

Golden Gate University Law Review

Volume 16

Issue 1 *Ninth Circuit Survey*

Article 12

January 1986

Immigration Law

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Recommended Citation

Maureen A. Monaghan and Jean Vieth, *Immigration Law*, 16 Golden Gate U. L. Rev. (1986).
<http://digitalcommons.law.ggu.edu/ggulrev/vol16/iss1/12>

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IMMIGRATION LAW

ARGUETA v. IMMIGRATION AND NATURALIZATION SERVICE: “NEUTRALITY” AS A POLITICAL OPINION

I. INTRODUCTION

In *Argueta v. Immigration and Naturalization Service*,¹ the Ninth Circuit reaffirmed that, under the Immigration and Nationality Act,² the “well-founded fear of persecution” standard of proof required for asylum was more generous than the “clear probability of persecution” standard required for withholding of deportation.³ The court further held that under either standard, the Board of Immigration Appeals (BIA) was incorrect in finding that because Argueta had not demonstrated allegiance to a particular political faction he had not established a fear of politically motivated persecution.⁴

II. FACTS

Argueta, a citizen of El Salvador, was threatened in his home by four members of the “Squadron of Death” who accused him of being a member of the Frente Popular de Liberación (FPL),⁵ a guerrilla organization.⁶ The squadron members stated

1. 759 F.2d 1395 (9th Cir. 1985) (per Hug, J.; the other panel members were Tuttle, J., Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation, and Poole, J., dissenting).

2. Immigration and Nationality Act, Pub. L. No. 414, Ch. 477, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

3. 759 F.2d at 1396-97.

4. *Id.* at 1397.

5. Translated from Spanish, this stands for “The Popular Front for Liberation.”

6. *Id.* at 1395-96. The “Squadron of Death” was identified as a rightist group in El Salvador whom Argueta testified he could identify because they drove red Land Rovers.

that if he did not leave the country he would disappear because he was the "next one."⁷ The following day, a close friend of Argueta was taken from his home by the same men who had previously threatened Argueta.⁸ Later, Argueta discovered his friend's tortured body.⁹ Argueta left El Salvador the next day and entered the United States on approximately September 26, 1982.¹⁰ On September 28, 1982, deportation proceedings were instituted against him.¹¹

At the deportation hearing, Argueta conceded his deportability, but filed an application for political asylum and withholding of deportation.¹² In his application, Argueta argued that if he were returned to El Salvador, he would be persecuted because of his political opinion.¹³ The Immigration Court denied the petitions because it found that his testimony lacked credibility.¹⁴ Argueta appealed to the BIA alleging that the burden of proof had been met.¹⁵ The BIA affirmed the Immigration Judge's decision and held that, even assuming that the testi-

Id.

7. *Id.* at 1395.

8. *Id.* at 1396.

9. *Id.*

10. *Id.* at 1395-96.

11. *Id.* at 1395.

12. *Id.* Under 8 C.F.R. § 208.3(b), asylum requests made after the institution of deportation proceedings are also treated as requests for withholding of deportation. 8 C.F.R. § 208.3(b)(1985). A prerequisite under the Immigration and Nationality Act for both asylum and withholding is that the petitioner be physically present in the United States or at a "land border or port of entry." INA §§ 208(a), 243(h), 8 U.S.C. §§ 1158(a), 1253(h)(1982).

13. 759 F.2d at 1397.

14. *Id.* at 1396-97. The Ninth Circuit cited errors in the Immigration Judge's findings. The Judge stated that Argueta was not specific in regard to the source of the danger. The court found that Argueta had testified that he could in fact identify the individuals who had killed his brother-in-law as the death squad because they drove red Land Rovers. *Id.* Argueta admitted that he could not identify them individually, but believed they were the same people who had threatened him the day before his brother-in-law was killed. *Id.* The Judge found that Argueta had been threatened the day *after* his brother-in-law was killed. The court stated that Argueta had in fact testified that he was threatened on the day before the killing. *Id.* The Judge stated that Argueta had testified that the killing of his brother-in-law had not affected him. The court found that Argueta testified that he believed the death would affect him because on the day before the killing, he had been threatened and accused of being a member of the FPL. *Id.* The Judge found that Argueta had testified that the individuals who threatened him merely accused him of being in "a guerrilla organization." In fact, the court found Argueta's testimony was that he was accused of being a member of the FPL. *Id.*

15. *Id.* at 1396. The decisions of the Immigration Judge in deportation cases are first appealed to the Board of Immigration Appeals. 8 C.F.R. § 3.1(b) (1985).

mony was credible, he had not established either a clear probability or a well-founded fear of persecution sufficient to be entitled to relief from deportation.¹⁶ Argueta appealed the Board's order to the Ninth Circuit for review of that decision.¹⁷

III. BACKGROUND

A. THE IMMIGRATION AND NATIONALITY ACT

Congress's attempt to organize the various laws relating to immigration, naturalization and nationality under one comprehensive statute was effectuated by its adoption of the Immigration and Nationality Act in 1952.¹⁸ Inter alia, that act had the effect of eliminating race as a bar to immigration, preventing separation of families, introducing a system of selective immigration which gave preference to skilled aliens needed in this country, broadening the grounds of exclusion, and safeguarding judicial review.¹⁹ This new statutory organization did not see any major change until 1980.

In 1980, the Refugee Act²⁰ was promulgated to amend the Immigration and Nationality Act. This amendment came about in order to put the United States in conformance with the United Nations Protocol Relating to the Status of Refugees.²¹ The Protocol, a multilateral treaty to which the United States

16. 759 F.2d at 1396.

17. *Id.* Appeal from a BIA decision may be reviewed by the Attorney General. 8 C.F.R. § 3.1(h) (1985). A petition for review of the BIA's decision shall be made to the judicial circuit in which the administrative proceedings were conducted. 8 U.S.C. 1105(a)(2) (1982).

18. Pub. L. No. 414, Ch. 477, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

19. H. REP. No. 1365, 82nd Cong., 2d Sess. reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1677-79.

20. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

21. The United Nations Protocol Relating to the Status of Refugees bound its signatories to comply with Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. 189 U.N.T.S. 150. The Convention accorded protection to those who had become refugees as a result of events occurring prior to 1951. The United States was not a party to the Convention but became bound by those ideals upon signing the Protocol. In essence, the Protocol only removed the 1951 deadline and adopted the Convention *de novo*. See S. REP. No. 256, 96th Cong., 2d Sess. 1-4, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141-44; H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19, 20, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 160, 161. See also Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1126 n.5 (1980) for further history of the Protocol and Convention.

acceded in 1968, provided that equal status be accorded to all refugees.²²

The congressional policy underlying the Refugee Act of 1980 was to respond to the urgent needs of persons subject to persecution in their homelands, to provide a procedure for the admission to this country of refugees, and to establish provisions for the effective resettlement of those admitted.²³ The Refugee Act made it possible for those aliens present in the United States to be eligible for refugee status if they feared persecution in their native country on account of race, religion, nationality, political opinion, or membership in a particular social group.²⁴

Refugee status is a prerequisite to eligibility for asylum relief from deportation under the Immigration and Nationality Act (INA) section 208(a).²⁵ After deportation has been initiated, the essential difference between asylum and withholding of deportation under INA section 243(h) is the burden of proof requirements. If a refugee demonstrates a well-founded fear of persecution, asylum may be granted at the discretion of the Attorney General.²⁶ On the other hand, withholding of deportation is mandatory if the petitioner can show a clear probability of persecution based on one of the five grounds enumerated above.²⁷

22. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 2684968. *See also* Immigration and Naturalization Service v. Stevic, 104 S.Ct. 2489, 2499 n.20 (1984).

23. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

24. *Id.*

25. Section 101(a)(42)(A) of the Immigration and Nationality Act reads in part:

'[R]efugee' means any person who is outside any country of such person's nationality . . . and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion

8 U.S.C. § 1101(a)(42)(A) (1982).

26. Immigration and Nationality Act § 208(a). In pertinent part, section 208(a) of the INA states that the Attorney General has discretion to grant asylum if the petitioner establishes that he is a refugee within the meaning of § 101(a)(42)(A). *Id.*; 8 U.S.C. section 1158(a) (1982).

