ORIGINAL

In the

# Supreme Court of the United States

CYRUS VANCE, SECRETARY OF STATE OF THE UNITED STATES,

APPELLANT,

V.

LAURENCE J. TERRAZAS,

APPELLEE.

No. 78-1143

Washington, D. C.
October 30, 1979

Pages 1 thru 61

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IN THE SUPREME COURT OF THE UNITED STATES

CYRUS VANCE, SECRETARY OF STATE OF THE UNITED STATES,

Appellant,

v. No. 78-1143

LAURENCE J. TERRAZAS,

Appellee.

Washington, D. C.

Tuesday, October 30, 1979

The above-entitled matter came on for argument at 11:42 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALLAN A. RYAN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., 20530; on behalf of the Appellant.

KENNETH K. DITKOWSKY, ESQ., 2626 W. Touhy, Chicago, Illinois, 60645; on behalf of the Appellee.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 78-1143, Secretary of State of the United States against Terrazas.

Mr. Ryan, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLAN A. RYAN, JR.

ON BEHALF OF THE APPELLANT

MR. RYAN: Mr. Chief Justice, and may it please the Court:

The Appellee in this case, Laurence Terrazas, was born in the United States in 1947. In 1970, he took an oath of allegiance to Mexico, in which he explicitly renounced his allegiance to the United States. He contends that despite this act he remains a citizen of the United States. The United States contends that by that act he expatriated himself, and is no longer a citizen of this country.

The facts of the case are these: Because Appellee was born in this country of a Mexican parent, he was a citizen of this country under the Fourteenth Amendment, and a citizen of Mexico under Mexican Law.

In 1968, he left this country to attend college in Mexico. In September of 1970, at age 22, he signed an application for a certificate of Mexican nationality. This application is a one-page document of three paragraphs, the most important of which reads in pertinent part, as follows.

I quote: "I, therefore, hereby expressly renounce United States citizenship, as well as any submission, obedience and loyalty to any foreign government, especially to that of the United States of America," or North America, depending on the translation.

QUESTION: Mr. Ryan, what was the year?

MR. RYAN: This was in 1970, Mr. Justice Blackmun. In September of 1970, he signed this application, by his own testimony.

Continuing the quotation: "And, furthermore, I swear adherence, obedience and submission to the Laws and Authorities of the Mexican Republic."

This application was duly submitted to the Mexican Government, and on April 3, 1971, that government issued the Appellee a certificate of Mexican nationality, which repeated that Appellee had sworn allegiance to Mexico and had renounced allegiance to any other government. Appellee received the certificate in Mexico.

There matters stood for approximately four months, until August of 1971. At that time, Appellee visited the American Consulate in Monterey, Mexico, and told the Consular Officer there that he felt more Mexican than American, that he intended to stay in Mexico, and that he was concerned about holding two citizenships.

The Consular Officer told the Appellee that there was

nothing illegal in holding dual citizenship, but he warned Appellee not to obtain a certificate of Mexican nationality. Appellee revealed at that point that he had, in fact, received such a certificate. The Consular Officer told him that he had probably expatriated himself, but that a final determination could be made only by the Department of State in Washington.

At the Consular Officer's suggestion, the Appellee took with him forms to fill out, so that a determination of his citizenship could be made, and he returned to the Consulate two months later with those papers. Because expatriation is a sensitive matter, these forms essentially consisted of three documents: First, an affidavit in which the individual describes the possibly expatriating act; second, a lengthy questionnaire designed to elicit the factual background and the individual state of mind; and third, a letter in which the individual can state whatever he wishes about the matter.

The Appellee executed an affidavit in which he stated that his oath of allegiance to Mexico was, and I quote: "My free and voluntary act, and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done with the intention of relinquishing my United States citizenship," end quote.

In the questionnaire, the Appellee gave conflicting answers. He stated that he had taken the oath, "willingly and voluntarily." He also stated, and I quote: "There comes a time

in everyone's life when he has to sit down and decide what he wants to do with his life. I did this and decided that my future happiness was here in Mexico. For that reason, I became a Mexican," end quote.

On the other hand, the questionnaire asked, "Did you intend by this oath or affirmation to abandon your allegiance to the United States, or transfer your allegiance to the foreign state?" And the Appellee answered, "No." And in his letter he said, at one point, "By taking this oath, I did not consider that I was relinquishing my rights as an American citizen."

QUESTION: When was this document signed?

MR. RYAN: These documents were signed in October, I believe, of 1971. This was after the visit to the Consulate. These papers were submitted to the Department of State, which determined that Appellee had expatriated himself, under 8 U.S. Code 1481 (a)(2). That statute provides that a citizen shall lose his citizenship, by "taking an oath or making an affirmation or other formal declation of allegiance to a foreign state."

Accordingly --

QUESTION: Excuse me. On the expatriating act point, the document he signed which you read really kind of contains two different thoughts, one,that he swore an oath of allegiance to Mexico, and secondly, that he renounced his United States citizenship.

MR. RYAN: That's correct.

QUESTION: The issues, as I understand them, would be precisely the same if the second half of the document had not been in it. In other words, it's the oath of allegiance, rather than the renunciation, that is legally significant, because it was not before a Consular Officer, is that correct?

MR. RYAN: That is entirely correct, Mr. Justice Stevens. The expatriating act here is the oath of allegiance to Mexico, although we do contend that the State Department was entitled to consider the circumstances under which it was made. But the expatriating act is not the renouncing of United States citizenship, because, as you state, the statute requires that that be done in front of a United States officer, which in this case it was not.

QUESTION: Mr. Ryan, does the record show whether he was or was not fluent in Spanish?

MR. RYAN: The record shows that he was very fluent in Spanish. That was his testimony.

The State Department issued the Appellee a certificate of loss of nationality, certifying that he was no longer an American citizen. When the Appellee received the certificate, he went to the Consular Officer in Mexico and asked what he could do to get his American citizenship back.

The Consular Officer advised an administrative appeal within the Department of State, and Appellee took such an appeal. The Board of Appellate Review, following a hearing,

issued an opinion affirming the issuance of the certificate of loss of nationality, and the Appellee then brought this action for a declaration of his citizenship.

At this point, let me refer to the statute that Congress enacted to prescribe rules of evidence for proceedings such as the one Appellee commenced. It is 8 United States Code 1481(c). It provides two things, both of which the Court of Appeals held unconstitutional. First, it states that in any action where loss of United States nationality is at issue, the party claiming that such loss has occurred -- in this case, that is the Government -- has the burden of proving such loss by a preponderance of the evidence.

The second provision proceeds on a premise that is not in the statute itself, but that the Government has always recognized, namely that no act can be expatriating unless it is done voluntarily. Thus, the second provision of the statute states that any person who performs an expatriating act -- in this case, taking an oath of allegiance to Mexico -- shall be presumed to have done so voluntarily, but the presumption may be rebutted on a showing by a preponderance of the evidence that the act was not performed voluntarily.

The United States District Court for the Northern District of Illinois held a four-day trial, de novo, on the question whether Appellee had lost his citizenship. Faithful to the statute's standard, the court held that the United

States had proved by a preponderance of the evidence that Appellee had taken the oath of allegiance to Mexico, and that Appellee had not rebutted by a preponderance of the evidence the presumption that such an act was voluntary.

On the Appellee's appeal, the Court of Appeals for the Seventh Circuit reversed. It specifically stated that assuming the District Court had applied the proper standard or proof, the record fully supported its findings that Appellee had voluntarily taken the oath of allegiance to Mexico. And it recognized that the standards that the District Court had applied were those that the statute commanded it to apply.

