of the Department of State to remand this case to the Department in order that it may vacate the Certificate of Loss of Nationality it approved January 27, 1987.

I believe the Department's request is based on a misunderstanding of the burden of proof it bears in this case and a mistaken conclusion that it cannot meet that burden. I further believe that although the majority has stated that it takes no position on the rationale on which the Department bases its request, the Chairman's letter of December 1, 1988, to the Parties, the Department of State's reply thereto and the opinion of the majority might create the impression that the Board is of the opinion that on March 13, 1964, Mr. [redacted] was not a U.S. citizen and thus could not form an intent to relinquish U.S. citizenship. To the contrary, I find that the law, and the effect of Afroyim, properly understood, require the conclusion that prior to his twenty-fifth birthday in 1964, [redacted] was a U.S. citizen, but in a legal "limbo" with respect to maintenance of his U.S. citizenship, that his intent to divest himself of U.S. citizenship, while not required to be demonstrated by anything other than his failure to establish a residence in the U.S. prior to his twenty-fifth birthday, was manifest, and that by failing to return to the U.S. [redacted] confirmed the expatriating effect of his 1959 naturalization as a Canadian.

This case is unusual, in that the sequence of events, changes in the law and administrative oversights by the Department combine to raise questions regarding the effect of Section 349(a)(1) of the Immigration and Naturalization Act (the Act), as it read prior to amendment in 1986, not previously addressed by the Board. Primary among these is the precise status of an individual during the period between taking out citizenship in a foreign country as a minor and his twenty-fifth birthday. In addition, it is necessary to discuss Afroyim both in terms of [redacted] citizenship status in the 1962-1964 period and with respect to the effect of Afroyim's requirement of a finding of intent in cases falling under Section 349(a)(1). And finally, it should be determined whether the performance of an act initially determined to be expatriating but subsequently determined not to be may be considered indicative of a state of mind.

None of these issues has been addressed with any specificity by the majority, due primarily to the majority's agreement to remand the case for the purpose of vacating the CLN, as requested by the Department. While I can appreciate the majority's reluctance to deny the Department's request, given its primary responsibility for dealing with cases of loss of citizenship, I believe that to

acquiesce in the course of action the Department proposes would result in a serious miscarriage of justice, For that reason I would affirm the Department's approval of a Certificate of Loss of Nationality, but remand the case for amendment of the CLN to identify the date of the expatriating act as September 15, 1959, and the effective date of loss of nationality as March 13, 1964.

* * * *

The proviso contained in Section 349(a)(1) of the Act prior to its amendment in 1986, made it clear that the effect upon a minor of being naturalized in a foreign country as a consequence of a parent's naturalization, or upon the application of another, would not be finally determined until the individual's twenty-fifth birthday. Mr. [redacted] originally asserted, in his sworn Affidavit of Expatriated Person of December 21, 1959, that his taking out of Canadian citizenship in September of that same year, was upon his own application. On the face of things, therefore, it would have appeared logical to conclude that [redacted] did not fall within the proviso, and that since his application was his own, the effect of his expatriating act was immediate. The record clearly indicates that this is what Mr. [redacted] expected and desired in 1959. However, the Department at that time, in response to the Consulate's recommendation that a Certificate of Loss of Nationality be issued, informed the Consulate that the legislative intent of the statute was otherwise: that despite the clear statement of Section 349(a)(1) that its proviso applied only to those individuals whose foreign naturalization resulted from the naturalization or application of another, it was the intent of Congress "to continue to enforce the rule laid down by the courts in construing the Act of 1907 that a minor does not have the capacity to expatriate himself by obtaining naturalization in a foreign state of his own application." The Department did not, however, address the applicability of the proviso to a minor making his own application, or make any reference at that time to the effect of a failure by [redacted] to establish a residence in the United States prior to his twenty-fifth birthday.

With the expertise that hindsight frequently provides, it is easy to say that the Department should more precisely have described Mr. [redacted] status at the time it disapproved the CLN. Was the effect of the Department's interpretation of the law to put Mr. [redacted] on the same footing as a minor whose foreign naturalization was the result of a parent's naturalization or an application made by an agent? It may be assumed so. To conclude otherwise would have created the anomalous situation that a minor taking out foreign citizenship on his own application would be placed in a more favorable situation vis a vis his ability to retain U.S. citizenship

than a minor becoming a foreign citizen by virtue of the action of another. Surely that was not the position maintained by the Department. But apart from the lack of refinement of the Department's legal analysis, what is of more importance here is the position that was conveyed to Mr, [redacted] and the effect that it had on his subsequent behavior.

