

UNITED STATES LOSS OF CITIZENSHIP LAW AFTER TERRAZAS: DECISIONS OF THE BOARD OF APPELLATE REVIEW

I. INTRODUCTION

Each year more than one thousand Americans¹ lose their citizenship² by committing one of the acts defined to be expatriatory³ in Section 349 of the Immigration and Nationality Act of 1952 (the "Act").⁴ For some, this relinquishment of citizenship is truly voluntary expatriation,⁵ while for others this loss is undesired and effectively constitutes denationalization⁶ by congressional fiat.

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1. According to the "Determination of Loss of U.S. Nationality Statistics" compiled by the U.S. State Department's Office of Citizens' Consular Services, 1,638 citizens lost their nationality during Fiscal Year 1977; 1,985 during Fiscal Year 1978; 1,236 during Fiscal Year 1979; 1,500 during Fiscal Year 1980; and 1,056 during Fiscal Year 1981 (Loss Statistics available in author's file at N.Y.U. J. INT'L L. & POL.).

2. Although there are slight differences between the terms "citizenship" and "nationality" (there are some inhabitants of American South Pacific territories who, while nationals of the United States, are not citizens), these words will be used interchangeably throughout this Note.

3. See *infra* notes 17-18 and accompanying text (discussion of term "expatriatory").

4. Immigration and Nationality Act of 1952, § 349(a), 8 U.S.C. § 1481(a) (1982) [hereinafter "Act"] provides a list of expatriating acts. For the text of this section, see *infra* note 61. For a discussion of the history of the Act and its predecessors, see *infra* text and accompanying notes 20-67.

5. For example, some individuals wishing to be relieved of their U.S. citizenship as a political act or as a demonstration of undivided loyalty to another country may initiate expatriation through a formal oath of renunciation. See *infra* notes 183-219 and accompanying text.

6. See Note, *Expatriation - A Concept in Need of Clarification*, U.C.D.L. REV. 375, 388 (1975) [hereinafter "Expatriation"]. See also note 17 and accompanying text.

The Supreme Court in *Vance v. Terrazas*⁷ held that in order to establish a person's loss of citizenship, the Government must prove by a preponderance of the evidence that a citizen performed an expatriating act with the intent to relinquish United States citizenship.⁸ To meet its burden of proof, the Government may draw inferences of such intent from the words and deeds of the citizen.⁹ Justices Marshall and Stevens, in dissent, maintained that the government should prove intent by at least clear and convincing evidence since citizenship is such a vital right.¹⁰

While *Terrazas* resolved decades of dispute over whether intent to relinquish citizenship was a necessary element in establishing loss of nationality,¹¹ two major questions remain: "what is intent?" and "how should a citizen's words and deeds be weighed in ascertaining intent?" While the courts have had little occasion to address these issues in the four years since *Terrazas*, the Bureau of Consular Services of the U.S. State Department ("Consular Services") and the Board of Appellate Review (the "Board") have been formulating answers to these questions.¹²

This Note will analyze the more than one hundred unpublished Board decisions since *Terrazas*, identify the component issues and their disposition by the Board¹³ and create a

7. 444 U.S. 252, *reh'g denied*, 445 U.S. 920 (1980). For additional discussion of this case, see *infra* notes 59-67 and accompanying text. See also Comment, *Dual Nationality and the Problem of Expatriation*, 16 U.S.F.L. REV. 291 (1981-82) [hereinafter "Dual Nationality"].

8. 444 U.S. at 261. The Court upheld the statutory standard of evidence provided for in § 349(c) of the Act, 8 U.S.C. § 1481(c).

9. 444 U.S. at 261.

10. *Id.* at 270-72 (Marshall, J., concurring in part and dissenting in part); *id.* at 272-74 (Stevens, J., concurring in part and dissenting in part). Justice Brennan refused to accept the intent requirement and maintained that under the Fourteenth Amendment, citizens born in the United States can lose their citizenship only by means of a formal, voluntary renunciation. *Id.* at 274 (Brennan, J., dissenting). Justice Stewart joined in Justice Brennan's alternative contention that a dual national adds nothing to his foreign nationality by an oath to the foreign state, and therefore loses none of his U.S. allegiance by that act. *Id.* at 276 (Brennan, J., dissenting).

11. See *infra* note 55.

12. See generally *infra* notes 117-326 and accompanying text.

13. The scope of this Note, however, does not encompass two related topics, loss of citizenship by revocation of naturalization, and the decisions of the Board of Immigration Appeals of the Immigration and Naturalization Service.

framework for further study. It will also provide a brief historical background,¹⁴ a description of the loss of nationality and appeals process¹⁵ and a survey of foreign loss of nationality law.¹⁶

II. HISTORICAL BACKGROUND

Loss of nationality consists of two distinct phenomena: expatriation, the voluntary relinquishment of citizenship by an individual, and denationalization, the deprivation of citizenship by governmental action.¹⁷ These two concepts are often confused with each other, and "expatriation" has come to be used as a generic term for both.¹⁸

Prior to 1868 it was unclear whether voluntary expatriation was possible.¹⁹ Blackstone asserted that no one "should be

A naturalized citizen can lose his citizenship under 8 U.S.C. § 1451 by having made material misrepresentations or concealments in obtaining citizenship, by joining certain organizations or by establishing a permanent residence abroad within five years of his naturalization. 8 U.S.C. § 1451(a), (b), (c) and (d). See, e.g., Note, *Immigration and Nationality—Denationalization of War Criminals—Standard of Materiality for Misrepresentations in Visa Applications*, 56 TUL. L. REV. 773 (1982); Note, *Denationalization and the Right to Jury Trial*, 71 J. CRIM. L. & CRIMINOLOGY 46 (1980).

The Board of Immigration Appeals (B.I.A.) has jurisdiction over disputes concerning citizenship arising within the United States. There are far fewer B.I.A. loss of citizenship cases than cases decided by the U.S. Department of State Board of Appellate Review.

14. See *infra* notes 17-67 and accompanying text. For a more comprehensive history, see C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 20.7(b) — § 20.8(a) (1980 rev.) [hereinafter "Gordon"]; Comment, *Limiting Congressional Denationalization After Afroyim*, 17 SAN DIEGO L. REV. 121 (1979-80) [hereinafter "Denationalization"].

15. See *infra* notes 68-116 and accompanying text.

16. See *infra* notes 327-53 and accompanying text.

17. The distinction between these concepts depends primarily on who initiates and desires the loss of citizenship. See *Expatriation*, *supra* note 6, at 388.

18. For a discussion of the historical source of this confusion, see *Denationalization*, *supra* note 14, at 130-31. "Acts of Expatriation," however, is a statutory term of art used to describe those deeds for which the Act prescribes denationalization. In this Note, the terms "loss of nationality" and "loss of citizenship" will refer to the result of either expatriation or denationalization.

19. While early English Common Law saw citizenship as immutable, and early commentators felt that this doctrine had become part of U.S. law, others argued that expatriation was one of the inalienable rights guaranteed by the Declaration of Independence and urged federal confirmation of this right. Gordon, *supra* note 14, § 20.7(b).

able at pleasure to unloose those bonds, by which he is connected to his natural prince."²⁰ The Expatriation Act of 1868,²¹ enacted primarily to afford consular protection to naturalized U.S. citizens visiting their former homelands, also guaranteed to each citizen the right to expatriate himself.²² The Act of March 2, 1907²³ listed specific acts which could result in the involuntary loss of citizenship.²⁴ This form of Congressional denationalization under the guise of expatriation²⁵ was continued in the Nationality Act of 1940²⁶ and remains in the present Immigration and Naturalization Act.²⁷

By 1954, automatic loss of nationality could result from voluntarily becoming naturalized in²⁸ or swearing allegiance to a foreign government,²⁹ serving in the armed forces of a foreign state,³⁰ holding office or employment under a foreign government³¹ or voting in a foreign election.³² Further, formal renunciation of U.S. citizenship,³³ the commission of treasonous acts against the United States,³⁴ desertion from U.S. com-

20. 1 W. BLACKSTONE, COMMENTARIES *370.

21. Ch. 249, 15 Stat. 223 (superseded by the Expatriation Act of 1907, ch. 2534, 34 Stat. 1228).

22. See Denationalization, *supra* note 14, at 127-29.

23. Expatriation Act of 1907, ch. 2534, 34 Stat. 1228 (superseded by the Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1137, 1168-69).

24. For example, under § 3 of the Expatriation Act of 1907, *id.*, an American woman who married a foreigner could lose her citizenship. See Denationalization, *supra* note 14, at 130.

25. See Denationalization, *supra* note 14, at 131.

26. Ch. 876, § 401, 54 Stat. 1137, 1168. Section 401 of this statute was reenacted as § 349 of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 267 (current version at 8 U.S.C. § 1481 (1982)).

27. The Immigration and Nationality Act of 1952 was amended by the Expatriation Act of 1954, ch. 1256, 68 Stat. 1146; Act of Sept. 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 650, 656; the National Emergencies Act of 1976, Pub. L. No. 94-412, § 501, 90 Stat. 1255, 1258; Act of Oct. 10, 1978; Pub. L. No. 95-432, 92 Stat. 1046.

28. Act, *supra* note 4, § 349(a)(1).

29. *Id.* § 349(a)(2).

30. *Id.* § 349(a)(3).

31. *Id.* § 349(a)(4).

32. *Id.* § 349(a)(5).

33. *Id.* § 349(a)(6), (7).

34. *Id.* § 349(a)(8).

bat forces during time of war³⁵ or the evasion of American military service³⁶ could deprive a person of his citizenship.³⁷

Twenty-five years ago, in *Perez v. Brownell*,³⁸ the Supreme Court in a five to four decision upheld congressional authority under the amended Nationality Act of 1940 to denationalize a citizen for voting in a foreign election.³⁹ The Court based its decision on an implied Congressional power to regulate foreign affairs.⁴⁰ In his dissent, Chief Justice Warren questioned the constitutionality of legislative denationalization⁴¹ and argued that the statute was overbroad since it failed to distinguish between involuntarily performed "expatriating acts" and voluntary abandonment of American citizenship.⁴²

On the same day that *Perez* was decided, the Court took the first steps toward weakening the Nationality Act of 1940. In *Trop v. Dulles*,⁴³ the Court held that desertion from the armed forces could no longer be punished by loss of nationality.⁴⁴ And

35. *Id.* § 349(a)(9).

36. *Id.* § 349(a)(10).

37. The 1952 Act also provided for denationalization of persons who acquired dual citizenship at birth and maintained continuous residence for three years in their foreign country of citizenship, after the age of twenty-two, without taking an oath of allegiance to the United States. *Id.*, § 350. This section, presumed to be unconstitutional after *Schneider v. Rusk*, 377 U.S. 163 (1964), was repealed effective October 10, 1978. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046, 1056.

38. 356 U.S. 44 (1958). *Perez* was a dual national of the United States and Mexico who had committed two expatriating acts under the Nationality Act of 1940. *Perez* remained outside the United States in order to avoid the draft and voted in a Mexican election.

39. *See id.* at 62.

40. *Id.* at 5. The Court found a rational nexus between discouraging U.S. citizen participation in foreign elections and the interest in avoiding embarrassment to the government or possible conflicts abroad. *Id.* at 59-61.

41. 357 U.S. at 66 (Warren, C.J., dissenting). Chief Justice Warren asserted that "[u]nder our form of government, as established by the Constitution, the citizenship of . . . the native-born cannot be taken from them."

42. *Id.* at 76.

43. 356 U.S. 86 (1958).

44. *See id.* at 101. *Trop* was a native-born American soldier who willingly surrendered to military police after deserting the Army for one day during World War II. Following a court martial, *Trop* was found guilty of desertion and dismissed from military service. Several years later, the former private was denied a passport on the ground that he was no longer a U.S. citizen based on his conviction and discharge from duty. *Id.* at 87-88. The

in *Nishikawa v. Dulles*,⁴⁵ the Court stated that expatriation could result only from voluntary acts and that the burden of proving voluntariness was on the Government.⁴⁶ In cases of loss of citizenship, the Court decided that any doubts should be resolved in favor of the citizen.⁴⁷ Three years later, however, Congress negated the potential impact of *Nishikawa* by amending the Act to include a statutory presumption of voluntariness which remains today.⁴⁸

In *Afroyim v. Rusk*,⁴⁹ the Court confronted a set of facts similar to those in *Perez*. An American had lost his nationality by voting in an Israeli election.⁵⁰ Specifically overruling *Perez*, the Court held that Congress lacked general power to unilaterally strip a person of his citizenship without his assent.⁵¹ Relying upon the Fourteenth Amendment,⁵² the court held in a five

Court ruled that use of denationalization as a sanction for criminal conduct was barred by the Eighth Amendment prohibition against "cruel and unusual" punishment. *See id.* at 99-101.

45. 356 U.S. 129 (1958). *Nishikawa* was an American citizen who went to study in Japan. He was involuntarily inducted into the Japanese Army and served in that Army while Japan was at war with the United States. *Id.* at 131-32.

46. *Id.* at 133-35, citing *Mandoli v. Acheson*, 344 U.S. 133 (1952).

47. *See* 356 U.S. at 136. This decision represented an expansion of the Court's holding in *Perkins v. Elg*, 307 U.S. 325, 337 (1939) that "[r]ights of citizenship are not to be destroyed by an ambiguity." This principle, originally applied to the interpretation of treaties, was extended to all evidentiary ambiguities in citizenship cases. The Department of State Board of Appellate Review (cited as Bd. App. Rev.) often cites *Nishikawa* when it construes doubts in favor of the retention of citizenship in denaturalization cases. *See, e.g., In Re KMM*, Bd. App. Rev. 10-11 (Mar. 16, 1983) [all Bd. App. Rev. decisions discussed are available at the New York University School of Law library].

48. § 349(c) added by the Act of Sept. 26, 1961. Pub. No. 87-301, § 19, 75 Stat. 650, 656 (current version at 8 U.S.C. § 1481(c) (1982)).

49. 387 U.S. 253 (1967).

50. *Id.* at 254-55.

51. *Id.* at 257.