But the Court of Appeals held the statute unconstitutional, under the Citizenship Clause of the Fourteenth Amendment. The Court of Appeals concluded that that clause, as construed by this Court in Afroyim v. Rusk, required that the Government prove by clear and convincing evidence that Appellee had voluntarily committed an expatriating act, and that he had done so with the specific intent of relinquishing his citizenship.

QUESTION: I take it those are two different issues?

MR. RYAN: Those are two different issues, Mr. Justice, in our view.

The Court of Appeals remanded the case to the District Court for a determination of whether the evidence in this case met the higher standard of proof that the Court of Appeals had

formulated. And the United States took this appeal to this Court.

The questions that this Court must decide are three. First, whether an act of expatriation to be valid, as such, must be undertaken with a specific intent to surrender American citizenship, or whether, as we contend, a citizen may lose his citizenship, regardless of his specific intent, if he voluntarily performs an act that is both designated by Congress as expatriating and that inherently manifests a transfer of allegiance to another country, that is inconsistent with retention of American citizenship.

Second, whether Congress may constitutionally provide, as it has done in 8 USC 1481(c), that in a lawsuit where loss of citizenship is at issue, the party claiming expatriation may prove such expatriation by a preponderance of the evidence.

We submit that such a standard of proof is not inconsistent with the Citizenship Clause of the Fourteenth Amendment, and that the Court of Appeals erred in holding that it was.

The third issue that this Court must decide is whether Congress may constitutionally provide, as it has done in that same statute, that an act once shown to have been done, is presumed to have been done voluntarily, unless the party claiming that no expatriation has occurred shows by a preponderance of the evidence that it was not done voluntarily.

We believe that such a presumption is constitutional,

at least on the assumption that expatriation does not require a showing of specific intent to surrender citizenship.

QUESTION: I suppose if we disagreed with you on the intent in the matter, the case is over or not?

MR. RYAN: If the Court disagrees with us on the intent matter --

QUESTION: Namely, if we say that intent is essential.

MR. RYAN: If the Court says that intent is essential, the case is not over, because it would still be -- Following the Court of Appeals' remand, it would still be available to show that that test was met here.

QUESTION: But the case is over here.

QUESTION: The judgment of the Court of Appeals would be affirmed.

MR. RYAN: The judgment of the Court of Appeals would be affirmed.

QUESTION: So we wouldn't need to reach the other issues?

MR. RYAN: Well, if this Court holds that specific intent is required, I think it then becomes necessary to address the other two issues, for this reason. The statute says that voluntariness must be shown by a preponderance. And it says that the voluntariness of the act is presumed, unless shown to the contrary by a preponderance.

The question then would become: Does voluntariness, in

that context, mean specific intent? If it does mean specific intent, then the case is over in this Court.

It is our contention that voluntariness does not have that meaning, and that the Court has consistently rejected any suggestion that it does.

QUESTION: I just have before me -- so I have an advantage over you who don't have before you -- the Court's opinion in Afroyim v. Rusk. There is constant use and reuse of the phrase "voluntary renunciation." And, of course, in Afroyim, as you all know, the voting in the election in Israel was a totally voluntary act.

MR. RYAN: Yes, it was. But in Afroyim the voting in a foreign election was not an act which demonstrated a transfer of allegiance to any other country.

Our position is that before one looks at Afroyim one should look at Chief Justice Warren's dissent in Perez, because the Court in Afroyim specifically approved that dissent, in announcing its holding. Perez was, like Afroyim, a case where a citizen had voted in a foreign election and this Court, sharply divided, held that was sufficient to expatriate him under the statute, as an exercise of Congress' power over foreign affairs.

Chief Justice Warren dissented, in a lengthy dissent, which recognized what Chief Justice Warren called the "long-recognized principle that citizenship may be lost not only by

explicit renunciation, but by other actions in derrogation of undivided allegiance to this country.

QUESTION: But he held that voting in the -- He thought that voting in the Mexican elections was not an act in derrogation of undivided allegiance to the United States?

MR. RYAN: That is correct.

QUESTION: And your submission is, I suppose, that if Afroyim had done two things, voted in the foreign election and sworn allegiance to another country, that he would no longer be a citizen? Do you think the Court would have upheld the one but not the other?

MR. RYAN: I think that is true.

QUESTION: The fact is that several States, historically, have allowed aliens to vote in their elections.

MR. RYAN: Including in this country up until 1928.

QUESTION: That's what I mean, in this country.

MR. RYAN: Yes, sir.

QUESTION: Mr. Ryan, do I correctly understand that under your submission if the CIA agent took an oath of allegiance to, say, Cuba, so he could perform his duties well, but did not intend to give up his American citizenship, he would nevertheless give up his American citizenship? Because it would be clearly an oath of allegiance, a specific expatriating act.

MR. RYAN: In a situation where he was doing it in

an undercover capacity --

QUESTION: Yes, but he did it voluntarily, just as this man did.

MR. RYAN: Well, I would have some question as to whether it would be voluntary in that case, because it would be done in the course of his official duties. And it may have been something that he was directed to do.

QUESTION: Wouldn't it be vulnerable also to the suggestion that it was not a real, not a genuine act?

MR. RYAN: I think it could be subject to that very narrow category of extrinsic means of showing that it was not a free and voluntary act.

QUESTION: What if in this case,when he signed this piece of paper down in Mexico, he had put a little asterisk and said, "P.S. I don't intend to give up my United States citizenship"?

MR. RYAN: If that were the case, I think that the State Department, on reviewing that sort of submission, would say to him, "Look, you can have one or the other. You can be a Mexican citizen or an American citizen. Which shall it be? You cannot take this oath -- "

QUESTION: But what if they hadn't said anything to him, but that's just the evidence. He says at the bottom, "I didn't intend -- I intended to swear allegiance to Mexico, but I didn't intend to give up my U.S. citizenship"?

MR. RYAN: I think what the State Department would do in that situation, if they were -- In the first place, it would be done, if the individual wanted, with a hearing, at least at the appeal stage. So they would have the opportunity to have this evidence. But if it were contradictory in that nature, they would --

QUESTION: I thought your position was that intent was irrelevant, that if he signs this piece of paper, his intent is irrelevant.

MR. RYAN: That is our position.

QUESTION: Then if he put that at the bottom, that P.S. at the bottom, you would say it is irrelevant?

MR. RYAN: If it was clearly his -- If that was his understanding, yes, I would say that it would be irrelevant. But the problem is that the State Department does not want to go around revoking --

QUESTION: But your submission, your basic submission is here, it doesn't make any difference what his intent was. I take it, even if you conceded that he did not intend to give up his United States citizenship, he nevertheless has done so by swearing allegiance to Mexico.

MR. RYAN: That is our position.

QUESTION: But the fact is he already was a citizen of Mexico, wasn't he?

MR. RYAN: Yes, he was, by birth.

QUESTION: As well as a citizen of the United States.

MR. RYAN: Correct.

QUESTION: You said he was born in the United States.

MR. RYAN: His father was a Mexican citizen, and under Mexican law, he therefore was also a citizen.

QUESTION: So he had dual citizenship at the time he made the renunciation?

MR. RYAN: Yes, that is correct, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to resume at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue.

ORAL ARGUMENT OF ALLAN A. RYAN, JR. (Resumed)

ON BEHALF OF THE APPELLANT

MR. RYAN: Mr. White, I want to make sure that I made myself clear in answering your question earlier. If the Court should decide, contrary to our submission, that specific intent is an element of voluntariness, it would still, in our view, have to address the other two questions, namely --

QUESTION: Both of them.

