March 13, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R[redacted] B[redacted] A[redacted], [redacted]

The Department of State determined on January 13, 1989 that R[redacted] B[redacted] A[redacted], [redacted] expatriated himself on September 30, 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/ [redacted] has appealed.

A single issue is presented: whether the Department has carried its burden of proving that appellant intended to relinquish his United States nationality when he obtained Canadian citizenship. For the reasons that follow, it is our conclusion that the Department has not met its burden of proof. Accordingly, we hereby reverse the Department's holding of appellant's expatriation.

I

Appellant, R[redacted] B[redacted] A[redacted], [redacted] became a United States citizen as a consequence of his birth at [redacted]. He grew up and was educated in California, graduating from high school in 1965. After working for a short time, he enlisted in the United States Marine Corps in April 1966. According to appellant, as the Vietnam conflict intensified, he applied for a discharge as a conscientious objector. His application, however, was denied; appellant therefore absented himself from the Corps without leave in December 1966. He went to Canada in 1367, allegedly

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

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
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> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; or ...

because he feared prosecution and imprisonment for absenting himself and because he feared he might be sent to Viet Nam, if he were returned to duty with the Marines.

Appellant states in his brief that in 1970 he was convicted of theft and placed on probation, and that subsequently, the Canadian immigration authorities moved to deport him. He therefore sought relief before the Canadian Immigration Appeals Board which granted him a waiver of deportation, allegedly upon the strength of his undertaking that if deportation were waived, he would apply to become a Canadian citizen and complete his university studies there.

Appellant applied for naturalization as a Canadian citizen, and on September 30, 1974 was granted a certificate of Canadian citizenship. 2/ At that time he made the prescribed oath of allegiance which reads as follows:

> I swear that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, her Heirs and Successors, according to law and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen, so help me God.

He obtained a Canadian passport in 1975 and renewed it in 1984. Appellant has a son who was born in Canada in 1977.

2/ In a questionnaire he completed in August 1988 during the processing of his case by the Consulate General at Calgary, appellant gave the following reasons for obtaining naturalization:

> A. My application for Canadian citizenship was out of fear of being deported, and subsequent imprisonment. If I had been deported, I would have faced certain prosecution of imprisonment by U.S.M.C., from which I had been awol since 1966.
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> I applied for Canadian citizenship as the only means I could think of to assure continuing any education and finding work, the only way I could think of to avoid poverty. Prior to 1974, I seldom had sufficient funds to have a residence of my own and

After President Carter issued his amnesty proclamation in January 1977, appellant decided to return to California to clear his record with the Marine Corps. On November 1, 1977 he was discharged "under other than honorable conditions."

In August 1988 when appellant applied for a passport at the United States Consulate General in Calgary, he disclosed that he had been naturalized in Canada. After the Consulate General obtained verification of his naturalization from the Canadian authorities, it processed his case as one of loss of nationality. At the request of the Consulate General, he completed forms to facilitate determination of his citizenship status and was interviewed by a consular officer. The latter thereafter executed a certificate of loss of nationality in appellant's name in compliance with section 358 of the Immigration and Nationality Act. 3/ Tne certificate recited

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2/ (Cont'd.)

> never had a permanent residence. From Spring, 1968 until 1974, my total employment income did not exceed $2,275.
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> My application was the surest means I could think of to avoid certain criminal elements from the "streets" of Regina, who had beaten me and threatened my life. That is, I felt that taking the oath of Canadian citizenship was the surest means I had to stay out of the "streets" -- to stay in school, to get viable amounts of university funding, and to find legitimate work -- and thereby avoid those criminal elements who had threatened my life.

3/ 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

that appellant acquired the nationality of the United States by virtue of his birth in the United States; that he obtained naturalization in Canada upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department approved the certificate on January 19, 1989, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

An appeal was entered through counsel in June 1989. The Board heard oral argument on November 3, 1989.