27. Immigration and Nationality Act section 243(h) states in part:

The Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. (emphasis added).

B. CASE LAW

These two standards of proof were further clarified by the Supreme Court in *Immigration and Naturalization Service v. Stevic*.²⁸ Stevic argued to the Court that he was entitled to withholding of deportation under INA section 243(h) upon establishing a well-founded fear of persecution.²⁹ The Supreme Court disagreed and held that the well-founded fear standard was applicable to asylum relief but not to withholding of deportation claims.³⁰ The Court stated that the "clear probability" standard required under INA section 243(h), was satisfied if it were more likely than not that the alien would be persecuted upon return to the subject country.³¹

In *Stevic*, the Supreme Court did not offer a definition for the term "well-founded fear of persecution" but it did state that "For purposes of our analysis, we may assume, as the Court of Appeals concluded, that the well-founded-fear standard is more generous than the clear-probability-of-persecution standard"³² Since the *Stevic* decision in 1984, several circuits, including the Ninth Circuit, have interpreted the well-founded fear of persecution standard as being more liberal than the clear probability standard.³³

8 U.S.C. § 1253(h)(1) (1982).

28. 104 S.Ct. 2489 (1984). Stevic, a Yugoslavian, became active in an anti-Communist organization in the United States. His father-in-law had been jailed in Yugoslavia because of membership in the same organization. Stevic, fearing imprisonment were he forced to return home, sought withholding of deportation relief under INA section 243(h). *Id.* at 2490-91.

29. *Id.* at 2497.

30. *Id.* at 2497 n.18.

31. *Id.* at 2498.

32. *Id.*

33. See, e.g., *Young v. United States Department of Justice*, 759 F.2d 450, 456 (5th Cir. 1985); *Youkhanna v. Immigration and Naturalization Service*, 749 F.2d 360, 362 (6th Cir. 1984); *Dally v. Immigration and Naturalization Service*, 744 F.2d 1191, 1196 n.6 (6th Cir. 1984); *Carvajal-Munoz v. Immigration and Naturalization Service*, 743 F.2d 562, 575 (7th Cir. 1984). In *Young*, the Fifth Circuit found the clear probability standard to be strict and the well-founded fear standard to be possibly more liberal. 759 F.2d at 456.

The Sixth Circuit court in *Dally*, stated that, like *Stevic*, though not sub justice, the petitioners requests for asylum made after the institution of deportation proceedings would be judged under the clear probability standard applicable to requests pursuant to section 243(h). 744 F.2d at 1196 n.6. The court's reasoning for this interpretation was based on 8 C.F.R. § 208.3(b) which states, in part, that requests for asylum made after the institution of deportation proceedings shall also be considered as requests for withholding of deportation pursuant to section 243(h) of the INA. (See *supra* note 11.) This

In *Zepeda-Melendez v. Immigration and Naturalization Service*,³⁴ the Ninth Circuit recognized that the petitioner's home in El Salvador was in a strategic location for the guerrillas and government troops, both of which repeatedly used the home's facilities and requested that it be used to store munitions.³⁵ Before munitions had been brought to his house, Zepeda left El Salvador and sought asylum in the United States.³⁶ He asserted that his position would be grounds for persecution if he were forced to return to El Salvador.³⁷ The court stated that even if Zepeda faced danger because of his neutrality, this position was not dissimilar from that of any other Salvadoran. The court held that these facts were not sufficient to support a claim of mandatory withholding of deportation.³⁸

The Ninth Circuit was soon faced with the question of deciding whether neutrality was a political opinion. In *Bolanos-Hernandez v. Immigration and Naturalization Service*,³⁹ the petitioner, an El Salvadoran, had been in the army, a member of

is an interesting interpretation in light of *Stevic* which stated in a footnote that 8 C.F.R. § 208.3(b) "simply does not speak to the burden of proof issue; rather, it merely eliminates the need for filing a separate request for section 243(h) relief if a section 208(a) claim has been made." 104 S.Ct. at 2497 n.18.

The Sixth Circuit, in *Youkhanna*, later held that the well-founded fear standard required less than the clear probability standard applied to section 243(h) relief. 749 F.2d at 362. It is not clear from the facts why *Youkhanna* was decided differently than the dicta in *Dally* indicated the Sixth Circuit might decide. The Sixth Circuit either adopted the Supreme Court's interpretation of 8 C.F.R. § 208.3(b) or it has not yet definitively decided the issue.

The Seventh Circuit, in *Carvajal-Munoz*, stated that establishing an entitlement to withholding of deportation should require a greater evidentiary burden than establishing discretionary relief under INA section 208(a). 743 F.2d at 575. The court felt that "clear probability" was a heavier burden than that required under a well-founded fear of persecution standard. *Id.* at 575-76.

But see *Sankar v. Immigration and Naturalization Service*, 757 F.2d 532, 533 (3rd Cir. 1985). In *Sankar*, the Third Circuit held that the BIA did not abuse its discretion when it equated a well-founded fear with a clear probability of persecution because the Third Circuit had unequivocally done so in the past. *Id.* at 533. The court held that *Stevic* had not defined the term "well-founded fear of persecution" and thus found that *Stevic* did not overrule the Third Circuit's earlier precedents. 757 F.2d at 533 (citing *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983), *cert. denied*, 104 S.Ct. 3553 (1984)).

34. 741 F.2d 285 (9th Cir. 1984).

35. *Id.* at 287.

36. *Id.*

37. *Id.*

38. *Id.* at 290.

39. 767 F.2d 1277 (9th Cir. 1984).

a right wing political party, and a member of a civilian police squad which acted for the government.⁴⁰ At his deportation hearing, Bolanos testified that the guerrillas believed that his knowledge and experience would be useful in their plans to infiltrate the government.⁴¹ Upon his refusal to join the guerrillas, Bolanos was told that if he did not leave the country he would be killed. Shortly thereafter, he fled the country.⁴² The court found that his actions indicated that Bolanos consciously chose to remain neutral.⁴³ The Ninth Circuit held that Bolanos's choice to remain neutral was no less a political decision than a choice to affiliate with a particular political faction.⁴⁴ The court stated that the petitioner's underlying reasons for a political choice were of no significance for purposes of sections 208(a) and 243(h) of the Immigration and Nationality Act and the government could not inquire into them.⁴⁵ Since Bolanos was aware of the contending political forces and affirmatively chose not to join any faction, his choice was a political one.⁴⁶

Further, the court decided that the assumption in *Stevic* was correct and held the well-founded fear standard to be "more generous" than the clear probability test.⁴⁷ Under these circumstances, the Ninth Circuit found that Bolanos had shown a clear probability that he would be subject to persecution if he were returned to El Salvador.⁴⁸

IV. THE COURT'S ANALYSIS

A. MAJORITY

The court reviewed the findings of fact made by the BIA using the substantial evidence test as required under *Bolanos-Hernandez v. Immigration and Naturalization Service* and *Zepeda-Melendez v. Immigration and Naturalization Service*.⁴⁹

40. *Id.* at 1280.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1286.

45. *Id.* at 1287.

46. *Id.* at 1286-87.

47. *Id.* at 1282.

48. *Id.* at 1288.

49. 759 F.2d at 1397 (citing *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984)). Factual findings under]] 243(h) are subject to review under the substantial evidence test.