52. The Court read the Fourteenth Amendment as "defining a citizenship which a citizen keeps unless he voluntarily relinquishes it." 387 U.S. at 262. The Court continued:

[t]o uphold Congress's power to take away a man's citizenship because he voted in a foreign election in violation of 410(e) would be equivalent to holding that Congress has the power to 'abridge,' 'affect,' 'restrict the effect of,' 'and take . . . away' citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things,

to four decision that every citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."⁵³

The Court did not make clear whether Congress could determine that the mere voluntary performance of certain acts would result in loss of citizenship, or whether the government would be required to prove that a person specifically intended to lose his citizenship.⁵⁴ While decades earlier, intent had been declared unnecessary in establishing loss of citizenship,⁵⁵ the law seemed to be in a state of flux.⁵⁶ The U.S. Attorney General stated⁵⁷ that "[o]nce the issue of intent is raised, the Act makes it clear that the burden of proof is on the party asserting that expatriation has occurred. *Afroyim* suggests that this burden is not easily satisfied by the Government. . . ."⁵⁸ This issue was not settled until the *Terrazas* Court held that the government must indeed prove intent.⁵⁹

we agree with the Chief Justice's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401(e). . . .

Id. at 267.

53. *Id.* at 268. *Afroyim* was not read to eliminate the power of Congress to infer an individual's assent to loss of citizenship from his words or deeds. See Denationalization, *supra* note 14, at 138.

54. In *United States v. Matheson*, 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976), the court viewed *Afroyim* as requiring proof of specific intent by the citizen to relinquish his citizenship. *Id.* at 814. This view was endorsed by the Supreme Court in *Terrazas* four years later. 444 U.S. 252, 261 (1980).

55. See *Mackenzie v. Hare*, 239 U.S. 299 (1915); *Savorganan v. United States*, 338 U.S. 491 (1950).

56. The Court in *Rogers v. Bellei*, 401 U.S. 815 (1971), refused to apply the *Afroyim* requirement of voluntary relinquishment to cases involving citizens born abroad and deriving their citizenship from one American parent. This case, decided within months of *United States v. Matheson*, 532 F.2d 809, was seen as a retreat from *Afroyim* at a time when the circuits were expanding it. See generally Comment, *Involuntary Expatriation: Rogers v. Bellei — A Chink in the Armor of Afroyim*, 21 AM. U. L. REV. 184 (1971).

Perez, *Afroyim* and *Rogers* were all five to four decisions. Justice Black, who authored the *Afroyim* decision, complained that the Court in *Bellei* overruled *Afroyim* "by a vote of five to four through a simple change in composition." 401 U.S. at 837 (Black, J., dissenting).

57. 42 Op. Atty. Gen. 397 (1969).

58. *Id.* This opinion was later cited with approval in *Terrazas*, 444 U.S. at 262-63.

59. See *infra* notes 62-67 and accompanying text.

In the interim, Congress had amended the Act⁶⁰ to eliminate those expatriatory acts that had been declared unconstitutional. The current version of the Act states that a person *shall* lose his nationality by becoming a naturalized citizen of or taking an oath of allegiance to a foreign state, joining the armed forces of or holding employment or office under the government of a foreign state, formally renouncing one's citizenship before certain U.S. officials or committing treasonous or other similar acts against the United States.⁶¹

60. For amendments, see *supra* note 26. In addition to denationalization for voting and desertion, deprivation of citizenship for evasion of military service was declared unconstitutional in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

61. 8 U.S.C. § 1481 (a). The statute currently in force states:

(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization shall lose his nationality by —

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States as a special immigrant under provisions of section 1101(a)(27)(E) of this title; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or subdivision thereof; or

(3) entering, or serving in the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4)(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or

In *Terrazas*, a dual national of the United States and Mexico had sworn an oath of allegiance to Mexico which expressly denounced his allegiance to the United States.⁶² While the controversy centered on the validity of the statutory standard of proof by a preponderance of the evidence,⁶³ the Court chose

a political subdivision thereof, if he has or acquired the nationality of such foreign state or (B) 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 office, post, or employment of an oath, affirmation, or declaration of allegiance is required; or . . .

(6) 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; or

(7) making in the United States a formal written renunciation in such form as may be prescribed by the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or . . .

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18, or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

62. The signed oath in its English translation contained the following statement:

I therefore hereby expressly renounce _____ citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of _____, 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.
444 U.S. at 255-56n.2.

Laurence Terrazas filled in the blank spaces with his name, the words "Estados Unidos" (United States) and "Norteamerica" (North America) respectively. 444 U.S. at 255n.2. This oath was executed one week after Terrazas had passed his Selective Service physical exam. *Terrazas v. Haig* 653 F.2d 285, 286 (7th Cir. 1981) (on remand). See also *infra* notes 230-38, 347-48 and accompanying text.

63. 444 U.S. at 265. The Court, in upholding the standard, cited the traditional and frequently exercised "power of Congress to prescribe rules of evidence and standards of proof in federal courts . . . rooted in the authority of Congress conferred by Art. I, § 8, cl. 9 of the Constitution to create

to address and clarify the issue of intent.⁶⁴ The Court concluded that once:

one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. . . . If he fails, the question remains whether the Government has satisfied its burden of proof [a preponderance of the evidence] that the expatriating act was performed with the necessary intent to relinquish citizenship.⁶⁵

Since the litigation involving *Terrazas*,⁶⁶ no federal court opinions dealing with loss of nationality under Section 349 of the Act have been reported.⁶⁷ The Board of Appellate Review however, has decided more than one hundred cases since *Terrazas*. Before analyzing Board cases, this Note will review the process by which Americans can lose their citizenship and appeal from a determination of loss.

III. THE LOSS OF CITIZENSHIP AND APPEALS PROCESS

Loss of citizenship is unusual in that it occurs automatically when a citizen performs an act statutorily defined as expatriatory.⁶⁸ Thus, any action, whether administrative or judicial, does not center upon the question of whether a person

inferior federal courts." *Id.* Four justices dissented on varying grounds. *See supra* note 10.

64. Although intent was not mentioned as an issue in the Secretary of State's jurisdictional statement or petition for certiorari, the Court, emphasizing the importance of the issue, decided to address it. 444 U.S. at 257n.5.

65. 444 U.S. at 269.

66. *Terrazas v. Muskie*, 494 F. Supp. 1017 (N.D. Ill. 1980) (on remand); *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981).

67. There has, however, been an unreported District Court case, *Richards v. Secretary of State* CV 80-4150 (C.D. Cal. 1982), in which the report of a U.S. Magistrate was adopted. Appellant, who swore an oath renouncing his American citizenship and became a naturalized Canadian, was found to have lost that citizenship. Magistrate's Report at 9, 13.

68. Some authorities have challenged the constitutionality of this automatic effect. While no constitutional requirement of prior judicial determination of expatriation has been found, the Court could infer such a right from the Fifth Amendment's Due Process Clause. *See e.g.*, Gordon, *supra* note 14, at § 20.11(a). There is also the possibility of subsequent judicial appeal. *See infra* note 103 and accompanying text.

should lose his citizenship, but rather upon the question of whether the loss has, in fact, already occurred.⁶⁹

A. *The Role of Consular Officials*

U.S. consular officials stationed around the world have a dual function in these cases. They are, or should be, advisors, giving citizens information on the consequences that contemplated or already performed acts may have on their citizenship.⁷⁰ Once informed of the importance of intent in cases where citizenship is endangered, a citizen may choose to have on record a statement of his intent to preserve his U.S. citizenship. Except in certain limited sets of facts,⁷¹ such a declaration, close in time to the statutory act of expatriation, will make it virtually impossible for the Government to prove the declarant's intent to relinquish his citizenship.⁷²

The consular official is also an enforcer of Section 349 and is legally bound to report all but certain routine classes of expatriatory acts⁷³ to the State Department.⁷⁴ The consular of-

69. "Loss of nationality takes effect upon the date of the performance of any of the acts....The loss of nationality is not dependent upon approval by the Department of the certificate of loss of nationality...." 8 Foreign Affairs Manual of the U.S. Dep't of State 224.11 (July 6, 1971) [hereinafter "FAM"]. Naturally, an administrative finding must be made in order for this loss of citizenship to acquire legal force. The finding of loss, or non-loss, however, is retroactive to the date of the "expatriating act." *Id.*

70. The Board has indicated in several of its decisions that consular officials must pay serious attention to this advisory role. *See, e.g., infra* notes 199-212 and accompanying text. For an example of State Department public information regarding loss of citizenship, see *Your Trip Abroad*, U.S. Dep't of State at 20 (rev. Spring 1982).

71. Where a citizen takes an oath of allegiance specifically renunciatory of his U.S. citizenship, prior or subsequent statements of non-intent will have little or no effect. *See infra* notes 263-67 and accompanying text.

72. *See generally* Board decisions cited *infra* notes 172-326 and accompanying text.

73. FAM, *supra* note 69, at 224.20b(2) (Mar. 21, 1977). These acts include marriage to an alien, naturalization in a foreign state upon the application of a parent, guardian or agent of a person under 21, "non-meaningful" oaths taken by those who are already dual nationals, service in the armed forces of a foreign state not engaged in hostilities against the United States and service under a foreign government in a position which is not an "important political post." *Id.* Unless it is reasonably clear that the citizen is performing one of these acts with an intent to relinquish U.S. citizenship, the consul merely writes a memo and files it. *Id.* at 224.20c.

74. 22 C.F.R. § 50.41 (1982).

ficial may learn of these acts from citizens who reveal them in their questions or requests for passports or other services⁷⁵ or from foreign governments which make available lists of newly naturalized citizens and their former nationalities.⁷⁶

Much of the procedure the consular official must follow is described in the August 27, 1980 airgram [the "Airgram"] sent by the State Department to all consular posts as a result of *Terrazas*.⁷⁷ When the consular official suspects the commission of an expatriating act by a citizen, she is required to send the citizen a citizenship questionnaire and accompanying transmittal letter.⁷⁸ The transmittal letter informs the citizen of his alleged expatriating act and resulting possible loss of citizenship, cites the appropriate subsection of Section 1481 and offers consular assistance.⁷⁹

The questionnaire begins by suggesting the retention of legal counsel and invites discussion with members of the consular staff.⁸⁰ The citizen is then asked to complete the questionnaire if he has performed one of the enumerated expatriating acts.⁸¹ The next item informs the citizen that loss of citizenship requires that this act have been performed voluntarily and "with the intention of relinquishing United States citizenship."⁸² If

75. FAM, *supra* note 69, at 224a (Mar. 21, 1977).

76. Jamaica publishes such lists in its equivalent of our Federal Register. See, e.g., *In Re VET*, Bd. App. Rev. 1 (Aug. 30, 1979).

77. The Airgram, U.S. Dep't of State, Circular Airgram No. 1767 (1980) [hereinafter "Airgram"], contained two sections: "Information for Determining U.S. Citizenship," and "Expatriation in light of *Vance v. Terrazas*." It also included hypothetical cases and accompanying commentary illustrating the Department's position, an analysis of *Terrazas*, a questionnaire form and a suggested transmittal letter.

78. *Id.* at 10-11. This procedure replaced four documents: the Uniform Loss of Nationality Letter, FAM; *supra* note 69, at Exhibit 224b; the Citizenship Questionnaire, *id.* at 224.5; Procedures and the Preliminary Finding of Loss Letter, *id.* at Exhibit 224.9; Procedures, Airgram, *supra* note 77, at 10, 18.

79. Airgram, *supra* note 77, at 12. For text of § 1481, see *supra* note 61.

80. Airgram, *supra* note 77, at 13.

81. *Id.* at 14. Question 7 asks the citizen whether he has been naturalized by, taken an oath to, served in the armed forces of, or held employment in the government of a foreign state, or whether he has made a formal renunciation at a U.S. consulate.

82. *Id.* at 15. Item 9 of the questionnaire:

9. You should be aware that under United States law a citizen who

this is the case, the citizen is requested to sign the "Statement of Voluntary Relinquishment of U.S. Nationality" on the same page.⁸³ If, however, the citizen does not believe he has acted voluntarily and with intent to relinquish his citizenship, he is asked to complete the rest of the questionnaire. The citizen must provide further information about the nature of the act, the citizen's intent in performing it⁸⁴ and the nature of the ties he maintains with both the United States and the nation in which the expatriating act occurred.⁸⁵

The material sent by the consulate has three significant flaws. First, the excerpt of the appropriate subsection of the Act is included without sufficient explanation of the *Terrazas* intent requirement.⁸⁶ Without mention of this requirement, there is a significant danger that the citizen might ignore the questionnaire or fail to give it the care and thought this crucial document should receive.⁸⁷

Second, the material fails to ask a question which would elicit a clear declaration of the citizen's intent either to relin-

has performed any of the acts specified in item 7 with the intention of relinquishing United States citizenship may have thereby lost United States citizenship. If you voluntarily performed an act specified in item 7 with the intention of relinquishing United States citizenship, you may sign the statement below and return this form to us, and we will prepare the necessary forms to document your loss of U.S. citizenship. If you believe that expatriation has not occurred, either because the act you performed was not voluntary or because you did not intend to relinquish U.S. citizenship, you should skip to item 10, and complete the remainder of this form.

83. *Id.*

84. Airgram, *supra* note 77, at 16, questions 12a and 12b.

85. *Id.* at 15-17.

86. See *supra* notes 62-65 and accompanying text. The questionnaire simply states that "a person who is a national of the United States . . . shall lose his nationality by" committing one of the enumerated expatriatory acts (emphasis added). 8 U.S.C. § 1481(a)(1) (1952 & Supp. 1983).

87. Some of the questionnaires received are carelessly filled out. In some cases, this may be the result of nonchalance and apathy on the part of citizens who no longer wish to retain their U.S. nationality. There is a strong possibility, however, that some citizens fail to use care in filling out the questionnaire because they see the loss of their U.S. citizenship as a *fait accompli*. Interview with Edward Betancourt, Acting Chief of the Near Eastern and South Asian divisions, Office of Citizens' Consular Affairs, in Washington D.C. (Mar. 16, 1983) [hereinafter "Betancourt Interview"].

quish or retain his citizenship. Question 12(b) asks in part "[w]hat was your intent in performing the act or acts?"⁸⁸ Such a question is likely to elicit a host of motives such as "economic considerations," "social and educational benefits," "belonging in the community," or "family pressure." An answer of "not to relinquish my U.S. citizenship" can hardly be expected. Yet this is precisely the most potent and relevant answer possible.⁸⁹

Finally, the statement in the questionnaire that "[y]ou may want to consult an attorney before completing this form"⁹⁰ is hardly strong enough. Given the importance of the questionnaire in determining citizenship status, it would be highly advisable for any citizen concerned about his status to consult an immigration attorney. Too often, attorneys are called in only after the uninformed or misinformed citizen has damaged his case through his statements and answers on the questionnaire.

