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The Board of Appellate Review of the Department of State: The Right to Appellate Review of Administrative Determinations of Loss of Nationality

ALAN G. JAMES*

The Chairman of the Board of Appellate Review traces the origins and development of this autonomous, quasi-judicial body, and examines its role as adjudicator of appeals from the Department of State's administrative determinations of loss of nationality. Analyzing illustrative decisions of the Board and applicable judicial precedent, the author focuses his inquiry into the appellate process on the crucial issue in loss of nationality proceedings: whether a citizen who performed a statutory expatriating act intended to relinquish "man's most basic right"—citizenship.

APPELLATE REVIEW AND DUE PROCESS OF LAW

For nearly twenty years the Board of Appellate Review (Board) has been hearing appeals of expatriated Americans to recover what Chief Justice Warren called "man's most basic right"—citizenship.¹ To those who chose to contest the Department of State's (Depart-

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¹ Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Chief Justice Warren observed: "Citizenship is man's most basic right for it is nothing else than the right to have rights." (emphasis in original).
ment) determination of loss of their nationality, the Board offers an
administrative remedy in the form of a quasi-judicial hearing or
review.

Under law, the Secretary of State is responsible for determining
the nationality of a person outside the United States. This respon-
sibility has been delegated to the Assistant Secretary of State
for Consular Affairs.

In determining that a citizen has expatriated himself, the Depart-
ment does not conceptually "take away" citizenship. As Chief Jus-
tice Warren explained: "In recognizing the consequences of such
action, the Government is not taking away United States citizenship
. . . . Rather, the Government is simply giving formal recognition to
the inevitable consequence of the citizen's own voluntary surrender
of his citizenship."

[hereinafter cited as INA], provides:
The Secretary of State shall be charged with the administration and enforce-
ment of the provisions of this Act and all other immigration and nationality
laws relating to . . . .
(3) the determination of the nationality of a person not in the United States.
He shall establish such regulations; prescribe such forms of reports, entries and
other papers; issue such instructions; and perform such other acts as he deems
necessary for carrying out such provisions.
3. The Assistant Secretary has in turn delegated this authority to the Director of
the Office of Citizens Consular Services, who further delegated it to certain officials of
that office. Memorandum to Mr. Alan A. Gise, (Director of the Office of Citizens Consu-
lar Services) from Ms. Barbara M. Watson, (Assistant Secretary of State for Consular
Affairs) (January 12, 1979).
4. Perez, 356 U.S. at 68-69 (Warren, C.J., dissenting). Regarding the right of
citizens to relinquish citizenship without sanction of the state, the Chief Justice said:
In the early days of this Nation the right of expatriation had been a matter of
controversy. The common-law doctrine of perpetual allegiance was evident in
the opinions of this Court. And, although impressment of naturalized Ameri-
can seamen of British birth was a cause of the War of 1812, the executive
officials of this Government were not unwaivering in their support of the right
of expatriation. Prior to 1868 all efforts to obtain congressional enactments
concerning expatriation failed. The doctrine of perpetual allegiance, however,
was so ill-suited to this growing nation whose doors were open to immigrants
from abroad that it could not last.

Id. at 67.
The right of expatriation was recognized by the Act of July 27, 1868, ch. 249 15 Stat.
223, 223-24, which provides:
Whereas the right of expatriation is a natural and inherent right of all people,
indispensable to the enjoyment of the rights of life, liberty, and the pursuit of
happiness; and whereas, in the recognition of this principle, this government
has freely received emigrants from all nations, and invested them with the
rights of citizenship; and whereas it is claimed that such American citizens,
with their descendants, are subjects of foreign states, owing allegiance to the
governments thereof; and whereas it is necessary to the maintenance of public
peace that this claim of foreign allegiance should be promptly and finally dis-
avowed: Therefore . . . any declaration, instruction, opinion, order, or decision
of any officer of this government which denies, restricts, impairs, or questions
the right of expatriation, is hereby declared inconsistent with the fundamental
principles of this government.

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Since the fifth amendment to the Constitution shields citizenship, determinations of loss of nationality must be made in accordance with due process of law. In considering appeals from such determinations, the Board must determine whether an individual received procedural and substantive due process when the Department decided he or she forfeited United States nationality by performing a statutory expatriating act in a foreign state. If the Board concludes the Department's decision is contrary to law or fact, it will grant relief by reversing that decision.

The Board is not a statutory body; it derives its authority from the Code of Federal Regulations. In reviewing loss of nationality determinations, the Board construes applicable statutory provisions and applies them to diverse factual situations on the basis of relevant case law. Like a court, the Board makes findings of fact and conclusions of law.

Federal regulations give the Board broad authority, empowering the Board to take any action appropriate and necessary to the disposition of the cases appealed to it. The Board may take cognizance of any evidence deemed relevant and material to the issues of the case, and, in its discretion, may undertake further investigation of facts and circumstances. In essence, the review conducted by the Board is a de novo examination of the entire proceedings leading to the Department's determination of loss of an individual's United States citizenship.

The Board is an autonomous body within the Department of

Nearly 40 years passed, however, before Congress legislated on expatriation. Until the enactment of the law of March 2, 1907, "in reference to the expatriation of citizens and their protection abroad," there was no mode of renunciation of citizenship prescribed by our laws, with the exception of Section 1998, of the Revised Statutes, by virtue of which desertion from the Army or Navy works forfeiture of the rights of citizenship. Whether expatriation had taken place in any case was to be determined by the facts and circumstances of the particular case. No general rule that would apply to all cases could be laid down.

F. VAN DYNE, A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES 336 (1907).


7. Id. § 7.6(b).
State. Its decisions are final, subject only to either party’s right to move for reconsideration. An appellant whose loss of nationality has been affirmed by the Board may institute an action in United States District Court for a judgment declaring him to be a United States citizen.

For administrative purposes the Board is assigned to the office of the Legal Adviser of the Department of State. The merits of an appeal or a decision of the Board are not, however, subject to review by the Legal Adviser or any other Department official.

By membership and its position within the Department, the Board is wholly separate from the authority making determinations of United States nationality—the Bureau of Consular Affairs. Officers of the Bureau of Consular Affairs and the Office of the Legal Adviser have scrupulously respected the independence of the Board, for all accept that the Board’s credibility is a function of its acting, and being perceived to act, as an independent adjudicatory body.

The operations and staff of the Board of Appellate Review are modest compared with those of an analogous administrative appellate body, the Board of Immigration Appeals of the Department of Justice. That Board annually hears several thousand appeals taken by aliens from adverse determinations of eligibility to enter or remain in the United States. Over the past eighteen years the Board of Appellate Review has heard and decided approximately 350 appeals from determinations of loss of nationality—more than 170 since 1982. The Board’s importance should not be judged by the number of cases it hears and decides, but rather by how well it discharges its mandate to provide a forum for fair and objective administrative adjudication of this fundamental right.

This Article examines the Board as adjudicator of citizenship appeals. The appellate process in the Department evolved slowly but inexorably toward greater autonomy for the panel charged with reviewing determinations of loss of nationality. As will appear from the following discussion of the Board’s antecedents, its predecessors did not enjoy the latitude to make the wholly independent judgments that is a hallmark of the Board of Appellate Review.

In examining the Board’s deliberations, a number of its recent de-

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8. Id. §§ 7.8-9.
9. The right to institute such an action is provided by INA § 360, 8 U.S.C. § 1503 (1982). See infra note 62 and accompanying text. The Department has no judicial recourse from an adverse decision of the Board.
11. Id.
12. Of the 185 decisions rendered from 1982 through 1985, the Board affirmed the Department’s holding of loss of nationality in 50; reversed the Department in 30; remanded 28 at the request of the Department for the purpose of vacating the certificate of loss of nationality; and dismissed 77 as not timely filed.

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cisions will be analyzed. The centerpiece of this analysis is an inquiry into the issue of whether a citizen intended to relinquish United States citizenship when he or she performed a statutory expatriating act.

The Board was established a few months after the Supreme Court rendered its germinal decision in *Afroyim v. Rusk*.13 Interpreted by the Attorney General in 1969,14 and by the Supreme Court in 1980 in *Vance v. Terrazas*,15 to stand for the proposition that loss of citizenship depends on the intent of the citizen to relinquish citizenship, *Afroyim* endowed nationality law with a constitutional quality that was not, evidently, either intended or envisaged by Congress. From the first, a party’s intent to relinquish or retain citizenship has been the pivotal issue in most cases that the Board decides on the merits.

**ANTECEDENTS**

On October 21, 1941, Secretary of State Cordell Hull signed a departmental order creating a Board of Review in the Passport Division of the Department of State.16 This order charged the three-member panel with reviewing all cases involving the loss of nationality under the United States nationality laws. As stated in the Order, “the Board will provide a forum for hearings and discussions to obviate as far as may be practicable hardships and inequities in the application of the new Nationality Act of 1940 . . . .”

At that stage the Board of Review was not a true appellate body with authority to hear and decide appeals from determinations of loss of nationality. It was a creature of the Passport Division charged with reviewing certificates of loss of nationality upon submission to the Department by diplomatic or consular officers, as required by the Nationality Act of 1940.17 Findings of the Board of Review were

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16. Dep’t of State Order No. 994 (Oct. 31, 1941).
17. Section 501 of the Nationality Act of 1940, ch. 876, § 501, 54 Stat. 1137, 1171 (superseded 1952) provided:
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 American nationality under any provision of chapter IV of this Act, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be 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 Department of Justice, for its 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.
subject to final approval by a senior official of the Passport Division.1\textsuperscript{8} Relatively little information is available about the early work of the Board of Review. Apparently it operated for some years without formal rules of procedure. Its first formal procedures were set out in an intra-Departmental circular sent to all diplomatic and consular posts in 1949.1\textsuperscript{9}

That document stated that persons who did not accept the Department's holding of loss of nationality "may be informed that appeal may be made to the Board of the Passport Division." No formal application or petition was required, but an appellant was expected to submit a statement clearly setting out the grounds of appeal. There was no prescribed time limit on appeal.2\textsuperscript{0}

That the Board of Review was not a true appellate body prior to 1949 was made clear by the circular in which it was noted that more than 100 actions were pending in federal courts for judgments declaring petitioners, who had performed a statutory expatriating act, to be citizens of the United States. Foreign Service posts were cautioned to document the performance of expatriating acts more thoroughly in order to avoid unnecessary litigation.

For a number of years the procedures of the Board of Review were reissued periodically as intra-Departmental guidelines without significant modification. In 1958 the Board of Review was renamed the Board of Review on the Loss of Nationality.2\textsuperscript{1} Although designated an autonomous body within the Passport Office, the Board could hardly be described as wholly autonomous. The Director of the Passport Office would still appoint the members. And although decisions of the Board constituted the final determination of the issues of citizenship and nationality by the Secretary of State, before a decision affirming a holding of loss of nationality became final, it was to be referred to the Legal Adviser of the Department of State.2\textsuperscript{2}

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\textsuperscript{18} Dept of State Order No. 994 (Oct. 31, 1941).

\textsuperscript{19} U.S. DEP'T OF STATE, FOREIGN SERVICE SERIAL No. 1019 (Sept. 13, 1949).

\textsuperscript{20} Id.

\textsuperscript{21} Administrative Policy Directive P-30 from Frances G. Knight, Director of the Passport Office, to all passport office employees (Apr. 10, 1958).

\textsuperscript{22} Shortly after issuance, the foregoing policy directive, id., was amended to provide that where an administrative decision on loss of nationality was upheld by the Board, all findings of fact and conclusions of law "shall be referred" to the Legal Adviser of the Department of State for advice and comment prior to the final entry of the decision. Administrative Policy Directive P-38 from Frances G. Knight, Director of the Passport Office, to all passport office employees, (Sept. 23, 1958).

In a memorandum dated April 21, 1961, the Assistant Legal Adviser responsible for consular affairs informed the Director of the Passport Office that it was no longer necessary that all decisions of the Board affirming the Department's holding of loss of nationality be referred to the Legal Adviser; referral would be necessary only in cases involving new or very complex questions. The Assistant Legal Adviser gave the following rationale
The first federal regulations governing the Board of Review on the Loss of Nationality were published in 1966. Although the Board remained a constituent element of the Passport Office, the Secretary of State henceforth would designate the Board's chairman and its members. For the first time the regulations placed a limitation on the right to appeal a loss of nationality determination, namely, "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality.

The 1966 regulations made no provision for informing an expatriate of the right of appeal when the individual was sent a copy of an approved certificate of loss of nationality; nor does the statute give such a right. It provides merely that if the Department approves a certificate of loss of nationality, the diplomatic or consular office making the report shall forward a copy of the certificate to the person to whom it relates. As early as 1954, however, Departmental memorandum from Mr. Raymond Yingling, Assistant Legal Adviser for Consular Affairs to Ms. Francis G. Knight, Director of the Passport Office (Apr. 21, 1961). In 1961 the Director of the Passport Office issued an instruction which stipulated that henceforth referral to the Legal Adviser would be at the discretion of the Director. TECHNICAL PROGRAM INSTRUCTION 3520.1a (Nov. 21, 1961).

24. Id. § 50.62.
25. Id. § 50.60 provided:
A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Review on Loss of Nationality. 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 Part III of this subchapter, 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.

guidelines stipulated that consular officers should inform an expatriate in writing of the right to appeal when forwarding the certificate of loss of nationality.  

On July 28, 1967, the Department established the Board of Appellate Review in the Office of the Deputy Undersecretary for Administration. The stated purpose behind the Board's creation was to centralize administrative appeal procedures, including hearings, required by law or regulations or as otherwise provided by the Department.  

Two general concerns led to the creation of the Board. One stemmed from considerations of efficiency. Prior to 1967 there were separate panels to hear appeals from determinations of loss of nationality, denial of passport facilities, certain contract disputes, and personnel decisions. Many officials in the Department felt that consolidating the functions of these separate boards into one tribunal would improve the appellate process and make better use of personnel. Equally persuasive was the view of a number of senior officials, particularly in the Office of the Legal Adviser, that the appellate process should be, and be seen to be, clearly separate from the function of determining a person's nationality. However professional and impartial Board members were, there was a general sense, even before 1967, that the requirements of due process dictated that the Board not be part of the Passport Office.

Initially, the Board operated under the federal regulations issued in 1966 for the Board of Review on the Loss of Nationality. On November 29, 1967, new federal regulations were promulgated. Those regulations prescribed that the Deputy Undersecretary for Administration would appoint the members of the Board, and that the Board would have jurisdiction over appeals from determinations of loss of nationality; denials of passport facilities; certain contract disputes; and, to a very limited extent, personnel matters. The new regulations prescribed that the affected party might file an appeal within a reasonable time after receipt of notice of the Department's loss of nationality holding. 

Available records tell little about the activities of the Board of Appellate Review during the first year and a half of its existence. Shortly before the establishment of the Board, the Supreme Court

The limitation on appeal was “within a reasonable time” after the affected person received notice of the Department's holding of loss of nationality. 22 C.F.R. § 50.60 (1967) (the text of which was the same as that in 22 C.F.R. § 50.60 (1966), supra note 25).
decided Afroyim v. Rusk\textsuperscript{30} which raised novel constitutional issues. Afroyim necessitated consultations between the State and Justice Departments to determine how the administrative authorities should apply the case to loss of nationality statutes. The Board therefore decided no loss of nationality appeals until several months after the Attorney General issued a statement interpreting Afroyim.\textsuperscript{31}

On July 1, 1979, the Department transferred the Board to the Office of the Legal Adviser for administrative support. The Department promulgated the present regulations for the Board on November 30, 1979.\textsuperscript{32}

\section*{The Board And Its Functions}

\textit{Membership}

As presently constituted, the Board of Appellate Review has two regular members: the chairman and a consultant to the Board. Both are professional employees of the Department of State and devote their full time to the Board.

In addition, there are nine ad hoc members of the Board, senior career officials of the Department who have other regularly assigned responsibilities and serve on the Board without additional compensation. None is an official of the Bureau of Consular Affairs, thus ensuring complete separation of the appellate function from the administrative function of making loss of nationality determinations. Ad hoc members give the Board depth, bringing diverse experiences and insights to bear on the appellate process.