Mr. [redacted] was advised of his citizenship status by his draft board on February 21, 1961. The record does not reveal any contemporaneous correspondence with [redacted] by the Department. In its 1961 letter, the Clerk of the draft board informed [redacted] that U.S. authorities had determined that [redacted] had not lost his U.S. nationality "up to the present time" and that "apparently you will continue to have a duel(sic) citizenship status until such time as you lose one of the nationalities."

It is thus reasonable to assume that upon receiving this letter Mr. [redacted] understood that the United States still considered him to be a U.S. citizen (a status that he had made clear in his Affidavit of Expatriated Person he did not intend or want) but that this status was not necessarily permanent. It would also appear reasonable to assume that the Department had not entirely wiped Mr. [redacted] slate clean, but rather, as evidenced by its reference to the possibility of his future loss of U.S. citizenship, considered him to be on the same footing as a minor who became a foreign national by virtue of parental action. Thus, in 1961, Mr. [redacted] was contending to his draft board that he had made appl[redacted]n himself to become a Canadian and had no desire to be a U.S. citizen (a clear, albeit not self-fulfilling, expression of intent) and U.S. authorities were implying that he came within the proviso of Section 349(a)(1). The Department has subsequently confirmed that this was its position, for it was on this basis that the CLN here at issue was approved. Two other factors suggest that further consideration of any possible difference in the legal effect of a minor's own application and a naturalization upon application of another be put aside in this case. First, Mr. [redacted] now maintains that, his affidavit notwithstanding, he did not make application himself but acquired Canadian citizenship as a consequence of his parents' naturalization, and second, Canadian authorities have now indicated that they consider [redacted] naturalization to have derived from his parents' action.

That Mr. [redacted] had more than a passing familiarity with Section 349 may be inferred from his November 22, 1965, correspondence with his draft board. In that letter, which Mr. [redacted] expressed as dispositive of the question of his citizenship status, he advised the draft board that he was not completing the forms they had sent him because he was not a citizen of the United States, having been granted Canadian citizenship on 16(sic) September, 1959. He then

went on to state that, in addition, he had voted in two Canadian elections and believed that these acts carried an automatic loss of citizenship.

The reference to these two bases for loss of citizenship, cited by Mr. [redacted] after his twenty-fifth birthday, are highly informative as to Mr. [redacted] state of mind in 1959 and 1964, as well as 1965. First, Mr. [redacted] was sufficiently familiar with the applicable law to know that voting in a foreign election was at that time an expatriating act. Second, Mr. [redacted] referred to his taking out Canadian citizenship as a basis for loss of U.S. citizenship despite the fact that he had been expressly informed by U.S. authorities in 1961 that he had not lost his U.S. citizenship in 1959 as a result of becoming a Canadian. Unless he considered the expatriating effect of his 1959 act to be dependent upon non-establishment of a U.S. residency prior to his twenty-fifth birthday, why would he have stated in 1965 that he had lost his U.S. citizenship by virtue of becoming a Canadian in 1959? I believe it is reasonable to conclude that Mr. [redacted] believed that the proviso of Section 349(a)(1) was applicable to him, and that whereas he had not lost his U.S. citizenship in 1959, by 1965 he had, since he had not returned to the United States to establish a residence prior to his twenty-fifth birthday.

Mr. [redacted] of course, could not have anticipated that Afroyim would hold voting in a foreign election not to be an expatriating act. In 1965, upon learning of Mr. [redacted] Canadian voting record, the Department proceeded to issue a CLN, and then, in 1967, following Afroyim, to void that CLN. But at the same time, the Department importantly and wisely advised [redacted] and others affected by Afroyim not that they were U.S. citizens all over again, but that they should check with their local Consulate, since their U.S. citizenship status might have been affected. Mr. [redacted] did not do anything. Why not? If Mr. [redacted] had been anxious to establish himself as a U.S. citizen, i.e., if such was his intent in 1967, surely he would have taken steps to ensure that such was the case, having himself stated in 1965 that he was not a U.S. citizen by virtue of having taken out Canadian citizenship in 1959, an act clearly not affected by Afroyim. However, if Mr. [redacted] intended in 1967 to be considered solely a Canadian, no action would have been called for, since his bases for exclusive Canadian citizenship were twofold, and only one had been undercut. It is difficult, if not impossible, to imagine that if Mr. [redacted] had had any desire or intention to regularize himself as a United States citizen he would not have heeded the Department's advice.

The legal effect on [redacted] of Afroyim's holding that the statutory provision making voting in a foreign election an expatriating act was unconstitutional was to establish the status quo ante 1962.