Upon receipt of the questionnaire, the consul may begin to evaluate the case. If the questionnaire is not received in a reasonable time,⁹¹ the consul, after having attempted to contact the citizen,⁹² may proceed on the basis of the facts available to him. The consul then prepares a Certificate of Loss of Nationality ["CLN"]⁹³ which includes a description of all relevant facts, and sends it to the Office of Citizens' Consular Services at the State Department along with supporting documents and his own recommendations.⁹⁴ The consul does have discretion

88. Airgram, *supra* note 77, at 16.

89. Almost all Board decisions in timely-filed appeals turn on intent. See generally *infra* notes 146-326 and accompanying text. While the State Department is not obliged to design an appellant's case for him, the relevant questionnaire language which does not reveal fully the importance of intent may lead citizens to concentrate their efforts on less fruitful but more obvious issues such as voluntariness. The result is more work, more confusion and the loss of citizenship by some citizens who might otherwise have retained it.

90. Airgram, *supra* note 77, at 13.

91. Thirty days is the time mentioned in the transmittal letters. Airgram, *supra*, note 77, at 12.

92. *Id.* at 11.

93. U.S. State Department Form FS-348, FAM, *supra* note 69, at § 224.1 (Mar. 21, 1977).

94. The Office of Citizens' Consular Services is a unit of the Office of Overseas Citizens Services, which in turn, is a part of the Bureau of Consular Affairs.

to make findings of non-loss in some routine classes of acts, such as low-level employment in a foreign state's civil service.⁹⁵ Most cases, however, are processed by Consular Affairs officers at the Department who submit the CLN with their recommendation for disposition to the chief of their geographic divisions.⁹⁶ The chief may approve or reject the CLN or, if he has difficulty in making a determination, submit it to the chief of the Office of Citizens' Consular Services for a final decision.⁹⁷

The State Department generally approves no more than one-third of the CLNs submitted.⁹⁸ If the CLN is approved, the Department returns it to the consulate which prepared it. The consulate then communicates the decision, together with notice of the right to appeal, to the citizen or his designated representative.⁹⁹

B. *The Board of Appellate Review*

A citizen may appeal a determination of loss of citizenship to the Board of Appellate Review¹⁰⁰ within one year of the ap-

95. See *supra* note 73.

96. The principal of not allowing a case to be decided by a single official is important since the disposition of hard cases would otherwise vary with the philosophy of the different Consular Services officers. Betancourt Interview, *supra* note 87.

97. *Id.*

98. Address of Carmen Diplacido, Chief of the Office of Citizens Consular Services, U.S. State Dep't, at the Annual Conference of Immigration Lawyers of America, New York City (May 22, 1983) (entitled "Loss of Nationality Workshop").

After reading Board cases, one may be tempted to view Consular Services as an office which constantly attempts to deprive people of their U.S. citizenship. Such a characterization would be misleading. The office disapproves hundreds of CLNs each year. Moreover, there have been numerous cases where the Consular Services, once it is alerted to mistakes made many years earlier, has promptly corrected them and restored citizenship to both the applicants and their extended families.

99. FAM, *supra* note 69, at 224.2 (July 6, 1971).

100. The Board was originally established in 1967 in what was then the Office of the Deputy Under Secretary of State for Administration in order to centralize administrative appeal procedures required by law and regulation within the Department. Board of Appellate Review of the Department of State, Fact Sheet at 1 (Jan. 1983) [hereinafter "Board Fact Sheet"]. The Board, which sits as a panel of three, currently consists of a full-time chairman, a regular member, and eight *ad hoc* members, of which two at most

proval of the CLN.¹⁰¹ The Board is an autonomous quasi-judicial body whose decisions in loss of nationality and passport cases are final within the Department,¹⁰² but which may be reviewed in a trial *de novo* in federal district court.¹⁰³ The Department, however, has the option of giving administrative reconsideration to those appeals dismissed by the Board as time-barred.¹⁰⁴ The Board provides prospective appellants with information¹⁰⁵ and makes prior opinions available to interested parties, once certain identifying details within these opinions have been excised in accordance with the Privacy Act of 1974.¹⁰⁶

may serve at any given meeting. 22 C.F.R. § 7.4 (1981). All members are appointed by the Legal Adviser of the U.S. State Department and must be attorneys. The Legal Adviser also designates the Chairman and determines the number of *ad hoc* members. *Id.* The Chairman is responsible for the administration of the Board's activities, presides at all meetings and hearings, takes testimony, receives and passes on the admissibility of evidence, writes opinions in support of decisions and rulings and performs generally the duties of an administrative law judge. He is aided by a full time staff assistant.

Current Departmental regulations (Part 7 of 22 C.F.R.) now place the Board within the Office of the Legal Adviser for administrative purposes, and empower it to "take any action it considers appropriate and necessary to the disposition of cases appealed to it." 22 C.F.R. § 7.2(a) (1981). While the Board works almost exclusively with appeals arising from determinations of loss of citizenship or denials of passports, its jurisdiction includes certain contractual disputes as well. Board Fact Sheet, at 1.

101. 22 C.F.R. § 7.5(a)-7.5(b) (1981). This limit may be extended only if "the Board determines for good cause that the appeal could not have been filed within the prescribed time." *Id.* Prior to November 30, 1979, an appeal could be filed "within a reasonable time." 22 C.F.R. § 50.60 (1967-79). For a discussion on the Board's treatment of time-barred cases, see *infra* notes 117-35.

102. 22 C.F.R. § 7.8 (1981). Motions for Board reconsideration may, however, be made within thirty days of a decision, pursuant to 22 C.F.R. § 7.9 (1981).

103. 8 U.S.C. § 1503(a) (1980).

104. See *infra* note 134 and accompanying text.

105. In order to help *pro se* appellants with their notices of appeal, the Board has recently designed form L/BAR 1-83 (optional) which is a model notice of appeal and instructions. This form, together with the Board Fact Sheet and relevant C.F.R. sections, is sent to citizens requesting information and assistance.

106. The Privacy Act of 1974, Pub. L. 93-579, codified at 5 U.S.C. § 522a(b) (1980), provides in relevant part that "[n]o agency shall disclose any record which is contained in a system of records by means of communication to any person, or to another agency, except pursuant to a written re-

When filing a notice of appeal, a citizen may elect to include a written brief and request a hearing before the Board.¹⁰⁷ Upon receipt of the notice of appeal, the Board notifies the Office of Citizenship Appeals and Legal Assistance, which gathers all pertinent facts and documentation from Consular Services and prepares the Government's case.¹⁰⁸ If the Office of Citizenship Appeals does not feel the Government will be able to satisfy its burden of proving that appellant committed his expatriating act voluntarily and with intent to lose his citizenship, it consults with Consular Services. If the latter agrees, the Office of Citizenship Appeals will request that the Board remand the case to the Bureau of Consular Affairs for the purpose of having the

quest by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record..." would fall under one of eleven enumerated exceptions. Since access of prospective appellants to prior cases does not fall into any of the categories, the opinions must be stripped of identifying details. Thus, Board cases are identified by the appellant's initials and the date of the decision.

The number of Board opinions shows a marked increase each year. In March 1983, there were sixty on the Board's docket. Appeals have risen by almost 700% from fiscal year 1979. Interview with William B. Wharton, Director, Office of Citizenship Appeals and Legal Assistance, U.S. Dep't. of State, in Washington, D.C. (Mar. 16, 1983) [hereinafter "Wharton Interview"]. At present, the opinions are still unpublished, and are available only at the office of the Board, in Washington D.C. Since January, 1984, however, the Board has begun publishing selected opinions, obtainable by contacting the Public Information Service of the Bureau of Public Affairs, Dep't of State, Washington, D.C. 20520. Interview with Alan G. James, Chairman of the Board of Appellate Review, in Washington, D.C. (Mar. 16, 1983) [hereinafter "James Interview"].

107. 22 C.F.R. §§ 7.5(d)-7.5(e) (1981). Written notice of hearings must be given to all parties at least fifteen days before the scheduled hearing date. The appellant may appear and testify on his own behalf, and may choose to be represented by counsel. If a witness is unavailable, the Board, in its discretion, may admit affidavits and records of depositions. Witnesses called by the appellant or the Department are subject to examination by the Board and cross-examination by the opposing side. A transcript of each hearing is prepared and is available for purchase or inspection by any party. Hearings are private unless appellants request in writing that they be open to the public. 22 C.F.R. § 7.6 (1981). Generally, fewer than one-third of the appellants request hearings. James Interview, *supra* note 106.

108. Betancourt Interview, *supra* note 87. The Office of Citizenship Appeals and Legal Assistance also aids the U.S. Attorney General in preparing the Government's case in subsequent appeals from the decisions of the Board. Wharton Interview, *supra* note 106.

CLN vacated.¹⁰⁹ Board reversal of a determination of loss or Board acquiescence to a request for remand results in retention of citizenship *ab initio*.¹¹⁰

For administrative purposes, the Board, the Office of Citizenship Appeals and the Office of Citizens' Consular Services are all units of the State Department. Nevertheless, they act independently, and may differ in their interpretations of the intent requirement.¹¹¹ In a February 1983 appeal,¹¹² for example, the Department had misplaced documents it regarded as necessary to its case. The Board, in response to appellant's complaint about the resulting delay, demanded to know what steps the Department was taking to locate the file.¹¹³ After the Department failed to respond to this inquiry, the Board advised the Department that it would consider the appeal on February 18, 1983 with or without the Department's brief.¹¹⁴ On that date,

109. Interview with H. Edward Odom, Acting Chief, European and Canadian Division, Office of Citizens' Consular Services, U.S. Dep't of State, in Washington, D.C. (Mar. 16, 1983).

The remand procedure is often necessary, since once an appeal is filed, only the Board may act. While the Board is empowered to remand by 22 C.F.R. § 7.2 ("The Board shall take any action it considers appropriate and necessary to the disposition of cases appealed to it"), it will not remand on a mere "bald statement to the effect that the Department cannot sustain its burden of proof." *In Re MLVK*, Bd. App. Rev. 4 (June 10, 1980). The Board requires that "a request for remand should state with particularity reasons for the request, including points of law and facts, which...warrant a remand." *Id.*

110. *See supra* note 69. The fact that one is or is not regarded as a citizen may have ramifications on tax treatment, right to social benefits and right to confer citizenship or preferential immigration treatment upon family members. In *In Re BFK*, Bd. App. Rev. 3 (Jan. 20, 1982), a citizen who had lost and then regained citizenship by naturalization requested a review of the original finding of loss in order to confer U.S. citizenship upon his daughter. *Id.* at 4.

111. This is to be expected since the Board is an autonomous body. *See* Board Fact Sheet, *supra* note 100, at 1. The Office of Citizenship Appeals does not relish defending "bad cases" before the Board, but Consular Services may have different ideas as to what constitutes a "bad case."

112. *In Re MFP*, Bd. App. Rev. (Feb. 24, 1983), involved a U.S. citizen who, after having been a naturalized Canadian, maintained in her Questionnaire that she had not intended by her naturalization to relinquish her U.S. citizenship. *Id.* at 3.

113. *Id.*

114. *Id.* at 4.

based upon appellant's evidence, the Board found that the Department had not met its burden of proving appellant's intent to relinquish her citizenship.¹¹⁵ Reversing the finding of loss, the Board characterized "[t]he Department's disregard for the regulations and the rights of appellants [as] cavalier and inexcusable."¹¹⁶

IV. EXAMINATION OF BOARD DECISIONS

A. *Timeliness: A Jurisdictional Question*

Before analyzing and deciding an appeal on its merits, the Board must first determine the jurisdictional issue of timeliness.¹¹⁷ Forty percent of recent appeals have failed on this ground.¹¹⁸ Prior to the current time limit of one year from receipt of the CLN, appeals could be brought within a "reasonable time."¹¹⁹ While the Board had never defined a "reasonable time," it expected that one would "prosecute an appeal with the diligence of a reasonably prudent person."¹²⁰ The "reasonable time" standard is still applied to cases where loss occurred prior to 1979.¹²¹ The Board will consider "acceptable excuses" for delay,¹²² such as the reasonable fear of prosecution by the United States¹²³ and the desire to await the results of a related case.¹²⁴ Fear of losing on appeal¹²⁵ and emotional

115. *Id.* at 8.

116. *Id.* at 6.

117. *See, e.g., In Re BEW*, Bd. App. Rev. 1, 4 (Aug. 5, 1983); *In Re GMC*, Bd. App. Rev. 1 (Aug. 17, 1983); *In Re CJE*, Bd. App. Rev. 5 (Nov. 3, 1983).

118. This figure is based on all 1982 and 1983 decisions.

119. *See supra* note 101 and accompanying text.

120. *In Re OSD*, Bd. App. Rev. 9 (Oct. 26, 1983).

121. *Id.* at 7. Extremely long periods are seen as almost *de facto* unreasonable delay. "Whatever the meaning of the term 'reasonable delay' as used in the regulations then in effect," the Board has observed, "we do not believe that such language contemplated an unaccountable delay of seventeen years." *In Re LMB*, Bd. App. Rev. 6 (Mar. 31, 1980).

122. 22 C.F.R. § 7.5 (1982) allows the Board to extend the limitations period for appeals that "could not" be brought within the prescribed time.

123. *See In Re TAB*, Bd. App. Rev. 3 (Dec. 10, 1981) (although the case was dismissed as time barred, the Board held that appellant, a Vietnam deserter in Sweden, might be excused for a portion of delay because of his fear of arrest).

124. *In Re WSH*, Bd. App. Rev. 2 (Aug. 31, 1982) (one year's additional delay excused because appellant awaited the result of spouse's appeal).

125. *See, e.g., In Re BAS*, Bd. App. Rev. 11 (Feb. 3, 1983).

depression¹²⁶ have been held not to constitute acceptable excuses.¹²⁷

While a one-year time bar may seem draconian, there are strong policy reasons favoring its existence. As the *Terrazas* decision became known, more citizens appealed after having received CLNs, increasing the Board's caseload.¹²⁸ In addition, many former citizens who had lost their citizenship years, even decades earlier, now sought to regain a status which was becoming even more valuable in an economically and politically troubled world.¹²⁹ The one-year time bar helps to keep the Board's case load manageable. The Board recognized that proof of intent and voluntariness becomes increasingly difficult with the passage of time.¹³⁰ One's memories of earlier intent fade, consular officials and witnesses retire and die, and documents are misplaced and lost over time. In addition, it is desirable to encourage finality of determination and to discourage the potentially unmanageable number of resurrected claims by long-since expatriated persons, their spouses and descendants.¹³¹

A dismissal by the Board of an appeal that has not been filed in a timely manner need not be the end of the case. In addition to the possibility of a trial *de novo* in federal district court,¹³² the Bureau of Consular Affairs may at its discretion reconsider certain time-barred appeals.¹³³ The Legal Adviser of the State Department stated that such reconsideration is permissible, but should be "exercised . . . only under certain limited conditions to correct manifest errors of law or fact, where the

126. *In Re DGA*, Bd. App. Rev. 7 (Dec. 30, 1982).