MR. RYAN: Both of them, although as we say in our brief, we would not defend the constitutionality of the presumption in those circumstances. But the question would still be whether clear and convincing evidence is required of voluntariness, or whether the statute is constitutional. And we presume the Court would address the presumption, even though we don't defend it.

I think our position is best stated by Chief Justice Warren in his dissent in the Perez case, which as I noted was specifically approved by the Court in Afroyim. We think that this Court should recognize, as Chief Justice Warren did, and I quote: "The principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship, and thus that any action defined by statute by which the

citizen manifests allegiance to a foreign state may be so inconsistent with retention of citizenship as to result in a loss of that status."

If the conduct described in the statute manifests what Chief Justice Warren called a"dilution of undivided allegiance sufficient to show voluntary abandonment of citizenship," then the Government may give formal recognition to the inevitable consequence of the citizen's own acts without regard to specific intent.

We submit that taking an oath of allegiance to a foreign government is such conduct.

QUESTION: Now, you address that to what particular facet of the issues before us?

MR. RYAN: The first issue, Mr. Chief Justice. The question whether specific intent is a necessary element of an expatriating act.

QUESTION: Not to the burden of proof issue?

MR. RYAN: Well, that -- In our view, that question has to be addressed before the burden of proof issue is addressed. In our view, that is the touchstone of the Perez dissent and the Court's opinion in Afroyim, one which the Court of Appeals did not follow here.

QUESTION: As indicated by my question before lunch, what bothers me in this case is the applicability of this statute to this particular case. This person already was a

citizen of Mexico and owed allegiance to Mexico, therefore.

MR. RYAN: Yes, he did, Mr. Justice Stewart.

QUESTION: In this particular case, why did his statement of his allegiance to Mexico change the status quo at all?

MR. RYAN: Under Mexican law, Mexico, like United States, does not favor dual citizenship, and it has this certificate of Mexican nationality which formally recognizes the individual as a citizen of Mexico. But in the process of doing so, it requires him to surrender his allegiance to any other country, particularly that of which he is also a national.

QUESTION: But before he signed anything, this person, Mr. Terrazas, was a citizen of Mexico, owed allegiance,as such, to Mexico, was also a citizen of the United States, and owed allegiance, as such, to the United States. And whether either Mexico or the United States [illegible] dual nationality, he was a citizen of each state, of each country.

MR. RYAN: That is correct.

QUESTION: And, therefore, why did this signing of an oath of allegiance, or an affirmation of allegiance to Mexico change the status quo at all?

MR. RYAN: Change the status quo of his dual nationality?

QUESTION: Yes.

MR.RYAN: Because he took the oath of allegiance to

Mexico.

QUESTION: Why did that add anything to what he already owed? He was a citizen of Mexico.

MR. RYAN: Well, as a dual national, his allegiance is in something of a tension. He owes --

QUESTION: Precisely, but in fact he was, wasn't he?

MR. RYAN: In fact, he was a dual national, yes, sir.

QUESTION: Had he ever given an allegiance formally to Mexico?

MR. RYAN: Not before this act, that I am aware of.

QUESTION: Would he have lost his Mexican citizenship if he had never signed an oath of allegiance?

MR. RYAN: I don't believe so, Mr. Justice Brennan.

QUESTION: Then I share my brother, Stewart's --

MR. RYAN: He testified that he believed that he had to sign this certificate, or this application for Mexican nationality, in order to graduate from the college that he was attending. Now there is evidence in the record that says that was not so, but regardless of that his testimony was that he believed he could not graduate from the school unless he signed this application for a certificate of Mexican nationality.

QUESTION: How does Chief Justice Warren's adjective "undivided" allegiance bear on this, if it does at all?

MR. RYAN: It bears on it because by applying for a certificate of Mexican nationality, by swearing his allegiance

to Mexico, he demonstrates that he allegiance to the United States is certainly divided, and in fact nonexistent.

QUESTION: Why? Didn't he already owe allegiance to Mexico if he was a citizen of Mexico?

MR. RYAN: I assume he did. As a national of Mexico, I assume he did. But he, for whatever reason, he thought it was to his advantage to --

QUESTION: And you are not relying at all on his renunciation of United States citizenship in this case?

MR. RYAN: Well, as I answered to Mr. Justice Stevens earlier, we are not relying on that as the basis, because the statute, as we describe, I believe, on page 48 of our brief, has four or five specific expatriating acts. Renunciation of citizenship is one of them, but -- on which we are not relying.

QUESTION: When you talk about renunciation, do you include with that the election that comes -- that most dual citizens have to make sometime in their lifetime -- and, as I understand, under United States law,as well -- to choose one or the other citizenship?

MR. RYAN: I wouldn't want to say that I would call that renunciation. I don't know that I wouldn't. It would have to depend on the specific act that he did in furtherance of this election.

QUESTION: Do the laws of the United States provide

that a dual national has to elect at sometime or other during his lifetime, after he reaches 21, to --

MR. RYAN: Not to my knowledge, sir.

QUESTION: He could have gone through his entire life being a citizen of each country?

MR. RYAN: As far as I know, yes, sir. I am not aware of any provision of United States law that says a dual national has to elect at some point with one or the other.

QUESTION: What could Mexico do, for example, about enforcing any obligations of citizenship, except when he was, perhaps,within the boundaries of Mexico?

MR. RYAN: As a dual national, there probably was not much that Mexico could do.

QUESTION: What could we do if -- the United States do, for example, about military service, if he was in Mexico? Would he be in default if he were drafted, for example?

MR. RYAN: He was subject to the draft and, in fact, he was given a physical at one point, and was subject to the normal process of the draft.

QUESTION: If that occurred when he was in Mexico and he just didn't respond, he would be in some form of AWOL, wouldn't he?

MR. RYAN: I assume he would be in some sort of trouble, yes, sir. He was in Mexico, and, in fact, I think the record shows that he did respond. He did come up and take

his physical, and so forth.

QUESTION: Similarly, I suppose, if he were in the United States and he were a citizen of Mexico, and Mexico had the draft, he would be in default in Mexico. So his citizenship -- His being a Mexican citizen does involve some obligation, some duties to the country?

MR. RYAN: I would assume that under Mexican law he does have some obligations to Mexico. That is one of the reasons that dual nationality is not a particularly favored status in any country. But in this case, as the Consul told him, there was nothing illegal about it.

QUESTION: Mr. Ryan, what is the purpose of the affidavit on page 38 of the Appendix?

MR. RYAN: On page 38, that is the affidavit that the Appellee signed before the Consul when he came back with the forms that the Consul had given him to be sent up to the State Department for a final determination of his nationality.

QUESTION: Why don't you rely on that as establishing an intention? He uses the word "intention" to relinquish United States citizenship.

MR. RYAN: He does use that phrase. There are other statements that he made at the same time, in which he said, "I have no intention of giving up my citizenship." They are just squarely contradictory.

QUESTION: Was the other statement also sworn to?

MR. RYAN: It was not sworn, no, sir.

QUESTION: Wasn't that to be resolved by the State Department?

MR. RYAN: The State Department did resolve it, although the exact weight that they placed on intention I don't know. But they resolved that he had lost his citizenship. And the Court of Appeals has remanded this case to the District Court, because it also has not passed on these conflicting statements of intention.

QUESTION: Was this affidavit executed for the purpose of making clear that he was not subject to draft in the United States?