II

Section 349(a)(1) of the Immigration and Nationality Act provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state after attaining the age of eighteen years with the intention of relinquishing United States nationality.

There is no dispute that appellant duly obtained naturalization in Canada when he was twenty-seven years old, and thus brought himself within the purview of section 349(a)(1) of the Act. Since appellant has not contended that he acted involuntarily when he applied for and was granted Canadian citizenship, the sole issue to be determined is whether he intended to relinquish United States nationality when he obtained naturalization in Canada.

The government has the burden of proving that one who performed a statutory expatriative act did so with an intent to relinquish United States nationality. Vance v. Terrazas, 444 U.S. 252, **270** (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The evidentisry standard is a preponderance of the evidence. 'Vance v. Terrazas, 444 U.S. at 267. Proof by a preponderance is proof which would lead the trier of fact to find that the existence of the contested fact is more probable than its non-existence.

3/ (Cont'd.)

> 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.

McCormick on Evidence, 3rd Ed., section 339. It is the citizenship-claimant's intent at the time he performed the expatriative act that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The following are the Department's principal arguments in support of its position that appellant intended to relinquish his United States nationality when he obtained Canadian citizenship.

> Mr. [redacted] naturalization in Canada is the initial evidence of his intent to abandon his United States citizenship. An overall attitude and course of behavior often reflects an individuals's disinterest and lack of concern in his or her **U.S.** citizenship and permits an inference of an intent to relinquish U.S. citizenship.
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> Citizenship is a right. With this right comes responsibilities and obligations. Appellant had the responsibility, as so many other young **U.S.** citizens did at that time, to fulfill his military obligations. [See Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (1971). If he could not fulfill this obligation because of his personal feelings about fighting in Viet Nam, then he, as an adult, had to face the possibility of being prosecuted. By avoiding deportation and certain prosecution and becoming a Canadian citizen, he was demonstrating his intent to relinquish his **U.S.** citizenship. He attempted to divest himself of the responsibilities of his **U.S.** citizenship and in essence it can be inferred that he was demonstrating an intent to relinquish his citizenship.
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> After appellant's naturalization, he identified himself as a Canadian. Re had held two Canadian passports and traveled solely as a Canadian. After naturalizing he identified himself at the U.S./Canadian border as a Canadian. He has never voted in the U.S. but has voted in

> Canada. He has never registered his child's birth. His overall behavior is not that of an individual who is trying to retain and preserve his U.S. citizenship.
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> He obviously never consulted with a U.S. official and wanted very little to do with his identity as a U.S. citizen until 1977 when he received his discharge. However, even after his discharge, he has expressed no concern for his status as a U.S. citizen.

We begin by noting that obtaining naturalization in a foreign state may be evidence of an intent to relinquish citizenship, but it is not the equivalent of or conclusive evidence of such an intent, as the Supreme Court declared in Vance v. Terrazas, supra:

> ...we are confident that it would be inconsistent with Afroyim to treat the expatriating acts specified in sec. 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. 'Of course,' any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.' Nishikawa V. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

444 U.S. at 261.

That he also made a simple i.e., non-renunciatory oath of allegiance to Queen Elizabeth the Second as an integral part of naturalization is additional evidence of his intent, but a non-renunciatory oath standing alone is "insufficient to prove renunciation." King v. Rogers, 463 F.2d 1188, 1889 (9th Cir. 1972). See also Richards V. Secretary of State, No. CV 80-4150 memorandum opinion (C.D. Cal. 1982): "An oath of allegiance which contains only an affirmation of loyalty to the country whose citizenship is sought leaves ambiguous the intent of the utterer regarding his present nationality."

Beyond naturalization and his oath of allegiance there is no evidence of appellant's probable state of mind in 1974. Since the evidence dating from that time is insufficient to support a finding that appellant intended to relinquish his United States citizenship, we must consider circumstantial evidence to determine whether or not it will establish the requisite intent. Terrazas V. Haig, 653 F.2d at 288. Specifically, we must try to determine whether one might fairly infer from appellant's proven conduct that he intended on September 30, 1974 to relinquish his United States citizenship.