[redacted] was in the legal "limbo" created by the proviso of Section 349(a)(1). While he was still a U.S. citizen, the final effect of his naturalization in 1959 was yet to be determined. What did [redacted] believe his status to be? While the record is by no means voluminous, the correspondence contained therein is surprisingly informative with respect to [redacted] state of mind. [redacted] clearly thought that he had divested himself of his U.S. citizenship by voting, but based on what he stated in 1965, he also thought that he could, and would, "doubly" divest himself of U.S. citizenship. In the 1962-1964 period he must have thought he was in the "limbo" status described above, or else he would not have described himself in 1965 as having lost his U.S. citizenship both by voting and as a result of his 1959 naturalization.

In its request for remand, the Department suggests that in order to support a finding of loss of nationality it must establish Mr. [redacted] intent in 1964 to relinquish U.S. citizenship. I believe that this is not the case, but that if it were, Mr. [redacted] intention in 1964 to abandon any possible claim to U.S. citizenship was manifest.

The effect of the proviso of Section 349(a)(1), prior to the 1986 amendments, was to specify a means by which the intention of a minor might be established. Section 349(a)(1) did not make failure to establish a residence in the U.S. by the age of twenty-five an expatriating act. Rather, it stated that a person would lose his U.S. nationality as a result of naturalization in a foreign country (putting aside for the moment the question of upon whose application it was made) unless such a person, being a minor, failed to return to the U.S. to establish a residence prior to his twenty-fifth birthday. The expatriating act was still the naturalization, if accompanied by an intention to relinquish U.S. citizenship. But the intent of a minor to give up his U.S. citizenship was not, the Act provided, dependent upon his state of mind at the time of foreign naturalization. Rather, the minor was given, by law, a deadline by which he must demonstrate his intent, in accordance with a precisely defined standard. Intent to abandon U.S. citizenship was not to be established on the basis of a body of evidence, but rather to be determined by only one thing - failure to return to the United States to establish a residence prior to the age of twenty-five. Afroyim, decided after relevant actions of Mr. [redacted] stands, inter alia, for the principle that no loss of U.S. citizenship can be found absent a showing of intent to abandon U.S. citizenship at the time of the expatriating act. The Act as amended in 1986 requires that intent be determined in all cases as of the time of the expatriating act. But the law applicable to [redacted] was different, and it is in light of the law applicable at the time of his actions that the effect of those actions must be determined. The law as amended in 1986 does not make a minor's action (minority

therein being established as age 18) in taking out foreign nationality, by whatever means, potentially expatriating. But the law, pre-1986, did. Afroyim's requirement to demonstrate intent, enunciated in a context that did not involve the act of a minor, cannot be applied to [redacted] so as to negate statutory protections specifically accorded him as a minor. For example, suppose [redacted] had returned to the United States before turning twenty-five. Could Afroyim be used to permit the Department to strip him of his citizenship on the basis of evidence of intent to abandon U.S. citizenship before his twenty-fifth birthday, despite the fact that he returned to the U.S.? No. The statute was clear. If the minor returned to the United States to establish a residence prior to his twenty-fifth birthday, no previous indicia of intent to relinquish U.S. citizenship could be used to support a finding of loss of U.S. nationality. The statute established a standard, a single standard, by which to establish intent, and thereby determine loss or retention of U.S. citizenship.

[redacted] was aware of this, as evidenced by his assertion in 1965, after his 25th birthday had come and gone, of his loss of U.S. nationality as a result of his taking out Canadian citizenship in 1959. And his intent in 1965 to settle the issue once and for all was clear from his closing remark "I trust this ends the question of my citizenship status." The end he desired was the agreement of U.S. authorities that for two reasons he was no longer a United States citizen, Two months later, [redacted] was informed that U.S. authorities agreed with him insofar as his having voted in a foreign election. By letter of December 14, 1965, [redacted] draft board "verified" that indeed he had lost his claim to United States citizenship in 1962 when he first voted in a Canadian election. However, no mention was made of his 1959 naturalization.

By memorandum of January 9, 1989, the Department responded to Chairman James' December 1, 1988, solicitation of additional legal analysis of the effect of Afroyim. The conclusion of the Department's memorandum contains a request to remand the case to the Department in order that it may vacate the CLN. This request appears to be based on the Department's conclusion that [redacted] having voted in Canada and thus lost his U.S. citizenship, could not form an intent to relinquish U.S. citizenship in 1964. This approach overlooks the important fact that [redacted] in 1965, thought that his loss of U.S. citizenship turned primarily on his having taken out Canadian citizenship in 1959. His indication that he had voted in Canadian elections was an added flourish. This approach also overlooks the fact that the requirement to establish intent enunciated in Afroyim cannot be "piggy-backed" onto the standard for determining intent established by Section 349(a)(1) with respect to minors.

