Subject

Phone 415 931-9107

EUGENE CHAIKIN, Attorney-at-Law
Post Office Box 15156 San Francisco, California 94115

October 14, 1976

Mr. Claude Worrell
Ambassador to the Guyanese Embassy
to the United States of America
2490 Tracy Place, N. W.
Washington, D. C. 20008

In re: Our File No. 280

Dear Claude:

Enclosed please find the materials that I said I would send you. Please enlist the services of the Embassy in requesting clarification of this issue from the U. S. State Department. We would also appreciate your impression of the receptivity of a request for oath of Guyanese citizenship which expressly could include a statement of intention to retain U. S. citizenship as well.

Jim tried to call you Sunday but you had just left. He wished to send you $1,000 to offset your trip expenses to the coast for the dinner, if that would not be against protocol. Our budget is strained somewhat but he said he wanted to raise the funds through lectures. He didn't think it fair for you to have the burden of that expense.

Please give my best to all. Have a good trip to Guyana.

Best regards,

Gene

Gene

Enclosures:
Citizenship and the Denationalization Statutes with Exhibits A, B, C, D, E, F, and G

KK-2-A-5

6. Making a formal renunciation of nationality before a diplomatic or consular officer in a foreign state...

7. Making in the United States a formal renunciation of nationality...

8. Deserting the military, air or naval forces of the U.S. in time of war...

9. Committing any act of treason against, or attempting by force to overthrow, or bearing arms against the U.S....

10. Departing from or remaining outside of the jurisdiction of the U.S. in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military...

(See Exhibit "A" for the full text)

Thus from the express terms of this statute a U.S. citizen upon the commission of any one of the enumerated acts of expatriation could be deprived of his U.S. citizenship and as an alien either be deported or denied entry to the United States. However case law interpreting this statute needs to be examined in order to fully comprehend its scope and effect.

Perhaps the most important and expansive case in this area was the decision rendered by the Warren court in Afroyim vs. Rusk (1967) 87 S. Crt. 1660, 387 U.S. 253, 18 L. Ed. 2d 757. (Hereafter Afroyim) In that case petitioner, a naturalized U.S. citizen went to Israel in 1950 and voluntarily voted in the 1951 Israeli election. In 1960, when he applied for renewal of his U.S. passport, the Department of State refused to grant it on the sole ground that he had lost his U.S. citizenship by virtue of voting in a foreign election. In restoring his U.S. citizenship the Supreme Court

stated for the first time that the 14th Amendment of the U.S. Constitution prevented the government from robbing citizens of their citizenship for voting in elections in foreign states. (See Exhibit "B")

The decision was significant for many reasons. The court in its ruling stated that U.S. citizenship was beyond the power of government to take absent the voluntary renunciation of it by the citizen. The court stated that the 14th Amendment which provides that "All persons born or naturalized in the U.S. ... are citizens of the U.S. ... was designed to, and does, protect every citizen of this Nation against a congressional forcibile destruction of his citizenship..." The decision seemingly invalidated each and every provision of the Act with the exception of those provisions relating to voluntary renunciation.

However, Afroyim left unresolved several important issues. The decision did not expressly address itself to the question of defining what declarations or other conduct of an individual could properly be regarded as a "voluntary renunciation" of citizenship. The decision did not provide guidelines of sufficient detail to permit one to definetly ascertain the validity of other expatriating provisions of the act. The Attorney General of the U.S. recognized this problem and issued an Opinion addressed to these issues. (Vol. 42 Op. No. 34 (1969) See Exhibit "C")

The Attorney General under 8 U.S.C.A. 1103 is granted the power to issue controlling determinations and rulings with respect to all questions of law arising in the administration of the

passport and immigration laws. Thus until further clarification by the Supreme Court as to the exact meaning of Afroyim the opinion would be binding upon the Department of State, the Immigration and Naturalization Service and the Department of Justice.

In construeing Afroyim the Attorney General held that voluntary relinquishment of citizenship was not confined to a written renunciation but could be manifested by other actions declared expatriative under the Act, if such actions are in derogation of allegiance to the U.S. In those cases the individual has the right to raise the issue of his intent. The government could still seek to deprive a citizen of his citizenship under one of the expatriating provisions and the individual could raise the issue of voluntary renunciation. The burden of proof on this issue would be on the government. The Opinion held that an act which does not reasonably manifest an individuals transfer or abandonment of allegiance to the U.S. cannot be made a basis for expatriation.