127. *In In Re BEW*, Bd. App. Rev. 6 (Aug. 5, 1983), a mistake in comprehending the law was also held to be an unacceptable excuse. Prior to 1979, the fact that the Government was not obligated to inform those who had lost their citizenship of the possibility of appeal also would not excuse a delay. *In Re GMC*, Bd. App. Rev. 8 (Aug. 17, 1983).

128. The number of appeals decided was only 12 in 1979, 16 in 1980, 19 in 1981, 38 in 1982, and 40 in 1983.

129. See, e.g., *In Re BG*, Bd. App. Rev. (Aug. 5, 1980) (delay of 8 years), and *In Re GAW*, Bd. App. Rev. (Nov. 7, 1980) (delay of 22 years).

130. See *In Re GAW*, Bd. App. Rev. 5 (Nov. 7, 1980) (Board held that a long delay "prejudiced the Department's ability to meet its burden of proof).

131. Betancourt Interview, *supra* note 87.

132. 22 C.F.R. § 50.52 (1982).

133. 8 U.S.C. § 1503(a) (1980).

circumstances favoring reconsideration clearly outweigh the normal interests in the repose, stability and finality of prior decisions."¹³⁴ Thus the timeliness of a citizen's appeal may be vital to its success.¹³⁵

B. *The Expatriating Act as a Nullity*

Once timeliness has been established, the Board examines the nature of the alleged expatriating act. In five post-*Terrazas* decisions, the Board's reversal or consent to remand turned on the lack of a valid expatriating act. In *HJP*,¹³⁶ the Board agreed to remand a case to Consular Services in order to vacate the CLN of an appellant who had been naturalized in Rhodesia.¹³⁷ Since Rhodesia was not a "state" within the terms of the Immigration and Naturalization Act, appellant's naturalization was

134. Leich, *Contemporary Practice of the United States Relating to International Law*, 77 AM. J. INT'L L. 298, 302 (Apr. 1983)) (citing Legal Adviser's Memorandum to the Chairman of the Board of Appellate Review Dep't of State File Nos. P83 0013-0749, 0013-0750 Dec. 1982) [hereinafter "Legal Adviser's memo"].

Prior to this opinion, there was some questions as to the standard of application of the time bar, since previous Board decisions strictly applied the time-bar to some cases while ignoring it in other cases.

For example, in *In Re TAB*, Bd. App. Rev. (Dec. 10, 1981), a citizen deserted the U.S. Army and moved to Sweden where he married and became a naturalized Swede in 1974. *Id.* at 2. He did not answer the consulate's letters and a CLN was issued. *Id.* at 1. In his appeal, TAB cited "paranoias" about his AWOL status, an unstable childhood spent in a series of orphanages and general lack of educational competence. *Id.* at 4. The Board excused his delay up to 1977, due to appellant's fear of arrest for going AWOL. However, the delay of three years after the appellant received an undesirable discharge was held to be beyond a reasonable time. *Id.*

On the same day, the Board approved a request for remand in *In Re AHM*, Bd. App. Rev. (Dec. 10, 1981), an appeal filed thirteen years after the determination of loss. The time bar issue was not even mentioned.

Three months later in *In Re GS*, Bd. App. Rev. 6 (Mar. 26, 1982), however, a request for remand was denied because GS appealed five years after the determination of loss.

135. This is an additional argument for improving the information supplied by the State Department to those in danger of losing their citizenship. See *supra* notes 86-90 and accompanying text.

136. *In Re HJP*, Bd. App. Rev. (Oct. 10, 1980).

137. *Id.* at 2.

held to be a nullity.¹³⁸ This was also the basis for the result in *RLP*¹³⁹ and *CRZ*.¹⁴⁰

Some formal declarations of renunciation before consular officials have been held void as well. In *NMYL*,¹⁴¹ appellant executed an oath of renunciation two years after having voted in a foreign election. The Board found the oath to be invalid since, by pre-*Afroyim* standards then in effect, appellant was no longer a U.S. citizen and thus could not renounce a citizenship she no longer possessed.¹⁴² And, in *DWL*,¹⁴³ the Board held invalid a renunciatory oath because it was neither performed at a consular establishment nor properly witnessed.¹⁴⁴

The performance of an actual expatriatory act is a *sine qua non* for proving loss of citizenship. Since Consular Services will generally not approve a CLN absent a clear showing that a citizen has indeed committed an expatriatory act, few cases lacking such an act come before the Board.¹⁴⁵

C. Voluntariness: The Overargued Issue

An expatriatory act must be voluntary if it is to result in the loss of citizenship.¹⁴⁶ Since the Immigration and Naturaliza-

138. *Id.* In this case, appellant may well have had the intent to relinquish his citizenship, but no actual statutory act of expatriation was committed. Thus, the Board never reached issue of intent.

139. *In Re RLP*, Bd. App. Rev. (Oct. 10, 1980).

140. *In Re CRZ*, Bd. App. Rev. (Dec. 12, 1980).

141. *In Re NMYL*, Bd. App. Rev. (Feb. 4, 1981).

142. *Id.* at 7, 8. Similarly, one must be aware that one is a citizen in order to lose that citizenship through an expatriating act. See *infra* note 146.

143. *In Re DWL*, Bd. App. Rev. (June 30, 1982).

144. *Id.* For a more extensive discussion of this case, see *infra* notes 213-19 and accompanying text. In *In Re SA*, Bd. App. Rev. (Jan. 12, 1979), a 1953 oath of renunciation was held to be a nullity since under the law in effect at that time (8 U.S.C. § 1481(a)(10)), appellants evasion of military service during wartime had already deprived him of his citizenship. He, therefore, had no U.S. citizenship to renounce. *Id.* at 11.

145. Betancourt Interview, *supra* note 87.

146. See *supra* notes 45-53 and accompanying text. Voluntariness includes an awareness that one possesses U.S. citizenship. *Rogers v. Patkowski*, 271 F.2d 858 (9th Cir. 1959). The State Department limits the application of this requirement to a person who "never was aware of [his] own claim to U.S. nationality. A person who was aware at one time of [his] own claim but assumed that it had been lost does not fall within this definition of unawareness." FAM, *supra* note 69, at 224.19(a)(3) (rev. Mar. 21, 1981).

tion Act establishes a rebuttable presumption of voluntariness,¹⁴⁷ the citizen must prove the lack of voluntariness if he is to prevail on this issue. This is a heavy burden. Physical duress, reasonable fear for life and safety, apprehension of incarceration or induction into the armed forces of a totalitarian state and lack of mental capacity will effectively rebut the presumption.¹⁴⁸ Such cases, however, rarely reach the Board, since Consular Services will usually not approve a CLN under such circumstances.¹⁴⁹

Nearly every appellant develops arguments with respect to his or her lack of voluntariness, and assertions of economic duress, family pressures, emotional distress and claims of pressure from various governments are common. The Board has made clear that economic security is not to be equated with economic duress as the latter must be truly severe.¹⁵⁰ The Board has cited the real fear of starvation in *Stipa v. Dulles*¹⁵¹ and *Insogna v. Dulles*¹⁵² as examples. Desire to pursue the profession for which one has been educated,¹⁵³ or the existence of discriminatory practices against non-citizens in employment,¹⁵⁴

147. 8 U.S.C. § 1481(c) (1980). In cases of dual nationals who have resided in their other homeland for at least ten years prior to the commission of expatriatory act, the law prescribes a conclusive presumption that the act was performed free of duress. *Id.* The constitutionality of such a presumption is questionable. See Gordon, *supra* note 14, at § 20.9(b).

148. See Gordon, *supra* note 14, at 20.9(b).

149. Betancourt Interview, *supra* note 87. But see *In Re GB-S*, Bd. App. Rev. (July 14, 1983) (lack of mental capacity successfully used to disprove intent). See *infra* notes 190-92 and accompanying text.

150. See *In Re TER*, Bd. App. Rev. 7 (June 30, 1980).

151. 233 F.2d 551, 555 (3rd Cir. 1956).

152. 116 F. Supp. 473, 475 (D.C. 1953).

153. See *In Re PHM*, Bd. App. Rev. (Nov. 24, 1981). An American citizen who moved to Canada as a child and eventually completed law school there was told upon his application to the Ontario Bar that he would have to become a Canadian citizen. *Id.* at 2. After several attempts to circumvent this requirement, appellant took the renunciatory Canadian oath then in effect. *Id.* See also *infra* notes 241-54 and accompanying text. The Board rejected PHM's argument that his oath was not voluntary since he was required to take in order to practice his chosen profession. This case can be compared to the Mexican government's interpretation of "voluntary naturalization." See *infra* notes 330-31 and accompanying text. See also *In Re TER*, Bd. App. Rev. (June 30, 1980).

154. In *In Re FJB*, Bd. App. Rev. (Dec. 30, 1982), the Board rejected appellant's conclusion that the possibility of losing his job if he did not obtain Canadian citizenship constituted duress. *Id.* at 7.

advancement¹⁵⁵ or in the awarding of fellowships or other financial aid¹⁵⁶ will not constitute economic duress, provided there are other, albeit less remunerative, sources of income to be found.¹⁵⁷ Neither discriminatory academic or professional fees¹⁵⁸ nor higher corporate capitalization requirements for foreign-owned businesses¹⁵⁹ is sufficient to rebut the presumption of voluntariness.

Assertions of possible governmental reprisals are generally insufficient as well, even where governmental pressures are known to be severe. In the case of *M*,¹⁶⁰ for example, the petition of the wife of a Cold War emigre for citizenship in an Eastern European country was held to be voluntary.¹⁶¹ Similarly, in *HMO*,¹⁶² a Japanese-American, who had resided in Japan since childhood, was held to have voluntarily enlisted in the Japanese Armed Forces in 1944 despite his assertion that he "might have been enlisted as a volunteer, but there actually was no choice but military service."¹⁶³

Courts also have held that extreme instances of family pressure, such as the direct and intense coercion of one member of a family by another, may create a "duress of devotion" which may overcome the statutory presumption.¹⁶⁴ Thus, in *MLVK*,¹⁶⁵ the Board remanded appellant's case to Consular Services after hearing consular officer's testimony that appellant's husband's campaign of harassment and hostility against the consulate, its staff and appellant caused appellant to renounce her

155. See *In Re TER*, Bd. App. Rev. 5 (June 30, 1980).

156. *Id.*

157. *Id.* at 6-7.

158. See *In Re LDB*, Bd. App. Rev. 9 (June 30, 1982) (university fees were lower for Mexican citizens than for noncitizens).

159. See *In Re HHE*, Bd. App. Rev. (June 17, 1981) (Appellant became a citizen of El Salvador in order to avoid the higher capitalization requirement El Salvador imposed upon foreign owned corporations).

160. *In Re M*, Bd. App. Rev. (Jan. 13, 1980).

161. *Id.* at 13. This case occurred during the Cold War. The Board found that the "Secret Police would have kept her from the American Embassy."

162. *In Re HMO*, Bd. App. Rev. (June 6, 1983).

163. *Id.* at 7.

164. See Gordon, *supra* note 14, at § 20.9b, n.8 (citing *Mendelsohn v. Dulles*, 207 F.2d 37 (D.C. Cir. 1953)).

citizenship.¹⁶⁶ However, neither a U.S. citizen's compliance with his mother's wish that he take control of the family business abroad,¹⁶⁷ nor the desire of a U.S. citizen to return to the foreign country from which his family originated,¹⁶⁸ has been deemed sufficient to negate the voluntariness of the expatriatory act.

Lastly, the Board has held that neither subjective declarations of emotional instability¹⁶⁹ nor unsubstantiated fear of imminent government round-ups of non-citizens¹⁷⁰ constituted probative evidence that the appellants acted involuntarily. As the cases discussed above illustrate, few succeed in rebutting the presumption of voluntariness. Thus, since the Government must affirmatively prove the appellant's intent to relinquish his citizenship,¹⁷¹ *this* would be a better issue for an appellant to rely upon in his defense.

D. Intent: A Functional Analysis

1. A Continuum of Definitions

The Court in *Terrazas* clearly enunciated the requirement that the Government prove appellant's intent to relinquish his U.S. citizenship at the time of his expatriatory act.¹⁷² While the dissent urged that intent be proved by clear and convincing evidence,¹⁷³ the majority held that the congressionally prescribed preponderance of the evidence standard was constitutional.¹⁷⁴

165. *In Re MLVK*, Bd. App. Rev. (June 10, 1980).

166. *Id.* at 2-3.

167. *In Re HHE*, Bd. App. Rev. 9 (June 17, 1981).

168. *See In Re VWvdH*, Bd. App. Rev. 2-3 (Aug. 25, 1982) (appellant, of German ancestry, renounced his U.S. citizenship, believing this act to be the only way he could legally remain in West Germany).

169. *See In Re JFL*, Bd. App. Rev. 8-10 (July 23, 1981) (Board rejected appellant's argument that his extreme instability at the time of his renunciation, and the "emotional turmoil of his early family background" rendered his act involuntary).

170. *See In Re TER*, Bd. App. Rev. (June 30, 1980). Appellant feared a general round-up of American draft resisters by the Canadian authorities. *Id.* at 4. The court held that appellant failed to produce evidence to substantiate these fears. *Id.* at 6.

171. 444 U.S. at 270.

172. 444 U.S. at 263. Thus, previous or subsequent acts or statements may be considered only to the extent that they may be probative of a citizen's intent at the time of his commission of the expatriatory act.

173. *See supra* note 10.

174. 444 U.S. at 265.