It reaffirmed the earlier ruling in *Bolanos* that the well-founded fear of persecution standard is more generous than the clear probability of persecution standard.⁵⁰

The court analogized the facts in *Argueta* to the facts in *Bolanos* and relied on that case's holding to determine that *Argueta* had a well-founded fear or a clear probability of persecution.⁵¹ The court pointed out that the facts which established withholding or asylum relief from deportation for *Bolanos* existed in *Argueta*'s case as well.⁵² Both petitioners had chosen to remain politically neutral even after being threatened with death.⁵³ Both petitioners knew that the individuals who had threatened them had killed their friends or relatives shortly before or after petitioners' own lives were threatened.⁵⁴ This factor demonstrated to the courts that those who made the threats to the petitioners had the will and ability to carry them out, thus making the petitioners' fears of persecution well-founded.⁵⁵

Next, the court reversed the BIA's finding that, even assuming that *Argueta*'s evidence was credible, it was insufficient to establish either a well-founded fear or a clear probability of persecution.⁵⁶ Assuming credibility, as the BIA had, the Ninth Cir-

50. 759 F.2d at 1396-97. This holding was later quantified in *Cardoza-Fonseca v. United States Immigration and Naturalization Service*, 767 F.2d 1448 (9th Cir. 1985). Having already determined in *Argueta* and *Bolanos* that the standards for withholding of deportation and asylum relief were not the same, the court went further to clarify the distinction:

There is a significant practical consequence to the fact that different analyses are required under the two standards. The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test, the likelihood of persecution need not be greater than fifty percent.

767 F.2d at 1452-53.

51. 759 F.2d at 1397.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The BIA found it credible that *Argueta* had been threatened for his alleged involvement in the guerrilla organization and that the next day his friend had been tortured and murdered by the same group of individuals whom he could identify as the "death squad." *Id.* at 1395-96.

cuit found that Argueta had established a clear probability and/or a well-founded fear of persecution.⁵⁷

The court found that Argueta's testimony did establish a political opinion even though he was not aligned with either political faction in El Salvador.⁵⁸ He had affirmatively chosen to remain politically neutral, which constituted an expression of political opinion under sections 208(a) and 243(h) of the Immigration and Nationality Act, as interpreted by *Bolanos*.⁵⁹

The majority held that their review was limited solely to the credibility findings made by the BIA, not to findings made by the Immigration Judge.⁶⁰ The BIA had chosen to accept all the evidence offered by Argueta as true, disregarding the Immigration Judge's findings to the contrary.⁶¹ Therefore the BIA could not deny Argueta's petitions on the ground that he had failed to meet his burden of proof.⁶² The case was remanded to the BIA to make credibility findings necessary to determine Argueta's entitlement to withholding or asylum relief.⁶³

B. DISSENT

In dissent, Judge Poole stated that the majority's conclusion was erroneous because it had adopted findings of fact different

57. *Id.* at 1397.

58. *Id.*

59. *Id.* In *Hernandez-Ortiz v. Immigration and Naturalization Service*, 777 F.2d 509 (9th Cir. 1985), decided after *Argueta*, the court held that, for persecution on account of political opinion, an alien's neutral or partisan political views are irrelevant. *Id.* at 517. The petitioner must establish a *prima facie* case of potential persecution because of the government's belief about the alien's views or loyalties. *Id.* The court stressed that the victim need not possess any political opinion. *Id.* (citing *Argueta*, 759 F.2d at 1397).

In *Argueta*, the potential persecutors were members of a right-wing political group, not the government. 759 F.2d at 1396. This discrepancy would be distinguishable but for the fact that persecution by non-government groups is recognized as persecution for purposes of INA §§ 208(a) and 243(h) where the government tolerates or is unable to control that group. *McMullan v. Immigration and Naturalization Service*, 608 F.2d 1312, 1315 (9th Cir. 1981). See also United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* D65 (1979) (regarding agents of persecution).

60. 759 F.2d at 1398 n.4.

61. *Id.*

62. *Id.* at 1397.

63. *Id.* at 1397-98.

than those found by the Immigration Judge.⁶⁴ In so doing, the majority controverted *Zepeda-Melendez v. Immigration and Naturalization Service*,⁶⁵ where the court held that the Immigration Judge's findings of fact must be upheld if supported by substantial evidence.⁶⁶ The dissent stressed that the Immigration Judge's findings must be given deference here as those conclusions were supported by the record.⁶⁷

In a footnote, the majority defended their holding.⁶⁸ They explained that the court's review was limited to the BIA's credibility findings.⁶⁹ Because the BIA had accepted Argueta's evidence as true, despite the Immigration Judge's findings, it was then erroneous for the BIA to conclude that Argueta had not met his burden of proof.⁷⁰

The dissent further argued that the facts in this case were identical to those in *Zepeda*. There, the petitioner had alleged that his lack of commitment to either political faction constituted a valid basis for a well-founded fear of persecution.⁷¹ The Ninth Circuit held that this did not constitute sufficient evidence to demonstrate that Zepeda could expect to be persecuted if returned to El Salvador.⁷² Judge Poole urged that the holding in *Argueta* clearly violated this precedent.⁷³

V. CRITIQUE

It is noteworthy that the *Argueta* dissent addressed the holding in *Zepeda-Melendez v. Immigration and Naturalization Service*,⁷⁴ but that it was not discussed in the majority opinion.⁷⁵ In both cases the petitioners asserted that their neu-

64. *Id.* at 1398. The majority had taken Argueta's evidence as true (as the BIA had) whereas the Immigration Judge had found that Argueta's evidence lacked credibility.

65. 741 F.2d at 289.

66. *Id.*

67. 759 F.2d at 1398.

68. *Id.* at 1398 n.4.

69. *Id.*

70. *Id.* at 1398.

71. 741 F.2d at 289-90.

72. *Id.* at 290.

73. 759 F.2d at 1398.

74. 741 F.2d 285 (9th Cir. 1985).

75. 759 F.2d at 1395-98.

trality attracted the attention of political partisans, giving rise to a fear of political persecution.⁷⁶ The *Argueta* dissent neglected to note that only Argueta provided evidence that his life in particular had been threatened because of his choice to remain neutral.⁷⁷ The majority found that the threat had been made by those who had the ability to carry it out, and thus that Argueta had substantiated his fear of persecution with articulable evidence.⁷⁸ The clear distinction between the facts in *Zepeda* and those in *Argueta* is that Zepeda had not been threatened by either of his potential persecutors and yet asserted that he would be subject to persecution by both sides if forced to return to El Salvador.⁷⁹

An analysis of the facts and law of *Argueta* and *Zepeda* leads to the conclusion that credible, individualized evidence of incidents of direct threats of persecution, made by those with the will and ability to carry them out, can lead to a finding that the petitioner has a well-founded fear, or that there is a clear probability, of persecution. *Argueta* suggests that holding a neutral political opinion when faced with threats of violence can be a basis for the fear of persecution.

In this case, evidence that a member of Argueta's family had been physically persecuted was significant to the court.⁸⁰ By itself, this would not necessarily be outcome determinative. Evidence of fear of persecution, considered cumulatively with evidence of a number of threats or acts of violence against an alien's family members, is weighed heavily to support a claim that the alien's life or freedom would be endangered in his home country.⁸¹

76. *Id.* at 1397; *Zepeda*, 741 F.2d at 289-90.

77. 759 F.2d at 1398.

78. *Id.* at 1397.

79. *See Zepeda*, 741 F.2d at 287. Recent cases have suggested that evidence of a threat to the petitioner may support a claim of potential persecution. *See, e.g., Ananeh-Firempong v. Immigration and Naturalization Service*, 766 F.2d 621, 627 (1st Cir. 1985) (alien seeking INA § 243(h) relief required to show a real threat of individual persecution) and *Espinoza-Martinez v. Immigration and Naturalization Service*, 754 F.2d 1536, 1540 n.1 (9th Cir. 1985) (expressly distinguishing *Bolanos* because no threat was made to petitioner).

80. 759 F.2d at 1397.

81. *Hernandez-Ortiz v. Immigration and Naturalization Service*, 777 F.2d 509, 515 (9th Cir. 1985). *See also* United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶53 (1979) (cumulative

United States political philosophies regarding a petitioner's country of origin are not an explicit consideration when granting asylum. The Refugee Act of 1980 removed language from the statutes which had indicated the United States' willingness to protect aliens fleeing from a Communist-dominated country.⁸² Though the current statutes do not make reference to the United States' political ideologies, the number of asylum cases granted from El Salvador, as opposed to Poland or Iran, may reflect the present as well as past political policies of the government.⁸³ If generally adopted, the *Argueta* decision to recognize the petitioner's neutrality as a political opinion could allow more successful asylum claims from volatile countries whose governments are supported by the United States.