The Legal Adviser of the Department of State appoints all the members of the Board. There is no prescribed limit on a member's tenure.\textsuperscript{33} Regular and ad hoc members must be attorneys in good standing, admitted to practice before the Bar in any state, the District of Columbia, or a territory or possession of the United States.\textsuperscript{34}

In hearing an appeal the Board acts through a panel of three members. No more than two of the panel members may be ad hoc members.\textsuperscript{35}

\begin{itemize}
  \item[30.] 387 U.S. 253 (1967).
  \item[32.] See supra note 5.
  \item[33.] 22 C.F.R. § 7.4(a) (1985).
  \item[34.] Id.
  \item[35.] Id. § 7.4(c).
\end{itemize}
The Appellate Process

The Department must inform persons who have been the subject of an adverse determination of nationality of the right to appeal to the Board of Review. Notice of this right is conveyed by information printed on the reverse of the certificate of loss of nationality which by law must be forwarded to the expatriate after the Department has approved it. The limitation on appeal is one year after approval of the certificate of loss of nationality. The appellant or authorized attorney must address an appeal to the Board in writing. The petition must state with particularity the grounds for the appeal, specifically why the appellant contends the Department’s determination of loss of nationality is contrary to law or fact. The Board is not restrictive in judging whether an appellant has stated grounds for a proper appeal, but insists that the facts and circumstances surrounding the performance of the expatriating act be clearly spelled out and that the appellant adequately document his or her allegations.

Although there is no requirement, an appellant may submit a legal brief in support of an appeal. Appellants may retain counsel, but legal representation is not a prerequisite. To practice before the Board, an attorney must be a member of the Bar in good standing, admitted to practice before any court in a United States jurisdiction.

Pleadings open with submission of an appellant’s brief or personal statement of appeal. If the appellant’s submission is found to state a cause of action, the Board forwards it to the Deputy Assistant Secretary of State for Consular Affairs (Passport Services) who in turn refers it to the Office of Citizenship Appeals and Legal Assistance, the office representing the Department in loss of nationality proceedings before the Board. The Department has sixty days to submit the administrative record upon which it based the loss of nationality determination and a brief setting forth the position of the Department on the appeal. After the Department files its brief, the Board for-
wards a copy to the appellant who may submit a reply brief within thirty days.\footnote{Id. § 7.5(d). For good cause shown, the Board may enlarge the time for filing briefs and other documents, or the taking of any action under Part 7. Id. § 7.10.}

If the Department concludes it is unable to sustain its burden of proof after the appellant files an appeal, it may request that the Board remand the case for the purpose of vacating the certificate of loss of nationality.\footnote{By 1976 the Board became seriously concerned about the Passport Office's persistent and unacceptable practice of reviewing and reversing administrative holdings of loss of nationality after an appeal had been taken to the Board. This practice, it was asserted, effectively precluded the Board from exercising its appellate jurisdiction pursuant to the Department's regulations. To correct this situation the Board proposed a remand procedure to the Passport Office, offering the following rationale: It is appreciated that, once an appeal has been with the Board, the Passport Office may on occasion conclude that it is unable to meet the burden of proof required by section 349(c) of the Immigration and Nationality Act [see infra note 106] or to establish by a preponderance of the evidence that the appellant intended by his acquisition of foreign nationality or other expatriating conduct to relinquish his United States citizenship. In circumstances of that character, we believe that the Passport Office should promptly inform the Board of its views on the appeal, forward the case record for the Board's consideration, and request the Board to remand the case to the Passport Office for further proceedings. The Board would thus have an opportunity to consider the matter and take whatever action "it considers necessary and proper to the disposition" of the case appealed to it, as provided in 22 CFR \textsection 50.63. [W]e consider that the jurisdiction of the Board attaches concurrently with the appellant's notice of appeal to the Board and thereafter it is the Board's exclusive function to decide the disposition of the appeal. Memorandum to Frances G. Knight, Director of the Passport Office, from Edward G. Misey, Chairman of the Board of Appellate Review (Oct. 29, 1976). Concurring in this proposal, the Director of the Passport Office stated: It is understood that the Board will give sympathetic consideration to requests for remand. It is hoped that the remand request would be viewed as a procedural matter which would be granted automatically unless the Board found that the determination made by the Passport Office was based upon very substantial misapprehension of fact, or misinterpretation of law. However, it is understood, that the final decision on remanding cases rests with the Board. Memorandum to Edward G. Misey, Chairman of the Board of Appellate Review, from Frances G. Knight, Director of the Passport Office (Apr. 26, 1977).} Provided it has jurisdiction over the case and there are no manifest errors of law or fact, the Board consistently grants such requests.

An appellant may elect or waive oral argument.\footnote{22 C.F.R. \textsection 7.5(e) (1985).} If oral argument is waived the Board will decide the case on the basis of all written submissions and the administrative record upon which the Department based its loss of nationality holding.\footnote{Id.}

An appellant who elects oral argument may appear pro se, or by
or with an attorney.\textsuperscript{47} Hearings are informal and not governed strictly by the federal rules of evidence and procedure.\textsuperscript{48} The Board grants the parties considerable latitude in presenting their cases. The admissibility of any evidence, however, is subject to the general rules of relevance, competency and materiality.\textsuperscript{49} Parties may present witnesses, offer evidence, make oral argument, and confront and cross-examine adverse witnesses.\textsuperscript{50} The Board may require supplemental statements on issues presented, or confirmation, verification or authentication of any evidence submitted by the parties.\textsuperscript{51} Hearings are private unless the appellant requests, in writing, that the public be admitted.\textsuperscript{52} A qualified reporter makes a transcript of the proceedings which becomes part of the permanent record.\textsuperscript{53}

Although an increasing number of appellants request oral argument,\textsuperscript{54} most appellants waive personal appearance. Most live abroad, and for various reasons consider it difficult or too expensive to appear before the Board in Washington, D.C. where hearings are held. From the Board’s perspective, hearings have positive value. They animate the dry record and enable the Board to assess the appellant’s credibility through examination and cross examination by counsel and its own questioning of the appellant. Hearings are also invariably helpful in clarifying facts that are ambiguous or not accurately elucidated by the record.

Although the regulations provide a party may appear by counsel, the Board found this less than satisfactory in the few instances where an appellant elected not to appear but instructed counsel to make an oral argument. On occasion, the attorney has not actually met the appellant and is unable to convey a fair impression of the kind of person the appellant is. More important, the human dimension is missing. Many lay appellants appearing pro se have made more effective presentations than counsel appearing on behalf of an absent client.

\textit{Decisions and Decisionmaking}

Generally, the Board renders its decision about nine months after entry of an appeal, unless facts or issues must be clarified, or the parties request an extension to file briefs or obtain and submit additional evidence. The Board must decide each case on the basis of the

\textsuperscript{47} Id. § 7.5(k).
\textsuperscript{48} Id.
\textsuperscript{49} Id. § 7.5(g).
\textsuperscript{50} Id.
\textsuperscript{51} Id. § 7.6(b).
\textsuperscript{52} Id. § 7.6(c).
\textsuperscript{53} Id. § 7.6(d).
\textsuperscript{54} In one-third of the cases decided in 1984 the Board heard oral argument.
entire record of the proceedings. 55 When pleadings are complete, the Chairman selects two other members to constitute the required panel of three. A conference is held on each appeal; in finely balanced cases, protracted consultation may be necessary before a comfortable decision can be reached. Decisions are by majority vote. 56 Written opinions set out the findings of fact and conclusions of law upon which the Board bases its decision. 57 Subject to the right of either party to move for reconsideration, 58 decisions of the Board are final, and thus the conclusive determination of a person’s nationality by the Department of State.

A motion for reconsideration must state precisely where the Board overlooked or misapprehended any points of law or fact. If the Board grants the motion, it must review the record of the proceedings and affirm, modify or reverse its original decision. By definition, a motion for reconsideration does not permit the introduction of new evidence.

Although the regulations make no express provision for the Board to entertain a motion to reopen, the Board’s general discretionary authority to “take any action it considers appropriate and necessary to the disposition of cases appealed to it,” 59 may reasonably be construed to permit the filing of such a motion. The Board took this position in a recent case where an appellant moved for reconsideration of the Board’s decision affirming the Department’s determination of loss of his nationality. 60

Although framed as a motion for reconsideration (it was alleged the Board had overlooked points of law), the Board considered it more properly as a motion to reopen because the appellant attempted to introduce new evidence. The Board denied the motion

56. Id.
57. Id.
58. Id. § 7.9 provides in part as follows:
The Board may entertain a motion for reconsideration of a Board’s decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion. Oral argument on the motion shall not be permitted. However, the party in opposition to the motion will be given opportunity to file a memorandum in opposition to the motion within 30 days of the date the Board forwards a copy of the motion to the party in opposition. If the motion to reconsider is granted, the Board shall review the record, and, upon such further reconsideration, shall affirm, modify, or reverse the original decision of the Board in the case.
motion for reconsideration on the grounds it did not show the Board overlooked or misapprehended any points of law in the original decision. The Board also denied the motion qua motion to reopen on the grounds the evidence appellant sought to introduce was inadmissible because it was demonstrably discoverable with due diligence before the litigation ended.

Since January 1984 the Board has been publishing selected decisions as a matter of public record, copies of which may be obtained by making a written request to the Board. Decisions rendered before 1984 may be reviewed in the Board’s offices.

Decisions as Precedent

There is no provision in the applicable federal regulations for the Board to designate selected decisions as precedent in cases involving the same or similar issues. Over the years the Board has not as a matter of practice expressly cited specific decisions as precedential. Furthermore, neither the Board nor the Department considers a prior decision binding on the Department in making subsequent nationality determinations. Board members realize adherence to the doctrine of stare decisis is generally conducive to impartiality and stability of decisions, and that decisions in outwardly similar cases should be rationally consistent. No requirement exists, however, for the Board to cite previously decided cases or to distinguish them from the case at bar.

In effect, many decisions are precedential because they involve application by the Board of well-settled judicial rulings to factual patterns similar to those the federal courts have confronted in loss of nationality proceedings. In another class of cases involving naturalization in a foreign state not requiring renunciation of previous nationality or allegiance, the Board operates in a judicially gray area. Apposite judicial precedent is minimal, as the discussion in the “Intent to Relinquish United States Citizenship” section of this Article will illustrate. In this class of cases, it would be inappropriate for the Board to designate certain cases as precedent. Indeed, it would probably be difficult to achieve the necessary unanimity within the Board to do so, given the lack of judicial precedent and the fact that members are not in uniform agreement on how to apply broad legal principles to specific facts.

Therefore, one should not regard published decisions as precedent. The Board selects them for publication mainly because they involve interesting fact patterns and illustrate the Board’s general approach to the disposition of a variety of appeals.

61. See infra notes 189-224 and accompanying text.
Judicial Review of Decisions of the Board

A person whose expatriation the Board affirms may institute an action in a federal district court to be declared a United States citizen. In such an action the cause is heard de novo.62

A number of unsuccessful appellants before the Board have instituted such actions, the Supreme Court's landmark decision in Vance v. Terrazas63 being the most notable example.

The administrative authorities have consistently accepted the decisions of the Board of Appellate Review as the final determination of a person's nationality by the Department of State. In 1972, however, the Immigration and Naturalization Service (INS) challenged the

62. INA § 360(a), 8 U.S.C. § 1503(a) (1982), provides in pertinent part: If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, [United States Code], against the head of such department or independent agency for a judgment declaring him to be a national of the United States . . . . An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence . . . . Paragraph (b) of the same section prescribes how a person not in the United States may gain entry to institute such an action.


It is doubtful that one whom the Department determines to have lost his or her nationality may bypass the Board and proceed directly to federal court. The Department's loss of nationality determination is a final administrative denial of a person's right or privilege as a national of the United States; its operative effect is not contingent upon the fulfillment of any condition subsequent. One held to have expatriated himself does, however, have the right to seek administrative relief through an appeal to the Board. Some cases suggest exhaustion of administrative remedies through appeal to the Board is a condition precedent to instituting an action under § 360 of the statute. See Peter, 347 F. Supp. at 1037 ("[h]aving exhausted her administrative opportunities, as to which no question is raised, [plaintiff] took an appeal to the Board which affirmed her loss of nationality] she instituted this suit". See also García-Sarquiz v. Saxbe, 407 F. Supp. 789 (S.D. Fla. 1974); Arias-Alonzo v. INS, 391 F. 2d 400 (5th Cir. 1968); Linzalone v. Dulles, 120 F. Supp. 107 (S.D.N.Y. 1954).
Board's decision in *In re Claude Cartier.* There, the Board concluded that Cartier acted involuntarily when he formally renounced his United States nationality in 1964, agreeing with appellant's contention he gave up his United States citizenship against his will under the duress of family devotion. Accordingly, the Board reversed the Department's holding of expatriation. The INS refused, however, to return Cartier's certificate of naturalization on the grounds the Board's decision was wrong as a matter of law, and referred the matter to the Attorney General to resolve.

Before the Attorney General ruled on the matter, Cartier sought a writ of mandamus in the United States District Court for the District of Columbia to compel the Department of State to issue him a passport and to compel the INS to return his certificate of naturalization. In February 1973 the Attorney General determined that Cartier was not a United States citizen. He held that the decision of the Board of Appellate Review was not binding on the Attorney General in view of the specific provisions of the statute and because the Board lacked a quorum when the decision was adopted. He also

64. *In re Claude Cartier, State Dep't Dec. (B. App. R. Aug. 7, 1972).*

65. Whether the INS concluded sua sponte that the Board's decision in *Cartier* was wrong as a matter of law, or whether the INS reached this conclusion after the Passport Office importuned the INS to attack the decision, is not a matter of record. The latter conjecture is plausible, however, for the Passport Office registered vigorous dissent. Memorandum to the Legal Adviser of the Dep't of State, John R. Stevenson, from the Director of the Passport Office, Frances G. Knight (Sept. 6, 1972). Ms. Knight wrote in part:

The Passport Office is unalterably opposed to the decision of the Board of Appellate Review on two grounds. First, the decision is probably invalid legally since two of its "members" had retired or resigned prior to the date of the official decision. Second, the decision of the Board is patently incorrect as a matter of law . . . . The decision is posited on an imaginary duress. Nowhere in the record is there any evidence of factual circumstances which forced Cartier to divest himself of his United States citizenship . . . if the Board's decision is to be followed in this case it will make impossible statutory acts of voluntary renunciation . . . .

It is the recommendation of the Passport Office that no passport be issued to Claude Cartier and that he should be allowed to avail himself of whatever legal remedies he may have available to him in the Courts. Furthermore, we have been formally advised by the Immigration and Naturalization Service that they disagree with the decision of the Board of Appellate Review and have declined to return to Mr. Cartier his Certificate of Naturalization. The Immigration and Naturalization Service is referring the Board's decision to the Attorney General for resolution of the differences between the Department of Justice and the Department of State.

If this decision is allowed to stand on this reasoning [Ms. Knight called the decision in *Cartier* "the most crucial citizenship determination to be made in any citizenship case yet decided"] there is little sense in trying to enforce the Congressional intent regarding loss of United States citizenship as manifested in the existing statutes and interpreted by the Attorney General.

concluded that Cartier had not overcome the presumption that he acted voluntarily. Citing the authority conferred upon him by statute,67 the Attorney General held that his decision was final and conclusive on the executive branch.

On March 9, 1973, the District Court ordered the INS to return Cartier's certificate of naturalization and ordered the Secretary of State to issue him a passport.68 The court observed that the Attorney General never before had attempted an appellate review of a quasi-judicial decision of the Board of Appellate Review, and found no such "broad and unfettered" power in the statute. The court held that the Board's jurisdiction over the appeal attached when the State Department issued the certificate of loss of nationality to Cartier, and expressed the view that a violation of due process may exist since the Department of Justice was without power to act in the case. Since the Board had rendered its decision in an adversary proceeding at which the government had been represented, the court concluded that the decision was binding and conclusive on all officers and agencies of the United States.

On appeal by the government, the Court of Appeals for the District of Columbia Circuit did not reach the issue of whether decisions of the Board are binding on all agencies of government. It remanded the case on procedural grounds.69 The court observed that because of the "bifurcation" of responsibilities under the statute, the INS and the Department of State would be called on to address similar issues in different contexts, and that neither considered itself bound by a previous determination of nationality made by the other. The court found it "unwise" in the context of the proceedings in Cartier to attempt to resolve the scope of the Attorney General's power to make controlling determinations of law under the Act, and the applicability of res judicata to loss of nationality determinations made by the Attorney General and the Secretary of State pursuant to the Act.