The Opinion went on to state that some kinds of conduct though within the proscription of the statute, would not be sufficiently probative to support a finding of voluntary renunciation. Thus simply accepting employment in a foreign country as a public schoolteacher would not be enough. With respect to acceptance of an important political post in a foreign government the opinion indicated that such might be enough. Service in a foreign army was also discussed and it was indicated that an individual who

enlists in the armed forces of an allied country does not necessarily evidence that by so doing he intends to abandon his U.S. citizenship. On the other hand it would be highly persuasive evidence of an intent to abandon U.S. citizenship if one voluntarily enlisted in the armed forces of a foreign government engaged in hostilities against the U.S. The opinion went on to state that in each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship.

Thus it becomes important to determine how the court's have evaluated individual cases regarding the issue of voluntary renunciation. In the case of Baker vs. Rusk (1969) 296 F. Supp. 1244 (Exhibit "D") the issue was whether the plaintiff by taking an oath of loyalty to King George the Fifth in Canada had voluntarily relinquished his U.S. citizenship. In that case plaintiff was born in the U.S. in 1905 and taken to Canada the next year where he remained until he graduated from law school. In the ceremony of admission to the bar he took an oath to be faithful and bear allegiance to the King. He then practiced law for several years in Canada and in 1944 returned to the U.S. The Immigration and Naturalization Service then took the position that Baker lost his citizenship by taking the oath.

The Court held that the provision of the act which Baker violated could not be interpreted under Afroyim to mean that, by taking the oath the plaintiff lost his U.S. citizenship as a matter of law. The court then stated that the burden of proof of

voluntary relinquishment was on the government and that the burden was not an easy one to satisfy. Noting that Baker never considered himself to be a citizen of Canada, and never voted in any election in Canada the court held that the government did not meet the burden of proving that plaintiff voluntarily abandoned his allegiance to the U.S.

Another case involving this issue of voluntary renunciation is that of Peters vs. Secretary of State (1972) 347 F. Supp. 1035 (Exhibit "E") Plaintiff in that case was born in Poland and emigrated to the U.S. with her parents in 1906. She became a naturalized citizen in 1934. Several years later she married a Hungarian citizen. By operation of Hungarian law she became a Hungarian citizen. In 1949 plaintiff moved to Hungary with her husband. She registered with the Hungarian police as an American citizen. The Department of State in 1971 made a determination that she had expatriated herself by accepting a position with the Hungarian Radio violating the provision of the Act relating to accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state. Plaintiff was first a translator, then had charge of the English Language Broadcast Station and was later appointed Deputy Head of the Foreign Language Department of the Hungarian Radio. She also accompanied the Hungarian Radio Children's Choir on a tour of the U.S. and Japan.

The court citing Afroyim held that the proof of voluntary renunciation failed to meet the burden imposed on the government. It went on to state that there can be no expatriation unless there is a voluntary act by which the American citizen unequivocally

indicated relinquishment of American nationality in favor of allegiance to some foreign state. The court said that the above acts did not support by clean, convincing and unequivocal evidence an inference of an intent to forfeit American citizenship, or voluntarily to renounce it. Nor were these acts shown to be so inconsistent with the retention of American citizenship as to result in the loss of that status.

It must be noted that the Afroyim decision was rendered in 1967 by the Warren Court in a sharply divided opinion (5-4). Since that time many of the liberal members of the court have been replaced by the conservative and reactionary appointments of the Nixon era. Thus a case entitled Rogers vs. Bellei (1971) 401 U.S. 815, 91 Sup. Crt. 1060, 28 Law. Ed. 2d 499 (Exhibit "F") takes on considerable importance as an indication of the current Court's attitude toward this area of the law. It must be noted that this decision was rendered before the Burger court was fully constituted in 1972 with the additions of Justice's Powell and Rehnquist.

That case involved a person born abroad of one American citizen and the other an alien. Such a person was defined as a citizen of the U.S. at birth, but 8 U.S.C.A. 1401(a)(7) specifically provided that such a citizen shall lose his citizenship unless after age 14 and before age 28, he shall come to the U.S. and be physically present continuously for five years. The statute granted citizenship at birth but took it away upon failure to comply with the post 14 pre 28 residency requirement. The District Court for the District of Columbia held the statute unconstitutional under Afroyim and the Supreme Court reversed.

Plaintiff's father was a citizen of Italy and his Mother a citizen of the U.S. Plaintiff failed to meet the residency requirement and his American citizenship was taken away. The lower court relying on Afroyim held that the statute was unconstitutional in that it gave Congress the power to take away a persons citizenship without his voluntarily relinquishing it.

