DEPARTMENT OF STATE October 1, 1992

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Y[redacted] H[redacted] P[redacted]

This case came before the Board of Appellate Review on the appeal of Y[redacted] H[redacted] P[redacted] from an administrative determination made by the Department of State on January 24, 1991 that he expatriated himself on March 12, 1990 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Korea upon his own application. 1

For the reasons set forth below, we conclude that appellant voluntarily acquired Korean citizenship with the intention of relinquishing his United States citizenship. We therefore affirm the Department's holding of loss of appellant's nationality.

I

Appellant Y[redacted] H[redacted] P[redacted], who was born in [redacted] in [redacted] came to the United States in 1965 to pursue his studies. He attended a theological seminary at St. Louis and later St. Louis University. He married a Korean citizen by whom he has two children, both born in the United States. In 1978, appellant and his wife were naturalized as United States citizens before the United States District Court for the Eastern District of Missouri. Under Korean law, appellant automatically lost his birthright citizenship by obtaining foreign naturalization. Appellant served as pastor of a Korean church in St. Louis for a number of years until September 1983 when he resigned to accept a professorship at Chongshin College and Theological Seminary in Seoul.

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

> 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; ...

In 1986, appellant was appointed President of the College by its Board of Trustees for a 4-year term. The Korean Ministry of Education conditionally approved his selection. "This is to notify you," read a memorandum (May 29, 1986) from the Ministry to the Trustees, "that the approval can be cancelled in case of no restoration of the nationality of the Republic of Korea may be carried out." The memorandum further directed the Trustees to submit to the Ministry evidence that appellant had re-acquired his Korean nationality.

Appellant states that he served almost all of his four-year term without taking any action to regain his Korean citizenship. However, after allegedly being assured (by whom he has not said) that it would not affect his United States citizenship, he "reluctantly" regained his Korean citizenship on March 12, 1990. (Appellant's Opening brief.)

When it informed him that his application for reacquisition of his Korean nationality had been approved, the Ministry of Justice cautioned: "If you ,do not lost [sic] your former citizenship within the period of six months, you will lose your Korean citizenship again. So please act promptly to lose your former citizenship, and send us a copy of certificate that you have lost the other citizenship." [2]

According to appellant's brief, in April of 1990, stude[redacted] at the college began demonstrating in opposition to Dr. P[redacted] reappointment because of his U.S. citizen[redacted]p. Stude[redacted] allegedly physically denied access to Dr. P[redacted]'s office, protested to the Board [redacted]stees, published newspaper articles in opposition of Dr. P[redacted] appointment, and boycotted classes. Appellant's brief co[redacted]s:

> On May 15, 1990, ... the Board of Trustees met to consider Dr. P[redacted]s reappointment for a second four-yea[redacted]rm. The Board of Trust[redacted] of the College suddenly informed Dr. P[redacted] that in addition to regaining his K[redacted]an citizenship, he must now also abandon his United States citizenship.

Shortly afterwards, appellant, who had accepted reappointment as College President, visited the United States Embassy at Seoul to initiate proceedings for a determination by the Department of State that he expatriated himself by

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2. The Korean Nationality Law of March 12, 1990 prescribes that persons who reacquire Korean nationality shall within 6 months of reacquisition divest themselves of their foreign nationality.

re-acquiring Korean citizenship. He was interviewed by a consular officer on May 18th, and completed a form, entitled "Information for Determining U.S. Citizenship," in which he acknowledged that he had been naturalized as a citizen of a foreign state and that he had performed that act voluntarily with the intention of relinquishing his United States nationality. He also executed a sworn statement (addressed to the Secretary of State) which reads in pertinent part as follows: 120

> I, Y[redacted] H[redacted] P[redacted], a citizen of the United Stat[redacted] int[redacted] d[redacted] relinquish U.S. citizenship voluntarily. In 1983 I departed United States to join the faculty of Chongshin College & Seminary in Seoul Korea. In 1986 I took a position of the college presidency until this date. At present, I would like to request you to allow me to relinquish United States citizenship. This action was perform-ed voluntarily by my own decision.

When the proceedings were completed, a consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as required by law. [3] The officer certified that appellant acquired United States nationality by virtue of naturalization; that he reacquired Korean nationality upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act (INA).

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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 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 CLN on January 24, 1991, approval being an administrative determination of loss of nationality from which a timely appeal may be taken to the Board of Appellate Review. 12

Prior to the Department's approval of the CLN, students reportedly continued to protest for appellant's removal as President of the College, and although his second term as president was to run until May 1994, he was, he states, forced to resign in November 1991 "as a result of continuing,..., demonstrations which in effect paralyzed the school administration." In December he entered the United States on a visitor visa. As of January 1992 he was awaiting INS action on a petition filed on his behalf by his wife for adjustment of his status to permanent resident.

Through counsel, appellant filed this appeal in early January 1992.