VI. CONCLUSION

The Ninth Circuit's interpretation of the meaning of political persecution within the Immigration and Nationality Act is without precedent in other circuits. In *Zepeda-Melendez v. Immigration and Naturalization Service*, the court seemed to reject the theory that maintaining a neutral political opinion was evidentiary grounds to demonstrate a well-founded fear or a clear probability of persecution. The court, in deciding *Argueta*, has now indicated that such a theory is viable. It appears that political neutrality itself cannot open the doors to deportation relief but must be substantiated by credible evidence demonstrating a direct and personal threat of persecution.

In light of the more recent Ninth Circuit holding in *Hernandez-Ortiz v. Immigration and Naturalization Service*, which expanded the term "political opinion" to mean the political opinion the government believes the petitioner holds, neutrality may be of only minor importance.⁸⁴ The finding of neutrality as a political opinion is clearly a view worth expanding in circuits

grounds for well-founded fear of persecution possible).

82. B. HING, HANDLING IMMIGRATION CASES 224 (1985).

83. From El Salvador, 129 petitioners have been granted and 2,299 have been denied asylum in the INS fiscal year 1985 to September 1985. From Poland, 549 were granted and 737 were denied asylum. The cases from Iran are more compelling, 4,087 petitions granted and 2,400 denied asylum. Immigration and Naturalization Service: Asylum Cases Filed With District Directors, Fiscal Year 1985, to September 1985.

84. 777 F.2d at 517.

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which have yet to reach such an interpretation or are more conservative than the Ninth Circuit in their approach to immigration cases.

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RICHARDS v. SECRETARY OF STATE: SPECIFIC INTENT AS AN INTEGRAL PART OF AN EXPATRIATING ACT

I. INTRODUCTION

In *Richards v. Secretary of State*,¹ the Ninth Circuit held that a United States national had expatriated himself when he was naturalized in Canada and took an oath of allegiance in which he explicitly renounced his United States citizenship.²

II. FACTS

Appellant William Anthony Richards was born a United States citizen in 1938 at San Luis Obispo, California. In 1965, he moved to Canada where he established residence. He taught school until 1969, at which time he applied for a job with the Boy Scouts of Canada. The Boy Scouts required that employees either be Canadian citizens or have declared an intention of acquiring Canadian citizenship upon becoming eligible. Richards applied for Canadian citizenship and it was granted on February 23, 1971.³

1. 752 F.2d 1413 (9th Cir. 1985) (per Reinhardt, J.; the other panel members were Hug, J., and Panner, D.J., United States District Judge for the District of Oregon, sitting by designation).

2. *Id.* at 1423. The court affirmed the holding of the district court that appellant Richards was not a citizen of the United States. *Id.* The opinion of the district court is unpublished. *Richards v. Secretary of State*, No. CV-4150-TJH(G) (C.D. Cal. Sept. 9, 1982) (per Hatter, J.). See also 8 U.S.C. § 1481(a) which provides, in relevant part, that:

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

8 U.S.C. § 1481(a) (1982).

3. 752 F.2d at 1416. On February 23, 1971, Richards signed the following Declaration of Renunciation and Oath of Allegiance:

I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom I may at this time be a subject or

The following year, Richards traveled to California on a Canadian passport and registered for graduate study as a foreign student. In 1973 he returned to Canada where he taught school until 1975, afterwards taking up a career as a freelance writer and trail guide. He married a Canadian citizen in 1976. United States officials first learned of Richards's naturalization in Canada later that year, when he went to the United States Consulate to obtain visas for his wife and her children. Upon inquiry, Canada confirmed that Richards had been naturalized. The Consulate prepared a Certificate of Loss of Nationality and forwarded it to the United States Department of State for approval. The State Department relayed instructions concerning certain preliminary procedures, but when the Consulate was unable to locate Richards in order to comply with these instructions, his case was retired to inactive status.

In December of 1977, Richards visited the Consulate to inquire about his citizenship status. Basing its decision upon questionnaires which Richards completed at that time, and on an interview he had with a consular official, the Consulate notified the State Department that he had lost his United States citizenship.⁴ On June 22, 1978, the State Department issued the Certificate of Loss of Nationality and delivered it to Richards, who was then in California.

Richards appealed his loss of citizenship to the State Department's Board of Review. The Board concluded he had renounced his United States citizenship.⁵ Richards then filed suit

citizen. I swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen so help me God.

Id.

4. *Id.* at 1417. The opinion does not relate the specific basis for the Consulate's decision. A questionnaire which Richards completed and signed under oath at the Consulate in 1976 formed part of the record of the de novo trial in district court. That court reached the same conclusion as the State Department. An answer to the questionnaire states: "At the time I was an employee of the Boy Scouts of Canada and felt I should become a citizen of Canada. I did not [sic] want to relinquish my U.S. citizenship but as part of the Canadian citizenship requirements did so." *Id.* at 1422.

5. *Id.* at 1417. The three issues Richards raised in this appeal were raised again in the suit he subsequently instituted in district court. The Board declined to consider Richards's constitutional arguments, for lack of jurisdiction, and it rejected his other arguments. *Id.*

in district court pursuant to 8 U.S.C. § 1503(a),⁶ seeking declarations that the procedures used by the State Department in issuing the Certificate violated the due process, equal protection, and bill of attainder clauses of the Constitution, and that he was a United States citizen. The lower court declined to reach the constitutional claims, finding that a trial de novo to determine Richards' citizenship status would provide him full relief.⁷ As a result of that trial, the court concluded that Richards had lost his United States citizenship.⁸ Richards appealed to the Ninth Circuit.

III. BACKGROUND

Changes in theory and application have significantly altered United States expatriation law within the past few decades.⁹ In 1958, the Supreme Court held in *Perez v. Brownell*¹⁰ that authority to strip a United States citizen of that citizenship was encompassed in the implied congressional power to conduct the nation's foreign affairs.¹¹ Eleven years later, in *Afroyim v.*

6. Section 1503(a), in relevant part, confers a cause of action upon a person within the United States, who has been denied a right or privilege of United States citizenship by a United States government department or agency on the ground that he is not a national of the United States. Such person may bring a suit against the head of the government department or agency for a declaratory judgment. 8 U.S.C. § 1503(a) (1982).

7. 752 F.2d at 1417 (referring to *Richards v. Secretary of State*, No. CV-4150-TJH(G) (C.D. Cal. Sept. 9, 1982)).

8. *Id.* Finding that Richards had voluntarily performed the expatriating acts, the district court stated: "[P]laintiff would have preferred to retain American citizenship, and in his mind hoped to do so, but elected to sign the Canadian naturalization documents and accept the legal consequences thereof rather than risk loss of his job or career advancement." The court also found that Richards's intent to renounce his U.S. citizenship was "established by his knowing and voluntary taking of the oath of allegiance to a foreign sovereign which included an explicit renunciation of his United States citizenship." *Id.* at 1421 (quoting *Richards v. Secretary of State*, No. CV-4150-TJH(G) (C.D. Cal. Sept. 9, 1982)).

9. For discussions of the historical development of expatriation law in the United States prior to 1958, see generally, Duvall, *Expatriation Under United States Law*, *Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 411-20 (1970); Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L. J. 315, 317-26 (1965).

10. 356 U.S. 44 (1958).

11. *Id.* at 62. In *Perez*, the Court, voting 5-4, upheld the constitutionality of section 401(e) of the Nationality Act of 1940, which provided for expatriation of a citizen who voted in a foreign political election. The Court expressly rejected the notion that a person must "intend or desire" to lose his citizenship for that loss to occur. *Id.* at 61. Section 401 of the Nationality Act, and subsequent amendments, are subsumed in 8 U.S.C. § 1481 (1982).