However, subtle shifts in the Board's analysis of the issues surrounding intent have increased the Government's burden of proof.¹⁷⁵

Such changes are perhaps only to be expected since intent is subject to a multitude of gradations and interpretations.¹⁷⁶ To some, intent is easily satisfied by a person's reasonable belief that his act may endanger his citizenship, regardless of his actual ignorance of the law.¹⁷⁷ While this "recklessness" standard has been used less frequently since *Terrazas*, it did surface in some pre-1982 decisions. In *TER*,¹⁷⁸ for example, the majority of the Board dismissed appellant's assertions that he was unaware that his naturalization in Canada meant the loss of his U.S. citizenship, and that he therefore lacked any intent to relinquish it.¹⁷⁹

175. These issues include the definition of intent, the probative weight accorded to the acts of commission and omission proposed by the Government as indicia of intent, and the classification of oaths of allegiance. See generally *infra* notes 176-326 and accompanying text. The question of whether these changes were the result of a conscious effort by the Board to accord greater protection to American citizenship remains open.

176. Nowhere is the difficulty of defining and proving intent more apparent than in the field of criminal law. The requirement of *mens rea* as an element of most crimes has led to an array of various definitional systems for characterizing the gradations of an individual's state of mind. Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts. The modern view, however, is that it is better to draw a distinction between intent (or purpose) and knowledge in some limited areas of liability. LA FAVE & SCOTT, *HANDBOOK ON CRIMINAL LAW* 195-96 (West 1972).

While 8 U.S.C. § 1481 is not a criminal statute, it does prescribe what most would term a penalty (loss of citizenship) for a physical act (expatriating act), committed with an accompanying state of mind (intent). Thus, signifi-

177. This view equates knowledge with intent, and is an example of the "traditional view" rather than the "modern view" advocated by La Fave and Scott. See *supra* note 176.

178. *In Re TER*, Bd. App. Rev. (June 30, 1980).

179. *Id.* at 9, 10. The concurring Board member asserted that while appellant's belief was erroneous, it was still "reasonable." *Id.* at 14. In a later decision, however, the Board, while characterizing an appellant's failure to investigate further the possibility that she was endangering her citizenship as indicative of "a careless and casual attitude," stated that it would

Others believe intent requires not only knowledge of the risk of losing one's citizenship, but also the willingness to relinquish it.¹⁸⁰ Finally, there are those who feel that nothing short of a proven desire to relinquish one's nationality at the time of the expatriatory act will suffice.¹⁸¹ The point at which the Board places its view on this continuum of intent is at least as important in the determination of denationalization cases as the evidentiary standard it applies.

Since intent is a mental state, and as such cannot be proven directly, *Terrazas* allows the Government to prove intent through inferences drawn from the observable acts and words of the citizen.¹⁸² In determining whether the requisite intent was present, the Board considers both the situation in which appellant found himself and the external pressures to which he was subjected.

This Note will use a functional analysis of Board decisions and opinions to ascertain the importance that the Board accords to certain facts when making determinations of intent.

In addition, this Note will also highlight certain trends which may lead to an understanding of the current state of U.S. loss of nationality law. The remainder of this section will explore the effects that various expatriatory acts, ties with the United States and foreign countries, personal attributes such as education and maturity, and consular behavior have on the determination of intent.

2. *Formal Oath of Renunciation*

The oath of renunciation and the procedure for administering it are closely prescribed by law and regulation.¹⁸³ The for-

not "conclude that this attitude . . . was tantamount to an intent to relinquish or abandon her citizenship." *In Re MF*, Bd. App. Rev. 11 (Jan. 29, 1982).

180. Betancourt Interview, *supra* note 87.

181. The Board has been moving closer to this position. Under this view, a simple "yes" or "no" answer to the question, "Did you wish to give up your U.S. citizenship when you committed the expatriating act?," in close proximity to the time of the act would provide conclusive evidence of loss or retention of citizenship. See *infra* text accompanying note 365.

182. 444 U.S. at 260.

183. See, e.g., 22 C.F.R. § 50.50 (1981); FAM, *supra* note 69, at 225.6 (July 14, 1969) and pertinent exhibits. The U.S. consular official must first

mal oath is administered by a U.S. consular official who may not encourage a citizen to renounce his citizenship. Rather the official should make every effort to explain to the citizen the gravity of the contemplated act.¹⁸⁴ A formal oath, voluntarily requested and properly executed by a mature, competent citizen, after the receipt of information from a consular official and an adequate period for reflection, is clear and un rebuttable proof of a contemporaneous intent to relinquish citizenship.¹⁸⁵ Neither the Board nor the courts have reversed a determination of loss

assure himself that the renunciant is, in fact, a U.S. citizen and has not already committed an expatriating act. FAM, *supra* note 69, at 225.6(f). Then a consular official or the renunciant should read the Statement of Understanding before two witnesses in the language in which the renunciant is most proficient. *Id.* at 225.6(g). This Statement declares that the renunciant realizes that he will no longer be a U.S. citizen and will be treated as an alien for all purposes, including eligibility to re-enter the United States. *Id.* at 225.6(k), at (1)-(4). The Statement also says that renunciation may not affect the renunciant's Selective Service or armed forces status, may cause the renunciant to become stateless and may even result in his being permanently barred from entering the United States pursuant to the entry requirements of the Immigration and Nationality Act. *Id.* at (5)-(8). The renunciant, in addition, attests to the voluntariness of the oath he is about to make, and is then asked to sign the Statement. *Id.* at (1)(q). The witnesses then sign the attestation. *Id.* at (2).

The Oath of Renunciation, *see id.* at 226.6, is then sworn to and signed. A copy is sent to the State Department, which then approves a CLN. *Id.* at 225.6(m). Although the minimum age for renunciants is 14, renunciations

The consular official is also required to initiate an investigation if he has any questions as to the renunciant's sanity or mental competence. *Id.* at 225.6(i).

184. FAM, *supra* note 69, at 226.6(c), cautions consular officers to "be particularly careful *not* to recommend or urge renunciation for any reason whatsoever Any recommendation or suggestion by a consular officer that a citizen renounce could be taken as evidence of duress" Instead, "the officer should suggest to the person that he defer the act of renunciation for a period to permit further reflection on the gravity and consequences of his contemplated act." *Id.* at 225.6(h). It is considered good consular practice to inquire into the citizen's motives and devote a good deal of time to discussing the matter with him. James Interview, *supra* note 106.

185. According to the Board, "[f]ormal renunciation of United States citizenship, in the manner provided by law, is considered the most unequivocal and categorical of all expatriating acts, and demonstrates an intent on the part of the renunciant to relinquish his citizenship . . . [T]he intent to relinquish is implicit in the act of renunciation. *In Re HHE*, Bd. App. Rev. 11 (June 17, 1981).

of citizenship on those facts during the period studied.¹⁸⁶ Renunciation is a right guaranteed by law¹⁸⁷ and, whether it is done out of political, religious or economic considerations, it is usually performed with an understanding of its permanence.¹⁸⁸ Subsequent statements of regret will not affect the Board's determination.¹⁸⁹

Demonstration of lack of capacity to appreciate the nature of a renunciation and its consequences will usually lead to a reversal. In such a case, medical documentation seems to be required. In *GB-S*,¹⁹⁰ petitioner secured a reversal by demonstrating, through the affidavits of several physicians who had treated him, that he had a long history of mental illness and that his renunciation was only one in a series of self-destructive incidents performed when he was "overtaken by an urge to do things on impulse and without rational thought."¹⁹¹ The physician stated that when appellant "purported to renounce his American citizenship he did not fully realize what he was doing and was unable to appreciate the implications and consequences of the act. . . ."¹⁹² On the same day, DP also sought to reverse the effects of his renunciation by alleging lack of capacity.¹⁹³ There was evidence that appellant believed God had spoken with him and had instructed him to start a farm in Guyana and learn to live without food or water.¹⁹⁴ Nonetheless, the Board denied the appeal and stated that "[a]ppellant, even though requested by the Board, did not submit any medical evidence with respect to the state of his mental and physical health at the time he renounced his United States citizenship."¹⁹⁵

186. Research by the author has included court decisions since 1958, and Board decisions since January 1, 1980.

187. See 8 U.S.C. § 1481(a)(6)(1978). U.S. law has recognized the right of every citizen to expatriate himself since 1868. See *supra* notes 21-22 and accompanying text.

188. There are, however, exceptions. See *infra* notes 199-207 and accompanying text.

189. *In Re EM v. DH*, Bd. App. Rev. (Aug. 25, 1982). In fact, such statements may be recognized as admissions that tend to strengthen the Government's proof of intent. *Id.*

190. *In Re GB-S*, Bd. App. Rev. (July 14, 1983).

191. *Id.* at 11.

192. *Id.* at 11-12.

193. *In Re DP*, Bd. App. Rev. 4 (July 14, 1983).

194. *Id.* at 4-5.

195. *Id.* at 6.

Somewhat irrational behavior by the appellant will not in itself allow him to overcome a renunciation. The appellant in *JFL*¹⁹⁶ cited among other grounds for his renunciation, the unresolved murder of his twin brother, his difficulty in finding employment and "little respect for the proper use of the English language."¹⁹⁷ Nonetheless the Board found him rational enough to formulate a plan to become stateless and thereby eligible to emigrate to Finland.¹⁹⁸

3. *Conduct of Consular Officials*

If a consular officer's conduct during the renunciation is somewhat improper, the Board may require less evidence from the appellant to overcome the renunciation. In *KMM*,¹⁹⁹ appellant, then eighteen years old, walked into the United States Embassy in Ottawa, Canada and asked to renounce his citizenship.²⁰⁰ The consular officer spent a brief time talking with the boy, and then gave him his renunciation papers.²⁰¹ A day later, the boy returned with the papers and executed the oath of renunciation in accordance with all the formalities.²⁰² A more extensive interview would have revealed the extreme immaturity of the renunciant, who, in the preceeding three years had spent a few weeks in the U.S. Marines and several months in the Navy, and had been unable to adjust to military life in either branch.²⁰³ The boy was now seeking to join the Royal Canadian Mounted Police and had been incorrectly told that this required that he relinquish his U.S. citizenship.²⁰⁴ Although appellant and his mother almost immediately sought to rescind the oath, the consular staff refused and issued a CLN.²⁰⁵ On appeal, the Board reversed the Department, citing appellant's

196. *In Re JFL*, Bd. App. Rev. (July 23, 1981).

197. *Id.* at 2.

198. *Id.* at 9-10.

199. *In Re KMM*, Bd. App. Rev. (Mar. 16, 1983).

200. *Id.* at 2.

201. *Id.* The Board found it strange that "natural curiosity, if not empathy, would not have led [the consular officer] to probe [the renunciant's] motives." *Id.* at 8.

202. *Id.* at 2-3.

203. *Id.* at 1-2, 10.

204. *Id.* at 3.

205. *Id.* at 3-4.

immaturity,²⁰⁶ and strongly criticized the consul's perfunctory treatment of a serious matter.²⁰⁷

Improper consular performance also resulted in the Board's finding in *RM*²⁰⁸ that a formal renunciation was not "sufficiently probative of an intent to relinquish U.S. citizenship."²⁰⁹ In that case, a U.S. citizen, naturalized in Australia, sought an American passport on which to return with his family to the United States.²¹⁰ In refusing to grant appellant the passport, the consular official declared that the only way appellant could enter the United States was by renouncing his U.S. citizenship and seeking an immigrant visa.²¹¹ At first, appellant refused to renounce, but after a few months he "got tired of waiting and gave up my citizenship so I could get back."²¹²

The Board, because of the weight it accords the oath of renunciation, requires strict compliance with the prescribed procedures. This due process safeguard is best illustrated by *DWL*.²¹³ In that case, appellant, who was about to be extradited to the United States from a Canadian public detention center, requested an opportunity to renounce his U.S. citizenship. Appellant believed that he would be allowed back into Canada as a stateless person following his sentence.²¹⁴ At appellant's request, a consular official visited him at the detention center and administered the oath which was witnessed by two Canadian corrections officers.²¹⁵ On appeal, the Board held that the renun-

206. *Id.* at 10. The Board conceded appellant's legal competence.

207. The consul's handling of the renunciation in the instant case may be contrasted to the consul's handling of the renunciations in *In Re NAMcG*, Bd. App. Rev. (Sept. 2, 1982). *In Re SBE*, Bd. App. Rev. (Sept. 2, 1982). In those cases, the official who actively counselled a family against renunciation, kept them waiting for several months. *In Re NAMcG* at 2; *In Re SBE* at 2-3. Eventually, they did renounce for religious reasons, but later regretted their decision. *In Re NAMcG* at 4; *In Re SBE* at 5. The Board upheld the determination of loss. *In Re NAMcG* at 9; *In Re SBE* at 10.

208. *In Re RM*, Bd. App. Rev. (Dec. 30, 1980).

209. *Id.* at 7.

210. *Id.* at 1.

211. *Id.* at 2.

212. *Id.*

213. *In Re DWL*, Bd. App. Rev. (June 30, 1982).

214. *Id.* at 3.

215. *Id.* at 10.

ciation was invalid because it was improperly witnessed²¹⁶ and was not executed within a consular establishment.²¹⁷ The Board denied that these errors were "mere procedural trivialities,"²¹⁸ and insisted on strict compliance with the terms of the Nationality Act of 1952.²¹⁹

4. *Other Admissions of Intent*

The signing of a statement admitting the commission of an expatriating act and the intent to relinquish one's citizenship may be indicative of such an intent. Prior to the 1980 Airgram, most consulates used the forms authorized in § 220 of the Foreign Affairs Manual.²²⁰ These forms were complex, and some citizens maintained that they had thought the statement of admission that they had signed was merely an attestation of the act's commission.²²¹ The Board, however, would look to the experience and education of the citizen to determine whether sufficient doubt as to intent was present.²²²

The new loss of nationality questionnaire, with its greater emphasis on intent and its comparative simplicity, clarifies the purpose and the significance of a statement of voluntary relinquishment.²²³ Despite the flaws of the questionnaire and its transmittal letter,²²⁴ on appeal, a competent, fully-informed citizen, who has filled out the statement voluntarily, will now

216. *Id.* See FAM, *supra* note 69, at 225.6(g) (providing that oaths of renunciation may be witnessed by consular officials, local employees of the consulate, companions of the renunciants or "other private persons who may be available." Since the Canadian detention center officers were not "private persons," they could not validly witness the oath). One could certainly argue that the officers were acting in an official capacity when they witnessed the oath. Whatever the stated rationale, however, it is clear that the Board was unwilling to allow a renunciation under a set of facts as questionable as those in this case.

217. *Id.* at 9.

218. *Id.* at 11.

219. *Id.* at 6.

220. See Airgram, *supra* note 77, at 10.

221. See, e.g., *In Re TER*, Bd. App. Rev. 10 (June 30, 1980).

222. See, e.g., *id.* at 12 (Board declared that "it strains credulity to believe that appellant, a holder of a doctorate in chemistry, did not understand the statement").