II

Section 349(a)(1) of the INA provides that a citizen shall lose his citizenship by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing his United States citizenship. There is no dispute that by reacquiring his birthright Korean citizenship appellant brought himself within the purview of section 349(a)(1) of the INA.

We address first the issue of whether appellant acted voluntarily when he applied for and obtained the citizenship of Korea. Section 349(b) of the Act prescribes a legal presumption that one who performs a statutory expatriating act does so voluntarily, but the actor may rebut the presumption upon a showing by a preponderance of the evidence that he did not do so voluntarily. 4

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4. Section 349(b), INA, 8 U.S.C. 1481(b), provides:

> (b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsecfion 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. 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

Appellant contends that his reacquisition of Korean citizenship was involuntary because he was subjected to political and economic duress. The political and economic duress arose initially, he alleges, "in the form of repeated student protests and demonstrations in opposition to his status as a U.S. citizen and his reappointment as President of Chongshin College for a second term." His opening brief continues: 12:

> These demonstrations, combined with other concerted actions, e.g., stopping tuition payments, blocking physical access to the campus and to administrative offices, and not attending classes, paralyzed the college administration. The College Board of Trustees elected a 'quick fix' solution to the student unrest and presented Dr. P[redacted] with a Hobson's choice: either abandon his U.S. Citizenship or lose his position with the College....

Appellant points out that the case law holds that for an expatriative act to be voluntary the citizen-actor must have faced a "Hobson's Choice" not of his own design, citing Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir.) 1971, cert. denied, 404. U.S. 946 (1971.)

Determination of whether appellant acted voluntarily in reacquiring his Korean citizenship turns, as appellant correctly suggests, on whether the situation in which he found himself was one of his own design or not. Put another way, if the expatriative act was done as a matter of personal choice, the act plainly must be deemed voluntary; "opportunity to make a decision based on personal choice is the essence of voluntariness." Jolley v. INS, 441 F.2d 1250.

From the facts presented by appellant, it is apparent that appellant applied to have his Korean citizenship restored before any student protests began. His application was filed some time prior to March 12, 1990, the date on which he reacquired it. Student protests in opposition to his reappointment as President of the College because of his United States citizenship did not begin, appellant states, until April

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4. (Cont'd.)

> 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.

of that year. Plainly, the sequence of events refutes appellant's contention that he obtained Korean citizenship (and relinquished United States citizenship) under the duress of student protests. In approving the action of the College Trustees in appointing appellant to the Presidency, the Ministry of Education stipulated that the appointment was conditional upon his regaining Korean citizenship. Appellant accepted the appointment in the knowledge that it was so conditioned.

That the Ministry placed an unwelcome and burdensome (in appellant's eyes) condition upon appellant's appointment did not make it involuntary. The condition was not on its face, ultra vires, irrational or capricious, and nothing in the facts presented to us indicates that appellant was not free to accept the appointment with the condition, or to reject it, remaining in his professorial position which, we are given no reason to doubt, did not require him to elect between holding it and giving up United States citizenship. Advancement to the Presidency of the College evidently was a distinction appellant welcomed; so he accepted it, stipulated condition and all. Wherein then was a "Hobson's Choice"?

As we understand appellant's position, he divested himself of United States citizenship only because student protests led the College Trustees to demand that he give up his United States citizenship.

The weakness in appellant's case is that he overlooks the fact that once he had recovered his Korean citizenship he had to surrender his United States citizenship in order to keep it. When he was informed that Korean citizenship had been restored, he was duly put on notice that he would have to act within six months to divest himself of United States citizenship. The College Trustees were not imposing their own or the students' conditions on appellant; the condition was imposed pursuant to law. In Korea, if one wishes to regain citizenship (lost through acquisition of a foreign citizenship), one must relinquish the foreign citizenship. Basically, the situation in which appellant found himself after the student protests began in April 1990 was one which originated several months earlier when appellant freely chose to comply with the requirement of the Ministry of Education that he recover Korean citizenship.

He might not hold Korean citizenship while retaining the citizenship of the United States, and he knew it. The student demands to which the College Trustees acceded simply accelerated appellant's action in initiating the inescapable loss of nationality proceedings at the United States Embassy; they did not give rise to it.

Appellant placed himself in a position where he could only acquire academic preferment by jeopardizing United States citizenship. Any doubt that he acted voluntarily in obtaining Korean naturalization is removed by the fact that appellant specifically acknowledged in two papers he signed at the United States Embassy in May 1990 that he had acted freely and not under duress in re-acquiring his Korean citizenship. 12.

Appellant has not rebutted the presumption that he obtained naturalization in Korean voluntarily.

III

The other issue for the Board to decide is whether appellant intended to relinquish his United States citizenship when he reacquired Korean citizenship.