Rusk,¹² the Court overruled *Perez*, by holding that a citizen has a constitutional right to retain United States citizenship unless he voluntarily relinquishes it.¹³ The Court grounded its opinion in the fourteenth amendment, which, it said, guarantees a citizenship unassailable by any branch of government.¹⁴

In 1979, twelve years after *Afroyim*, *Vance v. Terrazas*¹⁵ expanded upon the concept of voluntary relinquishment.¹⁶ The *Terrazas* Court held that loss of citizenship occurs when a citizen, with intent to renounce, voluntarily performs a statutory expatriating act.¹⁷ The Court clarified the scope of the prosecution's burden of proof in expatriation proceedings.¹⁸ It was not enough, the Court elaborated, for the prosecution to show that a person has performed one of the congressionally designated expatriating acts. To meet its burden of proof, the prosecution must also establish expatriative intent.¹⁹ The *Terrazas* Court next examined and resolved the confusion surrounding the proper evidentiary mechanisms in expatriation proceedings.

12. 387 U.S. 253 (1967).

13. *Id.* at 268. *Afroyim* posed the question of whether, consistently with the fourteenth amendment, Congress could enact a law which stripped one of United States citizenship, though that citizenship had never been voluntarily renounced or given up. *Id.* at 256. The Court, in a 5-4 decision, found section 401(e) of the Nationality Act of 1940 constitutionally infirm. The Court stated: "[I]n our country the people are sovereign and the government cannot sever its relationship to the people by taking away their citizenship." *Id.* at 257. See also 42 Op. Att'y Gen. 397 (1969) (interpreting *Afroyim*).

14. 387 U.S. at 262.

15. 444 U.S. 252 (1979), *reh'g denied*, 445 U.S. 920 (1980).

16. The Court's consideration of section 1481 addressed two issues. The first was whether, under section 1481(a)(2), in establishing loss of citizenship by the taking of an oath of allegiance to a foreign state, the prosecution must prove an intent to surrender United States citizenship. The second issue concerned the standard of proof and the statutory presumption contained in section 1481(c). Specifically at issue was whether Congress had acted within its constitutional powers by legislating with respect to expatriation proceedings. 444 U.S. at 255.

17. 444 U.S. at 261. Section 1481(a) lists seven expatriating acts. In addition to obtaining foreign naturalization and taking an oath of allegiance to a foreign state, see *supra* note 2, these acts are: serving in the armed services of a foreign state, serving in the government of a foreign state if it requires either naturalization or an oath of allegiance, formally renouncing United States citizenship before a United States diplomatic or consular official in a foreign state, making a formal renunciation of United States citizenship in the United States during a time of war, or committing treason against the United States. 8 U.S.C. § 1481(a) (1982).

18. Section 1481(c) places the burden of proof upon the person or party alleging the loss of citizenship. 8 U.S.C. § 1481(a) (1982).

19. 444 U.S. at 268.

In the 1961 amendment of 8 U.S.C. § 1481,²⁰ Congress had mandated a preponderance of the evidence as the requisite standard of proof.²¹ The Court declared that this standard was constitutionally valid.²² It stated that a 1958 Supreme Court decision, *Nishikawa v. Dulles*,²³ which had required proof by clear and convincing evidence,²⁴ was not constitutionally grounded.²⁵

The 1961 amendment had also created a statutory presumption that a statutory expatriating act is performed voluntarily. While the *Terrazas* Court found congressional authority to enact the presumption,²⁶ it clearly stated that the scope of the presumption is limited to the issue of voluntariness. There is no presumption that an expatriating act is performed with the intent to relinquish citizenship.²⁷

The Seventh Circuit interpreted the *Terrazas* precedent in the appeal of that case on remand from the Supreme Court.²⁸ In *Terrazas v. Haig*,²⁹ the Seventh Circuit held that appellant's knowing and understanding taking of an oath of allegiance to Mexico, together with an explicit renunciation of his United States citizenship, was a sufficient finding that he intended to relinquish his citizenship.³⁰ *Richards* is the first expatriation

20. Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, (codified at 8 U.S.C. § 1481(c) (1982)).

21. 444 U.S. at 264-65 & n.8 (citing H.R. REP. No. 1086, 87th Cong., 1st Sess., 40 (1961)).

22. 444 U.S. at 266. The Court held that neither the citizenship clause nor the due process clause of the fifth amendment removed expatriation proceedings from the power to set evidentiary standards traditionally held by Congress. *Id.*

23. 356 U.S. 129 (1958). *Nishikawa* concerned section 401(c) of the Nationality Act of 1940, which called for the expatriation of a United States citizen who served in the armed forces of a foreign country. Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1168-69.

24. The *Nishikawa* Court noted that it was prescribing the evidentiary standard of proof in the absence of congressional guidance. 356 U.S. at 135.

25. 444 U.S. at 266.

26. *Id.* at 267-70. In *Nishikawa*, however, the Court had held that the government must establish that the military service was voluntary. The *Nishikawa* Court noted that this reversed the usual rule of evidence that voluntariness is presumed, and that one alleging the involuntariness of his own act must plead duress as an affirmative defense. 356 U.S. at 139. *But cf. Terrazas*, 444 U.S. at 269 & nn.10-11 (commenting on the much criticized *Nishikawa* opinion).

27. 444 U.S. at 268.

28. 444 U.S. 252 (1979), *reh'g denied*, 445 U.S. 920 (1980), *rev'd and remanded sub nom. Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981).

29. *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981).

30. *Id.* at 288.

case to reach the federal courts since the *Terrazas* opinions.

IV. THE COURT'S ANALYSIS

The Ninth Circuit affirmed the district court's holding that Richards had relinquished his citizenship.³¹ In reaching its decision, the Ninth Circuit reviewed Richards's claims that he had performed the expatriating acts under duress and that he had lacked the intent to expatriate himself.

Richards argued that he sought naturalization in Canada and took the mandatory oath of allegiance because he was coerced to do so for purposes of employment.³² The trial record showed, however, that when he decided to take the job with the Boy Scouts, Richards was and had been continuously employed as a school teacher.³³ He did not contend that he was forced to leave his teaching position.³⁴ Also, Richards was aware of the citizenship requirement for the job with the Boy Scouts of Canada,³⁵ and he did not argue that he had searched for a job which would have permitted him to retain his United States citizenship.³⁶ In addition, at the time he took the position with the Boy Scouts, he was unmarried and showed no evidence of pressing financial obligations.³⁷ The Ninth Circuit concluded that the district court's holding that Richards was not under any economic hardship, was not clearly erroneous.³⁸

The Ninth Circuit determined that the lower court was correct in stating that the Secretary of State must establish that performance of both the expatriating acts and the act or acts demonstrating intent to renounce United States citizenship, was

31. 752 F.2d at 1423.

32. *Id.* at 1419. The court agreed with the premise of Richards's argument that an expatriating act was not voluntary if performed under conditions of economic duress. *Id.* (citing *Stipa v. Dulles*, 233 F.2d 551 (3d Cir. 1956) ("dire economic plight and inability to obtain employment" influenced the alleged expatriate)); *Insogna v. Dulles*, 116 F. Supp. 478 (D.D.C. 1953) (expatriating act performed to obtain money necessary "in order to live").

33. 752 F.2d at 1419.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1419-20.

38. *Id.* at 1419.

voluntary.³⁹ It found, however, that the lower court erred in declaring that the statutory presumption of voluntariness applies to both the expatriating acts and to those acts allegedly demonstrating the actor's specific intent to renounce United States citizenship.⁴⁰ It stated that the statutory presumption of voluntariness cannot apply to acts demonstrating expatriative intent because the Supreme Court, in *Vance v. Terrazas*, expressly held that there is no presumption of specific intent to relinquish citizenship.⁴¹

Nevertheless, the Ninth Circuit determined that the lower court's application of the presumption in *Richards* was not erroneous. The act which the Secretary of State alleged evidenced specific intent to relinquish United States citizenship, the renunciation, was also an *integral part* of each of the expatriating acts, namely the naturalization and the oath of allegiance.⁴² The court reasoned that since the presumption of voluntariness extended to the expatriating acts, the presumption must necessarily extend, in the instant case, to the act indicative of specific intent.⁴³

In reviewing Richards's argument that he lacked the requisite intent to renounce his citizenship because he never desired to give it up, the court explored the concept, enunciated in *Terrazas*, that expatriation turns upon the will of the citizen.⁴⁴ It noted that *Terrazas* did not define the state of mind necessary to relinquish citizenship.⁴⁵ The Ninth Circuit pointed out, how-

39. *Id.* at 1418. The court noted that showing the voluntariness of the act or acts which allegedly indicated specific intent to relinquish citizenship was a necessary part of establishing the element of intent. *Id.*

40. *Id.* at 1418.