223. See *supra* notes 77-85 and accompanying text.

224. See *supra* notes 86-89 and accompanying text, for a discussion of these flaws.

have more difficulty claiming that he lacked the requisite intent to relinquish his citizenship at the time he signed the statement.

5. *Naturalization in a Foreign State and Oaths of Allegiance*

Involuntary naturalization, acquisition of a second nationality by birth, marriage, adoption, or application of parents, has long been recognized, in varying degrees, as compatible with U.S. citizenship.²²⁵ Voluntary naturalization, on the other hand, before *Afroyim*, meant a virtual abandonment of one's citizenship.²²⁶ Since *Terrazas*, however, the Board has scrutinized the nature of each act of naturalization in a foreign state, and has time and again used the accompanying oath or affirmation of allegiance as the main indicator of the intent to relinquish.²²⁷

225. Since the United States chiefly applies the principle of *jus soli* (citizenship by virtue of birth in the country), many children of immigrants from countries that apply the doctrine of *jus sanguinis* (citizenship by virtue of one's parents' citizenship) become dual nationals at birth. Naturalization in a foreign state through an American woman's marriage to a foreign citizen is also no longer incompatible with her U.S. citizenship. This was, however, not true under the 1907 law. See *supra* notes 23-24.

Similarly, the dual citizenship conferred upon American Jews under the Israeli Law of Return will normally not affect U.S. citizenship because it is presumed that Israeli citizenship is accepted without the intent to relinquish U.S. citizenship. See "Information on U.S. Law and Israeli Citizenship and Military Service," a fact sheet of the Department of State.

226. See also *supra* notes 24-53 and accompanying text. The voluntary-involuntary naturalization distinction has been sharply criticized. If dual nationality is a threat to congressional control over foreign affairs, as is implied in *Perez*, 356 U.S. 44, 59 (1958), all dual nationals, no matter how they came to acquire that status, pose the same threat. Similarly, if one believes that those who voluntarily become naturalized in a foreign state are essentially or potentially disloyal, one would not be able to justify allowing thousands of foreign nationals each year to become naturalized, without insisting that they first show proof that they have given up their foreign citizenship.

Marriage to a foreign national may indicate a desire to be identified with the country of one's spouse. Thus, in a sense, it is a form of voluntary naturalization in those countries which provide for naturalization by marriage. Thus, it seems that the distinctions between involuntary dual citizenship and voluntary dual citizenship are irrational.

227. The Foreign Affairs Manual views swearing a "meaningful" oath to a foreign state as strongly indicative of an intent to relinquish citizenship. FAM, *supra* note 69, at 224.19(c) (1) (b). Since meaningfulness is at least

Other acts, such as the use of a foreign passport for travel to the United States, or some other independent expression of one's non-allegiance to the United States or exclusive allegiance to a foreign state, are used to resolve doubt in cases where the act of naturalization alone is not sufficiently probative of the intent to relinquish American citizenship.²²⁸

Depending on the laws of the foreign state, the oath may be clearly renunciatory of former allegiance, arguably renunciatory, or nonrenunciatory. For example, Mexico's oath is clearly renunciatory, and requires that the naturalized citizen explicitly renounce his former nationality by name, and execute a certificate²²⁹ filling in the name of his former country of citizenship.²³⁰

Laurence Terrazas executed such an oath.²³¹ In *LDB*,²³² the same oath, made by a dual national of Mexico and the United States, was held to be conclusive of appellant's intent to relinquish her American citizenship.²³³ Similarly, in *AY*,²³⁴ the Board declared that an eighteen year old woman's oath of allegiance to Mexico was "in itself highly persuasive evidence of an intent to transfer or abandon her allegiance. . . ."²³⁵ and was "an act, which was totally inconsistent with an intent to retain her United States citizenship."²³⁶ This view causes great hardship to Mexican Americans who, in order to obtain the full rights of Mexican citizenship, must execute the oath after they turn eighteen.²³⁷ In recent months, the Board has, however, approved at least three requests for remand in cases of dual citizens who have taken the Mexican oath.²³⁸

as difficult to define as "intent," the Board tends to distinguish between oaths explicitly renunciatory of U.S. citizenship and all other oaths. Unless there are other indications of intent that the Board finds heavily probative, the latter type of oath will not result in loss of nationality.

228. *In Re LDB*, Bd. App. Rev. 12 (June 30, 1982) (failure to renew appellant's U.S. passport is a probative of her intent to give up citizenship).

229. *See, e.g., In Re LDB*, Bd. App. Rev. 3-4 (June 30, 1982).

230. For text of the Mexican oath, see *supra* note 62.

231. 444 U.S. at 263, note 2.

232. *In Re LDB*, Bd. App. Rev. (June 30, 1982).

233. *Id.* at 14.

234. *In Re AY*, Bd. App. Rev. (June 2, 1983).

235. *Id.* at 8.

236. *Id.* at 9.

237. *See infra* notes 347-48 and accompanying text.

238. *In Re GB*, Bd. App. Rev. (Sept. 16, 1983); *In Re KMP*, Bd. App. Rev. (Sept. 22, 1983); *In Re GLQ*, Bd. App. Rev. (Sept. 29, 1983).

The gravity of explicit renunciatory language may be magnified by the surroundings in which the oath is sworn. In *DBQ*,²³⁹ an American missionary lost his citizenship when he declared in open court during his Brazilian naturalization hearing that he renounced "for all effects and purposes his previous citizenship," and signed an affidavit to that effect.²⁴⁰

Between 1967 and 1973, Canadian regulations required a renunciatory oath as a pre-condition to naturalization.²⁴¹ The Board has not reversed any determinations of loss of citizenship for those who have taken this oath. In *MBK*,²⁴² for example, appellant's later denial of intent to relinquish was termed a "subjective and self-serving statement."²⁴³ And, in *WRD*,²⁴⁴ an appellant who participated in President Ford's Amnesty Program²⁴⁵ after having taken the Canadian oath, was deemed to have lost his citizenship as well.²⁴⁶

239. *In Re DBQ*, Bd. App. Rev. (Nov. 19, 1982).

240. *Id.* at 1.

241. Section 19(1)(b) of the Canadian citizenship regulations, 1968-1703 SOR 68-44, was promulgated in 1968 and declared *ultra vires* by the Federal Court of Canada. See *infra* note 247. It provided for the following oath of allegiance: "I hereby renounce all allegiance and fidelity to any foreign person or State of whom or which I may at this time be a subject or citizen . . .," cited in *In re PHM*, Bd. App. Rev. 7 (Nov. 24, 1981).

242. *In Re MBK*, Bd. App. Rev. (July 2, 1981).

243. *Id.* at 7. The statement of non-intent was made six years after the expatriating act had been committed. See also *infra* note 262 and accompanying text.

244. *In Re WRD*, Bd. App. Rev. (Jan. 29, 1982).

245. In 1974, President Ford issued a proclamation establishing a program for the return of Vietnam war draft resisters and military deserters. 10 WEEKLY COMP. PRES. DOC. 1149-55 (Sept. 23, 1974).

246. *In Re WRD*, Bd. App. Rev. 9 (Jan. 29, 1982). After having completed the program, appellant asked the U.S. Army whether he was "free to travel through and within the United States without fear of being detained or arrested." *Id.* at 8. The Board characterized this question and appellant's earlier statement that he was a Canadian citizen as having "demonstrated an intent to relinquish his [U.S.] citizenship." *Id.* Thus, the Board equated appellant's belief that he had lost his citizenship with intent to do so. This is an example of the traditional definition of intent, see *supra* note 176, which the Board no longer follows. *In Re PHM*, Bd. App. Rev. (Nov. 24, 1981), is another example of loss of citizenship during the period in which Canada employed a renunciatory oath.

After the Canadian Federal Court rejected Canada's renunciatory oath as having been improperly instituted,²⁴⁷ and Canada reinstituted a non-renunciatory oath,²⁴⁸ the Board has reversed almost all determinations of loss where appellants have been naturalized using the new oath. Thus in *VC*,²⁴⁹ the Board approved a request for remand in the case of a woman who had taken the new oath "to try to please her husband and to keep harmony in the marriage."²⁵⁰ And in *JAG*,²⁵¹ an appellant who had taken the oath in order to qualify for a Canadian fishing license retained her citizenship as well.²⁵² Six months later, the Board reversed a finding of loss of citizenship in *FJB*,²⁵³ a case involving a draft resister, and came to a similar result in *MFP*.²⁵⁴

The required oaths of allegiance in England²⁵⁵ and France²⁵⁶ contain no language renunciatory of former or concurrent

247. *Ulin v. The Queen*, 35 D.L.R.3d 738 (Fed. Ct. Trial Div. 1973). The Court held the renunciatory oath enacted by the Governor-in-Council under the guise of carrying on to effect the purposes and provisions of the Canadian citizenship Act to be an *ultra vires* use of the Governor-in-Council's powers granted by the Act. *Id.* at 743.

248. The present Canadian oath of naturalization as prescribed by the Canadian Citizenship Act, ch. 108 § 43 (effective Feb. 15, 1977) reads as follows: "I, _____, swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors according to law and that I will faithfully observe the law of Canada and fulfill my duties as a Canadian Citizen so help me God."

249. *In Re VC*, Bd. App. Rev. 3 (May 13, 1982).

250. *Id.*

251. *In Re JAG*, Bd. App. Rev. (June 25, 1982).

252. *Id.* This case can be compared with *In Re PHM*, Bd. App. Rev. (Nov. 24, 1981) where an attorney trained in Canada took the renunciatory oath in order to practice law, and thereby lost his American citizenship. The change in language of the oath may have given the Board the excuse it needed to apply a more liberal standard to cases involving persons who became naturalized for professional reasons. See also *infra* note 331 and accompanying text for the Mexican government's treatment of similar cases.

253. *In Re FJB*, Bd. App. Rev. (Dec. 30, 1982). For a description of this case, see *infra* notes 302-05 and accompanying text.

254. *In Re MFP*, Bd. App. Rev. (Feb. 24, 1983). See also *supra* notes 112-16 and accompanying text.

255. The British oath of allegiance prescribed by Schedule 5 of the British Nationality Act of 1981, reads as follows: "I, _____, swear that by Almighty God that on becoming a [British citizen], I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Her Heirs and Successors according to law." (Provision is made for those whose beliefs will not allow an oath in this form).

citizenship. In no case since *Terrazas* has the Board affirmed a finding of loss of citizenship where a person, naturalized in one of these countries, lodged a timely appeal and denied having the intent to relinquish his citizenship.²⁵⁷

The Board will apparently treat an oath that is only colorably renunciatory as a non-renunciatory oath. In *PJP*,²⁵⁸ an oath used to obtain Danish citizenship, which stated, "I have not taken any precautions to preserve my previous citizenship despite acquisition of Danish nationality,"²⁵⁹ and a Danish policy of discouraging dual citizenship, were held to be indicative of "a general objective of the Danish Government [and] not a categorical imperative, that is rigorously enforced...."²⁶⁰ Predictably, naturalization by registration or accompanied by a mere promise to be a good citizen will not be viewed by the Board as conclusive proof of an intent to relinquish citizenship.²⁶¹

In most cases, then, voluntary naturalization no longer means automatic expatriation, especially where the citizen safeguards himself by denying intent to relinquish his citizenship either before naturalization or shortly thereafter.²⁶² A ques-

256. Upon applying for naturalization in France, a person must fill out a sworn affidavit certifying his request for French citizenship, and swearing that all information he has provided is true.

257. See, e.g., *In Re KLAH*, Bd. App. Rev. (Nov. 10, 1981); *In Re CU*, Bd. App. Rev. (Dec. 3, 1981); *In Re AHM*, Bd. App. Rev. (Dec. 10, 1981).

258. *In Re PJP*, Bd. App. Rev. (Apr. 1, 1982). PJP was a gay American who had relocated to Denmark to live with his lover. Upon his arrival, appellant successfully petitioned the Danish Government to be treated as the spouse of his lover for purposes of securing a residency permit. *Id.* at 2. After obtaining a teaching position, appellant became a naturalized Dane in order to have a voice in influencing the Community Board of Education for which he worked. In accordance with Danish law, he surrendered his U.S. passport to the Danish authorities who sent it to the U.S. consulate. *Id.* at 3.

Although the surrender of one's U.S. passport has been seen as a serious matter, the Board treated it as a technical requirement in PJP's acquisition of Danish nationality, rather than as an act indicative of renunciatory intent.

259. *Id.* at 2.

260. *Id.* at 8.

261. Austria requires such a statement. *In Re KJP*, Bd. App. Rev. (May 7, 1982).

262. The more time elapsing between the act and a subsequent declaration of non-intent, the less likely it is that the Board will accept the statement as reliable, and the more probable it is that the Board will view it as "self-serving." See, e.g., *In Re PHM*, Bd. App. Rev. 11 (Nov. 24, 1981); *In Re MBK*, Bd. App. Rev. 2 (July 2, 1981).

tionable exception arises with respect to naturalization in countries requiring an explicitly renunciatory oath or procedure.²⁶³

It is doubtful whether those wishing to acquire an additional citizenship truly place great emphasis on the exact wording of an oath. More likely, most regard the oath as just one more step in a prescribed process allowing them access to certain social, economic and political benefits. While an explicitly renunciatory oath may reflect a real intent to relinquish one's citizenship in this context, it should not be regarded dispositive of proof of intent.²⁶⁴ Unfortunately, the ultimate loss of a person's American citizenship might be determined by the wording of the oath prescribed by the country in which he had the fortune to be naturalized.

It may be that the refusal to permit those taking renunciatory oaths to keep their citizenship is seen as a matter of international comity. If a U.S. citizen is allowed to negate the effect of an oath sworn to before a foreign government official merely by informing an American consul that he intends no renunciation despite the words of the oath, would not the United States Government be knowingly aiding and abetting perjury?²⁶⁵ In practice, many of those taking our own renunciatory oath of naturalization remain citizens of foreign states which do not automatically denationalize.²⁶⁶ Since these states do not regard

263. There are, however, exceptional situations where a citizen, having taken such a renunciatory oath of naturalization, has still won on appeal. *See In Re RM*, Bd. App. Rev. (Dec. 30, 1980) (defendant had taken the Australian renunciatory oath). *See supra* notes 208-12 and accompanying text.