The court remanded the case with instructions to dismiss Cartier's

67. INA § 103(a), 8 U.S.C. § 1103(a) (1982), provides in pertinent part: The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That [sic] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.
petition without prejudice to renew the action under the provisions of section 360 of the Immigration and Nationality Act.\textsuperscript{70} The Supreme Court denied Cartier’s petition for certiorari.\textsuperscript{71} He died shortly thereafter.

Intriguing as it is for the many complex legal issues raised, the case of Claude Cartier is unique in the Board’s experience. Although the respective responsibilities of the Attorney General and the Secretary of State to make final, binding determinations of a person’s nationality remain undelineated judicially, the INS has not formally challenged a decision rendered by the Board since the \textit{Cartier} case.

\textbf{JURISDICTION}

\textbf{Subject Matter}

The Immigration and Nationality Act provides that a United States national shall lose his nationality by:

(1) obtaining naturalization in a foreign state upon his own application;
(2) swearing an oath of allegiance or making a formal declaration of allegiance to a foreign state;
(3) serving in the armed forces of a foreign state, unless expressly authorized by the Secretaries of State and Defense;
(4) serving in the government of a foreign state while having the nationality of that state; or accepting employment in a foreign state for which an oath of allegiance is required;
(5) making a formal renunciation of United States nationality before a consular officer of the United States in the form prescribed by the Secretary of State;
(6) making a formal renunciation of United States nationality in the United States in wartime in the manner prescribed by, and with the approval of, the Attorney General; and
(7) committing treason against the United States.\textsuperscript{72}

\textsuperscript{70} See supra note 62.
\textsuperscript{71} Cartier v. Secretary of State, 421 U.S. 947 (1975).
\textsuperscript{72} INA § 349, 8 U.S.C. § 1481(a), paras. (1)-(7) (1982). By definition, the Department’s authority to make determinations of loss of nationality under § 349(a) is limited to paragraphs (1) through (5). Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 267-69; this Act prescribed that five other acts would cause loss of citizenship:

(a) voting in a political election in a foreign state. [section 349(a)(5) declared unconstitutional, Afroyim v. Rusk, 387 U.S. 253 (1967)].
(b) deserting the armed forces of the United States in wartime. [section 349(a)(8) declared unconstitutional Trop v. Dulles, 356 U.S. 86 (1958)].
(d) obtaining the benefits of foreign nationality by a dual national of the United States and a foreign state who remains in the foreign state for 3 years after the age of 22. [section 350].
(e) residing for 3 years in the state of one’s origin or 5 years in another foreign state if one is a naturalized citizen of the United States. [section 352, declared unconstitutional Schneider v. Rusk, 377 U.S. 163 (1964)].

The regulations make clear that the Board's jurisdiction in nationality matters is limited to hearing appeals from determinations of loss of nationality based on performance of a statutory expatriating act.\textsuperscript{73}

There is usually no dispute that the Board has subject matter jurisdiction. Occasionally, however, persons who expatriated themselves by performing a statutory expatriating act may later (often many years later) apply for a passport which is denied on the grounds of noncitizenship. They may then appeal to the Board basing the appeal on denial of a passport. No appeal follows from such an adverse decision;\textsuperscript{74} if such a person wishes to proceed, the Board will consider the appeal to be from the underlying holding of loss of citizenship.

The Board has no jurisdiction to hear appeals from a determination that a person born abroad of a United States citizen parent and an alien parent did not acquire United States citizenship at birth. In \textit{In re P.A.W.I.},\textsuperscript{75} the Department determined that a child born in
Switzerland to an American father and a Swiss mother did not derive United States citizenship from his father because the father did not meet the statutory requirements for transmission of citizenship, that is, he had not resided in the United States for ten years prior to the child's birth. 76

The Board pointed out that the applicable regulations limit its jurisdiction to hearing appeals from loss of nationality: 77 there is no provision for the Board to consider appeals from decisions of non-acquisition of citizenship. "Loss of nationality and non-acquisition of nationality . . . are semantically and conceptually distinguishable." 78 "Nonacquisition of nationality does not arise from performance or nonperformance of any specific act by the affected person, but results from the inability of his or her citizenship parent to fulfill a congressionally mandated condition precedent to confer citizenship." 78 The Board recognized that in some nonacquisition of citizenship cases there might be issues of fact or law appropriate for an administrative appellate body to review, but the present regulations may not be read as conferring authority that is not there, however meritorious the appellant's claim may be. 80

Timely Filing—A Jurisdictional Imperative

Timely filing is mandatory and jurisdictional. 81 If an appellant fails to comply with a condition precedent to the Board's hearing of his claim, that is, fails to appeal within the applicable limitations and provides no legally sufficient excuse, he properly suffers dismis-

76. INA § 301(g), 8 U.S.C. § 1401 (1982), reads as follows:
The following shall be nationals and citizens of the United States at birth: a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years; Provided, That (sic) any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 228 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 228 of title 22 may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.
79. Id. at 7-8.
80. Id. at 8.
A limitation on appeal ensures adjudication of an appeal in a manner fair to both parties—the appellant and the Department of State. The rationale for imposing a time limit is that a party who has been the subject of an adverse determination of nationality should have sufficient time to prepare a case showing why in the individual’s opinion the Department erred in holding expatriation occurred. A correlative purpose is to ensure the exercise of the right to assert a claim to United States citizenship within a circumscribed period of time to preclude the filing of appeals that could more easily and fairly have been resolved when events on which the appeal is based are fresh in the minds of both parties and full records are available.

Under the present regulations, effective November 30, 1979, a party must appeal an adverse determination of nationality within one year after approval of the certificate of loss of nationality. The limitation period begins to run from the date of approval of the certificate of loss of nationality, not from the date upon which the appellant received it. If an appeal is not filed within the one year limitation, it “shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed limit.” When the Department forwards an approved certificate of loss of nationality to the person to whom it relates, that person must be informed of the right of appeal. The reverse side of the certificate of loss of nationality sets out appeal procedures and the time limit. Thus, if the affected person received the certificate, there can be no doubt that he or she received notice of the right of appeal. The specific time limit on appeal and the legal requirement that an expatriate be expressly informed of the right of appeal undoubtedly account for the fact that, with few exceptions, timely appeals are consistently filed from determinations made after November 1979.

Where an appellant files an appeal outside the allowable limit, the central issue is whether the person can show good cause for not appealing within one year after approval of the certificate of loss of nationality. Usually, determining whether an appellant shows good

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83. 22 C.F.R. § 7.5(b) (1985).
84. Id. § 7.5(a).
85. Id. § 50.52. See supra note 36 and accompanying text.
cause is a straightforward matter of applying objective criteria. 86

Appeals from Determinations of Loss of Nationality Made Before 1979

Over the past four years, more than one-third of all cases appealed to the Board were from holdings of loss of nationality made prior to November 1979. The Board dismissed virtually all as time-barred. If only a few stale appeals came before the Board, the matter would require only cursory discussion. Unfortunately, many appellants and some attorneys do not seem to understand that the Board rarely is able to entertain long-delayed appeals even though they may arguably present meritorious issues.

Before 1979 the applicable regulations prescribed that a person who contended the Department's holding of loss of nationality was contrary to law or fact, might, "within a reasonable time" after receipt of notice of such holding, take an appeal to the Board of Appellate Review. 87 With respect to appeals taken from a holding of loss of nationality made prior to November 1979, the Board's practice is to apply the standard of "reasonable time," rather than the present limitation. In so doing, the Board follows the general principle that new or amended regulations shortening the time for appeal are intended to have a prospective, not retroactive effect, since to

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86. What constitutes "good cause" depends on the circumstances of each case. In general, to excuse a delay of more than one year an appellant must have been confronted with an event beyond his or her immediate control that was to some extent unforeseeable. See Wray v. Folsom, 166 F. Supp. 390 (D.C. Ark. 1958); Manges v. First State Bank and Trust Co., 572 S.W.2d 104 (Tex. Civ. App. 1978); Syby v. Department of Civ. Serv., 66 N.J. Super. 460, 169 A.2d 479 (1961); Becker v. Smith, 237 Wisc. 322, 296 N.W. 620 (1937).

Although one appellant presented no persuasive reason for not appealing within one year after approval of the certificate of loss of nationality, the Board excused her delay because of the material error of the consulate processing her case. The reverse of the certificate of loss of nationality sent to appellant in 1982 was blank, i.e., the required appeal procedures were missing. The Board ascertained that when appellant requested a copy of those procedures from the consulate, she was given information relevant to making appeals under regulations applicable from 1967 to 1979. The Board concluded that the appellant was entitled to assume she had a flexible period of time—not one year—within which to appeal, and had evidently acted on that assumption. The Board thus ruled the consulate's failure to inform appellant of the applicable limitation, as mandated by 22 C.F.R. § 50.52 (1985) (see supra note 36), excused her delay. In re L.S.K., State Dep't Dec. (B. App. R. July 9, 1985).


The federal regulations governing the Board of Review on the Loss of Nationality, the predecessor of the Board of Appellate Review, also prescribed a limitation on appeal of "within a reasonable time" after receipt of notice of the Department's holding of loss of nationality. 22 C.F.R. § 50.60, 31 Fed. Reg. 13,537 (1966). Prior to 1966, however, there was no time limit on appeals to the Board of Review on the Loss of Nationality. The Board of Appellate Review applied the standard of "reasonable time" to appeals from a loss of nationality determination made prior to 1966. The premise for this standard is that where no time limit exists, it is customary to follow the common-law rule.
apply the shorter time limit would disturb a right acquired under previous regulations.

Of the innumerable judicial renderings of reasonable time, the Board considers the succinct definition in Ashford v. Steuart a fair and useful rule of thumb: "What constitutes 'reasonable time' depends on the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Appellants rarely allege that physical constraints or incapacitating illness prevented them from seeking redress sooner. If proven, such factors could constitute a legally sufficient excuse for even a very substantial delay in taking an appeal. In all too many cases, the excuse offered appears to be an ex post facto rationalization of the appellant's tardiness.

A common excuse for not taking an appeal until many years after performance of the expatriating act is that the appellant did not learn of the Department's holding of loss of nationality until fairly recently. If proven, the failure of the Department or a consular office to give such notice might vitiate the time bar, since the statute mandates that the consular office concerned forwarded a copy of the approved certificate of loss of nationality to the expatriated person. But if a long delay were to occur before filing an appeal, it is unlikely there would be evidence (beyond the Department's record that it sent a copy of the certificate to the consular office on a specific date) to show what disposition was made of the certificate. Whether the consular officer received the certificate and, if so, whether the office forwarded it to the party concerned, may not be disclosed by

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88. See, e.g., Ackerman v. United States, 340 U.S. 193 (1950); Klapprott v. United States, 335 U.S. 601 (1949); Chesapeake and Ohio Ry. v. Martin, 283 U.S. 209 (1931); United States v. Karahallas, 205 F.2d 331 (2d Cir. 1953); In re Roney, 139 F.2d 175 (7th Cir. 1943); Dietrich v. United States Shipping Board Emergency Fleet Corp., 9 F.2d 733 (2d Cir. 1926).

89. 657 F.2d 1053, 1055 (9th Cir. 1981).


What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

extant records. In the absence of evidence to the contrary in such situations, the presumption is that the officials involved complied with the law and the office forwarded the certificate to the affected person.91 Passage of many years between performance of the expatriating act and entering an appeal, however, often makes it moot whether the appellant received a copy of the certificate of loss of nationality; the facts are probably undiscoverable. In such cases (this is particularly pertinent where the appellant made a formal renunciation of United States nationality), the relevant inquiry is whether the appellant had sufficient reason to believe he or she might have forfeited United States citizenship. If the record establishes this fact, the Board has concluded the appellant had cause to be put upon inquiry to ascertain his or her citizenship status and, upon learning the facts, to initiate timely action to contest the Department's holding. Failure to act on such knowledge, the Board has held, is inexcusable neglect.92

In In re J.F.M.W.,93 appellant made a formal renunciation of his United States nationality in 1959. He entered an appeal in 1981. He contended the Department never informed him of his loss of citizenship. The Board found that appellant knew he performed an explicit act of expatriation. "Thus armed with facts which should have put him on his guard," the Board said, "W. had a responsibility to ascertain his actual citizenship status, regardless of any alleged lack of actual notice of the Department's ministerial confirmation of his expatriative act."94

An allegation that one was not informed of the right of appeal when the holding of loss of nationality was made or did not learn of the right until many years later is an insufficient reason for a long-delayed appeal. Prior to 1979 there was no legal requirement to inform an expatriate of the right of appeal. Internal Department guidelines dating from 1954, however, directed consular officers to inform, in writing, the individual concerned of the right of appeal when forwarding the approved certificate of loss of nationality to the

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91. There is a legal presumption that officials execute their duties faithfully and correctly, unless the contrary is proven. Webster v. Estelle, 505 F.2d 926 (5th Cir. 1974); Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1954).

92. In making this analysis, the Board applies the general rule that the law imputes knowledge where opportunity and interest coupled with reasonable care would necessarily impart it. United States v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). Knowledge of facts putting a person of ordinary knowledge on inquiry notice is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939).


94. Id. at 15-16.
In the absence of contrary proof, the Board must assume in this instance as well that the consular officer properly carried out his assigned duties. Furthermore, since 1972, certificates of loss of nationality carry information about appeals on the reverse side. Anyone who received a certificate from 1972 onward may be presumed to have had notice of the right to appeal.

In any event, due process does not contemplate a right of appeal. While a statutory review is important and must be exercised without discrimination, such review is not a requirement of due process. A fortiori, giving notice of the right of appeal is not a requirement of due process, unless expressly prescribed by law or regulations.

Recently learning that lack of intent to relinquish citizenship might be grounds for an appeal is an insufficient reason for delay in appealing. An appeal based on such grounds has been available for nearly twenty years. An expatriate, genuinely concerned with recovering citizenship, could have learned that fact with due diligence. To countenance a long delay on grounds of unawareness of readily ascertainable information would allow one to appeal at a time suitable to oneself, something not contemplated by the rule of reasonable time.

Although appellants often concede their delay in appealing was substantial, they have submitted that the Board should exercise administrative discretion and waive the requirements of timely filing because the merits of the appeal are so compelling and the rights involved so precious. True, the Board has authority to “take such [action] as it considers appropriate and necessary to the disposition of cases appealed to it.” The Board’s authority under this provision, however, may not be construed so as to nullify other jurisdictional preconditions established by the applicable regulations for the Board. Once the Board determines it lacks jurisdiction to consider an appeal, it lacks jurisdiction to consider an appeal.

95. See supra note 27 and accompanying text.
98. Appellants referred to the Supreme Court’s decision in Vance v. Terrazas, 444 U.S. 252 (1979), where the Court held that the government must prove intent to relinquish citizenship.
99. The Supreme Court’s holding in Afroyim v. Rusk, 387 U.S. 253 (1967), to the effect that Congress has no power to take away citizenship, absent the assent of the citizen, and the Attorney General’s interpretation that a party may always raise the issue of intent, in 42 Op. Att’y Gen. 397 (1969), gave an aggrieved party adequate grounds for seeking review of the determination of loss of his nationality.
100. In re Roney, 139 F.2d 175 (7th Cir. 1943).
appeal as time-barred, the only proper course is to dismiss it.\textsuperscript{102} The principle that a limitation on appeal is, among other things, intended to protect the opposing party against stale claims is especially relevant to appeals from determinations of loss of nationality made prior to 1979. The Department bears the burden of proving a party's intent to relinquish United States citizenship,\textsuperscript{103} and since it must prove intent at the time of the expatriating act,\textsuperscript{104} an appellant's allowing many years to pass before appealing will invariably prejudice the Department's ability to essay its statutory burden of proof. With passage of time, memories fade, and notes of consular officers about the case may have been destroyed. Consular officers may have died or may no longer be available to testify, or if available, they may be unable to remember events of years ago. The Department is thus handicapped in carrying its burden of proof not only on the issue of intent, but also in meeting allegations that the appellant performed the expatriating act under duress.\textsuperscript{105}

The Board will docket appeals from determination of loss of nationality made prior to 1979, even though such appeals represent delays of at least six years. As it does in all such cases, the Board will examine the record closely to determine whether there may be a valid reason for the appellant's not having moved sooner. Absent a legally sufficient excuse, the Board will give decisive weight to the interest in finality and stability of administrative determinations of loss of nationality.