Unlike with the presumption of voluntariness, there is no presumption that appellant intended to relinquish his United States citizenship. Intent is an issue the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 252, 267 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent to be proved is the party's intent at the time the expatriative act was done, in this case, when appellant reacquired Korean citizenship. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department of State submits that appellant's words and actions at the time he performed the expatriative act establish that it was his intent *to* relinquish his United States citizenship. He acted knowingly and intelligently, the Department asserts, when he voluntarily initiated proceedings to determine that he had lost his Untied States citizenship. The Department is thus of the view that "the probative and unrefuted evidence of record clearly establishes that appellant intended to abandon his U.S. citizenship in undergoing Korean naturalization."

The expatriating acts specified in the statute are not the equivalent of or conclusive evidence of a citizen's intent to relinquish citizenship. Vance v. Terrazas, 444 U.S. at 261. However, any one of those acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." Id. Not only does the voluntary action of this appellant in seeking restoration of his Korean citizenship strongly suggest an intention to divest himself of United States citizenship. There are other factors as well which add weight to that highly persuasive evidence.

Two months after he was granted Korean citizenship, appellant voluntarily went to the United States Embassy in May 1990 for the express purpose of effectively divesting himself

of United States citizenship so that he might continue to serve as President of Chonshin College. At the Embassy, he signed a statement he himself had drafted in which he averred that he intended to relinquish his United States citizenship voluntarily. He also subscribed to a statement that he reacquired his former Korean citizenship voluntarily with the intention of relinquishing United States citizenship. 12

In brief, he did all he could do (short of making a formal renunciation of citizenship) to persuade the Department of State that he wished to surrender United States citizenship so as to be able to prove to the Ministry of Justice that he had complied with the proviso to retain his reacquired Korean citizenship.

Appellant maintains that he never intended to relinquish his United States citizenship as shown by several considerations which he submits as fact:

-- he was unaware when he regained Korean citizenship that he would eventually have to relinquish his U.S. citizenship;

-- he did not fully understand either of the two statements he signed when he visited the United States Embassy in May 1990;

-- the request in one of the statements that "I would like to request you to allow me to relinquish U.S. citizenship," is too tentative to establish a specific intent to surrender citizenship;

-- neither the seriousness nor the consequences of the two statements he signed were explained to him;

-- aside from signing the two statements he performed no act inconsistent with United States citizenship.

Absence of intent to relinquish citizenship is further evidenced he asserts, by his conduct during the time he lived and worked in Korea: returning to the United States twice a year to see his family; maintaining other personal and property interests to the United States.

We do not consider that the considerations appellant adduces are sufficient to establish lack of the requisite intent to relinquish his United States citizenship. Plainly he knew on March 12, 1990 that he would have to divest himself of his United States citizenship in order to retain his newly-acquired Korean citizenship; the notice he received from the Ministry of Justice was crystal clear in this respect. We find it incredible that appellant who has lived for 18 years in the United States, has been educated in the United States, and

was pastor of a church for 13 years in a large American city did not fully understand the meaning and the consequences of the statements he signed at the United States Embassy, acknowledging the voluntariness of his act and his will and purpose to relinquish his United States citizenship. Similarly, as an educated man, he surely needed no special exegesis to comprehend the seriousness and consequences of signing the two statements; their practical meaning and effect should have been manifest to him. And it is quibbling to protest that the statement he made in one of the statements is too tentative to establish intent to relinquish citizenship.

Finally, we see nothing in appellant's conduct to call into question the import of his own words at the time he performed the expatriative act. Were the elements in this case finely balanced it might make a difference that he is and acts like a good family man and a prudent householder and business man. His conduct shows affection for his family and a desire to safeguard his property; it has little bearing on the issue of intent to retain American citizenship.

Appellant says that he "reluctantly" applied to recover his Korean nationality. From this one might deduce that he means that because he did not act eagerly to surrender United States citizenship, he lacked the requisite intent. The Court in Richards v. Secretary of State. 752 F.2d 1413 (9th Cir. 1985) made short work of that line of argument.

> We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been out-

> weighed by his reasons for performing an act inconsistent with that citizenship. If a citizen makes that choice and carried it out, the choice must be given effect.

752 F.2d at 1421-22 (emphasis supplied).

In the case before the Board, appellant acted with a conscious purpose - to forfeit United States citizenship so that he might retain his reacquired Korean citizenship and thus be able to serve his academic constituency and advance his own professional purposes.

We perceive no factors in the case which cast reasonable doubt on the inescapable conclusion that appellant's will and purpose was to divest himself of his United States citizenship. Furthermore, it is evident that appellant acted knowingly and intelligently when he reacquired Korean citizenship and initiated action to accomplish loss of his United States citizenship.

All the evidence shows that when appellant recovered his Korean nationality it was his conscious purpose to divest himself of his United States nationality. The Department has carried its burden of proof.

IV

Upon consideration of the foregoing, it is our conclusion that the Department's determination that appellant expatriated himself by reacquiring his Korean nationality should be and hereby is affirmed.

Alan G. James, Chairman

Howard Meyers, Member

Frederick Smith, Jr., Member