The Burger court in a very narrow and technical reading of the 14th Amendment held that the plaintiff was not entitled to the protection of the Amendment and therefore Congress could enact a statute taking away his citizenship without his voluntary relinquishment. The 14th Amendment states: "All persons born or naturalized in the United States . . . are citizens of the United States . . . ". The court said that the central fact in their weighing of plaintiff's claim to U.S. citizenship is that he was born abroad. He was not born or naturalized in the U.S. They thus reasoned that the first sentence of the 14th Amendment had no application to the plaintiff. In the words of the majority "He simply is not a 14th Amendment first-sentence citizen". Since he was not within the scope of the 14th Amendment the statutory power of Congress and the appropriate exercise of said power would only be limited by other pertinent constitutional provisions. The court reasoned that this type of citizenship could be left to proper congressional action. They went on to conclude that the statute which deprived plaintiff of his U.S. citizenship was "not unreasonable, arbitrary, or unlawful".

The dissent citing Afroyim said that until this decision it was clear that Congress could not enact a law stripping an American

of his citizenship which he never voluntarily renounced or gave up. Citing the case of Schneider vs. Rusk (1964) 377 U.S. 163, 84 Sup. Crt. 1187, 12 Law. Ed. 2d 218 which held that the rights of citizenship of the native born and of the naturalized person are of the same dignity and co-extensiveness the dissent concluded that the majority had overruled Afroyim and Schneider. Commenting upon the concept of a first-sentence 14th Amendment citizen the dissent stated that although those Americans who acquire their citizenship under statutes conferring citizenship on the foreign born children of citizens are not popularly thought of as naturalized citizens, the use of the word "naturalize" in this way had a considerable constitutional history. They stated that Congress is empowered by the Constitution to establish a uniform rule of naturalization. Therefore anyone acquiring citizenship solely under the exercise of this power, is constitutionally speaking, a naturalized citizen. For authority they cited U.S. vs. Wong Kim Ark (1898) 169 U.S. 649, 18 Sup. Crt. 456, 42 Law. Ed. 890 which stated that the 14th Amendment contemplates two sources of citizenship, and two only, birth and naturalization . . . A person born out of the jurisdiction of the U.S. can only become a citizen by being naturalized, either by treaty . . . or by authority of congress. They reasoned that naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than by birth in this country.

It would seem that the broad holding in Afroyim elevating citizenship like freedom of speech, press and religion, to a preferred position in the constitution has been somewhat abrogated by the Rogers decision. It seems clear that Rogers liberalizes

the absolute conception of citizenship that Afroyim seemed to make a 14th Amendment standard. The court held that there is a category of citizenship that although legally obtained is not indestructible. Thus, Rogers departs from the 14th Amendment standard and acknowledges congressional power over some types of citizenship, and suggests a possible re-evaluation of Afroyims Fourteenth Amendment absolutism. Thus while Afroyim simply held that American citizenship was indestructable the Burger court invented the concept of a "fourteenth amendment first-sentence person". (See Hasting Constitutional Law Quarterly, Fall 1975, Exhibit "G")

In conclusion it is submitted that the concept of denationalization is still valid. The most that can be guaranteed by the Afroyim decision is that the government must bear the burden of proving voluntary renunciation in denationalization proceedings. The government still possesses the power to institute proceedings for revocation of citizenship but the citizen may allege that the acts the government relies on to show "voluntary renunciation" are not in fact evidence of a voluntary renunciation of U.S. citizenship.

To clearly state what a U.S. citizen may or may not do in a foreign nation is then a difficult task. The current state of the law is not clear. Voting in a foreign election would seem to be permitted as Afroyim established. The Peters decision would seem to indicate that serving in some governmental capacity in a foreign nation would not be enough to establish "voluntary renunciation". However the Attorney General's opinion indicates that acceptance of an important political post in a foreign government might be enough to establish such intent.

In conclusion it is suggested that contact be made with the Attorney General's office, the Secretary of State and the Immigration and Naturalization Service to ascertain if they have issued any internal guidelines or standards in this area.

One further possibility is research into treaty laws. 8 U.S.C.A. 1489 states that "nothing in this subchapter (i.e. loss of citizenship) shall be applied in contravention of the provisions of any treaty or convention to which the U.S. is a party and which has been ratified by the Senate . . .". Little research was done in this area and research might prove helpful.