\textbf{Constituent Elements of a Decision on the Merits}

If the jurisdictional prerequisites are met, the Board determines seriatim: whether the individual validly performed a statutory expatriating act; whether it was voluntary; and whether the act was done with an intent to relinquish United States citizenship.

\textsuperscript{102} Opinion of Davis R. Robinson, Legal Adviser, Dep't of State (Dec. 27, 1982), excerpted in \textit{77 Am. J. of Int'l L.} 298 (1983). The Legal Adviser further stated the fact the Board dismissed an appeal because it is time-barred does not in itself operate as a bar to the Department's taking further administrative action to correct manifest errors of fact or law, subject to the general requirements of stability, repose, and finality of administrative decisions.

\textsuperscript{103} \textit{Vance}, 444 U.S. at 252.

\textsuperscript{104} Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981).

\textsuperscript{105} \textit{In re S.B.S.}, State Dep't Dec. (B. App. R. Apr. 15, 1984), is a singular exception. There, the delay in entering an appeal was nearly seven years. Nonetheless, the Board found that the appeal had been taken within a reasonable time. Two salient aspects of appellant's case set it apart from others in which the Board had found that delays of comparable length were unreasonable. There, the Department suffered no prejudice by the delay, the record was "replete with detailed information" about appellant's intent when she obtained naturalization, and appellant's concern about her loss of nationality was constant, although her efforts to seek redress were somewhat uneven. \textit{Id.} at 9-10.
Validity of the Expatriative Act

Under the statute, the Department has the burden to prove the performance of a valid expatriative act. To be valid, the individual must perform the act in accordance with established legal principles. Most appellants concede they performed a statutory expatriating act and do not contest its validity.

Occasionally, appellants contend the act they performed is void because of procedural defects. In re M.C.G. and In re C.J.McC. are illustrative of this point. In both cases appellants expatriated themselves by making a formal declaration of allegiance to Mexico in conjunction with an application for a certificate of Mexican nationality. They argued making such a declaration was invalid because it did not conform with United States legal norms: they were not formally sworn; the declaration of allegiance contained no invocation of the deity; it was set out on a pre-printed mimeographed form; and there was no formal ceremony presided over by a dignitary. The Board found this line of argument to be without merit.

The Board takes notice that Mexico regards the making of a declaration of allegiance in the form prescribed by its laws as a solemn and binding undertaking to renounce all other allegiance and adhere

106. INA § 349(c), 8 U.S.C. § 1481(c) (1982), provides that:
Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this Chapter 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. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.


108. Challenge has also been made to the constitutionality of the applicable section of the statute or federal regulations. The Board is expressly barred from considering arguments challenging the constitutionality of any law or any regulation of the Department of State. 22 C.F.R. § 7.50 (1985). The same section of the regulations bars the Board from taking into account any classified or administratively controlled material.


111. INA § 349(a)(2), 8 U.S.C. § 1481(a) (1982), reads as follows:
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 lose his nationality by . . . . (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof . . . .

112. In re M.C.G., slip op. at 13-14; In re Matter of C.J.McC., slip op. at 5.
solely to Mexico. Being a meaningful statement of fidelity to Mexico, the declaration satisfies the requirements of the United States statute. As the district court said in Terrazas v. Vance: “It is the form of the substantive statement of allegiance to a foreign state as opposed to the adjectival description of the statement itself which is determinative and most relevant in deciding matters of expatriation.”

The Board must closely examine the circumstances surrounding each expatriative act. In no case is careful scrutiny more important than where one has made a formal renunciation of United States nationality. Given the gravity of this deliberate act of divestiture of citizenship, no material deviation is permissible from the provisions of the statute and the guidelines issued by the Secretary of State to ensure the act is accomplished freely and wittingly.

In In re D.W.L., the Board concluded that appellant did not make a formal renunciation of his citizenship in conformity with applicable legal principles, and therefore the act was void ad initio. There, appellant swore an oath of renunciation before a consular officer of the United States. The oath was not sworn at a United States diplomatic or consular office, but at a public safety building in Winnipeg, Canada, where he was detained pending disposition of criminal charges against him.

The provisions of the Immigration and Nationality Act governing formal renunciation are identical to those of the Nationality Act of 1940, which provided the first statutory procedure for formal re-

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113. No. 75-C 2370, slip op. at 5 (N.D. Ill. Aug. 16, 1977) (citing III G. Hackworth, Digest of Int'l Law 219-20 (1942); Savorgnan v. United States, 338 U.S. 491 (1950)). The passage in Hackworth cited by the court reads as follows:

The Department of State has taken the view that in adopting the provision of section 2 of the act of March 2, 1907, concerning the taking of an oath of allegiance to a foreign state, Congress did not have in mind any particular formula. Secretary Hughes declared in a letter of March 16, 1924 to the Honorable Frank L. Polk:

It is the spirit and meaning of the oath, and not merely the letter, which is to determine whether it results in expatriation.

It is not a mere matter of words. The test seems to be the question whether the oath taken places the person taking it in complete subjection to the state to which it is taken, at least for the period of the contract, so that it is impossible for him to perform the obligations of citizenship to this country.

114. The statutory provisions for formal renunciation are found in INA § 349(a)(5), 8 U.S.C. § 1481(a)(5) (1982), which reads as follows:

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.


nunciation of citizenship. Before enactment of the Immigration and Nationality Act of 1952, the Senate Committee on the Judiciary investigated the immigration and naturalization systems of the United States. With respect to the statutory procedure of a formal renunciation in the Nationality Act of 1940, the Committee stated: "Formal renunciation by a native-born or naturalized citizen abroad must be made only at a consulate of the United States before diplomatic or consular officers." Since the intent of Congress was clear, the Board concluded that appellant's renunciation was not made in accordance with law because he made the statement at a place other than a consular establishment of the United States. Furthermore, the witnesses to appellant's renunciation were not in the category of persons who may witness a formal renunciation; they were Canadian prison officials. Holding that appellant had not expatriated himself, the Board stated that the procedural defects surrounding his renunciations were not, as the Department argued, procedural trivialities. Rather, appellant's oath was defective because it was not administered in the manner provided by statute or in the form prescribed by the Secretary of State.

**Voluntariness**

If it is proved that the appellant performed a valid statutory expatriating act, the voluntariness of the act is the next issue for determination. In law, it is presumed that a person who performs a statutory expatriating act does so voluntarily but this presumption may be re-

117. Section 401(f) of Chapter IV of the Nationality Act of 1940, ch. 876, § 401 (f), 54 Stat. 1137, 1169, reads:
A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

\[\text{(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.}\]


120. The then-applicable Departmental guidelines, *U.S. DEP'T OF STATE, 8 FOREIGN AFFAIRS MANUAL, Citizenship and Passports § 225.6g (1969)* provided: "Witnesses may be diplomatic or consular officers, local employees, companions of the would-be renunciant or other private persons who may be available."

121. *D.W.L.*, State Dep't Dec., slip op. at 10-11.
butted upon a showing by a preponderance of the evidence that the act was involuntary.\textsuperscript{122}

If an appellant can show that the act was not freely done because it was the result of coercion, performed while lacking capacity to perform a rational act of expatriation, or when appellant was unaware of being a United States citizen,\textsuperscript{123} that is the end of the matter. "It is settled that no conduct results in expatriation unless the conduct is engaged in voluntarily."\textsuperscript{124}

Judicial norms of duress in loss of nationality proceedings come largely from the plethora of cases spawned in World War II and the post-war period when many American citizens in Europe and Japan confronted dangerous or extraordinarily difficult situations which forced them to perform a proscribed act to protect their own or their family's lives. Precedents based on human experience in dire situations many years ago may seem inapposite to the cases of United States citizens who perform an expatriating act today. Recent court decisions (with a possible exception discussed below), however, have not overruled or modified such precedent, and the Board, as a quasi-judicial administrative panel, is constrained to apply settled case law in determining duress.

Appellants who seek review of determination of loss of their nationality before the Board have not encountered the stark dilemmas that faced many plaintiffs in the cases decided in the 1940's and

\begin{itemize}
  \item \textsuperscript{122}INA § 349(e), 8 U.S.C. § 1481(c) (1982). See supra note 106.
  
  Section 349(c) was enacted in 1961. Pub. L. No. 87-301, 75 Stat. 656 (1961). Mr. Justice Harlan's dissent in Nishikawa v. Dulles, 356 U.S. 129, 142 (1958), provided impetus for its passage. In it, he took issue with the holding of the majority that the government bore the burden of proving, by clear, convincing, and unequivocal evidence, that a voluntary expatriative act had been performed. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 40 (1961) (House Report on § 349(e)) quoted the Harlan dissent \textit{in extenso}. Section 349(c) shifted the burden of proof to the party claiming involuntariness, the rationale being that since involuntariness is an affirmative defense and the evidence lies in the possession of the party claiming it, he should bear the burden of proof. At the same time, the standard of proof was lowered to a preponderance of the evidence.

  INA § 349(b), 8 U.S.C. § 1481(b) (1982) prescribes a conclusive presumption of voluntariness, if the party is also a national of the state where the expatriating act was done and has been physically present in that state for a period of 10 years immediately prior to commission of the act. The validity of § 349(b) has not been tested in the courts, but some commentators consider its constitutionality doubtful. See C. Gordon & H. Rosenfield, \textit{Immigration Law and Procedure} § 20.9B (rev. ed. 1979).

  The Department's position is it would not be "prudent" to rely on § 349(b) for any determinations of loss of nationality. Supplemental Memorandum of Law, \textit{In re C. deT.}, State Dept' Dec. (B. App. R. Jan. 29, 1982). In none of its decisions has the Board based a finding of voluntariness on the provisions of § 349(b).

  \item \textsuperscript{123}A statutory expatriating act is deemed involuntary if one is unaware of being a United States citizen when performing the act. Rogers v. Patokoski, 271 F.2d 858 (9th Cir. 1959).

  \item \textsuperscript{124}Nishikawa v. Dulles, 356 U.S. 129 (1958). \textit{See also} Vance v. Terrazas: "We also hold that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been voluntary until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation." 444 U.S. at 270.
\end{itemize}
1950's. The duress claimed is usually of a more mundane nature, and the issue of voluntariness is seldom dispositive. Indeed, it is the Board's experience that voluntariness is "the over-argued issue." In only two cases in the past four years did the Board find the appellant's claim of duress or incapacity persuasive.

Nonetheless, as Mr. Justice Frankfurter said: "[W]here a person who has been declared expatriated contests that declaration on grounds of duress, the evidence in support of this claim must be sympathetically scrutinized. This is so because of the extreme gravity of being denationalized and because of the subtle psychological factors that bear on duress."

Economic Duress

Economic duress is the most commonly argued defense. Many appellants contend they were "forced" to jeopardize their citizenship because only by so doing could they avoid economic hardship or discrimination in employment. For example, a number of teachers alleged they had to seek foreign citizenship to retain their positions in a public school system where untenured (noncitizen) teachers were vulnerable to dismissal. Other appellants argued they were obliged to acquire foreign nationality to enter a profession closed to non-citizens of the foreign state or even to find any work.

Some degree of economic hardship is present in many cases appealed to the Board. The decisive issue, however, is whether the pressures to obtain foreign nationality, or to do some other expatriative act, were sufficiently compelling to render the act involuntary as a matter of law.

Generally, appellants fail to demonstrate that "extraordinary circumstances" forced them to commit a proscribed act in the sense

125. Abramson, United States Loss of Citizenship Law after Terrazas: Decisions of the Board of Appellate Review, 16 N.Y.U.J. OF INT'L L. AND POL. 850, 853 (1984). Abramson argues that since the government must prove a person's intent to relinquish citizenship, "this would be a better issue for an appellant to rely on in his defense." His article is an excellent survey of the Board's decisions after Terrazas.


127. Nishikawa, 356 U.S. at 140 (Frankfurter, J., concurring); see also Nakashima v. Acheson, 98 F. Supp. 11, 13 (S.D. Cal. 1951) ("[t]he means of exercising duress is not limited to guns, clubs, or physical threats").


envisaged by the court in *Doreau v. Marshall.* There, the petitioner claimed she obtained French naturalization during the German occupation to avoid internment, fearing that internment would endanger her life and the life of her unborn child. "If by reason of extraordinary circumstances amounting to true duress," the court said, "an American citizen is forced into the formalities of citizenship of another country, the *sine qua non* of expatriation is lacking." The court noted, however, that foresaking American citizenship as a matter of expediency, when "crass material considerations suggest that course," does not constitute duress.

In the Board’s experience the degree of economic compulsion pleaded is not on the order of severity that the courts hold must exist for such a defense to prevail. No appellant, recently at least, has met the stringent tests laid down in *Stipa v. Dulles* and *Insogna v. Dulles.* Where petitioners performed an expatriative act in the economic chaos of wartime and postwar Italy to subsist, appellants coming before the Board are unable to show dire economic circumstances that forced them to perform a proscribed act.

In the recent case of *Richards v. Secretary of State,* plaintiff argued he obtained naturalization in Canada to retain his employment. The district court found, however, that he was under no economic hardship. Affirming the district court, the Ninth Circuit stated:

Conditions of economic duress, however, have been found under circumstances far different from those prevailing here. In *Insogna v. Dulles,* for instance, the expatriating act was performed to obtain money necessary “in order to live.” In *Stipa v. Dulles,* the alleged expatriate faced “dire economic plight and inability to obtain employment.” Although we do not decide that economic duress exists only under such extreme circumstances, we do think that, at the least, some degree of hardship must be shown.

Although it is arguable that *Richards* qualifies the current pertinence of *Stipa* and *Insogna,* it is important to note that the Ninth Circuit was only required to determine whether the district court erred in finding that Richards was under no economic hardship, and it held the lower court did not err. Plainly, an individual must prove more than ordinary hardship to sustain a defense of economic duress.

130. 170 F.2d 721 (3d Cir. 1948).
131. *Id.* at 724. *See also* Schioler v. United States, 75 F. Supp. 353 (N.D. Ill. 1948). Petitioner obtained Danish naturalization to protect herself, her husband, and her children during the German occupation.
132. 170 F.2d at 724.
133. *Stipa v. Dulles,* 233 F.2d 551 (3d Cir. 1956) (individual faced “dire economic plight and inability to obtain employment”).
135. 752 F.2d 1413 (9th Cir. 1985).
136. *Id.* at 1419.
Appellants pleading economic duress have not been able to establish that they had no alternative to performing the act, or that they made a bona fide effort to protect their economic position by means short of jeopardizing their United States citizenship, but failed. Where one has a clear alternative to performance of an expatriating act or fails to prove that alternatives were explored but to no avail, the Board has concluded that the individual has an opportunity to make a personal choice.\textsuperscript{197} Neither motivation nor the difficulty of the choice makes an action involuntary if the actor is free to choose between alternatives.\textsuperscript{138} "The opportunity to make a decision based upon personal choice is the essence of voluntariness."\textsuperscript{139} In today's world a plea of economic duress rarely will be a persuasive defense.

Family Devotion

In \textit{In re K.L.D.},\textsuperscript{140} subtle psychological factors purportedly caused appellant to perform a statutory expatriating act. Appellant, wife of a leading provincial politician, allegedly obtained naturalization in Canada to protect her husband's public career at a time when the press and political circles were highly critical of her non-Canadian citizenship. Only the detrimental effect of this criticism on her husband's political fortunes, and on her children, who were subjected to growing public exposure, led her to take Canadian citizenship.