MR. RYAN: No, I would not say that it was done for that purpose. It was done to forward his --

QUESTION: Well, you can forward papers without swearing you are not a citizen of the United States. It must have had some purpose. What was it?

MR. RYAN: The purpose, I believe, was to give the State Department a basis to determine whether he had voluntarily committed an expatriating act or not.

QUESTION: The purpose was to tell the State Department that he had intentionally relinquished his citizenship in the United States? That's what it says.

MR. RYAN: It does say that. And --

QUESTION: Why do you resist?

QUESTION: Yes, why don't you rely on that?

MR. RYAN: We don't rely on it in this Court because the Court of Appeals made no finding on that issue when it faced the case.

QUESTION: What finding do you need in face of that affidavit?

MR. RYAN: There were other statements that were executed at the same time which are squarely contrary.

QUESTION: Were any statements subsequent to this that are to the contrary?

MR. RYAN: No, sir, at the same time. This is the affidavit. He also answered some questions in a questionnaire, and he also wrote out a letter in his own hand, all of which, the three documents, the affidavit and the questionnaire and the letter, were all sent to the State Department at the same time.

QUESTION: But the questionnaire has, as I think you pointed out, conflicting statements.

MR. RYAN: Yes.

QUESTION: And that's not sworn to, is it?

MR. RYAN: The other statements are not sworn to, as far as I know.

QUESTION: What I don't understand is why this affidavit doesn't settle this case. If intent is requisite,

and if an act may be evidence of intent, it seems to me, at least on the surface -- perhaps I don't understand it -- that you have both here. He went to Mexico, went to school there, swore in a document that hasn't been repudiated, so far as I know, that it was his intention to relinquish his United States citizenship.

MR. RYAN: If this Court should hold that intent is required, it may well be that we will argue in the District Court that there is all the evidence of intent that is needed. But we have not taken that position here because the Court of Appeals announced this requirement in this case for the first time, and then remanded to the District Court for findings of fact on that issue. We did not want to come up here and ask this Court to make findings of fact as to whether he did or did not have an intention, when the Court of Appeals has not done so and, in fact, remanded to the District Court for precisely that purpose, stating that credibility was an issue.

QUESTION: Does the State Department have a fact-finding process for determining these things, or do they go directly,de novo, to the District Court?

MR. RYAN: The determination is made in the first instance on the papers that are submitted, and then there is an administrative appeal if the individual wants it, in which there is live testimony taken.

QUESTION: Facts were found there, were they not?

MR. RYAN: Yes, but the trial in the District Court was de novo. It was not a review of the State Department record. There is a statutory right to a de novo trial, and that was done here.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Ditkowsky.

ORAL ARGUMENT OF KENNETH K. DITKOWSKY, ESQ.

ON BEHALF OF THE APPELLEE

MR. DITKOWSKY: Mr. Chief Justice and Members of the Court, may it please the Court:

The issue to be determined, as we understand it, is whether a native-born American citizen can be denaturalized or denuded of his American citizenship by a minimum standard of proof,equal to or less than that of a simple negligence case.

We believe also that Addington v. Texas is espoused under this particular issue. The Court considered the applicability of the Fourteenth Amendment to the standard of proof in Addington.

QUESTION: When you say "or less than that of a simple negligence case," is that an issue here?

MR. DITKOWSKY: Well, when you talk about preponderance of the evidence, when the reviewing court looks at preponderance of the evidence, the reviewing court looks to

determine if there is one scintilla of evidence that would sustain the verdict of the District Court. If they find that scintilla of evidence, then they sustain the verdict. Now, that may or may not have been a preponderance. That's the reason I use the word "less."

QUESTION: In Addington, someone was being incarcerated. Your client is not being incarcerated.

MR. DITKOWSKY: Our client is worse than being incarcerated. Our client is losing the right to have rights, the most valued right --

QUESTION: That is just a lot of kind of rhetoric, isn't it?

MR. DITKOWSKY: No, it is not.

QUESTION: He is not forbidden to move any number of places that he wants to the way the person in Addington was who was confined within the walls of an institution.

MR. DITKOWSKY: He is not only confined -- He is confined without the laws of the United States, because not being a citizen he doesn't have the right to American citizenship. He could very well be barred from entry into the country.

QUESTION: But he can go anywhere else in the world he wants to, can't he?

MR. DITKOWSKY: He was born here, he is a native-born American. He was born within sight of this Courthouse.

QUESTION: Can't he come in here with a visa?

MR. DITKOWSKY: But that is still a matter of privilege. It is not a matter of right, and it takes away the most valued right that the courts have consistently held, from Afroyim, Nishikawa, Perez, you name it. The courts --

QUESTION: I think you would say this proof has to be beyond a reasonable doubt.

MR. DITKOWSKY: I would like to see proof beyond a reasonable doubt. I would like to see the most stringent proof required, rather than the standard of clear, convincing and unequivocable.

As pointed out in the Addington case, there were three standards of proof that were determined. The first standard of proof was the minimum standard,which was preponderance. This involves cases where society really doesn't have much at stake. Then you have the cases where society has a great deal at stake, and cases in which the risk of error can't be tolerated. Those primarily are the criminal cases.

Then you have the middle ground cases, and they are divided into two basic sections. The first section is the private case, where you have civil fraud and action to declare a child born in wedlock illegitimate, an action to enforce an oral contract to make a bequest. To these we apply the standard of clear and convincing.

Then we have the more public cases which Addington

talked about, the deportation case, the naturalization case, the civil commitment case, and we believe the expatriation case.

Important here --

QUESTION: Why would your client sign the affidavit Mr. Justice Powell referred to?

MR. DITKOWSKY: The reason my client signed the affidavit was he was frightened. This is a young man --

QUESTION: Is the question of voluntariness in the case?

MR. DITKOWSKY: It certainly is.

QUESTION: He was twenty-two, college educated, fluent in Spanish?

MR. DITKOWSKY: Well, we have to go back --

QUESTION: Do you agree with all that?

MR. DITKOWSKY: No. Our client signed the affidavit -- Our client signed an application for a certificate of Mexican nationality in his home in Niles, Michigan, sometime in 1970. We've got a number of dates. Counsel this morning said September 1970. Mrs. Ibarra testified November 1970. The court found August 3rd, Mr. Parson said April 3rd. We don't even know when the event occurred.

In addition to that, the court was presented -- the District Court -- was presented with another application for certificate of Mexican nationality. This certificate of

Mexican nationality did not even bear the Plaintiff's signature. This had his name spelled wrong, and the name --

QUESTION: Yes, but the affidavit -- and I go back to it -- was in November of '71.

MR. DITKOWSKY: That's correct.

QUESTION: When he was a year older.

MR. DITKOWSKY: That's correct.

QUESTION: "I further swear the act mentioned above was my free and voluntary act, and that no influence, compulsion, force or duress was exerted upon me by any other person, and that it was done with the intention of relinquishing my United States citizenship.

MR. DITKOWSKY: Unfortunately, that is not a true statement of what actually occurred. This young man came to the Consulate office, after having been at a party. He was told that he had committed an overt act of treason and he had to go to the Government, the Consulor -- c-o-n-s-u-l rather than c-o-u-n-s-e-l -- to get a determination of citizenship. The documents he signed said "registration." This young man was frightened, his father had died a short while before this, and he put himself in their hands and he signed the documents.

You can see if you look at Exhibit 14A exactly the type of pressure that he was under.

QUESTION: Would you have any case if Perez v. Brownell were the law?