41. *Id.* at 1419 (citing *Vance v. Terrazas*, 444 U.S. 252, 268 (1979)).

42. *Id.*

43. *Id.*

44. *Id.* at 1420-21. The *Terrazas* Court held that although the citizen voluntarily performed one of the expatriating acts listed in § 1481(a), for loss of citizenship to occur, the act must be accompanied by an intent to terminate United States citizenship. 444 U.S. at 263. The Ninth Circuit stated this rule in similar words, declaring that a citizen could effectively renounce United States citizenship only by an act which was meant to constitute a renunciation. 752 F.2d at 1420. The Ninth Circuit noted that it was not required to decide whether United States citizenship can effectively be renounced only through the performance of section 1481(a) acts, or whether other, "similarly formal" acts might result in loss of citizenship if performed with that intent. *Id.*

45. 752 F.2d at 1420. *Afroyim* postulated that expatriation requires the citizen's "assent." *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). In *Terrazas*, the Court construed this

ever, that specific intent cannot be proved by merely showing that the actor knew that Congress has designated an act an expatriating one.⁴⁶ In fact, knowledge is irrelevant. A person who does not know that an act is an expatriating one, or even that expatriation is possible, might have the requisite intent.⁴⁷

Despite imprecision in the concept of expatriative intent, the court was clear that intent does not depend upon motivation. A United States citizen's free choice to renounce his citizenship is effective whatever his motivation.⁴⁸ Consequently, the court rejected Richards's theory that renunciation should be given effect only if motivated by a principled, abstract desire to sever allegiance to the United States.⁴⁹ In no other context, the court noted, does the law refuse to give effect to a decision made knowingly and willingly simply because it was also made reluctantly.⁵⁰ The court determined that whenever a citizen has freely and knowingly renounced United States citizenship, his reasons for doing so outweigh his desire to retain that citizenship.⁵¹

"assent" to mean an intent to relinquish citizenship, whether "expressed in words" or "found as a fair inference from proved conduct." 444 U.S. at 260.

46. 752 F.2d at 1421. The *Afroyim* Court clearly stated that Congress has no power to declare that the performance of particular acts results in expatriation. *Afroyim v. Rusk*, 387 U.S. 253, 262-63 (1967). In *Richards*, the Ninth Circuit posed the question whether some acts may be so inherently inconsistent with a desire to retain United States citizenship that voluntary relinquishment may be inferred from them. 752 F.2d at 1420 n.5 (citing *Vance v. Terrazas*, 444 U.S. 252, 261 (1979) and *Perez v. Brownell*, 356 U.S. 44, 62-84 (1958) (Warren, C.J., dissenting)). The Ninth Circuit did not attempt to answer the question but did reconcile it with the *Afroyim* position. If loss of citizenship should occur in such a case, the court said, it would be a function of the inherent nature of the act, and not because Congress had designated it an expatriating one. 752 F.2d at 1420.

47. 752 F.2d at 1420-21.

48. *Id.* at 1420. See also *United States v. Lucienne D'Hotelle de Benitez Rexach*, 558 F.2d 37, 43 (1st Cir. 1977) (expatriation to avoid liability for U.S. taxes); *Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971) (expatriation to avoid military conscription).

49. 752 F.2d at 1421. Richards argued that he lacked the requisite intent to expatriate himself because his sole motivation was career advancement. The court found his contention meritless. Specific intent was not lacking, the court said, merely because one sought to gain an important advantage he could not otherwise obtain. *Id.*

50. *Id.* at 1421. The court reinforced its position: "[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." *Id.* at 1422 (quoting the Preamble to the Act of July 27, 1868, ch. 249, 15 Stat. 223).

51. 752 F.2d at 1421.

The Ninth Circuit agreed with the district court that the voluntary taking of a formal oath which includes an express renunciation of United States citizenship will ordinarily suffice to establish expatriative intent.⁵² Having determined that *Richards* presented no factors to justify a different result,⁵³ the Ninth Circuit affirmed the district court's holding.⁵⁴

V. CRITIQUE

The Ninth Circuit's decision appears to scrupulously apply the precedents of *Afroyim v. Rusk*⁵⁵ and *Vance v. Terrazas*:⁵⁶ expatriation results when a United States citizen voluntarily performs a statutory expatriating act, with the intent to relinquish that citizenship.⁵⁷ Voluntariness is the first issue the Ninth Circuit considered. The court stated that even without the benefit of the presumption that an expatriating act is performed voluntarily, the government had proven the voluntariness of Richards' actions.⁵⁸ This does not appear disputable, given Richards' decision to accept a job which he knew required a change of citizenship, and his failure to show that adversity influenced that decision. Richards's sole claim was that a desire to advance his career had influenced him.⁵⁹

The court next examined the issue of specific intent. Following the district court's reasoning, the Ninth Circuit found the requisite intent⁶⁰ in Richards's express renunciation of United States citizenship, which was included in the oath he signed at the time of his naturalization.⁶¹ This finding is in direct accord with the conclusion of the Seventh Circuit in *Terrazas v. Haig*.⁶²

52. *Id.*

53. *Id.*

54. *Id.* at 1423. The court also declared that "under the circumstances of this case" the district court had not abused its discretion by refusing to consider Richards's constitutional objection. *Id.* at 1422-23.

55. 387 U.S. 253 (1967).

56. 444 U.S. 252 (1979), *reh'g denied*, 445 U.S. 920 (1980).

57. *See supra* text accompanying notes 12-17.

58. 752 F.2d at 1419.

59. *Id.*

60. *Id.* at 1421. The court noted that Richards did not argue that he did not mean what he said when he signed the declaration of renunciation. *Id.*

61. *See supra* note 3.

62. 653 F.2d at 288. The Seventh Circuit recognized that rarely is direct evidence of expatriative intent available. Circumstantial evidence surrounding the commission of a

It should be noted, however, that *Terrazas* was specifically concerned with a dual national's oath of allegiance to a country of which he was a citizen by birth. Although the decisions in *Terrazas* have been criticized⁶³ because of the inequity which may be suffered by dual nationals, who, in swearing allegiance to a foreign sovereign, are merely attempting to preserve that citizenship, *Richards* does not raise this troublesome issue. *Richards* was not a dual national,⁶⁴ and so, given that renunciatory intent may be an integral part of an expatriating act, the case against him is much stronger.

At this point, however, it may be useful to examine an oath of allegiance as an act clearly evincing renunciatory intent. One commentator notes a possible distinction between so-called dramatic oaths, which include an express renunciation of a former allegiance, and dull oaths, which do not.⁶⁵ It can be argued that an oath containing a renunciation would, at the least, put one on notice that citizenship might be lost. However, common sense rebels at categorizing oaths of this sort as being somehow more binding and, therefore, more probative of intent, than those which do not include a renunciation. In fact, some countries do not require that a person seeking naturalization must renounce a former allegiance.⁶⁶ In the United States, by comparison, renunciatory language is a part of the oath of allegiance administered in naturalization proceedings,⁶⁷ and, until recently, this was also

voluntary act of expatriation may establish the requisite intent to relinquish citizenship. *Id.*

63. Dissenting opinions in the Supreme Court decision in *Terrazas* itself questioned the constitutional validity of 8 U.S.C. § 1481(a)(2) since the United States recognizes dual nationality. See 444 U.S. at 272 (Stevens, J., dissenting); *Id.* at 276 (Brennan, J. and Stewart, J., dissenting).