264. In the Canadian cases discussed *supra* notes 241-54 and accompanying text, those benefiting from the Canadian court decision in *Ulin v. The Queen*, 35 D.L.R.3d 738 (Fed. Ct. Trial Div.) took the non-renunciatory oath and thus were deemed not to have demonstrated an intent to relinquish citizenship. Such an intent was found among those who had taken the renunciatory oath in effect a few years earlier.

265. Wharton Interview, *supra* note 106.

266. The U.S. oath of naturalization, as prescribed by the Immigration and Nationality Act of 1952, § 337.1, 8 U.S.C. § 1448 (1982) is signed and sworn to in open court, and reads as follows:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and

themselves as obligated to police their citizens' compliance with the U.S. oath, the U.S. does not accuse *them* of aiding and abetting perjury. Likewise these countries do not accuse the U.S. of such a transgression. Thus, compliance with such oath is, and should be universally acknowledged as a matter of conscience for the individuals involved.

6. Other Expatriating Acts

An American citizen can also lose his nationality by committing a treasonous act, serving in the armed forces of a foreign state or holding office under or being employed by a foreign government.²⁶⁷ Expatriation as a punishment for committing a treasonous act, however, has not been used since the Second World War.²⁶⁸ Moreover, the Supreme Court's decision in *Trop*²⁶⁹ which held that Congress may not denationalize for desertion, has caused commentators to question the constitutionality of expatriation for committing a treasonous act.²⁷⁰

Similarly few citizens have lost their citizenship by serving in the armed forces of a foreign state,²⁷¹ and it is generally agreed that military service for an ally or other non-belligerent nation will no longer result in loss of citizenship.²⁷² The large number of Americans who serve in the Israeli Army and do not lose their U.S. citizenship bears witness to this fact.²⁷³ Thus the

domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; or that I will perform non-combatant service in the armed forces of the United States when required by the law; or that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.

267. 8 U.S.C. § 1481(a)(3), (4), (7) (1982). For the text of the statute, see *supra* note 61.

268. See Gordon *supra* note 14, at § 20.10k; Loss Statistics, *supra* note 1.

269. See *supra* notes 43-44 and accompanying text.

270. See, e.g., Gordon, *supra* note 14, at § 20.10k.

271. For example, only eleven persons have lost their citizenship in the past five years. Loss Statistics, *supra* note 1.

272. See, e.g., FAM, *supra* note 69, at 224.20(b) (2) (c) (Mar. 21, 1977).

273. While no U.S. statistics exist on the exact number of Americans serving in the Israeli armed forces, the State Department has declared that "[a]lthough the United States opposes service by U.S. citizens in foreign armed forces, there is little we can do to prevent it since each sovereign country

Board has held that although military service, like voting or applying for a passport in a foreign country, may indicate a desire to identify with that nation, it is not "tantamount to an expression of intention to relinquish U.S. citizenship."²⁷⁴

Enlistment in the armed forces of a nation at war with the United States, however, may yield a different result. In *HMO*,²⁷⁵ the Board observed that while a citizen will not be required to "martyr himself" by resisting induction into a foreign military force,²⁷⁶ the fact that the appellant volunteered for the Japanese Army was probative of his true allegiance.²⁷⁷

Another statutory act of expatriation which seldom results in loss of citizenship is employment of U.S. citizens by foreign governments. While the Act broadly defines as expatriatory all service under a foreign government by a dual national and all such service requiring an oath, affirmation or declaration of allegiance by any citizen,²⁷⁸ acceptance and performance of low and middle level employment has long been recognized as not being expatriatory.²⁷⁹ However, holding elective or high-level policy-making posts has been cited by the Immigration and Naturalization Service²⁸⁰ and by commentators²⁸¹ as highly indicative of an intent to relinquish one's citizenship.

Nevertheless, in *MF*,²⁸² the Board followed a functional rather than a formalistic analysis by inquiring whether the duties imposed upon a U.S. citizen elected to the parliament of a foreign state would prevent her from *actually fulfilling* the duties of American citizenship.²⁸³ The Board cited her concern with domestic rather than foreign issues, and her "thorough going,

has the right to make its own laws on military service and apply them as it sees fit to its citizens and residents." U.S. Dep't State, *Information on U.S. Law and Israeli Citizenship and Military Service* (undated).

274. *In Re SLS*, Bd. App. Rev. 10 (Jan. 2, 1981).

275. *In Re HMO*, Bd. App. Rev. (June 16, 1983).

276. *Id.* at 13-14.

277. *Id.* at 13.

278. 8 U.S.C. § 1481(a) (4) (1982).

279. *See, e.g.*, FAM, *supra* note 69, at 224.20 (b) (2) (d).

280. Immigration and Naturalization Service Interpretations 349.5(a) (1).

281. *See, e.g.*, Gordon, *supra* note 14, at 20.10(g).

282. *In Re MF*, Bd. App. Rev. (Jan. 29, 1982).

283. *Id.* at 7-11.

outspoken identification as an American with the [foreign country's academic and social communities] . . . even at the cost of political unpopularity"²⁸⁴ as indicative of a lack of a conflict between her holding office and retaining her citizenship.²⁸⁵ The holding in *MF*, however, is largely the result of the special facts of that case.²⁸⁶ Therefore it is unclear whether *MF* marks the end of expatriation for those employed by or holding office under a foreign government who wish to retain their citizenship. Few cases, however, arise in which citizenship is lost on ground, and even fewer of these cases are appealed.²⁸⁷

7. *Proof of Intent By Other Acts*

In the 1980 Airgram²⁸⁸ and in arguments of the Office of Citizenship Appeals and Legal Assistance,²⁸⁹ certain acts not listed in the statutes were also deemed to indicate intent either to retain or relinquish U.S. citizenship. Acts showing an intent to retain citizenship include continuing use of one's United States passport; registering at a consulate; voting in American elections; maintaining a residence in the United States; registering one's children as American citizens; consulting consular officials on matters of citizenship; registering for the draft and filing U.S. tax returns.²⁹⁰ Failure to perform these acts was considered indicative of an intent to relinquish citizenship.²⁹¹ Similarly, the following factors indicate an intent to relinquish citizenship; holding oneself out to be exclusively a citizen of a foreign country; traveling on that nation's passport; engaging in the political life of that country²⁹² and continually residing abroad.²⁹³

284. *Id.* Appellant was mainly concerned with feminist issues.

285. *Id.*

286. "[T]he Board finds that this case turns on very thin edges of highly unusual circumstances. . . ." *Id.* at 12.

287. From October, 1977 to September, 1982, only six persons lost their citizenship on this ground. Loss Statistics, *supra* note 1.

288. See, e.g., Airgram, *supra* note 77, at 4-10.

289. See *In Re FJB*, Bd. App. Rev. 12 (Dec. 30, 1982).

290. See Airgram, *supra* note 77, at 4.

291. *Id.* at 5.

292. *But see In Re MF*, Bd. App. Rev. (Jan. 29, 1982).

293. *Id.*

Although in a few pre-1982 cases, the Board agreed with these interpretations,²⁹⁴ it now consistently questions the probative value of these acts in proving a citizen's intent to relinquish his nationality. In *TAC*,²⁹⁵ a 1982 case in which a citizen who had become naturalized in the United Kingdom in order to avoid the draft,²⁹⁶ the Board stated that such an act, while not to be condoned, was not highly persuasive evidence of an intention to sever permanent ties to the United States.²⁹⁷ The Board went on to say that:

enrolling in a foreign university, working abroad, marrying a foreign national, not registering at the United States Embassy, not inquiring about the consequences of naturalization in a foreign state do not set appellant apart from countless other Americans, or support a conclusive presumption of an intent to disavow allegiance to the United States.²⁹⁸

Two months later, in *PAB*,²⁹⁹ a citizen who had been naturalized in New Zealand was found to have retained his U.S. citizenship. The Board held that appellant's lack of contact with a U.S. embassy, his failure to pay U.S. taxes and even his belief that he had already lost his U.S. citizenship were not to be considered as probative of an intent to relinquish.³⁰⁰

294. See, e.g., *In Re PHM*, Bd. App. Rev. (Nov. 24, 1981) (appellant's application for tourist visa was viewed as supporting an earlier intent to give up his citizenship).

295. *In Re TAC*, Bd. App. Rev. (July 29, 1982).

296. *Id.* Appellant was married to a British citizen. *Id.* at 1.

297. *Id.* at 1-2.

298. *Id.* at 5. The Board also considered appellant's statement under oath, made at the U.S. embassy nine months after his naturalization, indicating his intent to remain an American citizen. *Id.* at 6. The Board cited *Nishikawa v. Dulles*, 356 U.S. 129 (1958) and resolved its doubts in favor of the appellant. *Id.* at 7. See also *supra* note 47.

299. *In Re PAB*, Bd. App. Rev. (Sept. 29, 1982).

300. The Board found that the Department's inferences

from the foregoing catalog of appellant's acts and words are quite as susceptible of being turned around, permitting contrary inferences to be drawn from them.

His belief that he had lost his citizenship by becoming naturalized in New Zealand could as easily be interpreted to mean that he was concerned lest he lose it . . .

Id. at 8.

Finally, in *FJB*,³⁰¹ a draft resister in Canada had become naturalized by taking the new non-renunciatory oath.³⁰² The Board decided that he had retained his U.S. citizenship despite his failure to register his children as citizens, pay taxes, renew his passport, own U.S. property, maintain a U.S. residence or avail himself of President Ford's amnesty offer.³⁰³ The Board refused to consider these factors, as well as appellant's knowledge of the possible consequences of his Canadian naturalization and failure to consult U.S. consular officials, as dispositive on the issue of appellant's intent.³⁰⁴ These facts had been accorded great weight in prior decisions.³⁰⁵

The major difficulty in using these acts as proof of intent is their inherent ambiguity. One may, for example, fail to file income tax returns because all the income that one earns is excludable under the foreign income exclusion,³⁰⁶ not vote out of apathy or dissatisfaction with the candidates; fail to register one's children out of ignorance; and not maintain a second residence in the United States because of limited economic resources. In addition, a belief that one has lost one's citizenship through operation of law might lead to the non-commission of these acts.³⁰⁷

Moreover, the very acts said to indicate an intent to relinquish citizenship may be probative of the opposite intent. For example, a citizen wishing to preserve the citizenship which he perceives to be threatened may refrain from visiting a U.S. consulate for information about passport renewal out of fear that an "expatriating act" might come to light and endanger that citizenship.³⁰⁸ Also, fear of prosecution and loss of citizenship

301. *In Re FJB*, Bd. App. Rev. (Dec. 30, 1982).

302. *Id.* at 3. For text of oath, see *supra* note 248.

303. *Id.* at 12.

304. *Id.* at 14-17.

305. See, e.g., *In Re MBK*, Bd. App. Rev. 7 (July 2, 1981); *In Re PHM*, Bd. App. Rev. 11-12 (Nov. 24, 1981); *In Re WRD*, Bd. App. Rev. 8-9 (Jan. 29, 1982). As in *In Re PAB*, Bd. App. Rev. (Sept. 29, 1982), the case illustrates Board's shift from its earlier "knowledge" definition of intent to a "purposefulness" definition.

306. Under 26 U.S.C. § 911(b) (2) (1982), the first \$75,000 of income of an American residing abroad is exempt from taxation.

307. *In Re FJB*, Bd. App. Rev. 14 (Dec. 30, 1982).

308. When appellant in *In Re LAMcM*, Bd. App. Rev. 11 (Dec. 12, 1983) "conceded candidly at the [Board] hearing that she had avoided mak-

are often present in deserter and draft resister cases.³⁰⁹

Both the Board and the Department tend to see positive performance of the acts discussed above as probative of an intent to retain citizenship.³¹⁰ This is in keeping with the Board's policy of giving the citizen the benefit of the doubt.³¹¹ By refusing to acknowledge these often ambiguous acts as proof of intent to relinquish citizenship, the Board, in its recent decisions, has effectively reduced the arsenal of circumstantial evidence the Government may use in loss of citizenship cases.

8. *Additional Considerations*

Since *Terrazas*, the Board has discussed several additional considerations which may well have been influential in determinations of whether citizenship was relinquished.³¹² For example, a quickly filed appeal has been mentioned as indicative of an intent to retain citizenship.³¹³ Even more significant is the time elapsed between the commission of the alleged expatriating act and the later affirmation of non-intent to relinquish. In two recent decisions, the Board discounted "later self-serving statements,"³¹⁴ while giving a prompt, post-act statement of non-intent a great deal more credence.³¹⁵ Finally, the Board looks favorably upon a citizen's cooperation with the consulate, and thoroughness and fair treatment shown by a consular official. Ignoring consular advice³¹⁶ and not answering official mail³¹⁷

ing inquiries then because she feared to learn what she suspected, namely, that naturalization [in Canada] could endanger her U.S. citizenship," the Board held that "[f]earing that one might lose one's nationality by performing a particular act is a far cry . . . from intending to renounce one's citizenship."

309. See, e.g., *In Re TAB*, Bd. App. Rev. 3 (Dec. 10, 1981) (appellant cites "paranoia"); *In Re TER*, Bd. App. Rev. 5 (June 30, 1980) (fear of possible roundup of draft resisters for placement in detention camps).

310. See *Airgram*, *supra* note 77, at 10; James Interview, *supra* note 106.

311. See *Nishikawa v. Dulles*, 356 U.S. 129 (1958). See also *supra* notes 45-47 and accompanying text.

312. The Board has never cited these factors as determinative.

313. See *In Re PAB*, Bd. App. Rev. 7 (Sept. 29, 1982). This, however, does not imply that appealing at the last allowable moment will prejudice one's claim.