In its January 9, 1989, memorandum, the Department notes that the CLN approved by the Department on the basis of [redacted] voting in Canada was prepared in light of [redacted] letter of November 22, 1965. The Department notes furt this was at a time when [redacted] could also have been considered to have relinquished U.S. citizenship by failure to establish a residence in the U.S. by his 25th birthday. The Department opines that "there seems to be no reason beyond his own suggestion for preparing the CLN on the basis of the one rather than the other expatriating act." I agree fully. But consider the difference in effect. Had the Department proceeded in a fashion which it itself now states would have been fully justified, and approved a CLN based on [redacted] failure to return to the United States, that CLN would not have been affected by Afroyim in any respect. Is it justified to permit a diametrically opposed determination to result from an arbitrary, and incomplete, administrative action? Had the Department done its work thoroughly in 1965 it would have based the CLN on both expatriating acts, the taking out of Canadian nationality and the voting in a Canadian election. Why does the Department believe that it is in any less tenable position today to approve a CLN based on the taking out of Canadian citizenship than it would have been in 19651

To the extent that the answer lies in the Department's response to Chairman James' letter it causes me considerable concern. The Department states: "The Board suggests that after Mr. [redacted] voted in a Canadian election in 1962 believing that act to be expatriating, he ceased to have the capacity to intend thereafter to relinquish citizenship. Thus between 1962 and 1964, while he continued to fail to establish a residence in the U.S., he could not be said to intend to relinquish citizenship since he "knew" he was not a U.S. citizen (although no such holding had then been made). In brief, one cannot intend to relinquish a status one does not believe one's self to possess." The Department continues: "The Board reasons that Mr. [redacted] "belief" that he was not a U.S. citizen after 1962 was confirmed in 1965 by the CLN approved by the Department and thus, after 1967, when voting was declared unconstitutional as an expatriating act, it was improper to go back and attribute to Mr. [redacted] an intent to relinquish between 1962 and 1964 by his failure to establish a residence in the U.S."

The Board has never so suggested or reasoned. Chairman James' letter of December 1, 1988, does not represent the view of the Board, but rather constitutes a simple request by the Chairman for further analysis by each of the Parties as to the effect of Afroyim upon the case. In so requesting additional analysis, the Chairman posited, hypothetically, that between 1962 and 1964 Mr. [redacted] was not a U.S. citizen. The Chairman did not, however, announce any conclusions of the Board regarding Mr. [redacted] ability to form an intention to relinquish citizenship during that period, or the

relevance of a conclusion on that issue. Given the Department's statement, the question arises as to the degree to which its misapprehension as to the Board's suggestions or reasoning may have influenced its decision to request a remand for the purpose of vacating the CLN.

For the reasons stated above, this member of the Board does not believe that any finding of intent to relinquish, beyond that evidenced by failure to establish a residence in the United States by the age of twenty-five, is required. The only que[redacted]s member believes to be raised by the juxtaposition of [redacted] voting in Canada and his twenty-fifth birthday is whether, believing himself to have cast off his U.S. citizenship by voting in a Canadian election, [redacted] believed himself relieved of the requirement to remain in Canada in order to ensure that he was not considered a U.S. [redacted]. The Department's concern would be of relevance only if [redacted] had returned to the U.S. prior to his twenty-fifth birthday and thereafter argued that such an action did not evidence any intent to be considered a U.S. citizen. But [redacted] did not return to the U.S. and he has addressed the issue of his real intent repeatedly. He described his loss of citizenship by voting as additional to his loss by virtue of taking out Canadian citizenship. And he told authorities over and over again that he did not want to be a U.S. citizen. In 1965 [redacted] went to pains to tell U.S. authorities that he had not only c[redacted]f his U.S. citizenship once, but twice, and that he trusted that any question regarding his citizenship status was ended. It was only some twenty years later that he expressed a different opinion. Could there ever be a case of more explicit, contemporaneous statements of intent?

The Department concludes its memorandum by stating that because the link or relation between the expatriating act and the manifest intent is here tenuous, the Department believes the better view in this case would be to be guided by the individual's contemporaneous belief concerning his citizenship and that [redacted] could not have formed an intent to relinquish U.S. citizenship during the period when he thought himself not a U.S. citizen. The Department has mistakenly assumed that a "link" need be shown. The Department has mistakenly assumed that Afroyim required a showing of intent in cases governed by the pre-1986 proviso of Section 349(a)(1). The Department also has failed to take into account [redacted] explicit intention to compound the bases for his expatriation, by adding voting to the list. The Department is absolutely correct, however, in suggesting that the outcome should be guided by [redacted] contemporaneous belief. If the CLN is vacated, the outcome will not have been so guided.

I would remand the case to the Department for further action consistent with this opinion.

Mary Elizabeth Hoinkes

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