Several commentators have expressed concern at the potentially harsh treatment which *Terrazas* metes dual nationals. See 3 Gordon & Rosenfield, *Immigration Law and Procedure*, § 20.8(b)(4) (1984); Note, *Vance v. Terrazas Expands the Erosion of the Equal Rights of Dual Nationals*, 9 DEN. J. OF INT'L L. & POL'Y 265 (1980); Note, *United States Loss of Citizenship After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. OF INT'L L. & POL. 829, 862 (1984); Note, *Dual Nationality and the Problem of Expatriation*, 16 U.S.F.L. REV. 291, 320 (1982).

64. *Richards*'s United States citizenship derives from the principle of *jus soli*, or right of birth. The United States also recognizes *jus sanguinis*, right of blood. See 8 U.S.C. § 1401 (1982).

65. Note, *Acquisition of Foreign Citizenship: The Limits of Afroyim v. Rusk*, 54 CORNELL L. REV. 624, 631-32 (1969).

66. *Id.*

67. See 8 U.S.C. § 1448 (1982).

true in Canada.⁶⁸

The question raised is whether the outcome of *Richards* would have been different had appellant sought naturalization in a country where a renunciation is not required. The search for an answer requires consideration of the Attorney General's Opinion interpreting *Afroyim*,⁶⁹ which was cited by the *Terrazas* Court.⁷⁰ A meaningful oath, which might be either dull or dramatic, was considered to be highly persuasive of a citizen's intent to transfer or abandon allegiance. Oaths which were not meaningful were distinguished.⁷¹ Moreover, circumstances surrounding the oath-taking, including the citizen's acts and statements at the time, were determinative factors.⁷²

After *Terrazas*, a State Department memorandum addressing the issue of expatriative intent⁷³ stressed that it is intent at the time of the commission of the act which must be ascertained.⁷⁴ Recognizing that no mechanical formula exists for this purpose, the State Department said that a proper determination of intent requires evaluation of the citizen's entire course of conduct.⁷⁵ It suggested that an act accompanied by an express statement of renunciation before foreign government officials was substantial evidence of intent to relinquish United States citizenship.⁷⁶ However, in some cases, a United States citizen might be naturalized in another country or take an oath of allegiance to a foreign nation without intending to renounce his United

68. In 1973 the Canadian Federal Court rejected Canada's renunciatory oath as *ultra vires*. The present oath of naturalization does not include a renunciation of former allegiance. Note, *United States Loss of Citizenship After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. OF INT'L L. & POL. at 864 & nn.247-48 (1984).

69. 42 Op. Att'y Gen. 397 (1969).

70. 444 U.S. at 262-63 & n.6 (citing 42 Op. Att'y Gen. 397 (1969); Department of State, 8 FOREIGN AFFAIRS MANUAL 224.4 at 2 (1970)).

71. See Duvall, *supra* note 9, at 438-43 (distinguishing cases in which an oath was not deemed to be expatriating).

72. 444 U.S. at 262 n.6 (citing Brief for Appellant at 57 n.28).

73. Circular Airgram to all Diplomatic and Consular Posts, Aug. 27, 1980 (reprinted in Fed. Immigration L. Rep. (WSB) ¶ 17,523).

74. Fed. Immigration L. Rep. (WSB) at 12-42. Subsequent acts may be probative of the citizen's state of mind at the time the expatriating act was performed, but may not be used to supply the requisite specific intent. *Id.*

75. *Id.*

76. *Id.* The State Department recognized that absent such a statement proof of intent is more difficult. *Id.*

States citizenship.⁷⁷ The State Department listed factors which were indicative of an intent not to renounce United States citizenship.⁷⁸

In *Richards*, the Ninth Circuit's analysis subscribes to a view of express renunciation similar to that of the State Department. The court concluded that in the absence of mitigating circumstances, the finding that Richards's knowingly signed the oath of renunciation satisfied the burden of proof of the element of intent.⁷⁹ Though the court did not bolster its decision by citing Richards's actions following his naturalization in Canada, the factual statement recounts acts which the State Department memorandum lists as corroborative of intent to relinquish citizenship.⁸⁰ Specifically, Richards travelled to the United States on a Canadian passport and registered for graduate study in California as a foreign student.⁸¹ Thereafter, on his second Canadian passport, he travelled to Ireland.⁸²

There is a danger inherent in conclusively finding expatriatory intent where naturalization or an oath of allegiance requires a renunciation of a previous citizenship. When courts permit evidence of intent to be established by the renunciation

77. *Id.*

78. *Id.* These included: statements, made immediately prior to or contemporaneously with the questioned act, that the actor considers himself to be a United States citizen and has no intention of relinquishing that citizenship; continued compliance with the obligations of United States citizenship such as filing tax returns and registering for military service; use of a United States passport; maintenance of a residence in the United States; voting in the United States; registering children born after the questioned act as United States citizens. *Id.*

Compare factors indicating intent to relinquish United States citizenship: renunciatory statements made in connection with the questioned act; surrender of passport or other documents evidencing United States citizenship to United States or foreign authorities; denial of United States citizenship made in connection with tax returns, financial transactions, applications for employment or admission to educational institutions; exclusive use of a foreign passport; requesting a visa for foreign travel to the United States and/or entering on a foreign passport; failure to register as United States citizens children born subsequent to the questioned act, when children born previously were registered; failure to file tax returns, register for military service, or otherwise comply with the obligations of United States citizenship; membership in a political party or seeking public office in a foreign country; failure to maintain documentation of United States citizenship. *Id.* at 12-42 to 12-43.

79. 752 F.2d at 1421.

80. See *supra* note 78.

81. 752 F.2d at 1412.

82. *Id.*

included in, and therefore an integral part of, these statutory expatriating acts, the application of the presumption of voluntariness is extended. There is a bootstrapping effect: unless complainant successfully contests voluntary performance of the expatriating acts, then not only is the element of intent established, but also the issue of voluntariness regarding it. An action of logic thus aids the government by circumventing part of its burden of proof against the person contesting expatriation. Courts must guard against potential abuse by carefully assessing the facts of each case, and avoid a perfunctory finding that an express renunciation establishes intent.

VI. CONCLUSION

Although the language of the holding is broad, the Ninth Circuit exhibited no inclination to mechanically apply *Vance v. Terrazas* in reaching its decision in *Richards*. The court's careful analysis of the facts dispels fear that *Terrazas* might encourage a hasty finding of expatriation under 8 U.S.C. § 1481(a)(1) and (2) in cases where an express renunciation is an "integral" part of either act.

The issue, not addressed by *Richards*, and which remains to be more fully litigated, concerns dual nationals. Where such persons are required to make an oath of allegiance in order to exercise the rights of an existing citizenship, it is hoped the courts will not be too quick to find expatriative intent.

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IMMIGRATION LAW

SUMMARY

NINTH CIRCUIT DEFINES A MEANINGFUL RIGHT TO COUNSEL: *RIOS-BERRIOS V. INS.*

I. INTRODUCTION

In *Rios-Berrios v. Immigration and Naturalization Service*,¹ the Ninth Circuit held that the fifth amendment due process clause² and the Immigration and Nationality Act³ assured an alien the right to legal counsel of his choice at deportation hearings. The court reversed a Board of Immigration Appeals (BIA) decision which had both affirmed denial of asylum and determined that two continuances were “reasonable and sufficient” to permit petitioner time to obtain counsel.⁴ The Ninth Circuit found that the petitioner had been prejudiced because the continuances together amounted to only two working days.⁵

Rios-Berrios was arrested at San Ysidro, California on January 22, 1983, the day he entered the United States. He was an El Salvadoran native who entered this country without inspection.⁶ When apprehended, he was en route to Los Angeles where

1. 776 F.2d 859 (9th Cir. 1985) (per Chambers J.; other panel members were Tang, J. and Wiggins, J.)

2. U.S. CONST. amend V.

3. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

4. 776 F.2d at 861.

5. *Id.* at 862.