We do not find persuasive the Department's argument that it is reasonable to infer from appellant's proven conduct - shirking his military duty - that he intended to relinquish United States citizenship when he obtained naturalization in Canada.

By absenting himself from the Marine Corps without leave, appellant, of course, committed a crime, but that fact does not in itself warrant inferring that appellant intended to relinquish his citizenship when he became a Canadian citizen. Appellant stated at the hearing on November 3, 1989, that on the advice of the attorney who represented him before the Canadian Immigration Appeals Board, he "represented" that he "would take out Canadian citizenship if the appeal board quashed the deportation order." 4/ He applied for naturalization in 1974, and apparently as a consequence of his application or the subsequent grant to him of a certificate of Canadian citizenship, the order of deportation was quashed. In response to a question from counsel for the Department, appellant acknowledged that he obtained naturalization in order to protect himself from deportation and the possibility of prosecution for desertion from the Marine Corps. 5/

Thus, appellant submits, his aim in performing the expatriative act was to avoid deportation, nothing more. We consider it reasonable to assume that appellant realized that he might remain in Canada simply by obtaining Canadian citizenship, and did not have to divest himself of United States citizenship in order to achieve that result. Nor is it implausible that while protecting himself against deportation, he still considered himself (by his own lights) to be a loyal American citizen, intending to return to the United States when he might do so with impunity. As is well known, many young Americans who went to Canada to escape the Viet Nam war

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4/ Transcript of Hearing in the Matter of R [redacted] B [redacted] A [redacted] before the Board of Appellate Review, November 3, 1989 (hereafter referred to as "TR"). TR 8.

5/ TR 17-18.

and obtained naturalization there did so simply to protect themselves against feared deportation. In brief, the Department has adduced no hard evidence to show that appellant meant his naturalization in Canada to constitute relinquishment of his United States citizenship.

In 1957 the Supreme Court declared unconstitutional a statutory provision prescribing loss of citizenship for desertion in wartime from the armed forces. Trop V. Dulles, 356 U.S. 86 (1957). Speaking for the Court, Chief Justice Warren declared:

> ...citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship and this petitioner has done neither, I believe his fundamental right of citizenship is secure.

356 U.S. at 92-93.

In the case before the Board, appellant did not renounce his citizenship nor did he perform any express act which might fairly be construed as abandonment of citizenship. Even though his conduct was derelict, it is insufficient in itself to establish that he probably intended to relinquish his American citizenship when he acquired that of Canada.

We find no more persuasive the other evidence the Department presents in support of its contention that appellant specifically intended to relinquish citizenship.

It is not self-evident that obtaining two Canadian passports, not registering his son as a United States citizen, or consulting United States authorities before obtaining naturalization constitute evidence of an intent to divest himself of United States citizenship. In his precarious position until 1977, it is understandable why he decided to use a Canadian passport and not seek a United States passport in 1975 to visit his mother in Spain. Obtaining a Canadian passport in 1984 after he had cleared himself with the Marine Corps might, as he contends, have been a matter of convenience so that he could visit her without delay after an accident. As for not registering the birth of his child as a United States citizen, ignorance of the importance of doing so might plausibly account for this omission. Nor is it difficult to understand that as a fugitive from the Marine Corps, appellant

would wish to avoid United States authorities in 1974 when he applied for and obtained Canadian citizenship.

In short, there are plausible and rational explanations other than intent to relinquish United States citizenship for the way appellant has conducted himself. In our view, one could not assert with fair sssurance that he probably intended in 1974 to divest himself of his United States nationality.

It follows that the Department has failed to meet its burden of proof.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated himself by obtaining naturalization in Canada upon his own application.

Alan G. James, Chairman

Warren E. Hewitt, Member

Gerald A. Rosen, Member