The Board accepted that the pressures appellant felt were genuine. Nonetheless, it could not consider them coercive as a matter of law. The circumstances under which she obtained naturalization were not "extraordinary." Appellant was in a sense the author of her own difficulty; she married when her husband was already prominent in politics, and might have been expected to foresee that her lack of Canadian citizenship could one day create problems for his career. Furthermore, both appellant and her husband conceded that their marriage would probably not have suffered had she not obtained naturalization.\textsuperscript{141}

Nor was appellant's situation remotely comparable to that of the

\textsuperscript{138} Prieto v. United States, 289 F.2d 12 (5th Cir. 1961); Jubran v. United States, 255 F.2d 81 (5th Cir. 1958).
\textsuperscript{139} Jolley v. INS, 441 F.2d 1245, 1250 (5th Cir.), \textit{cert. denied}, 404 U.S. 946 (1971).
\textsuperscript{141} \textit{Id.} at 10.
plaintiffs in *Mendelsohn v. Dulles*,\(^1\) or *Ryckman v. Acheson*.\(^2\) In those cases, a husband (Mendelsohn) and a daughter (Ryckman), both naturalized United States citizens, remained abroad in excess of the time permissible for naturalized citizens under the then-applicable law. The purpose of each individual’s extended stay abroad was to care for a seriously ill wife and terminally ill mother, respectively, for whom there was no one else to minister. The courts found the devotion of both plaintiffs was just as compelling as physical restraint.\(^3\)

A case of first impression: *In re K.L.D.* presented duress in an elusive form. Although appellant’s situation evoked its sympathy, the Board was constrained to follow settled precedent, and thus concluded that she voluntarily performed the expatriating act.

Duress and Formal Renunciation of United States Nationality

In cases of formal renunciation of United States nationality, the issue of voluntariness may be crucial. Unless the appellant can prove involuntariness, he or she is unlikely to prevail; the categoric language of the formal oath of renunciation seldom leaves any doubt the appellant intended to relinquish citizenship.

One appellant argued that she joined her husband in making a formal renunciation because he exerted pressure on her to do so; she thus acted because of marital devotion and the influence of another.\(^4\) When she renounced, appellant was pregnant and sole financial support for the family. Her contention that she acted involuntarily because she was particularly vulnerable at the time was plausible. However, she submitted no evidence to support her claim, save a latter-day statement from her husband. The Board could not accept her unsubstantiated, after-the-event allegations of duress in the face of clear language of the oath of renunciation and the statement of understanding she executed in the presence of the consul in which she attested that she had renounced her citizenship freely and not under the compulsion or influence of another.\(^5\)

Appellant in *In re G.B.S.*\(^6\) was a schizophrenic, with a history of attempted suicide and dissolute habits. The consul who administered the oath of allegiance to appellant reported to the Department that the appellant appeared competent when he renounced his citizenship, and the record showed he managed his business affairs fairly efficiently. He argued, however, that he was not mentally competent to

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\(^{142}\) 207 F.2d 37 (D.C. Cir. 1953).
\(^{144}\) *Mendelsohn*, 207 F.2d at 39; *Ryckman*, 106 F. Supp. at 741-42.
\(^{146}\) *Id.* at 16-17.
perform a voluntary act of expatriation on the day of his renunciation. The psychiatrist in whose care appellant was under for a year prior to his renunciation and who examined appellant only one week before he renounced, stated without any reservation in a sworn statement that his patient was incapable of performing a rational act on the day he gave up his citizenship. On the basis of the unequivocal evidence of an eminent practitioner with forty years experience, the Board concluded that appellant rebutted the statutory presumption of voluntariness.\textsuperscript{148}

In \textit{In re H.H.L.},\textsuperscript{149} appellant, a dual national of the United States and Saudi Arabia, renounced his United States nationality in Jidda when he was sixteen years old, allegedly because he was forced to do so by his father.\textsuperscript{150} In concluding appellant rebutted the statutory presumption of voluntariness, the Board gave great weight to the fact appellant was a minor when he renounced. It reasoned that an ostensibly devout Muslim child, living in a state where the Koran is law, probably would have lacked the will to resist the dictates of a forceful father who, the record showed, was adamant his son not hold two citizenships.\textsuperscript{161}

\textit{Intent to Relinquish United States Citizenship—the Constitutional Dimension}

Even though an appellant fails to rebut the statutory presumption of voluntariness, the question remains whether the government satisfies its burden of proof that the individual performed the expatriating act with the intention of relinquishing citizenship.\textsuperscript{162}

\begin{footnotes}
\footnotetext[148]{Id. at 13-14.}
\footnotetext[149]{\textit{In re H.H.L.}, State Dep't Dec. (B. App. R. Aug. 8, 1985).}
\footnotetext[150]{Under the statute, a person under the age of 18 may legally renounce United States nationality. See \textit{infra} note 268.}
\footnotetext[151]{\textit{H.H.L.}, slip op. at 20-21. Although there was a five year delay in taking the appeal, the Board found that it had been entered within a reasonable time after the Department's holding of loss of appellant's nationality. The appellant made a showing that he could not move sooner, because his father restrained him from taking any action to contest the loss of his citizenship.}
\end{footnotes}
The Judicial Setting

Before *Afroyim v. Rusk*, the Supreme Court rejected any contention that the power of Congress to regulate loss of nationality depended on the assent of the citizen. In *Perez v. Brownell*,153 a narrowly divided Court (5 to 4) affirmed a line of decisions holding intent was irrelevant in loss of nationality proceedings. Mr. Justice Frankfurter, who wrote for the majority, grounded the Court's decision firmly on stare decisis: "Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily . . . But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."154

Chief Justice Warren took strong issue with the majority view, maintaining that the government is without power to take away citizenship. The fourteenth amendment, he asserted, "recognizes that this priceless right is immune from the exercise of governmental powers . . . every exercise of governmental power must find its source in the Constitution. The power to denationalize is not within the letter or the spirit of the powers with which our Government was endowed."155

A number of cases later decided by the Court and a number of commentators raised serious doubts about the soundness of *Perez*.156 Nearly ten years passed, however, before the Supreme Court again addressed the issue of whether loss of nationality depended on a party's intent to relinquish citizenship. *Afroyim v. Rusk* presented the opportunity to do so. There, the petitioner instituted an action for a declaratory judgment after the Board of Review on the Loss of Nationality of the Department of State affirmed the Department's determination that Afroyim expatriated himself by voting in an election in Israel.157 The lower courts rejected petitioner's argument that he could only lose his citizenship if he intended to relinquish it.

A new majority (*Afroyim*, too, was a 5 to 4 decision) adopted the basic premise of the Chief Justice's dissent in *Perez*. Speaking for the Court, Mr. Justice Black said: "[W]e reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American

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154. Id. at 77-78 (Warren, C.J., dissenting).
155. Id. at 77-78 (Warren, C.J., dissenting).
157. Like Perez, Afroyim lost his citizenship under Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137, 1168. See supra note 153.
citizen's citizenship without his assent.”

He concluded the Constitution protects the right of an individual to remain a United States citizen unless the person voluntarily relinquishes his citizenship. The Court overruled Perez and declared the statutory proscription on voting in a foreign election unconstitutional.

Although a watershed in nationality law, Afroyim was not a model of clarity. It did not expressly define voluntary relinquishment, nor did it allocate the burden or establish the standard of proof that a citizen has assented to loss of his United States citizenship. The Departments of State and Justice therefore consulted for over a year to determine how the administrative authorities should apply Afroyim to specific loss of nationality statutes. The result of those consultations was the Attorney General’s Statement of Interpretation of Afroyim, issued January 18, 1969. Afroyim makes it clear, the Attorney General said:

that an act which does not reasonably manifest an individual’s transfer or abandonment of allegiance to the United States cannot be the basis for expatriation. I have concluded that it is the duty of executive officials to apply the act on the following basis. “Voluntary relinquishment” of citizenship is not confined to a written renunciation. It can also be manifested by other actions declared expatriative under the act, if such actions are derogation of allegiance to this country. Yet even in those cases, Afroyim leaves it open to the individual to raise the issue of intent.

Once the issue of intent is raised, he said, the government has the burden of proving by a preponderance of the evidence that expatriation took place. Citing Mr. Justice Black’s concurring opinion in Nishikawa v. Dulles, the Attorney General stated that the volun-

158. 387 U.S. at 257.
159. Id. at 267-68.
160. In invalidating § 401(e) of the Nationality Act of 1940, the Court ipso facto invalidated § 349(a)(5) of the Immigration and Nationality Act. See supra note 72.
161. Mr. Justice Harlan, who dissented, pointed out an ambiguity in the majority's opinion.
163. Id. at 400.
164. Id. The Attorney General noted that the government’s burden is clear under § 349(c) of the Immigration and Nationality Act. See supra note 106.
tary performance of some acts may be highly persuasive evidence of intent to abandon citizenship, adding, "[y]et some kinds of conduct though within the prescription of the statute, simply will not be sufficiently probative to support a finding of voluntary expatriation." He concluded that in each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the term of an expatriation provision and has in fact voluntarily relinquished his citizenship.

Under the Attorney General's advice, the Department and the INS adopted the following general principles to guide the administrative authorities in loss of nationality proceedings:

The voluntary performance of the following acts is considered highly persuasive evidence of an intention to relinquish citizenship and will normally result in expatriation:

1. Naturalization in a foreign state
2. A meaningful oath of allegiance to a foreign state
3. Service in the Armed Forces of a state engaged in hostilities against the United States
4. Service in an important political post in a foreign government.

In all cases the person who performed an act described as expatriative by statute should be given, to the extent possible, an opportunity to state fully all of the facts and circumstances, and the motives and purposes surrounding the expatriative act he performed with emphasis on ascertaining his intent to relinquish such act.

In 1977 the Department's guidelines for consular and Departmental officers spelled out specific indicia of intent to relinquish citizenship. Among the factors to assess in potential loss of nationality cases were whether one: registered with the authorities of the foreign country of his residence as an alien or as a citizen of that foreign country; held documents issued by the foreign country; registered or otherwise was documented as a United States citizen; documented one's children United States citizens; consulted a United States official about the effect of performing the expatriative act in question; tried to avoid performance of the expatriative act. After *Afroyim* and the Attorney General's interpretation, the courts consistently addressed the issue of intent, assuming intent was a required element in expatriation.

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167. Id. at 401.
168. The principles were set out in an instruction to all diplomatic and consular posts, Circular Airgram 2855 (May 16, 1969). They were incorporated in the Department's Foreign Affairs Manual in 1970. U.S. DEP'T OF STATE, 8 FOREIGN AFFAIRS MANUAL, Citizenship and Passports § 224.5 (1970).
In 1980 the Supreme Court revisited *Afroyim* in *Vance v. Terrazas*. The litigation began after the Board of Appellate Review had affirmed the Department’s holding that Terrazas voluntarily swore allegiance to Mexico with the intention of abandoning his United States citizenship. In its opinion the Board stated: “We view appellant’s declaration of allegiance to Mexico and his concurrent repudiation of any and all submission, obedience, and loyalty to the United States as compelling evidence of a specific intent to relinquish his United States citizenship.”

Terrazas instituted an action in the United States District Court for the Northern District of Illinois for a judgment declaring him to be a United States citizen. After the district court held that Terrazas “voluntarily relinquished” his United States citizenship, he appealed to the Court of Appeals for the Seventh Circuit. The Seventh Circuit ruled that the fourth amendment to the Constitution requires the government to prove expatriation by clear and convincing evidence, not by a preponderance of the evidence. Accordingly, it declared the statutory standard of proof unconstitutional, and remanded the case for further proceedings consistent with its decision. The government meanwhile petitioned the Supreme Court for a writ of certiorari which the Court granted in view of the constitutional issue presented. The Supreme Court did not decide the merits of the case; its decision allocated the burden of proof and set the standard of proof in loss of nationality proceedings.

Clarifying and elaborating its opinion in *Afroyim*, the Court said: “[t]he 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 citizenship.” “This understanding of *Afroyim*,” the Court continued, “is little different from that expressed by the Attorney General in his 1969 opinion explaining the impact of that case.” After quoting extensively from the Attorney General’s opinion, the Court said: “it was under this advice, as the
Secretary concedes, that the relevant departments of the Government have applied the statute and the Constitution to require an ultimate finding of an intent to expatriate.  

Intent, the Court said, may be expressed in words or found as a fair inference from proven conduct. With respect to the burden and standard of proof, the Court held constitutional the statutory provision requiring the government to prove intent by a preponderance of the evidence.

Reversing the decision of the court of appeals, the Court remanded the case for further proceedings consistent with its decision. On remand, the district court again held against Terrazas. The Seventh Circuit affirmed the judgment of the district court.

After Terrazas, the Department of State amplified its post-Afroyim guidelines for determining intent. Indicia of intent to retain citizenship include the following: ties to the United States; performance of the rights and duties of United States citizenship—voting, filing and paying income taxes; obtaining and maintaining documentation for oneself and one's children as American citizens. Indicia of intent to relinquish citizenship include the following: use of a foreign passport; taking part in the political life of the foreign state; and not doing the things listed above as indicating

178. *Id.* at 262. The Court observed that:
As the Secretary states in his brief, "both the State Department and the Immigration and Naturalization Service have adopted administrative guidelines that attempt to ascertain the individual's intent by taking into consideration the nature of the expatriating act and the individual's statements and actions made in connection with that act."

The State Department's guideline evidences a position on intent quite similar to that adopted here:
In the light of the *Afroyim* decision and the Attorney General's Statement of Interpretation of that decision, the Department now holds that the taking of a meaningful oath of allegiance to a foreign state is highly persuasive evidence of an intent to transfer or abandon allegiance. The taking of an oath that is not meaningful does not result in expatriation. The meaningfulness of the oath must be decided by the Department on the individual merits of each case.


179. 444 U.S. at 260.

180. *Id.* at 267.

The Supreme Court was "in fundamental disagreement" with the holding of the Seventh Circuit to the effect that Congress is without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof must be by clear and convincing evidence. Proving intent is in itself a heavy burden, the Court said, and "we cannot hold that Congress exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of the evidence." *Id.*


an intent to retain citizenship.

Except for the Department's guideline that the making of a meaningful oath of allegiance to a foreign state may be highly persuasive evidence of an intent to relinquish citizenship (noted with approval by the Supreme Court in Terrazas), the courts have yet to review the Department's guidelines for determining a person's intent.

At the end of the litigation in Terrazas, the Seventh Circuit emphasized that the intent the government must prove is the party's intent at the time the expatriative act is done. The court also amplified the Supreme Court's rule that intent may be expressed in words or found as a fair inference from proven conduct: "A party's specific intent 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."184

Credible, direct evidence dating from the time of the performance of the expatriative act is the most probative. In some appeals there is compelling contemporary, or nearly contemporary, evidence of a party's intent. Formal renunciation of United States citizenship is the most obvious. Renouncing allegiance to the United States in conjunction with the performance of some other expatriative act may also show intent. On the other hand, appellants occasionally submit persuasive evidence indicative of intent to retain citizenship at the critical moment; such instances, however, tend to be exceptional.

In many appeals, there is no decisive evidence of a person's intent at the performance of the proscribed act. In such cases, proven conduct subsequent to commission of the expatriative act must therefore be the primary focus of inquiry.

Applying Judicial Standards

In the last four years, the Department of State has made on the average slightly more than 1000 annual determinations of loss of nationality.185 Obtaining naturalization in a foreign state is the basis of well over half of those determinations.186 So it is hardly surprising

184. 653 F.2d at 288.
185. Information provided by the Office of Citizen's Consular Services, Bureau of Consular Affairs, Dep't of State. This office has delegated authority to make determination of nationality. The statistics show a downward trend in the total number of determinations of loss of nationality from 1579 in fiscal year 1981 to 975 in fiscal year 1984.
186. INA § 349(a)(1), 8 U.S.C. § 1481(a)(1) (1982), provides in pertinent part:

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 lose his nationality by . . .