MR. DITKOWSKY: Yes, I think I would.

QUESTION: Under what grounds?

MR. DITKOWSKY: Under the Fourteenth Amendment, and the history of the Fourteenth Amendment cited in Afroyim. The Fourteenth Amendment --

QUESTION: But Afroyim overruled Perez.

MR. DITKOWSKY: That's correct.

QUESTION: I am saying if Perez v. Brownell were the law.

MR. DITKOWSKY: I would think so. I think that even with Perez v. Brownell being the law, we have a different act involved. We still are involved with the question of standard of proof to be involved. The standard of proof that's required proves its voluntariness. Perez v. Brownell did not abrogate the standard of voluntariness. So, the first step is to prove voluntariness. The second step is to prove what, in fact, he did. And these burdens are on the Government.

In order to prove what anybody did, you have to prove certain things: One, intent; two, what happened, where it happened, who was present. You've got to prove some kind of foundation. The record here is totally devoid of any foundation. And when we look at the Fourteenth Amendment and look at the history of the Fourteenth Amendment, as indicated by the Afroyim case, the intention of the Citizenship Clause of the Fourteenth Amendment was to prevent exactly what has

happened in this particular case.

And getting back to Addington again, we have to weigh two things: What error can we constitutionally allow to occur, and the relative importance of society. And we submit that the relative importance of society in this particular situation is supreme.

We also point out --

QUESTION: You would be satisfied with the Addington standard?

MR. DITKOWSKY: Well, I personally would want beyond a reasonable doubt, but if I had -- it was all I could get -- I would take the Addington standard.

QUESTION: Now, what is the affidavit that you referred to? Tell me about the setting of the one that you identified as 14A. In that one, he said -- And it is obviously more in the nature of a letter, not a form of some kind, "I feel more Mexican than American. I want to stay and live here. I plan on marrying a Mexican girl. I've learned what a great country Mexico is. I feel part of Mexico. I have many relatives here, I want to be near them. Even my taste in foods is Mexican. I could not lead a double life any more."

Now that last sounds as though he is saying, informally, he doesn't want dual citizenship any more, doesn't it?

MR. DITKOWSKY: Well, 14A is not reproduced. Fourteen is reproduced. Fourteen is the product of 14A.

QUESTION: What is 14A? Did he write that?

MR. DITKOWSKY: He wrote it under the guidance of the Consular officials. Fourteen A -- the testimony relative to the 14A was that he prepared a document, and then a Consular official, who happened to be a Mexican national, proceeded to edit that document, taking out many of his statements. One of the statements was that he had been told by a Consular official that he had committed an overt act, or treasonable act. This kid was scared to death. He believed that he had to do specifically what his attorney told him, what his Consul told him. And on that basis, because of the fiduciary relationship that was imposed on him, or he believed it had occurred, he was misled and led to sign the documents that were not in accord with objective reality. This should not be sufficient to take away his citizenship.

QUESTION: This does not read -- at least in my experience -- like something that someone told him to write. It looks like a candid expressions of a person who is trying to state the facts.

MR. DITKOWSKY: I can only tell you, Your Honor, that 14A has a particular statement, and it does have the statement that he had been told by a Consular official that he had committed an overt treasonable act.

QUESTION: Am I looking at the same thing? Exhibit 14 at page 10A of Appellant's Appendix. What are you talking about when you say "14A"?

MR. DITKOWSKY: 14A is the document that gave rise to Exhibit 14. Let me explain.

QUESTION: Where is 14A in the Appendix?

MR. DITKOWSKY: 14A is not reproduced in the Appendix. We were not given the opportunity to add to the Appendix. The Government came to this Court and said -- and asked this Court --

QUESTION: Where is the document 14A?

MR. DITKOWSKY: It should be in the record.

QUESTION: We don't have it here in any of these papers?

MR. DITKOWSKY: It is not in any of these papers. The printing of an Appendix was dispensed with upon the Government's motion. Then the Government proceeded to print an Appendix to their brief, and consequently the documents that we asked to be reproduced and the sections of testimony we asked to be reproduced were not, in fact reproduced.

QUESTION: You can always put them in as an appendix to your brief, can't you?

MR. DITKOWSKY: Well, when we asked for our brief to be printed, we did have documents attached to that, and they were not printed with them. I understand they were photocopied

and copies of some of those documents were -- The Clerk --

QUESTION: Are you suggesting that something prevented you from giving what it is you suggest is missing?

MR. DITKOWSKY: Well, how can I put it?

When I sent in to the Court the Brief for the Appellant, I sent in a document that had exhibits attached to it. When it was printed, it was printed without adding any of my exhibits. Among the exhibits that I had attached were statements of Mrs. Ibarra taken at trial, where she admitted the alteration of his document and the editing of his document.

QUESTION: Is that the thing that you sent into the Court, the green thing?

MR. DITKOWSKY: Yes, this is a photocopy of what I sent into the Court.

QUESTION: Well, that certainly doesn't comply with our rules as to size or anything else, does it?

MR. DITKOWSKY: Well, we were granted leave to proceed as a pauper, and we proceeded to send in our brief to the Court and the Court printed our brief. And what came out was this brief which does comply.

QUESTION: Did you ask that these other items be printed?

MR. DITKOWSKY: Well, I sent it and then I called the Clerk's office afterwards and I asked the Clerk's office what happened to my exhibits that were attached, and I was told

that they were photocopied and copies were given to each of the Justices.

QUESTION: And that's what we have here?

MR. DITKOWSKY: That's correct.

QUESTION: It says "Appendix to Brief for the Appellee."

MR. DITKOWSKY: I assume that is it, that's correct.

QUESTION: Well, can you tell us in this document where 14A is?

MR. DITKOWSKY: No. I did not reproduce 14A because there is only one copy of 14A, and 14A is something that cannot be entirely reproduced, because what it has in there are many colored pencil marks and scratch marks.

QUESTION: Couldn't it be typed and reproduced in that way?

MR. DITKOWSKY: You still can't reproduce the colors.

QUESTION: You are relying on 14A for something, aren't you?

MR. DITKOWSKY: Yes, I am relying upon --

QUESTION: How does it help us if we don't have it?

MR. DITKOWSKY: Well, I did produce many of the pages that were involved in 14A. I did not reproduce it, but I did have testimony in connection with it, and I reproduced sections of the testimony where it was discussed, and where Mrs. Ibarra testified as to what she had done. And we take the

position that in her editing his document she showed exactly the power that she had over him, or that the Consular official had over him.

I am sorry I didn't reproduce 14A, but I had no ability to do so, and --

QUESTION: What is 14A?

MR. DITKOWSKY: It is the original questionnaire which eventually became 14. Fourteen is produced for the Court by the Appellant.

QUESTION: You say it doesn't exist?

MR. DITKOWSKY: It exists in the record. There is only one copy of it.

QUESTION: Where is that?

MR. DITKOWSKY: That is in the record.

QUESTION: Here?

MR. DITKOWSKY: Yes.

QUESTION: I thought you said a minute ago it wasn't here.

MR. DITKOWSKY: No, I don't have it in the documents that I produced for the Court, but it is in the actual trial record that was brought into this Court.

There is one concession that is made, which is part of the weighing factor, that goes along with the statement of the Court in Addington. Addington made a statement that the function of the legal process and the burden of proof, as part

of it, was to minimize the risk of an erroneous decision.

On page 16 of Mr. Vance's jurisdictional statement, in a footnote -- I believe Footnote 11 -- Mr. Vance concedes that the burden of proof on a given issue may be dispositive of the issue.