6. *Id.* at 860, 861.

his son and his son's mother resided.⁷ Rios-Berrios was directed to appear at a processing center in Miami, Florida to show cause why he should not be deported.⁸ The order indicated, *inter alia*, that he had the right to be represented by counsel of his own choice.⁹

The petitioner was taken into custody and transported to Florida where, on the following Friday, January 28th, his deportation hearing commenced.¹⁰ At the hearing, petitioner asked for time to find a lawyer and the Immigration Judge continued the hearing for twenty-four hours, admonishing the petitioner that the hearing would go forward with or without counsel.¹¹ The next day, February 1, petitioner told the Immigration Judge that his friend had been in contact with counsel and a bail bondsman but that he had heard nothing from either of them. The Immigration Judge continued the hearing for another twenty-four hours and again admonished Rios-Berrios that the hearing would commence.¹²

At the hearing the following day, the petitioner appeared without counsel and the Immigration Judge did not inquire further into petitioner's desire for counsel.¹³ The Immigration Judge then took evidence and found Rios-Berrios deportable. Not wanting to be returned to El Salvador, Rios-Berrios applied for asylum and the hearing was postponed until his application could be heard.¹⁴

Still without the aid of counsel, petitioner filed a timely application for asylum.¹⁵ He received an advisory opinion letter from the State Department which concluded that the applicant failed to establish a well-founded fear of being persecuted in El

7. *Id.* at 861-62. He had no other friends or relatives in the United States. *Id.*

8. *Id.* at 860.

9. *Id.* Rios-Berrios indicated that he wished to have bail redetermined. He signed a statement to expedite determination of his case by having an immediate hearing and waiving any right to more extended notice. *Id.*

10. *Id.* It is not known if the petitioner was advised at that hearing of the right to counsel of his own choice or of the availability of free legal counsel. *Id.* at 860-61.

11. *Id.* at 861.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

Salvador.¹⁶ The deportation hearing was reconvened on March 17, 1983 where petitioner appeared in pro per; nothing was mentioned regarding his earlier wish to be represented by counsel.¹⁷ The Immigration Judge concluded that Rios-Berrios was not eligible for asylum, but instructed him about the privilege of voluntary departure.¹⁸ Rios-Berrios informed the Immigration Judge that he felt he did not qualify for voluntary departure and chose instead to appeal the determination of deportability.¹⁹

The petitioner was represented by counsel at his appeal to the BIA which affirmed the denial of asylum. The BIA held that two continuances were "reasonable and sufficient" to permit petitioner time to obtain counsel and that his denial of voluntary departure was knowingly and intelligently made.²⁰ Rios-Berrios then appealed this decision to the Ninth Circuit.

II. BACKGROUND

The primary authorities relied upon by the court were the Ninth Circuit's decision in *United States v. Barraza-Leon*, the Supreme Court's decision in *Ungar v. Sarafite*, and sections 292 and 242(b) of the Immigration and Nationality Act.²¹

In *Barraza-Leon*, petitioner claimed that an earlier deportation order was invalid because he had been denied due process at that hearing.²² The court held that the fifth amendment guarantee of due process was applicable to an alien in a deportation hearing.²³

16. *Id.* The State Department advisory opinion letter quoted the language of 8 U.S.C. § 1101(a)(42)(A)(1982) which articulates the meaning of refugee for purposes of qualifying for asylum under 8 U.S.C. § 1158(a)(1982). *Id.* at 861.

17. 776 F.2d at 861.

18. *Id.* In mid-June 1983, the petitioner secured his release from custody on bond. Appearing in the records, during this same time, was the first correspondence to Rios-Berrios's attorney from a governmental official. *Id.*

19. *Id.*

20. *Id.* The BIA relied on 8 C.F.R. § 242.13 (1985) which limits a petitioner to one continuance for the purpose of securing legal representation. 8 C.F.R. § 242.13 (1985).

21. *United States v. Barraza-Leon*, 575 F.2d 218 (9th Cir. 1978); *Ungar v. Sarafite*, 376 U.S. 575 (1964); Immigration and Nationality Act §§ 292, 242(b), 8 U.S.C. §§ 1362, 1252(b) (1982).

22. 575 F.2d at 220.

23. *Id.*

Because a deportation hearing is not a criminal matter, the alien is not entitled to an attorney at government expense under the sixth amendment,²⁴ but both the due process clause and the Act require that the alien be entitled to counsel of his choice at his own expense.²⁵ Section 292 of the Immigration and Nationality Act expressly states that in deportation proceedings, or in appeal proceedings therefrom, the petitioner has the privilege of being represented by counsel of his choice at no expense to the government.²⁶ Section 242(b) of the Act further reiterates this point. Regulations require that the alien be notified of this right to counsel and be given a list of available free legal services at three unique times: when first served with the order to show cause; when served with the warrant; and at the deportation hearing.²⁷

The regulations that accompany the Act state that a continuance to permit the petitioner to obtain counsel "shall not be granted more than once unless sufficient cause for the granting of more time is shown."²⁸ In *Ungar*, petitioner challenged a judge's criminal contempt order. Ungar claimed that the denial of a continuance in that matter deprived him of his constitutional right to engage counsel.²⁹ The Court recognized that the decision to grant or deny continuances was within the sole discretion of the judge and that his decision would not be overturned except upon a showing of clear abuse.³⁰

III. THE COURT'S ANALYSIS

The Ninth Circuit relied on *Ungar* for the proposition that a violation of due process based on denial of a continuance must be found in the circumstances of each case as there is not an articulated test.³¹ Addressing the facts, the court felt that it was an abuse of discretion for the Immigration Judge to allow con-

24. *United States v. Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975).

25. 575 F.2d at 220. See Immigration and Nationality Act §§ 292, 242(b) (1952).

26. 8 U.S.C. § 1362 (1982).

27. 8 C.F.R. §§ 242.1(c), 242.2, 242.16(a). References by the court to Title 8 were to those regulations revised as of January 1, 1983. 776 F.2d at 862.

28. 776 F.2d at 862. See 8 C.F.R. § 242.13.

29. 376 U.S. at 576, 588-89.

30. *Id.* at 589.

31. 776 F.2d at 862 (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

tinuances amounting to only two working days where the petitioner was in custody, spoke only Spanish, had limited education, was not familiar with this country and its legal procedures, and had been removed nearly 3,000 miles from his only friend in this country.³²

The court took note of the BIA's position under 8 C.F.R. § 242.13 which limits the Immigration Judge's discretion to the granting of only one continuance, for the purpose of securing legal counsel, absent a showing of sufficient cause for more time.³³ The court again stressed that the facts presented made "a mockery of the clear statutory mandate that a person in petitioner's position has the right to counsel of his own choice."³⁴

In its appeal to the Ninth Circuit, the Immigration and Naturalization Service contended that the petitioner had waived the right to counsel at the February 2 hearing by not reiterating his request for legal representation.³⁵ Because of the statutory and regulatory right to counsel granted to aliens and the Immigration Judge's immediate taking of evidence at the February 2 hearing, waiver was not found to be a tenable argument for the Immigration and Naturalization Service.³⁶

The court neglected to decide whether denial of the right to counsel, if found to be a due process violation, requires a showing of prejudice to the petitioner.³⁷ The Ninth Circuit did find that, on the facts of this case, absence of counsel was clearly prejudicial to the petitioner on the matters of voluntary departure, asylum, and mandatory withholding of deportation.³⁸

IV. CONCLUSION

The Ninth Circuit has clearly stated that the right to counsel provided for by statute and agency regulation must be given

32. 776 F.2d at 862-63. The court conceded that it was within the discretion of the Attorney General to transport Rios-Berrios from California to Florida under Title 8 of the /code of Federal Regulations, section 1252(c).

33. 776 F.2d at 863.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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full force and effect. The court stressed that the fundamental issue of the right to counsel of one's choice would be carefully scrutinized in the future. When the petitioner is requesting relief predicated upon presentation of legal concepts, the Ninth Circuit has recognized the important role legal counsel plays in protecting an alien's due process rights.

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