(1) obtaining naturalization in a foreign state upon his own application, upon
that most appeals taken to the Board are from determinations of loss of nationality through naturalization in a foreign state. For example, from March 1982 through December 1984, nearly eighty appeals were taken from determinations of loss of nationality made on those grounds.\footnote{78 of the 78 decisions rendered from 1982 through 1984 involving naturalization in a foreign state, the Board affirmed the Department’s determination of loss of nationality in 15; reversed the Department in 19; remanded 18 at the request of the Department for the purpose of vacating the certificate of loss of nationality; and dismissed 26 as not timely filed.}

For purposes of analysis one must distinguish between two types of appeals from determinations of loss of nationality through foreign naturalization: (a) those where a United States citizen obtained naturalization in a foreign state that does not require the applicant to renounce his nationality of origin upon swearing another allegiance to the foreign state; and (b) those where the foreign state demands that applicants for naturalization expressly renounce previous allegiance incident to pledging allegiance to the state where citizenship is sought.\footnote{For purposes of analysis one must distinguish between two types of appeals from determinations of loss of nationality through foreign naturalization: (a) those where a United States citizen obtained naturalization in a foreign state that does not require the applicant to renounce his nationality of origin upon swearing another allegiance to the foreign state; and (b) those where the foreign state demands that applicants for naturalization expressly renounce previous allegiance incident to pledging allegiance to the state where citizenship is sought.}

\begin{itemize}
  \item \textit{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 (sic) 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 . . . .}

  Obtaining the nationality of a foreign country by operation of law, \textit{i.e.}, by virtue of birth to a United States citizen parent in a foreign country, or birth in the United States to foreign citizen parents is not expatriative. INA § 101(a)(23), 8 U.S.C. 1101(a)(23) (1982), defines naturalization as “the conferring of nationality of a state upon a person after birth, by \textit{any} means whatsoever.” (emphasis added).

  An American citizen may also acquire the nationality of a foreign state automatically, by operation of a law that grants its nationality to certain classes of foreigners who move to the country to reside permanently. The prime example is Israel. Under the Law of Return, 4 L.S.I. 114 (1950), any Jew who is granted permission to immigrate to Israel automatically acquires Israeli citizenship, unless he or she opts out within a limited period of time after arrival. The Department of State does not consider such an acquisition of foreign nationality to be expatriative, whereas obtaining naturalization in Israel (or any foreign state) upon one’s own application is so considered. 7 FOREIGN AFFAIRS MANUAL § 1261(a) (1984).

  Acquisition of foreign nationality by an American woman through marriage to a citizen of a foreign state, whose laws grant citizenship automatically on the basis of marriage, is not, without more, expatriative. \textit{See Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972)}.\footnote{Acquisition of foreign nationality by an American woman through marriage to a citizen of a foreign state, whose laws grant citizenship automatically on the basis of marriage, is not, without more, expatriative. See Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972).}

187. Of the 78 decisions rendered from 1982 through 1984 involving naturalization in a foreign state, the Board affirmed the Department’s determination of loss of nationality in 15; reversed the Department in 19; remanded 18 at the request of the Department for the purpose of vacating the certificate of loss of nationality; and dismissed 26 as not timely filed.

188. The distinction is crucial, as the District Court pointed out in Richards v. Secretary of State, No. CV80-4150, slip op. at 5 (C.D. Cal. 1982).

Within the context of voluntary oaths of allegiance to another country as evidence of one’s intent voluntarily to relinquish United States citizenship, we must differentiate between a “dramatic” oath and a “dull” oath. A “dramatic” oath is one which contains both an express affirmation of loyalty to the country whose citizenship is sought and an express renunciation of loyalty to the country in which citizenship has been maintained. A “dull” oath contains only the
Naturalization in a Foreign State with only Oath of Allegiance

Some of the most vexing cases that come before the Board involve naturalization in a foreign state that does not require renunciation of previous allegiance or citizenship. The difficulty in reaching comfortable decisions in such cases arises in part because of the "great variety of ambiguous circumstances in which naturalization can and does occur, and the fact that many citizens are still unaware of the legal consequences of voluntarily obtaining foreign naturalization . . . ."

A further difficulty arises from the fact that rarely in this type of case is there direct contemporary evidence of the citizen's intent, save performance of the expatriative act and the making of an oath of allegiance to a foreign state. But obtaining foreign naturalization or any one of the statutory expatriating acts is not conclusive evidence of an intent to relinquish citizenship, although it may be persuasive evidence of such intent. Evidence of intent must therefore usually be sought in a party's words or conduct after naturalization. The pertinent inquiry is whether later statements and actions are more likely than not a fair representation of the individual's will and purpose when naturalization was obtained. In making an a posteriori determination of a citizen's intent, the trier of fact must be satisfied that the individual's conduct is free from ambiguities.

In Baumgartner v. United States, the Court pointed out the evidentiary uncertainties of relating back words or conduct to determine intent at a given moment in time. There, the United States brought an action to set aside plaintiff's naturalization on the grounds that plaintiff did not intend to support the Constitution former, leaving ambiguous the intent of the utterer regarding his present nationality. The taking of a "dramatic" oath of allegiance to another country by an American citizen effectively works a renunciation of American citizenship, because it evidences an intent by the citizen to so renounce. Id. (citation omitted).

189. Canada, France, the Netherlands, New Zealand, Norway and the United Kingdom are leading examples. The Netherlands and Norway, in fact, do not require the making of an oath of allegiance. Before 1973 Canadian Citizenship Regulations required applicants for naturalization to renounce all previous allegiance. See infra note 234.

190. Duvall, Expatriation Under United States Law, Perez to Afroym: The Search for a Philosophy of American Citizenship, 56 VA. L. REV. 408, 435 (1970), is a comprehensive treatise on citizenship and loss of citizenship by a former member of the Board of Review on the Loss of Nationality, the predecessor of Board of Appellate Review. Duvall's article is still pertinent 16 years later.

191. 444 U.S. at 261.

when he swore an oath of allegiance to the United States ten years before. Holding the evidence was insufficient to sustain the charge that appellant did not intend to support the Constitution, the Court stated:

For Baumgartner professed loyalty at the trial, denied or explained the few disturbing statements attributed to him by others, and reconciled suspicious diary entries in ways that do not preclude the validity of his oath of allegiance. In short, the weakness of the proof as to Baumgartner's state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive.  

Specific judicial criteria for determining intent to relinquish citizenship in this particular area of nationality law are sparse, although there are some benchmarks in addition to the general guidelines the Supreme Court laid down in Terrazas.

In asserting that circumstantial evidence may reveal a party's intent to relinquish citizenship, the Seventh Circuit in Terrazas v. Haig cited an earlier Ninth Circuit decision, King v. Rogers. The Secretary of State may prove intent, the court stated in King, by: "evidence of an explicit renunciation, acts inconsistent with United States citizenship, or by 'affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality . . . .'"  

In determining the intent of a person who obtains foreign naturalization without making a renunciatory declaration, only one of the above tests is, of course, relevant—"acts inconsistent with United States citizenship."  

King and Baker v. Rusk are instructive for the light they shed on conduct that may prove intent. In Baker, plaintiff made an oath of allegiance upon admission to the bar in Canada to King George V as symbolic head of the Canadian legal system, but did not acknowl-

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193. Id. at 676-77.
194. 653 F.2d 288 (7th Cir. 1981).
195. 463 F.2d 1188 (9th Cir. 1972).
196. Id. at 1189.
197. The Ninth Circuit cited In re Balsamo, 306 F. Supp. 1028 (N.D. Ill. 1969) for the proposition that affirmative voluntary acts showing a decision to accept foreign nationality may evidence intent. There, a naturalized United States citizen reacquired his Italian nationality of birth by operation of law after having lived there for many years. The court concluded that he did not intend to relinquish United States citizenship, because he performed no voluntary act clearly manifesting a decision to acquire Italian nationality. It would be illogical to assert that one who voluntarily obtains naturalization in a foreign state does not intend to acquire the nationality of that country; the party's intent to relinquish or retain United States nationality, however, remains to be determined.
edge the King as his national sovereign.\footnote{199. The Department held that the plaintiff lost his United States citizenship under of the Act of March 2, 1907, Pub. L. No. 193, 34 Stat. 1228, which provided that a citizen who took an oath of allegiance to a foreign state shall be deemed to have expatriated himself.} The court found that plaintiff did not intend to relinquish United States citizenship, reasoning that:

after taking the oath, [plaintiff] did not at any time consider himself to be a citizen of Canada. He did not vote in any election in that country and, apart from the matter of the oath, there is no indication that he made any expression or performed any act that might be considered inconsistent with United States citizenship.\footnote{200. 296 F. Supp. at 1246.}

Plaintiff in King obtained naturalization in the United Kingdom. Although the court held that plaintiff's oath of allegiance to the British Crown incident to naturalization was in itself insufficient evidence of an intent to relinquish United States citizenship, the court characterized it as substantial evidence of such intent. Furthermore, the court noted that after naturalization plaintiff made his intent clear by informing both his draft board and United States consular officials that he no longer considered himself to be an American citizen. Such statements, the court said, indicated that while King never formally renounced his United States citizenship, he intended to do so when he became a British subject.\footnote{201. 463 F.2d at 1190.}

Evidence of intent to relinquish United States citizenship as unambiguous as that in King v. Rogers is rare in the Board's experience; a party's intent must invariably be gauged by conduct (and words) that are far less explicit.

What conduct will support a finding of intent to relinquish United States citizenship? After obtaining foreign naturalization a party may enter the armed forces of the foreign state; or formally hold him or herself out exclusively as a citizen of that country; obtain and use that country's passport to the exclusion of the United States passport; or take an active role in the political life of the foreign state, beyond merely voting occasionally. Performance of any of those acts is, on its face, inconsistent with United States citizenship, as suggested in Baker. Nonetheless, the Board must examine carefully all the circumstances of the case to determine whether mitigating considerations might exist, giving rise to material doubt about the party's specific intent. It may be pertinent to inquire whether there is a basis for an allegation that an appellant believed it legally
possible to hold two citizenships and thus to exercise citizenship rights of the foreign country in that country without jeopardizing United States citizenship.

More difficult judgmental problems are presented in cases where an appellant has done no act (beyond obtaining foreign naturalization) that is inconsistent with United States citizenship. For example, a person may have sought no tangible benefit from naturalization except perhaps the right to enter certain kinds of employment. He or she may, however, have failed to discharge or exercise the duties and rights of United States citizenship after obtaining foreign citizenship. Such conduct obviously shows little respect for one's obligations toward the United States, but query whether it sufficiently manifests an intent to relinquish United States citizenship. What weight should be given to such variables as: inertia, lack of knowledge, or a belief that because one lives in a friendly foreign environment no need was perceived to seek advice, assistance or documentation from United States authorities? How pertinent is the fact that one may have been taken to a foreign country at a tender age, grown up and been educated there, never having had close ties to the United States or been educated in the responsibilities of United States citizenship? Is it relevant that many American citizens living in the United States are also negligent in observing their civic duties?

If one obtains foreign naturalization and continues to discharge the obligations of citizenship, a strong case of intent to retain citizenship may be made. But the converse does not unerringly indicate an intent to abandon United States citizenship. “Citizenship is not lost everytime a duty of citizenship is shirked.”

A review of some representative decisions will illustrate how the Board has decided the issue of a citizen’s intent to relinquish United States citizenship in a variety of factual settings. Since most cases appealed to the Board involved naturalization in Canada, the following selection draws heavily on the Canadian experience. But first, an observation of general applicability is in order.

In loss of nationality proceedings it is axiomatic that an adequate evidentiary record is indispensable if the Board is to reach a just decision. In no such proceeding is a good record more essential than in the case of one who obtained naturalization in a foreign state that does not require renunciation of previous nationality.

The responsibility to develop a full record on the issue of intent rests on consular officers who, since Afroyim, have been under explicit Departmental instructions to do so. If a consular officer has

203. U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 224.20(2) (1970); Cir-
not adequately explored and assessed an appellant's intent, the Board has found such a lapse grounds for reversing the Department's determination of loss of the person's citizenship.

In In re A.K.S.,\textsuperscript{204} appellant obtained naturalization in Norway. The only documentation the consular officer submitted to the Department to support the certificate of loss of nationality he had executed was a statement of the Norwegian authorities attesting that appellant had become naturalized and a questionnaire to facilitate determination of United States citizenship which appellant had completed in evident confusion about its significance. Although the record showed there was ample reason for the consular officer to develop the issue of appellant's intent carefully, he did not do so. The result was a meager record. In reversing the Department's determination of loss of appellant's citizenship, the Board observed that where such a vital right is at stake, the Board was not prepared to accept a scant evidentiary record as a sufficient basis to confirm the holding of loss of appellant's nationality; reaching a fair decision is often hard enough when the record has been fully developed and ample evidence has been presented.\textsuperscript{205}

In re H.\textsuperscript{206} involved a diversity of factors that may bear on intent. Appellant married a British subject in Canada in 1963, and through marriage acquired the right to become a British subject simply by registering with the British High Commission; this she did in 1965. For the next sixteen years appellant lived in Canada and the United Kingdom, travelling abroad and to the United States on a British passport. She voted in British elections, and neither filed United States income tax returns nor paid United States income taxes, apparently having no income taxable in the United States. She did not consult United States officials about her citizenship status for many years until she inquired about an immigration visa for her husband to enter the United States.

On appeal from the Department's determination she expatriated herself by registering as a British subject; appellant maintained she never intended to relinquish United States citizenship. She believed registering was not an act of naturalization (which it legally was) but an act of registering dual citizenship rights acquired by

\textsuperscript{204} In re A.K.S., State Dep't Dec. (B. App. R. Sept. 25, 1984).
\textsuperscript{205} Id. at 15.
\textsuperscript{206} In re H., State Dep't Dec. (B. App. R. Mar. 1, 1984).
marriage.

The Board felt that appellant made a credible case for believing she acquired a second nationality without forfeiting American citizenship when she registered as a British subject. She showed that she lived in the United Kingdom as a British subject, and when she frequently came to the United States, she lived there as a United States citizen. There was evidence appellant maintained close ties to the United States over many years after she became a British subject. The affidavit of a prominent business executive who knew appellant when she obtained British citizenship, although executed years after the event, effectively supported appellant’s claims. He declared that appellant made clear to him at the time she registered as a British subject and thereafter that she never intended to relinquish her United States citizenship. In the Board’s view, appellant strengthened her case by the candid, credible testimony she offered at oral argument.

The Board did not consider the negative inference the Department drew from appellant’s failure to exercise the rights and duties of American citizenship sufficient to support loss of citizenship. The Department has an affirmative duty to prove by a preponderance of the evidence that appellant intended to relinquish her United States citizenship. Here, the evidence did not demonstrate a clear intention to renounce citizenship.

Appellant in In re A.A.P. moved to Canada while a child, where she grew up and studied law. To meet the citizenship requirements for call to the Bar, appellant obtained Canadian citizenship. The Board disagreed with the Department’s contention that appellant’s conduct supported a finding of loss of citizenship. Naturalization aside, appellant performed no subsequent act inconsistent with United States citizenship. She claimed, and the record did not contradict her, that she did not vote in Canada, obtain a Canadian passport, or hold herself out solely as a Canadian citizen. The Board found irrelevant the Department’s contention that her orientation to Canada, including living there many years, showed an intent to abandon United States citizenship. That argument, the Board said, was inconsistent with Schneider v. Rusk where the Supreme Court held a United States citizen is free to live abroad indefinitely without suffering loss of citizenship.

In In re E.J.A., an American citizen who taught at a French

207. Id. at 15.
208. Id. at 14-15.
University obtained naturalization in France to qualify for a tenured professorship. Thereafter he obtained a French passport for a planned trip to India with an all-French academic delegation. The foregoing two actions apart, appellant did nothing inconsistent with United States citizenship, although for several years after naturalization he did nothing affirmatively to demonstrate he still considered himself a United States citizen. The evidence was too ambiguous, in the Board's view, to permit it to ascribe to appellant an intent to relinquish United States citizenship when he became a citizen of France. In concluding that the Department failed to make a persuasive case, the Board said the inferences the Department drew from appellant's conduct were susceptible of more than one reasonable interpretation. Conduct susceptible of more than one interpretation could not be the basis for a finding of intent to surrender citizenship.\(^213\)

The circumstances under which appellant in \textit{In re C.P.B.}\(^214\) obtained naturalization in Venezuela were less than clear from the record and were a material consideration in the Board's conclusion that appellant did not intend to relinquish United States nationality when he became a Venezuelan citizen. No copy of appellant's application for citizenship came to light, and he denied making an oath of allegiance. He claimed he asked his attorney simply to obtain a residence visa for him and to take other steps to protect his business interests as a non-Venezuelan. He said he signed no application for naturalization, and despite the consulate's request to the Venezuelan authorities for the required application, they sent none. The Board noted that the indirectness and impersonal nature of the whole Venezuelan naturalization process suggested appellant's intention was to get whatever protection he could by improving or changing his status in Venezuela, not necessarily to terminate United States citizenship. It observed loss of citizenship could not hinge on facts which may be construed as either signifying intent to retain or relinquish citizenship. Noting the Supreme Court's directive that the facts and law should be construed as far as reasonably possible in favor of the citizen,\(^215\) the Board resolved its doubts in favor of continuing appellant's United States citizenship.\(^216\)

\(^{213}\) \textit{Id.} at 13.  
\(^{216}\) \textit{C.P.B.}, slip op. at 18.
An appellant's long commissioned service in the armed forces of Canada was a crucial consideration in the Board's conclusion that he intended to relinquish United States citizenship when he obtained naturalization there.217 Three months after his birth in the United States to non-United States citizen parents, appellant was taken abroad. He never again resided in the United States. His father registered appellant at age ten as a British subject and citizen of New Zealand. Six years later appellant went to Canada where he lived continuously. In 1961 he entered the Canadian Navy, and in 1967 became naturalized.218 Fifteen years later appellant inquired about immigration to the United States, his first contact with United States authorities in many years.