Now, expatriation is a right that is given to an individual citizen. It is not a right given to the Department of State or Government. It is a right which must be exercised voluntarily by the citizen. Voluntary means -- It means voluntary, it doesn't mean equitous. It doesn't mean res ipse loquitor, like occurred in this case. It does not mean punishment for a crime. If I am the worst person in the world, that's no right to take away my citizenship. Punish me for the crime, but don't take away my citizenship.

QUESTION: Do you concede that it can be an act voluntarily done, inconsistent with allegiance to the country, without necessarily also having the intent, specific intent, to renounce citizenship?

MR. DITKOWSKY: If there is no intent to do the act, it cann't be voluntary.

QUESTION: But if there is intent to do the act, but not the intent to specifically renounce citizenship.

MR. DITKOWSKY: You can't make that broad a statement. If Congress should declare that wearing a red shirt should be an act of expatriation, the red shirt has no relationship

to citizenship. Consequently, I can wear a red shirt until the sun sets in the east and still I will not do an act which I should be expatriated for.

QUESTION: What about enlisting in the Army of a foreign country?

MR. DITKOWSKY: Well, it depends on the circumstances. In Nishikawa where there is coercion, absolutely not.

QUESTION: What about where there is no coercion?

MR. DITKOWSKY: Where there is no coercion? We have allowed Americans to enlist in the Army of Israel and we have not expatriated them. We have --

QUESTION: What was the expatriation in Perez v. Brownell?

MR. DITKOWSKY: That was voting.

QUESTION: Was there a finding there that it was done with the conscious intent to relinquish citizenship?

MR. DITKOWSKY: I think it is implicit in the Court's decision, and I think that they did feel that that was such an act that it did have a conscious intent, because the fact that when you vote in a foreign election -- If I were to vote in the election in Mexico, for instance, I would be involved in the intimate process of Government in Mexico, and that is pretty good evidence of being an interloper or of --

QUESTION: But if you enlist in the Mexican Army, you may be ordered to invade the United States.

MR. DITKOWSKY: Well, that is a problem that does exist, and then comes the question of coercion. That's the reason this area of voluntariness is so very important. That's the reason we really have to determine as to -- and on a case by case basis -- what the act was, why it was done, where it was done, how it was done, and who was present. It cannot be a secret type of situation. It cannot be a situation that only I know what I have done, only you and I know what I have done. It must be some formal act. The statute itself does say "formal."

QUESTION: When you have dual citizenship, there is a great difference between giving up one there, isn't there?

MR. DITKOWSKY: Yes. When you have dual citizenship -- When I have dual citizenship, I have a vested right in both my American citizenship and in my other citizenship, and only I should have the right to give it up as an individual and as a member --

QUESTION: Couldn't you do something there, that if you just had one citizenship you wouldn't have any trouble.

MR. DITKOWSKY: That's right. If I had just one citizenship, that's true. Where I have dual citizenship, --

QUESTION: You had that problem.

MR. DITKOWSKY: I haven't made any change in my statute. Mr. Terrazas did not change his situation.

QUESTION: Why did he file that affidavit?

MR. DITKOWSKY: The only explanation for it is stupidity, or the indication by the Consular official that this was the right thing to do.

QUESTION: In reading the parts that I just read to you, does that sound like something dictated by someone else, or does it sound like a person who sits down and writes out his thoughts?

MR. DITKOWSKY: Well, as one lawyer to another, what we have in many situations is, the lawyer suggests sometimes the manner in which one is going to present a particular fact situation.

QUESTION: Including his statement that not only did he like the people and had a lot of relatives, but that he even liked Mexican food better than ours.

MR. DITKOWSKY: That is still not expatriation.

QUESTION: We are probing for intent.

MR. DITKOWSKY: That's right.

QUESTION: These things sound quite sincere.

MR. DITKOWSKY: They may sound sincere, but they are not necessarily intent of giving up one's citizenship. I like Swedish cooking.

QUESTION: He almost has dual citizenship.

MR. DITKOWSKY: He does have dual citizenship.

QUESTION: That's not a theory that you pull down

out of the clear blue, is it?

MR. DITKOWSKY: I am sorry?

QUESTION: You don't pull down, quote, "dual citizenship," end quote, out of the clear blue sky.

MR. DITKOWSKY: No.

QUESTION: You mean something when you say that.

MR. DITKOWSKY: That's right.

QUESTION: And so he meant something when he said it.

MR. DITKOWSKY: Certainly. He --

QUESTION: He meant that he was giving up the dual citizenship.

MR. DITKOWSKY: He did not intend to give up his dual citizenship.

QUESTION: I thought you said he did.

MR. DITKOWSKY: No, he did not intend to give up his citizenship.

QUESTION: Oh, he didn't mean what he said?

MR. DITKOWSKY: He said what he said in those statements because it was suggested to him that that was the thing to say, that was what the Department of State wanted to hear. So he said it.

QUESTION: Including the statement, "I could not lead a double life any more. There comes a time in everyone's life when he has to sit down and decide what he wants to do

with his life. I did this and decided my future happiness was here in Mexico. For that reason, I became a Mexican."

MR. DITKOWSKY: I believe so, because he was told that he had committed an overt act of treason against the United States Government. He would never be allowed to go home.

QUESTION: What was the nature of the act?

MR. DITKOWSKY: The act? We don't know what the act was. It may very well have been a third person's act. There is no evidence in the record that the forged application for citizen of Mexican nationality did not promulgate the certificate of Mexican nationality. When Mr. Terrazas appeared at the Consulate in Monterey, Mexico, and he told Mr. Parsons that he had in his possession his certificate of Mexican nationality, Mr. Parsons said to him, "That's it, you are no longer an American citizen. You have committed an expatriating act. We have to document your case. I can't make that determination."

And when Parsons was asked about it, what did he say? He said, "Mr. Terrazas was surprised and Mr. Terrazas did not know that he had expatriated himself."

How can an act be voluntary if you don't know what you have done?

And, again, getting to this burden of proof issue, we still have the situation that even in the most simple case

if I want to prove that I have spoken before the Supreme Court, I must still be able to have somebody testify what was done, when it was done, where it was done, who was present, and in a case like this, I have to prove cienter?

When dealing with something as important as expatriation, we are entitled to know with specificity. The Government said we took an oath of allegiance. Mexico does not have an oath of allegiance. Mexico has no oath whatsoever. This is admitted by Parsons. It is admitted by the Government. Consequently, we couldn't even take an oath. We are accused of taking a bite out of the apple, and then in the reply brief we are accused of taking a bite out of an orange. The two are distinct situations.

QUESTION: He went to school down in Mexico?

MR. DITKOWSKY: He went to school down there. Many Americans have gone to school down in Mexico. Then he went to medical school down in Mexico. In fact, it used to be recommended that that was a place to get a degree.

QUESTION: Was the application he signed an application for a certificate of Mexican nationality, in 1970?

MR. DITKOWSKY: It was a document that was signed in blank. It did not contain the words that my brother said it did. It did not contain the specific renunciation of --

QUESTION: Had he applied for a certificate of Mexican nationality or not?

MR. DITKOWSKY: He signed a document which his father sent -- His Uncle George was a Mexican official and that blossomed somehow into a certificate of Mexican nationality. The document is not rationally distinguishable from the document signed by Mrs. Byrnes in the Matheson case, which occurred essentially --

QUESTION: Did somebody issue him a certificate of Mexican nationality?

MR. DITKOWSKY: The Mexican Government issued a certificate of Mexican nationality.