314. See *supra* note 262.

315. See, e.g., *In Re PJP*, Bd. App. Rev. 8-9 (Apr. 1, 1982).

316. See, e.g., *In Re SBE*, Bd. App. Rev. 2 (Sept. 2, 1982).

317. See, e.g., *In Re TAB*, Bd. App. Rev. 2 (Dec. 10, 1981).

may work against a citizen who later appeals, just as a consular official's failure to give a citizen the time and attention he deserves may work against the Government.³¹⁸

Central to these considerations are the desire for fair play by the Government and the search for consistency between appellant's words and deeds. A citizen who makes a statement of non-intent to relinquish his citizenship either before or shortly after committing a statutory act of expatriation, who answers all correspondence and who promptly appeals a determination of loss will have a good basis for his contention of non-intent. Obvious inconsistencies as to facts and intent, on the other hand, will make it difficult for the Board to give an appellant a sympathetic ear and the benefit of the doubt.³¹⁹

In *MR*,³²⁰ appellant's inconsistent words and deeds probably led to the Board's determination of loss of citizenship. *MR*, who had taken the non-renunciatory Canadian oath of naturalization in order to maintain her teaching position,³²¹ testified that she considered herself an American even after the naturalization.³²² It was therefore surprising that appellant, in her application for a Canadian passport, answered "no" to the question: "Have you the citizenship of another country in addition to Canada?"³²³ Despite an agreement with a U.S. con-

318. See, e.g., *supra* notes 199-219 and accompanying text.

319. In *In Re ECG*, Bd. App. Rev. (Apr. 20, 1983), appellant, a former Dane naturalized in the United States, returned to Denmark five years after his naturalization and joined the Danish armed forces. He was warned by an attorney to return to the United States to renew his passport, but he disregarded this warning. *Id.* at 4. When he sought naturalization in Denmark, he was cautioned against this step by the American Embassy, but again did not heed the warning. On appeal, he claimed that he had been told earlier that since he had joined the Danish armed forces prior to his naturalization, he had already lost his citizenship. He thus denied having the requisite intent at the time of naturalization. His statements were contradicted by official records and by a memo written by appellant before his naturalization in which "he analyzed with considerable clarity the possible application to his situation of section 349(a) (3) of the Act." *Id.* at 16. At his hearing, appellant finally conceded that "at no time prior to his acceptance of Danish citizenship had he been informed officially that he was not a United States citizen." *Id.* at 9.

320. In *Re MR*, Bd. App. Rev. (Nov. 17, 1983).

321. *Id.* at 2.

322. *Id.* at 10.

323. *Id.* at 11.

sul to submit a copy of the passport application, appellant failed to do so until after the Board hearing.³²⁴ The Board's decision affirming the Department's determination of loss, was contrary to the weight of recent cases.³²⁵ Chairman Alan G. James, in a strong dissent, admitted he was troubled by inconsistencies in appellant's case but asserted that the case should not "turn on the fact that she answered "no" when required to state to Canadian authorities whether she held any other citizenship."³²⁶

V. AN INTERNATIONAL PERSPECTIVE

Although most nations allow for loss of nationality through voluntary expatriation, legislation prescribing involuntary denationalization varies greatly.³²⁷ Some nations will automatically denationalize a citizen for voluntarily acquiring a second citizenship or for other enumerated acts. Others, such as the United States, analyze each particular act. Certain nations, however, will *never* deprive a citizen of his nationality against his will, or will do so only in the most extreme wartime cases.

Australia,³²⁸ Japan³²⁹ and Mexico³³⁰ are examples of nations which prescribe automatic denationalization upon voluntary naturalization in another state. Mexico, however, defines "voluntary" narrowly so as to exclude, for example, naturaliza-

324. *Id.* at 4.

325. See *supra* notes 250-54 and accompanying text. See also *In Re AAP*, Bd. App. Rev. (Nov. 10, 1983) (appellant retained citizenship despite same renunciatory oath taken for similar professional reasons).

326. *Id.* at 21.

327. Many nations, including the Soviet Union, Poland and Bulgaria allow for loss of nationality only with the approval of the government, which may be withheld for political or religious reasons. See A. MUTHARIKA, *THE REGULATION OF STATELESSNESS UNDER INTERNATIONAL AND NATIONAL LAW* (1977, 1980).

328. AUSTRALIAN CITIZENSHIP ACT 1948-1973 § 17.

329. JAPANESE NATIONALITY LAW (Law No. 147 of 1950, as amended by Law No. 268 of 1952), Art. 8.

330. MEXICAN CONSTITUTION, Art. 37, para. B.

331. A statement of the laws of Mexico, General Secretariat, Organization of American States, 4th Edition (Washington, D.C. 1970) Doc. No. 341.1-E 7912 at 15. In one recent case a Mexican citizen who taught in the public schools of an American city became a U.S. citizen in order to keep her job. Despite the presence of other teaching positions, the consul asserted that no loss of Mexican nationality occurred, since "the acquisition of U.S.

tion in order to continue one's employment.³³¹ Although Sweden also seeks to discourage dual citizenship, its laws prescribing loss of nationality for Swedes naturalized abroad are seldom enforced.³³² On the other hand, foreigners seeking to become Swedish citizens who do not automatically lose their first citizenship, are naturalized conditionally and given a period of time (normally two to four years) in which to submit proof of loss of that nationality.³³³ A German may avoid loss of German nationality upon naturalization by petitioning the German government before becoming naturalized.³³⁴

France generally allows its citizens to retain their nationality upon naturalization in a foreign state,³³⁵ although its law provides for a rarely used procedure whereby the *Conseil d'Etat* may deprive such a dual national of his French citizenship for acts detrimental to the welfare of France.³³⁶ British law provides that native-born British citizens may lose their citizenship only upon their own formal renunciation.³³⁷ Finally, the new Canadian Citizenship Act of 1977 states that a native-born Canadian can lose his citizenship only as a result of a voluntary renunciation.³³⁸ Naturalized Canadians can also lose their citizenship if it was fraudulently obtained in the first place.³³⁹ Thus, Canada will not denationalize a bona fide citizen under any circumstances.

Some countries have enacted special provisions whereby a former citizen may regain his nationality. British law provides

citizenship was obviously not voluntary." Interview with P., Mexican Consul, in New York City (April 1983).

332. SWEDISH CITIZENSHIP ACT (1950: 382) (as amended July 1, 1979, Section 7) (available in author's file at N.Y.U. J. INT'L L. & POL.). Swedish consular regulations do not require consular officers to seek out Swedes naturalized abroad. Interview with Bosse Hedberg, Swedish Vice Consul in New York City (April, 1983).

333. *Id.* § 7.

334. GERMAN CITIZENSHIP LAW, July 27, 1913, § 25(2).

335. CODE DE LA NATIONALITE FRANCAISE, 1979, Art. 7, as amended March 7, 1983.

336. *Id.* Arts. 96-98.

337. BRITISH NATIONALITY ACT OF 1981, § 12. Naturalized citizens, however, run the additional risk of losing their citizenship because of fraudulent naturalization, certain criminal acts and disloyalty. *Id.* § 40.

338. CANADIAN CITIZENSHIP ACT OF 1976, §§ 6, 8.

339. *Id.* § 9.

that any former British citizen who has renounced his citizenship in order to acquire a new nationality has a right, valid only once, to "resume" his British citizenship by a simple registration.³⁴⁰ In all other cases, a renunciant may apply for immediate resumption of citizenship to the British Secretary of State who may grant it at his discretion.³⁴¹ Canada gives the vast majority of renunciants an absolute right of resumption.³⁴²

Many nations attempt to prevent statelessness, i.e., the possession of no nationality.³⁴³ Canada, for example, will not allow renunciation of citizenship unless the renunciant will be acquiring another nationality.³⁴⁴ An American, however, could conceivably become "a man without a country."³⁴⁵

Dual nationality by birth may also create problems.³⁴⁶ For instance, Mexico differentiates between "nationality," which a Mexican child gains at birth, and "citizenship," a status reserved for those nationals over eighteen who have an "honest means of livelihood."³⁴⁷ Mexico requires its foreign born nationals to swear an oath renouncing other allegiances if they wish to assume Mexican citizenship.³⁴⁸ A Mexican-American swearing such an oath may put his American citizenship in great danger. If the United States continues to attach great weight

340. BRITISH NATIONALITY ACT OF 1981, §§ 13(1)-13(2).

341. *Id.* § 13(3).

342. CANADIAN CITIZENSHIP ACT OF 1976, § 10. The exceptions are those persons under order of deportation and those judged to be dangerous to the security of Canada. *Id.*

343. *See, e.g.*, U.N. Convention on the Reduction of Statelessness (A/CONF. g/15) (1961) (entered into force on Dec. 13, 1975).

344. CANADIAN CITIZENSHIP ACT OF 1977, § 8(a).

345. U.S. consuls are, however, required to warn prospective renunciants of the dangers of statelessness. *See supra* note 183.

346. There is, for example, a 1963 Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality which provides in part that "[n]ationals of the Contracting Parties who are of full age and acquire of their own free will, by means of naturalization, option or recovery, the nationality of another Party, shall lose their former nationality. They shall not be authorized to retain their former nationality." After more than twenty years of existence, however, the Convention has only been ratified by France, West Germany, Italy, Luxembourg, Norway and Sweden. 1972 Eur. T.S. No. 43.

347. MEXICAN CONSTITUTION, Art. 34.

348. This is the reason why Laurence Terrazas, a dual national at birth, had to swear his renunciatory oath of naturalization. 444 U.S. at 255.

to the Mexican oath, it may face the possibility of denationalizing hundreds of native-born citizens.³⁴⁹

In the future, movement toward the creation of regional "super citizenships" may also influence loss of citizenship law. The European community is slowly developing a "European citizenship" which already guarantees its holder freedom to travel, work and settle in any of the other Community States³⁵⁰ and the right to vote in direct elections to the European Parliament.³⁵¹ Plans now exist to expand the concept to include the right to vote in local elections and to hold local office.³⁵² The Scandinavian countries and Finland, as members of the Nordic Council, also allow each other's citizens similar privileges. The Nordic Council also provides for a shorter waiting period for naturalization and acquisition of citizenship by registration.³⁵³

VI. CONCLUSION

In the four years since *Terrazas*, Board decisions have made it increasingly difficult for the Government to succeed in loss of citizenship appeals. While the Board does not allow untimely, resurrected appeals,³⁵⁴ and refuses to stretch the concept of duress to include any difficult choice when applying the intent requirement,³⁵⁵ the Board has shown great respect for what it calls "the most fundamental right of an American."³⁵⁶

The Board's decisions have, in effect, changed the requirements for demonstrating intent. Mere proof of a person's

349. See generally *supra* notes 229-38 and accompanying text.

350. G. VAN DEN BERGHE, *POLITICAL RIGHTS FOR EUROPEAN CITIZENS*, 19-20 (1982).

351. *Id.* at 57-63.

352. *Id.* at 186-96.

353. See, e.g., SWEDISH CITIZENSHIP ACT §§ 6, 10 (1950: 382) (as amended July 1, 1979) (available in author's file at N.Y.U. J. INT'L L. & POL.).

As national citizenships become more like administrative classifications, similar to citizenship in U.S. states, concurrent citizenship in two or more member states would be an unlikely occurrence since such a condition would lead to multiple voting and pension rights.

354. See *supra* notes 117-35 and accompanying text.

355. See *supra* notes 146-70 and accompanying text.

356. *In Re BAS*, Bd. App. Rev. 12 (Feb. 3, 1983).

voluntary performance of a statutory act of expatriation when he has reason to believe that the act may endanger citizenship is no longer sufficient. Rather, the current standard approaches a requirement of proof of a conscious purpose of losing that citizenship.³⁵⁷

At the same time, the Board has taken a far more critical and exacting view of many of the Department's easily provable "indicia of intent."³⁵⁸ In addition, the Board tends to consider any naturalization oath as non-renunciatory unless it contains explicitly renunciatory language. These changes effectively give American citizenship the strong protection advocated by the dissent in *Terrazas* in every case but the *Terrazas* context of a renunciatory oath.³⁵⁹

Where no renunciatory oath is present, the Board now functionally analyzes each case to ascertain whether the expatriatory act "would render it impossible for [the citizen] to perform the obligations of U.S. citizenship."³⁶⁰ In the vast majority of non-wartime cases no conflict is found. This functional approach is especially discernable in cases of citizens holding office or employment under a foreign government, or serving in the armed forces of a foreign state.³⁶¹ Although acts of formal renunciation are certainly probative of one's intent to relinquish citizenship, the Board scrutinizes such cases for any actual impropriety.

The law has thus moved from a formalistic, almost talismanic concept of citizenship whereby undivided loyalties are suddenly and irrevocably transferred, to a more modern functional view allowing for dual loyalties which arise frequently in our "global village." The decisions of the Consular Services Staff, already quite protective of citizenship, may be influenced further in that direction by the paths the Board is taking.³⁶²

357. See *supra* text accompanying notes 174-81.

358. See *supra* text accompanying note 290.

359. Given the Supreme Court decision in *Terrazas*, and the Seventh Circuit's finding on remand that *Terrazas* exhibited the requisite intent to relinquish his citizenship in swearing the Mexican oath, see *supra* note 66, it is understandable that the Board is reluctant to reverse a finding of loss in a case with facts paralleling those of *Terrazas*.

360. *In Re PAB*, Bd. App. Rev. 6 (Sept. 29, 1982).

361. See *supra* notes 267-86 and accompanying text.

362. If the flaws in the transmittal letter and questionnaire are eliminated in the planned revision of the Foreign Affairs Manual, clearer and more accurate guidance can be given citizens wishing to preserve their citizenship.

Given these developments, what does the future hold? Since the Supreme Court will not eliminate the intent requirement, raise the standard of proof for the issue of intent³⁶³ or strike down the Act itself with its "expatriating acts,"³⁶⁴ any change in the law must be legislatively accomplished. Congressional action is possible, however, especially in view of the debate on revision of the Immigration and Nationality Act. The current statute no longer reflects the present state of loss of nationality law,³⁶⁵ and therefore should be a prime candidate for legislative revision.

A new simplified statute should be enacted. Under such a statute:

1. No citizen would be deprived of his citizenship against his will. Loss of citizenship would result only when a willing, informed and competent citizen has executed a voluntary relinquishment before a U.S. consular official, and only after proof has been submitted that the individual will not be stateless.

2. Expatriatory acts now listed in the Immigration and Nationality Act would no longer automatically terminate U.S. citizenship. Instead, a consular official, learning of these acts, would contact the citizen in order to ascertain whether he wished to execute the voluntary relinquishment. This procedure would eliminate the thorny problem of proving intent.

3. The U.S. Government, through diplomatic channels, would inform the international community of its new policy. Any country could then choose to require U.S. citizens seeking naturalization to present documentation of their relinquishment of American citizenship.

Even if Congress takes no action, the Board, having established its new direction, will probably continue in its role of strengthening the protection accorded to U.S. citizenship and modernizing our concept of allegiance in a changing world.

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363. Another reversal of a five-to-four decision seems improbable, given the current composition of the Court.

364. The Court refused to strike down the entire statute in both *Afroyim*, 387 U.S. at 253 and *Terrazas*, 444 U.S. at 252.

365. Although 8 U.S.C. § 1481(a) prescribes automatic loss of nationality for those committing one of the enumerated "expatriating acts," the specified grounds are seldom used (e.g., treasonous acts) and are subject to major qualifications. Finally, the statute does not mention the all important requirement of proof of intent.