Affirming the Department's holding of loss of appellant's nationality, the Board said appellant manifested his intent to relinquish United States nationality by a series of acts inconsistent with United States citizenship.219 The Board found appellant's long service in the Canadian Navy in particular to be in derogation of allegiance to the United States and to manifest a transfer of allegiance from the United States to Canada.220

The above decisions were unanimous, as indeed were most of the decisions the Board rendered recently in cases involving loss of nationality through naturalization in a foreign state not demanding renunciation of previous nationality. In five cases decided since 1982, however, the Board was unable to reach unanimity on the conclusions of law to be drawn from an appellant’s proven conduct. Two are especially interesting for the sharpness with which they juxtapose

218. The appellant's counsel argued that the appellant's acquisition of Canadian citizenship under § 10(2) of the Canadian Citizenship Act of 1946 did not constitute an expatriating act within the meaning of § 349(a)(1) of the Immigration and Nationality Act. (Section 10(2) of the Canadian Act authorized the grant of Canadian citizenship to any person who was a British subject and who possessed certain stipulated qualifications). Counsel asserted that the appellant's acquisition of Canadian citizenship was not naturalization, but more akin to the automatic acquisition of citizenship by certain persons under the nationality laws of Israel and Ireland, in that § 10(2) confers Canadian citizenship status upon a preexisting condition—the nationality of a commonwealth state. Disagreeing, the Board held that the grant of Canadian citizenship to the appellant was not automatic; the appellant was required to first apply and to demonstrate he could satisfy certain statutory requirements. His acquisition of Canadian citizenship was thus "naturalization" within the definition of that term in INA § 101(a)(23), 8 U.S.C. § 1101(a)(23) (1982). A.J.H., slip op. at 14 (“the conferring of nationality of a state upon a person after birth, by any means whatsoever”) (emphasis added).
219. These acts included his voluntary naturalization in Canada; his swearing oaths of allegiance to the British Crown upon his naturalization and earlier upon entering the Canadian Navy; his lack of expressed concern about or interest in United States citizenship until 1982; his failure to seek documentation as a United States citizen; his use of a New Zealand and later Canadian passport; and his 23 years' service in the Canadian navy. A.J.H., slip op. at 14.
220. Id.
two perceptions of what facts are sufficient to support a finding of intentional expatriation.

In *In re B.T.L.*,\(^{221}\) appellant went to Canada in 1968 admittedly to evade the draft. He soon learned he had been inducted and that a warrant had been issued for his arrest. He did not return to the United States, but remained in Canada where he married a Canadian citizen, studied, and worked. In 1974 he became a Canadian citizen. The indictment against appellant was dismissed in 1975. The record was not clear on whether appellant knew of the likely dismissal of the indictment against him before completing the final steps in his naturalization process.

The majority concluded that a preponderance of the evidence did not establish appellant's intention to relinquish United States citizenship; accordingly, it reversed the Department's determination of loss of nationality. The majority recognized that by 1979, when for the first time since arriving in Canada, appellant asserted a claim to United States citizenship, his circumstances had changed. He and his Canadian wife had been divorced, he had remarried a United States citizen, and the indictment against him had been dismissed. Reasonable people might differ, the majority said, about the inferences to be drawn from the fact that appellant attempted to establish his American citizenship after his civil status had been so radically changed. Had he changed his mind after naturalization and now wanted to recoup his citizenship, or had he believed from the outset that he never lost his citizenship because he never intended to surrender it? Did he proceed with naturalization after learning the indictment might be dismissed because he wanted to end his United States citizenship, or simply because he wanted to have citizenship of the country where he intended to study? No single answer to these kinds of questions was more plausible than another, the majority reasoned. Appellant's passivity with respect to asserting a claim to United States citizenship for five years did not, in the view of the majority, suggest that appellant more likely than not intended to terminate his United States citizenship. Some explicit act, not a series of acts of omission, the majority stated, must be proved before the trier of fact can with fair confidence conclude that the citizen intended to surrender citizenship.\(^{222}\) The dissenter argued that the Department's holding was sound; appellant's intent seemed clear. His entire conduct indicated a belief that he was no longer a United


\(^{222}\) *Id.* at 11-12.
States citizen. He had had many opportunities before 1979 to show that he considered himself a United States citizen, but did nothing from 1974 to 1979 to indicate an interest in remaining a United States citizen. In *In re R.J.C.*, the Board affirmed the Department's determination of loss of appellant's nationality. Appellant, a native born United States citizen, was taken to Canada when he was twelve years old. He grew up there and studied law. After completing his studies, appellant could be only provisionally articled since he was not a Canadian citizen. To be fully articled and to be eligible for call to the bar, he obtained Canadian citizenship in 1973.

Around 1982, appellant's business interests prompted him to think about having access to the United States as an American citizen. He therefore sought to clarify his status. It appeared appellant had voted in Canada but did not take part in Canadian politics. He conceded that after naturalization he habitually identified himself as a Canadian when he crossed the border between the United States and Canada, but said he did not obtain a Canadian passport. Aside from American clients, his associations with the United States were minimal, although in his submissions and during oral argument he professed a strong and consistent admiration for things American.

During oral argument, the Board asked appellant whether there were people who knew him when he became naturalized who could offer evidence with respect to the issue of his intent in 1973. He replied there were many who knew him and knew he considered himself to be an American as well as a Canadian citizen; he was not sure, however, how definitively such people would now testify. He undertook to obtain affidavits to support his claim of lack of intent to abandon American citizenship, but in the end submitted only his own affidavit.

In the view of the majority there was a clear pattern in appellant's conduct from 1973 to 1982 from which an inference of intent to relinquish his United States citizenship might properly be drawn. In all respects he acted as a Canadian, in none as a United States citizen. Although he emphasized that his ties to the United States and his identification of himself as an American were widely known, he could not produce evidence supporting his contentions, even though he had specifically named people who could provide affidavits.

The majority concluded that the record supported a finding that

223. *Id.* at 16-17, 20.
appellant intended to relinquish his United States citizenship.228

The dissenter in this case did not consider the facts that appellant voted in Canada but not the United States, paid income tax returns in Canada but did not file United States income tax returns (he allegedly had no income taxable in the United States), and had no close personal associations or property interests in the United States relevant to the issue of his intent. The other actions cited by the majority were arguably more germane. Appellant was imprudent not to seek official advice before applying for naturalization, and in delaying for many years clarifying his citizenship status. Acting incautiously, however, is not per se expressive of a renunciatory intent. Appellant’s situation did not distinguish him from many other appellants who have been successful before the Board. Also, his original perception that he could acquire Canadian citizenship without jeopardizing United States citizenship, although erroneous, is a commonly held belief among many people who obtain naturalization in Canada where dual citizenship is officially recognized.227

Why appellant did not or could not submit affidavits from people who knew him in 1973 was, in the view of the dissent, far from clear. But even if it were assumed that appellant tried and could not induce his acquaintances to give evidence, his failure to do so did not add weight to the Department’s case; it is the government’s burden to prove intent, not the appellant’s to prove lack thereof.228

Naturalization with Renunciatory Oath

Like the United States, many countries require applicants for naturalization to make both an oath of allegiance and a declaration renouncing former nationality or allegiance.229

Renouncing United States nationality or allegiance in foreign nat-

226. Id. at 13.
227. Id. at 17-19.
228. Id. at 20-22.
229. Australia, Brazil, Israel, Mexico, and the Philippines, inter alia, require the making of renunciatory declaration.

In Australia and Brazil the applicant must renounce all other allegiance; the name of the country concerned is not specified. Israel, Mexico, and the Philippines require the declarant expressly name the country whose nationality he surrenders. Israeli law provides an applicant may be exempt from the renunciatory statement upon petition to, and at the discretion of, the Minister of Interior.

As a matter of law, the difference between expressly renouncing United States citizenship and renouncing all other allegiance is purely semantic. A person who is aware of being a United States citizen can have no doubt that by renouncing all other allegiance he or she is foreswearing allegiance owed to the United States.
uralization proceedings does not, in itself of course, work expatriation, for it is not formal renunciation of United States nationality within the terms of the statute.\(^{230}\) Making such a declaration does, however, express more eloquently a person’s intent with respect to United States citizenship than merely swearing an oath of allegiance to the foreign state. And the case law makes it clear that such a pledge to a foreign state manifests an intent to relinquish United States nationality.\(^{231}\) Thus, if one who seeks foreign naturalization knowingly and understandingly pledges allegiance to a foreign state and renounces United States nationality, such conduct will generally support a finding of intent to relinquish United States citizenship.\(^{232}\)

*Richards v. Secretary of State*\(^{233}\) is particularly relevant. Appellant, Richards, obtained naturalization in Canada in 1971 upon pledging allegiance to Queen Elizabeth the Second and declaring that he “renounced all allegiance and fidelity to any sovereign or state of whom or of which I may at this time be a subject or citizen.”\(^{234}\) In affirming the district court’s judgment that Richards expatriated himself, the Ninth Circuit said the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship “is ordinarily sufficient to establish an intent to renounce United States citizenship.”\(^{235}\)

Appellants have argued that the Board should not give decisive weight to their renunciatory oath because in making it they were not motivated by a desire to terminate United States citizenship; they had no wish to acquire foreign nationality independently of a perceived need to do so.\(^{236}\) This line of argument is unsustainable. A person’s motive in making a renunciatory pledge of allegiance to a foreign state is irrelevant to the issue of his intent, as the Ninth Circuit made absolutely clear in *Richards* when it rejected appellant’s contention he did not really wish to foreswear allegiance to the United States. The court said:

Under Richards’ theory, a renunciation of United States citizenship would be effective only if motivated by a principled, abstract desire to sever alle-

\(\begin{align*}
231. & \text{United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975). (“[a]n oath expressly renouncing United States citizenship . . . would have little room for ambiguity as to the intent of the applicant”).} \\
232. & \text{Terrazas v. Haig, 653 F.2d 285, 288 (7th Cir. 1981).} \\
233. & \text{753 F.2d 1413 (9th Cir. 1985).} \\
234. & \text{From 1947 to 1973, under Canadian citizenship regulations, applicants for naturalization (excepting British subjects) were required to renounce all other allegiance. On April 3, 1973, the Federal Court of Canada declared the applicable section of the regulations ultra vires. Ulin v. The Queen, 35 D.L.R.3d 738 (1973).} \\
235. & \text{753 F.2d at 1421.} \\
\end{align*}\)
A person's free choice to renounce United States citizenship is effective whatever the motivation.\textsuperscript{287}

Although making a renunciatory oath of allegiance to a foreign state is compelling evidence of an intent to relinquish United States citizenship, the courts admonish the trier of fact to be satisfied that there are no other elements in the record that might warrant a different conclusion.\textsuperscript{238} The Board has consistently heeded this admonition. But in no recent case has the Board found ancillary evidence sufficiently persuasive to negate the evidence of a renunciatory intent inherent in forswearing allegiance to the United States. Since 1982 the Board has affirmed the Department's determination of loss of nationality in every appeal where an appellant made a renunciatory oath of allegiance. Of course, it is conceivable that there may be situations where the party who swears a renunciatory oath can produce evidence sufficient to offset the oath; the Board has not recently encountered such a case, however.

In none of the cases taken to the Board has there been contemporaneous evidence of an intent to retain United States citizenship. The only disclaimers to lack of intent have been self-serving statements made after performance of the expatriative act. The facts in each case disclosed that the appellant had facility in the language of the state where citizenship was sought and, as a matter of law, was competent to understand the meaning and consequences of the renunciatory declaration. Without exception the appellant's conduct subsequent to performing the expatriative act raised no reasonable doubts about the will and purpose he or she manifested in making the renunciatory oath.

\textit{In re M.J.C.} is illustrative.\textsuperscript{239} Appellant obtained naturalization in Canada in 1969. On appeal from the Department's 1982 holding that she voluntarily became a Canadian citizen with the intent to relinquish her United States citizenship, appellant contended that she did not understand making an oath of allegiance that includes a renunciatory declaration could lead to loss of her United States citizenship. The Board found her contention unpersuasive. She had obtained naturalization when she was twenty-eight years old, was em-

\begin{itemize}
  \item \textsuperscript{237} 753 F.2d at 1421.
  \item \textsuperscript{238} See, e.g., Richards v. Secretary of State, 752 F.2d 1413 (9th Cir. 1985); Terrazas v. Haig, 653 F.2d 285 (7th Cir. 1981).
  \item \textsuperscript{239} In re M.J.C., State Dep't Dec. (B. App. R. July 12, 1984).
\end{itemize}
ployed in a responsible position at the time, and had conceded that she was accustomed to signing documents in her own right after marriage and tried to read them through before signing. Upholding the Department’s decision that appellant expatriated herself, the Board concluded that for twelve years she had done nothing palpable to maintain her United States citizenship; her unsupported latter-day statements that she never ceased to consider herself a United States citizen were insufficient, in the Board’s opinion, to vitiate her categoric repudiation of United States citizenship in 1969.240

**Declaration of Allegiance to a Foreign State**

Swearing an oath of allegiance or making a formal declaration of allegiance to a foreign state incident to naturalization is not expatriating; the operative act is considered to be obtaining naturalization.241 Making a meaningful oath of allegiance to a foreign state in another context, however, may result in expatriation.242

The only appeals the Board has heard in the past four years from determinations of loss of nationality resulting from the making of an oath of allegiance to a foreign state have been those taken by dual nationals of the United States and Mexico. These individuals became citizens of both countries by operation of law through being born in the United States of Mexican parents or in Mexico of United States citizen parents. In re Lawrence J. Terrazas243 is the classic example. Such appeals constitute the second largest number the Board hears.

Mexican public policy does not tolerate dual nationality after minority. A dual national must elect Mexican or his other nationality upon attaining the age of eighteen. If such person wishes to exercise the rights of Mexican nationality, he must possess a certificate of Mexican nationality244 application for which must be made one year

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240. *Id.* at 13.
242. INA § 349(a)(2), 8 U.S.C. § 1481(a)(2) (1982). See supra note 111. Swearing an oath of allegiance to a foreign state is not considered expatriative in the case of a dual national of the United States and a foreign state who acquired foreign nationality by operation of law. “[C]onduct merely declaratory of what one national aspect of dual citizenship necessarily connotes, cannot reasonably be construed as an act of renunciation of the other national aspect of the actor’s dual status.” Jalbuena v. Dulles, 254 F.2d 379, 381 (3d Cir. 1958). A different situation exists, however, where one who is a dual national of the United States and a foreign state not only swears allegiance to the foreign state but also expressly renounces United States citizenship.
after the person becomes eighteen. To obtain a certificate of Mexican nationality the applicant must expressly renounce his or her other nationality or nationalities and make a declaration of allegiance to Mexico. Making a renunciatory oath in conjunction with foreign naturalization and declaring allegiance to a foreign state while expressly renouncing United States citizenship are conceptually analogous, and the legal principles discussed in the previous section are applicable to the Mexican cases. In brief, the words one subscribes to in both situations manifest an intent to relinquish United States nationality.

The Board must, of course, consider carefully all the circumstances surrounding the application for a certificate of Mexican nationality to determine whether there might be evidence of a lack of intent contemporaneous with making the renunciatory pledge. For, as the Seventh Circuit indicated in Terrazas v. Haig, a finding of intent to relinquish citizenship depends on the actor having knowingly and understandingly made the renunciatory declaration. Without exception the Board has found that the applicant had command of Spanish, was schooled, and as a matter of law, was capable of understanding the implications of making an explicit repudiation of United States citizenship. Furthermore, the conduct of appellants after obtaining the certificate of Mexican nationality had not evidenced an intent to retain United States nationality.