QUESTION: What did that certificate have in it?

MR. DITKOWSKY: That evidenced his Mexican citizenship, which he had already.

QUESTION: And what else did it evidence?

MR. DITKOWSKY: In my opinion, that is all --

QUESTION: Well, it says that he has expressly renounced all rights and adherence to other nationalities. That's what that certificate says. And so that was an official certificate, wasn't it?

MR. DITKOWSKY: There is no question about it.

QUESTION: And he had applied for such an official certificate, hadn't he?

MR. DITKOWSKY: Well, that --

QUESTION: Had he or hadn't he?

MR. DITKOWSKY: He signed a document blank and a

document with a forged signature --

QUESTION: At least the Government thought he had applied for it, the Mexican Government.

MR. DITKOWSKY: The Mexican Government did, yes.

QUESTION: And I suppose that if the application hadn't had in it this renunciation, he never would have gotten the certificate.

MR. DITKOWSKY: I don't know, Mrs. Byrnes did.

QUESTION: The certificate recites that he has made this renunciation.

MR. DITKOWSKY: The certificate does say that, but we do not know how that certificate was obtained. No evidence was proven as to how this --

QUESTION: Did he ever make any effort to send it back when he saw that it contained a renunciation?

MR. DITKOWSKY: No, he did not send it back. He didn't even think about it. He had the document which got him his grades from school and that's all he was interested in. This was the sole crux of what, in fact, he was interested in.

QUESTION: Mr. Ditkowsky, you said that you didn't know, and none of us knew, what brought all this about. Could it have been that they found out that he was in Mexico posing as a Mexican citizen?

MR. DITKOWSKY: No.

QUESTION: Are you sure that's not true?

MR. DITKOWSKY: Yes. He went to school down there.

QUESTION: Is there anything in the record that proves that?

MR. DITKOWSKY: There is nothing in the record that proves --

QUESTION: But you said his uncle was a big Mexican official.

MR. DITKOWSKY: That's right, his uncle was a Mexican official. His mother lives here --

QUESTION: Could that be the great treason they are talking about?

MR. DITKOWSKY: I don't know where they got the idea of treason. I don't know where they got the res ips loquitor approach to this matter. We are asking this Court to declare that statute unconstitutional, require voluntariness and require specifically that the Government prove what happened, how it happened, who was present --

QUESTION: Do you raise any question about the constitutionality of the provision that taking an oath of allegiance to a foreign power shall be an expatriating act, in view of the fact that I understand your position to be that one can be a citizen of more than one country at a time?

MR. DITKOWSKY: I believe that statute is unconstitutional because I don't think it has any relationship at all to --

QUESTION: It doesn't necessarily follow that if your basic position is right that you must prove specific intent to relinquish citizenship, that the basic underlying statute is unconstitutional.

MR. DITKOWSKY: The basic underlying statute does not have to be unconstitutional to sustain my position.

QUESTION: It seems to me that it follows logically, if we should adopt your position, because one can be a citizen of two countries.

MR. DITKOWSKY: That's correct.

QUESTION: And if you must prove specific intent to renounce and so forth, and if you fail to prove that the mere taking an oath of allegiance to another country should not be the constitutionally permissible basis for revoking citizenship.

MR. DITKOWSKY: I think it does follow and I think the Court --

QUESTION: Particularly for a person who is a citizen already.

MR. DITKOWSKY: That is correct.

QUESTION: But you wouldn't suggest that these two cases are the same, would you?

You go and you apply for a certificate of Mexican citizenship. In the one case, you sign a piece of paper that says, "I swear allegiance to Mexico." Say the other fellow signs a piece of paper that says "I swear allegiance to Mexico and I renounce my allegiance to the United States."

Now, in the second case, there certainly is an intent that is connected with sewaring allegiance to Mexico that isn't present in the first?

MR. DITKOWSKY: Well, except for the fact that our --

QUESTION: Well, you wouldn't say the two cases are the same, would you?

MR. DITKOWSKY: They are not identical, but our court and our State Department has said that in order to renounce you've got to do it in a particular manner so that that intent is clearly made possible.

QUESTION: But you wouldn't be relying on the renunciation as a separate matter, but you would be relying on a renunciation in order to inform you as to what the intent was in connection with the swearing of allegiance.

MR. DITKOWSKY: I want to point out that there was no oath in this case because there was no oath possible.

We are asking this Court to once and for all end this case. It has gone far enough. We have fought since 1971 to the present time.

We are asking this Court at the very least to declare Laurence Terrazas a citizen of the United States.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ryan.

REBUTTAL ORAL ARGUMENT OF ALLAN A. RYAN, JR.

ON BEHALF OF THE APPELLANT

MR. RYAN: I would like to clear up the status of this Exhibit 14A. But before I do that, I would like to be very frank with this Court as to the precise problem that the United States sees in the Court of Appeals decision.

That decision, as I stated, requires that the United States prove, by clear and convincing evidence, a specific intent to surrender citizenship. It is the combination of those two requirements that creates the dilemma to which I referred earlier.

Should this Court hold, as we believe it should, that specific intent is not an element of expatriation and that expatriation can arise regardless of specific intent, if the citizen performs voluntarily a statutorily designated act that demonstrates a transfer of allegiance, then in all

candor, I must state that the clear and convincing standard applied to proving the commission of the act of expatriation itself is not an intolerable burden.

QUESTION: Mr. Ryan, under prior cases, is it any of the Government's business to say what -- when and under what circumstances a citizen loses his citizenship? I thought that was the business of the citizen to give up his citizenship.

MR. RYAN: It is the business of both, because the Government has a legitimate interest in knowing who is a citizen and who is not. It cannot depend on the subjective intent of --

QUESTION: I thought, arguably at least, on the prior cases, a citizen doesn't give up his citizenship against his will.

MR. RYAN: The Government cannot strip his citizenship away from him. That is Afroyim.

QUESTION: Unless he actually knows that -- at the minimum, he actually knows that some act that he is performing is -- Well, unless he intends to give up his citizenship.

MR. RYAN: That is not, respectfully, what Afroyim holds in our view, and we ask the Court not to hold that now.

QUESTION: You haven't gotten much help out of

the Court of Appeals, have you?

MR. RYAN: No.

QUESTION: As a matter of fact, Courts of Appeals all read Afroyim that way, against you.

MR. RYAN: The Second Circuit and this Seventh Circuit both have. The Ninth and the Fifth Circuit look the other way, we think, although it is not a square holding. We discuss those cases in our brief.

It is the standard of proof here applied in conjunction with the specific intent requirement that creates the tough problem.

QUESTION: Why wouldn't you say that Afroyim was just wrong? Here the United States said voting in a foreign election is an act which the Government says amounts to a renunciation of your citizenship.

MR. RYAN: We don't believe Afroyim is wrong and we are not asking this Court to cut back --

QUESTION: Then why should you be able to say that swearing allegiance to a foreign government is a renunciation of your citizenship?

MR. RYAN: Because, unlike voting in a foreign election, swearing allegiance to another government, especially when that is done in the context of renouncing United States citizenship, is an act that --

QUESTION: But that isn't your argument. You don't even make that argument, apparently, that swearing allegiance in connection with renunciation makes it stronger than if you just swore allegiance. That isn't the way you cast your argument, is it? Certainly not in your brief.

MR. RYAN: Well, we said that circumstance would be taken into account. But even if it is ignored, we think that swearing allegiance to a foreign government is an act intrinsically different from simply voting in a foreign election.

QUESTION: You are saying that's what the Government says that act should mean. I thought Afroyim, at least arguably, says that we really have to have some proof of what the man subjectively intended by this act, not what some government says.

MR. RYAN: It is Chief Justice Warren, sir, that I read that statement as coming from. In his statement --

QUESTION: Chief Justice Warren was in dissent.

MR. RYAN: He was, but that dissent later became the basis for Afroyim.

QUESTION: Well, it didn't, because that wasn't the issue in Afroyim, was it?

QUESTION: Afroyim was voting in a foreign election.

MR. RYAN: It was the same case as Perez, but Chief Justice Warren, in his dissent in Perez, said that there is a difference between voting in a foreign election and naturalizing one's self in a foreign state. That was the particular example he used.

QUESTION: You still say that if in Afroyim there were two people and one of them had voted and one of them had sworn allegiance, the two cases would have come out differently.

MR. RYAN: Would have come out differently, yes, sir.

QUESTION: Even though the one who swore allegiance was already a citizen of that government?

MR. RYAN: Under the circumstances of this case, yes. The individual there --

QUESTION: How can it be that if you are already a citizen of Mexico that a certificate stating that you are a citizen of Mexico changes the status?

MR. RYAN: Because under Mexican law there are certain things that can be done only by a person holding a certificate of Mexican nationality. It is an official solemn document that youaare a full-fledged citizen of Mexico.

QUESTION: He already was.

MR. RYAN: No, he was a dual national.

QUESTION: He was a full-fledged citizen. I don't know what a half-fledged citizen is.

MR. RYAN: It is my understanding that there are

certain things that a dual national cannot do in Mexico, even though he -- half of his legal nationality is Mexican.

QUESTION: There are things nobody can do in Mexico legally.

To what are you referring?

MR. RYAN: I am referring to certain acts -- and I don't have them specifically at hand, but there is testimony in the record, in the documents, that the Mexican Government requires that those who are born dual nationals have a certificate of Mexican nationality in order to carry out certain things. For example --

QUESTION: Well, that's just a matter of proof of what was already a fact, concededly in this case.

MR. RYAN: Yes, and so he proceeded to be -- in his interest to take out the certificate of Mexican nationality.

QUESTION: To prove what was already a fact, i.e., that he was a citizen of Mexico, and also a citizen of the United States.

MR. RYAN: It, apparently, was not sufficiently a fact to the Mexican government.

QUESTION: My only question is: How in this case, at least, can it be considered to be inconsistent with American citizenship to simply preserve the status quo?

MR. RYAN: Because he was not preserving the status quo. He was pledging his whole obedience --

QUESTION: Mr. Ryan, why don't you use the argument you have already used in part, that because in this case he not only swore allegiance, but the same as said, "And furthermore I intend by this swearing of allegiance to renounce my citizenship."

QUESTION: Well, the reason you don't is, as my Brother White has already said, you haven't relied on that throughout --

QUESTION: He does now.

MR. RYAN: I can make -- I will tell you precisely what my position is on that argument. The statute says renouncing United States citizenship before a United States officer, that is an expatriating act. That is not what happened in this case, and so the Government does not rely on the statute that says --

QUESTION: No, but I asked you -- There are two parts to this document, one,an oath of allegiance, and second, renunciation language.

Would it be the same legal issue here if we left out the second half of the document and you said yes.

MR. RYAN: I say yes right now.

The only significance that that renunciation has in the context of this case is that it is a piece of evidence which the State Department and the courts could consider along with all the other evidence in the case,to determine just what

happened here. It is not--As we say in our brief, we are not suggesting that the renunciation is an independent legal basis, because it doesn't fit the statute.

QUESTION: You are saying that, but why isn't the case different if you've got the two together, than if you had just the swearing of allegiance?

For instance, the man swears his allegiance -- assume in this case he had sworn his allegiance and then in parenthesis he said, "And furthermore, I intend by this swearing of allegiance to give up my citizenship in the United States," close parenthesis. And then the question is: What did you intend by your swearing of allegiance? Isn't that a different case than if he just swears allegiance?

MR. RYAN: That may make it a stronger case for expatriation, but it does not change the legal basis on which the expatriation occurs, which is the swearing of allegiance, not the renunciation of American citizenship.

QUESTION: You hope that's the rule.

What if we need an intent?

MR. RYAN: Well, we are saying that intent is not needed.

QUESTION: I know you do, but what if you lose on that?

MR. RYAN: If we lose on that, then --

QUESTION: Why don't you say that intent is here?

MR. RYAN: As I said before lunch, if we lose on that

issue we may well go back to the District Court and say the intent is here. But the fact is that the Court of Appeals made no finding on that issue, and we did not think it proper to come up and argue to this Court that it should make a finding, which is in fact what I believe the Appellee is doing, asking this Court to rewrite the record and --

QUESTION: The finding to be made would be in the District Court in the first instance, perhaps is: What is the significance of the statement of renunciation of American citizenship, and how does that bear on the first half of that point?

MR. RYAN: Mr. Chief Justice, that is evidence of his intent to surrender his American citizenship.

QUESTION: Strong evidence, I suppose you would say?

MR. RYAN: I would certainly argue that in the District Court, if it comes to that, yes, sir, whether it is ultimately persuasive or not. It is not the only statement of intent. There are contrary statements, and that is a matter for the District Judge to make findings on in the first instance.

MR. CHIEF JUSTICE BURGER: Very well.

MR. RYAN: With the Court's leave, I could explain the situation of Exhibit 14, although my time has expired.

MR. CHIEF JUSTICE BURGER: About 14? It is available to us now, is it not?

MR. RYAN: Yes, Mr. Chief Justice, it is. It is in

the Clerk's office of the Court. The original exhibits are there. What happened is, 14 and 14A are both copies of a preprinted form called The Questionnaire, designed to find out what happened in an allegedly expatriating act. The Vice Consul, in this case, when he first met the Appellee said, "Here, take this questionnaire back home and fill it out and bring it back to us." The Appellee did so. He came back and he filled it out. Unfortunately, although not unreasonably, he proceeded on the,answering the questions as if he had been naturalized as a Mexican citizen, which in fact he was not. He was a Mexican citizen by birth. The Consular officer, the Consular assistant, Maria Ibarra, testified -- and this is all in the record. There is no Svengali influence here -- that she sat down with Mr. Terrazas and she went through question by question. She said, "Actually, you are not a naturalized citizen, you are a native-born citizen, so this question shouldn't be answered." She went through page by page while he was there. He never said anything in response. He just took her instructions as to the proper way of filling out the form. She said, "Fine, now that you understand it, please take this fresh form home and complete it with the correct questions answered," which he did. None of this business about, "I feel more Mexican than American," and so forth, was ever dictated in any way, shape or form by anyone in the Consul.

The record simply doesn't support that. The question

of treason. There is absolutely no evidence in the record that anyone told him that he was committing a treasonous act. In fact, the Vice Consul flatly and repeatedly denied that he had ever said any such thing. The only place that ever shows up is in various statements outside the record, or outside the trial testimony that the Appellee has made.

I would be distressed if this Court were to characterize the record as my opponent has characterized it, because I think those facts are simply not in the record. The record is a four-volume transcript, and a number of documents which we believe are self-explanatory. This Appellee was not forced or coerced or hounded by any employee.

MR. CHIEF JUSTICE BURGER: I think we have your point now, Mr. Ryan.

Thank you, Gentlemen. The case is submitted.

(Whereupon, at 1:56 o'clock, p.m., the case was submitted.)