The Mexican cases tend to be of a pattern, involving people who were faced with a difficult personal decision at or shortly after age eighteen. Circumstances seem to lead them to opt for Mexican citizenship. Most have lived all their lives in Mexico, studying and planning careers there. When confronted with the necessity of choice of

246. The operative language of the application reads as follows:

I therefore hereby expressly renounce . . . citizenship as well as my submission, obedience, and loyalty to any foreign government, especially to that of . . . which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

The United States-Mexican dual national must write the words “United States” in the blank spaces on the form.

247. *See supra* notes 229-40 and accompanying text.
249. *Id.* at 288-89.
citizenship, most appear to consider that claiming United States citizenship, which requires that they leave Mexico and obtain permission to return as resident aliens, is not a viable alternative.

The Board is not indifferent to the situation of these people, but where the record establishes that the declaration of allegiance to Mexico was knowingly and understandingly made, the Board has no alternative but to conclude that the requisite intent to relinquish United States citizenship has been proved by a preponderance of the evidence. As the Board observed in In re S.N.V., it was unfortunate that appellant acted hastily, and made no prior inquiries about the legal effect of his act on his United States citizenship. However, the words in the application to which he subscribed should have conveyed to him the gravity of the step he was taking, and as a matter of law he must be held accountable for his actions.

Serving in the Armed Forces of a Foreign State

Appeals to the Board from determinations of loss of nationality arising from service in the armed forces of a foreign state are rare; hardly strange, however, since in the past four years the Department has made only four determinations of loss of nationality on those grounds. One interesting case is In re H.M.O., a vestige of World War II.

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251. Many appellants seem to be unaware they may jeopardize their United States citizenship by applying for and obtaining a certificate of Mexican nationality. The United States authorities in Mexico have endeavored to bring this fact to the attention of dual nationals. A document issued by the United States Embassy at Mexico City sets out clearly and in detail the provisions of Mexican law requiring dual nationals to elect between their nationalities upon attaining the age of 18. It warns that making a formal declaration of allegiance to Mexico is a potentially expatriating act under United States law.

The fact so many young appellants seem unaware of the legal effect on their United States citizenship of making an oath of allegiance to Mexico suggests, however, the need for a broad, continuing effort to apprise United States-Mexican nationals of the provisions of the law of both countries.


253. Id. at 10.

254. In re H.M.O., State Dep't Dec. (B. App. R. June 6, 1983). The appeal was not time-barred because the appellant’s expatriating act, performed in 1944, was not disclosed until 1981 when the appellant sought to register as a United States national at the Embassy in Tokyo. The Department held that appellant expatriated himself under the provisions of the Nationality Act of 1940, ch. 876, § 401(c), 54 Stat. 1137, 1168-69, which provided:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.


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 lose his nationality by: (3) entering, or serving in, the armed forces of a foreign state unless, prior
War II. In this case, appellant was born in Hawaii of Japanese parents who took him, while still a child, to Japan several years before the outbreak of war. He enlisted in the Japanese Naval Air Arm in 1944, but alleged on appeal he was a volunteer only in a technical sense. His enlistment came at a time when Japan drafted all high school students. He claimed that even to allege one did not wish to volunteer in wartime conditions never entered his mind.

The Board found that appellant entered the armed forces of Japan voluntarily, and proceeded to determine whether he performed the proscribed act with the intention of relinquishing his United States citizenship. In examining appellant's intent, the Board took as its point of departure the Attorney General's statement of interpretation of *Afroyim*, wherein the Attorney General stated:

> with respect to service in a foreign army . . . an individual who enlists in the armed forces of an allied country does not necessarily evidence that by so doing he intends to abandon his U.S. citizenship. But it is highly persuasive evidence, to say the least, of an intent to abandon U.S. citizenship if one enlists voluntarily in the armed forces of a foreign government engaged in hostilities against the United States.

The Board noted that the record was barren of any evidence contemporaneous with appellant's entry into the Japanese Navy which might reveal his United States citizenship, except his performance of an act that in itself may be highly persuasive evidence of an intent to transfer his allegiance from the United States to Japan. Thirty-six years passed before he asserted a claim to United States citizenship and disclaimed any intent to relinquish United States citizenship when he entered the Japanese Navy. The Board found that appellant's conduct subsequent to his performance of the expatriating act raised no reasonable doubt about his specific intent to abandon United States citizenship.

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256. Id. at 401.
257. *H.M.O.*, slip op. at 17-18. The Board stated:

The record does not show that he made any effort to assert a claim to United States citizenship between the end of the war and his first application at the United States Embassy in Tokyo on January 21, 1981, for registration as a United States citizen. He held a Japanese passport issued November 9, 1979. There is no evidence of record to show that by any of his everyday acts in the period since the war that he considered he was still an American citizen, ac-
Since 1980, the Department has made four determinations of loss of nationality on the grounds that a citizen served in the government of a foreign state. Appeals were filed from two of those determinations: In re M.F. and In re Meir Kahane; the latter case is at this writing under consideration by the Board.

In In re M.F., appellant was born in the United States. She acquired the nationality of Israel automatically under the Law of Return when she later went there to live and work. A university teacher, appellant became active in women's affairs in Israel, gaining national prominence. She ran for the Knesset in 1974 and won one of the three seats won by a minor party championing women's rights; she served from 1974 to 1977. Upon installation as a member she swore an oath of allegiance to Israel. At the request of the Ministry of Foreign Affairs, she surrendered her unexpired United States passport and agreed to travel only on her official Israeli passport.

By a vote of two to one, the Board reversed the Department's determination that appellant expatriated herself. The majority noted that service in an important political post in a foreign government may be highly persuasive evidence of an intent to relinquish citizenship, but it is not conclusive evidence. Under the rule in Vance v.

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- accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or
- accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which an oath, affirmation, or declaration of allegiance is required.
260. See supra note 186.
261. M.F., slip op. at 8. Here, the Board relied on 42 Op. Att'y Gen. 397 (1969) in which the Attorney General stated:
- it is obviously not enough to establish a voluntary relinquishment of citizenship that an individual accepts employment as a public school teacher in a foreign country. This I have already decided in the case of a dual national.
- A different case would be presented by an individual's acceptance of an important political post in a foreign government. Id. at 401.

The only reported federal case since Afroyim involving service by a United States citizen in an important position in a foreign government is Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972). As precedent, however, Peter is not helpful, for the standard of proof the three-judge court applied was "clear, convincing and unequivocal" evidence, not a "preponderance of the evidence," as required by the Supreme Court's ruling in Vance, 444 U.S. at 267. In Peter, the plaintiff, a dual national of the United States and Hungary, served for many years in an important position in Hungarian Radio, travelled to the United States and abroad on a Hungarian passport and had no contact for many years with United States authorities in Hungary. The court held that
Terrazas, the proscribed act will not result in expatriation unless the citizen intended to relinquish United States citizenship.\textsuperscript{262}

Although some of appellant's actions suggested an intent to relinquish citizenship, the majority took the view that the record showed her thoroughgoing, outspoken identification as an American within the community and the Israeli legislature. Other considerations influencing the majority were the unexpected nature of her election; her lack of political responsibilities in the Knesset; her low profile as a Knesset member; and her consistent pattern of identifying herself as an American. These factors narrowly overcame other evidence that she intended to relinquish her United States citizenship. Since the majority felt that appellant's conduct left the issue of her intent in doubt, and since it is incumbent on the Board to resolve doubts in favor of retention of citizenship, the majority concluded that appellant lacked the intent to terminate her United States citizenship.\textsuperscript{263}

The dissenting member maintained that appellant knowingly and intentionally surrendered her United States citizenship. Noting that there was no concrete contemporary evidence to support the majority's finding of appellant's lack of intent, the dissent asserted that appellant's conduct during her service in the national legislature manifested not only an intent to transfer allegiance to the foreign state but also prevented her from giving continued and undivided allegiance to the United States. In the opinion of the dissenter, appellant's statements made in 1978 and at the hearing to the effect that she had no intention to relinquish United States citizenship were "contravened by her voluntary acceptance of service" in the Knesset, by pledging allegiance to Israel, by declaring faithfully to discharge her duties, by serving in the parliament for three years and by other conduct at the time she was a member of the parliament.\textsuperscript{264}

Formal Renunciation of United States Nationality

Formal renunciation of United States nationality results in the second largest number of annual determinations by the Department of loss of nationality.\textsuperscript{265} In the past four years the Department has

\textsuperscript{262} M.F., slip op. at 12.
\textsuperscript{263} Id. at 10-12.
\textsuperscript{264} Id. at 22.
\textsuperscript{265} For the text of the applicable statutory provision, INA § 349(a)(5), 8 U.S.C.
made approximately 1000 such determinations. Yet, in the same period, no more than twenty renunciants have appealed to the Board. In only a few cases did the Board reach the merits of the appeal; most were time-barred.

The right of every American citizen to terminate citizenship is natural and inherent. Provided the citizen acts voluntarily and with full consciousness of the serious consequences of the act, exercise of that right may not be denied.266

If an appellant acted deliberately and under no duress and was capable of appreciating the serious consequences of this most categorical act of alienage, a finding of intent to relinquish citizenship follows almost ineluctably. Intent, in cases of this character, is implicit in the language of the renunciatory oath: "I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining."

The circumstances under which most renunciants who appeal to the Board gave up their citizenship have left no doubt that they acted voluntarily, wholly aware of the ramifications of renunciation. The events incident to the renunciation of appellant in In re K.M.M.,267 however, led the Board to question whether he had fully grasped the gravity of his action.

Appellant was eighteen years of age when he made a formal renunciation of his United States nationality at the Embassy in Ottawa,268 allegedly because he had been told he would have to surren-

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266. See supra note 4. Formal renunciation of United States nationality may often result in statelessness. Former Secretary of State Dean Rusk, for one, has argued renunciation should not be accepted if it would leave the renunciant with no citizenship. See Ulman, Nationality, Expatriation and Statelessness, 25 AD. L. REV., 113, 125 (1973).

The case law, however, makes clear that formal renunciation of citizenship does not require acquisition of another nationality. Davis v. INS, 481 F. Supp. 1178, 1182 (D.D.C. 1979) states that:

The Oath of Renunciation recited by the petitioner, as applied to the applicable federal law, revoked the petitioner's citizenship. 8 U.S.C. § 1481(a)(5) does not require allegiance to another nation; it only requires renunciation of United States nationality.

The imposition of statelessness upon the petitioner cannot deter this court from the requirements of the federal nationality law. The Supreme Court recognized that expatriation may result in statelessness in Afroyim v. Rusk. In Afroyim the Court declared that "[i]n some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country." 387 U.S. at 268.


268. A person under the age of 18 may effectively renounce United States nationality, unless, within six months after attaining the age of 18, he or she asserts a claim to United States citizenship in the manner prescribed by the Secretary of State. INA § 351(b), 8 U.S.C. § 1483(b) (1982), provides:

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der his United States citizenship to enlist in the Royal Canadian Mounted Police. The record showed that two years before his renunciation he had been discharged from the United States Marine Corps after a month's service as unfit for military life. Later, he enlisted in the United States Navy and served barely six months when he was separated, again as unsuited for military life.

The Board found that appellant acted voluntarily. However, it reversed the Department's determination of loss of nationality because it entertained substantial doubt whether appellant renounced his nationality with full awareness of the consequences. Although appellant made the renunciation in the form prescribed by the Secretary of State and signed the required statement of understanding of the serious consequences of renunciation, the Board did not think it followed ineluctably that because an eighteen year old citizen voluntarily subscribed to a formal oath of renunciation he had the requisite intent to relinquish United States nationality. Resolution of the issue of appellant's intent depended, the Board said, on an assessment of all the surrounding facts and circumstances.

The Board found that both the Embassy and the Department had handled appellant's case casually and contrary to the dictates of elementary fairness. It was the Board's unanimous conclusion that given appellant's age, his evident immaturity and the possibility he might have had insufficient time to digest the consular officer's explanation of the serious consequences of renunciation—matters which both the Embassy and the Department should have taken fully into account—it was problematical that appellant acted in full awareness of the consequences of his act.

The Attitude Appropriate for Judgment

In deciding appeals, the Board of Appellate Review has two correlative responsibilities: to apply a law "designated to preserve and uphold the dignity and priceless value of citizenship, with attendant

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A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2), (4), (5) and (6) of section 1481 (a) of this title. Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046 amended § 351(b) by repealing paragraph (5) (voting in a foreign election), and renumbering paragraphs (2), (4), and (6) as (2), (4), and (5) respectively. See supra note 72.

269. K.M.M., slip op. at 7.

270. Id. at 10-11.
obligations;” and to ensure American citizenship is not “lightly taken away.”

In discharging its office, the Board is not wittingly activist. In each case, the Board must conscientiously apply the statute, as interpreted by the courts, to the facts of record. An appellant’s character (admirable or not) is irrelevant. To paraphrase the opinion of a federal judge who held that a plaintiff engaged in “criminal and unsavory activities” was not deportable because he convinced the court he was an American citizen: the duty of the Board is to decide the questions of law and fact presented in each proceeding, not to pass judgment on the morality of an appellant’s life.

The controlling case law allows the Board a measure of discretion in certain kinds of appeals to determine whether an appellant intended to retain or relinquish citizenship—a discretion to be exercised prudently. Decisions must not reflect the predilections of members. Yet, however much we try to see things objectively, we can never see them with any eyes but our own.

That members see facts with no eyes but their own is borne out by the divided decisions reviewed above. Different perceptions of the evidentiary value of proven conduct tend to emerge mainly in appeals involving foreign naturalization without renunciation of previous nationality because there is often more scope in such appeals for reasonable people to differ about the inferences to be drawn from a party’s actions. Similar differences could as readily arise in cases involving other acts declared expatriative under the statute if the decision were to turn on inferring intent from the appellant’s proven conduct after the individual did the expatriating act.

Some members submit that even though the record shows an appellant did not take specific steps to affirm or document United States citizenship after obtaining naturalization of a foreign state, there may be reasonable doubt the individual knowingly and intelligently intended to surrender citizenship, unless the party also performed some act explicitly and affirmatively derogatory of allegiance to the United States. Here the dictum of the Court of Appeals for the Second Circuit seems pertinent:

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.

275. United States v. Matheson, 532 F.2d 809, 814 (2d Cir. 1976).
Other members have expressed the view that judicial precedent does not require that a party necessarily act overtly and unequivocally in order to evince an intent to surrender United States citizenship. Performance of a statutory expatriating act—in itself highly persuasive evidence of intent—combined with a pattern of conduct that indicates an abandonment of the rights and duties of citizenship may be sufficient to express an expatriative will.

The divergences shown by these two tendencies are not doctrinal. They center rather on the criteria to be applied in judging the evidence in an area where the courts have yet given little guidance. Until the courts are called upon to make conclusions of law from facts similar to those in foreign naturalization cases, it seems inevitable that Board unanimity will at times be elusive.

In In re B.T.L.,276 discussed above with respect to naturalization in a state that does not require the applicant to renounce previous citizenship, the dissenting member made a fair criticism of the first of the two tendencies just summarized. If the Board continued to adopt the position of the majority in In re B.T.L., the dissenter wrote, it would substantially eliminate the practical possibility of sustaining the Department of State's determinations of loss of nationality in cases involving naturalization in a foreign state which does not require renunciation of former nationality. He did not believe that the judicial precedent cited by the majority was meant to have such an effect.277

It is inherent, however, in the doctrine of intent, that the government will find it difficult to sustain its burden of proof in finely balanced cases.278 The Supreme Court has charged the trier of fact to make the final judgment whether the individual comes within the terms of the statute and indeed intended to relinquish citizenship.279 In rendering judgment, the Board can do no more than endeavor to adopt "the attitude appropriate for judgment,"280 mindful that "when we deal with citizenship we tread on sensitive ground,"281 and mindful too that in these proceedings "the facts and the law should be construed as far as is reasonably possible in favor of the citizen."282

277. Id. at 20-21.
278. Proving intent is "in itself a heavy burden." Vance, 444 U.S. at 267.
279. Id. at 261.