DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

February 4, 1981

CASE OF: N[redacted] M[redacted] Y[redacted] L[redacted]

This is an appeal from an administrative holding of the Department of State that appellant, Mrs. N[redacted] M[redacted] Y[redacted] L[redacted], expatriated herself on January 24, 1961, under the provisions of section 349(a)(6) of the Immigration and Nationality Act, by making a formal renunciation of her United States nationality at the American Consulate at Cebu, Philippines. 1/ On October 7, 1970, nine years after the renunciation, the American Embassy at Manila executed, at the request of the Department, a certificate of loss of nationality. It was approved by the Department on October 28, 1970. Appellant is taking an appeal to the Board of Appellate Review from this administrative determination of loss of nationality.

In 1964, the Embassy executed, and the Department approved, an earlier certificate of loss of nationality in appellant's name. This earlier certificate certified that appellant expatriated herself on November 10, 1959, under the provisions of section 349(a)(5) of the Immigration and Nationality Act by voting in a political election in the Philippines. In 1967, the Supreme Court held unconstitutional section 401(e) of the Nationality Act of 1940, which provided that an American citizen shall lose his nationality by voting in a political election in a foreign state. Afroyim v. Rusk, 387 U.S. 253 (1967). The Department vacated the earlier certificate of loss of nationality on September 25, 1970.

1/ Section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
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> . . .
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> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

Appellant, Mrs. L[redacted], was born at [redacted], [redacted] on [redacted], of parents who were Philippine citizens. In July of 1929, she went with her family to the Philippines, and has resided outside the United States since that time. On January 15, 1959, she married [redacted] a Philippine national. Appellant registered as an United States citizen at the Embassy in Manila in 1946, and at the Consulate in Cebu in 1951. The latter issued her a card of identity on March 5, 1952, which expired on September 25, 1953.

Mrs. L[redacted] appeared at the Consulate on January 24, 1961, and made a formal renunciation of her United States citizenship pursuant to section 349(a)(6) of the Immigration and Nationality Act. The Consulate prepared a certificate of loss of nationality, as required by section 358 of that Act, and forwarded it to the Embassy at Manila.[2/] For reasons undisclosed in the

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2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

record, the Embassy did not send the certificate to the Department for approval. The Embassy instructed the Consulate to invite Mrs. L[redacted] to execute an application for registration as a United States citizen and to determine whether she had performed any prior act of expatriation.

In March of 1961, the Consulate ascertained from Mrs. I[redacted] and the City Treasurer of Cebu that she voted in a 1959 political election. The Consulate thereafter requested Mrs. L[redacted] to complete a registration form and an affidavit of an expatriated person with respect to her voting. She did not complete either form.

It appears from the record that Mrs. I[redacted]'s citizenship file at the Consulate during this period was either misplaced or misfiled. In July 1964, the Consulate discovered the file and forwarded it to the Embassy at Manila. On July 20, 1964, the Embassy prepared the first certificate of loss of nationality in this case. It certified that Mrs. L[redacted] expatriated herself on November 10, 1959, under the provisions of section 349(a)(5) of the Immigration and Nationality Act by voting in a political election in the Philippines. 3/ In approving

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3/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481, which was repealed by Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, read:

> Sec. 349. From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
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> (5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; ...

this first certificate on September 21, 1964, the Department determined and held that appellant lost her United States citizenship status on November 10, 1959. A copy of the approved certificate of loss of nationality was sent to Mrs. L[redacted] on October 15, 1964.

On May 27, 1967, the Supreme Court declared section 401(e) of the Nationality Act of 1940 and, thereby its successor provision, 349(a)(5) of the Immigration and Nationality Act, to be unconstitutional. These sections prescribed loss of nationality by voting in a foreign political election. Afroyim v. Rusk, 387 U.S. 253 (1967). The Court held that section 401(e) of the Nationality Act of 1940 contravened the citizenship clause of the Fourteenth Amendment and that Congress was without power to divest a person of his American citizenship unless he voluntarily relinquished or abandoned it.

In November 1967, the Embassy informed Mrs. L[redacted] of the Afroyim decision and sent her an application to vacate the certificate of loss of nationality resulting from her voting in a foreign political election in 1959. On May 21, 1970, Mrs. L[redacted] executed such application and applied for registration as a United States citizen. In view of the fact that Mrs. L[redacted] had made a formal renunciation of her United States citizenship in 1961 at the Consulate at Cebu, the Embassy sought instructions from the Department on the disposition of her case.

On September 25, 1970, the Department advised the Embassy that the certificate of loss of nationality was vacated under the Afroyim decision. Further, the Department requested the Embassy to prepare a new certificate of loss of nationality based on appellant's formal renunciation in 1961. The Department instructed the Embassy as follows:

> Since Mrs. L[redacted] executed her oath of renunciation prior to the time she was informed that she had lost her United States citizenship by voting, the consular officer is requested to prepare a certificate of loss of nationality holding loss of nationality under the provisions of Section 349(a)(6) of the 1952 Act.

As instructed, the Embassy prepared on October 7, 1980, the second certificate of loss of nationality, which is the basis for this appeal. The Embassy certified this time that appellant made a formal renunciation of United States nationality at the Consulate in Cebu on January 24, 1961, and that she thereby expatriated herself on January 24, 1961, under the provisions of section 349(a)(6) of the Act. The Department approved the certificate on October 28, 1970.

The record shows that in June 1974, Mrs. L[redacted] inquired at the Embassy about the possibility of regaining her United States citizenship. She was reportedly told by the Embassy that she had no chance unless she immigrated to the United States and was naturalized. Thereafter, Mrs. L[redacted] wrote to the former Board of Review on Loss of Nationality of the Department seeking a reconsideration of her loss of United States citizenship.

Although Mrs. L[redacted]'s letter of January 21, 1976, was in the nature of an appeal, a matter which falls within the exclusive jurisdiction of the present Board of Appellate Review, the Department nevertheless undertook a so-called administrative review of the case. Following a protracted examination, the Department affirmed its previous holding of loss of United States nationality. On December 20, 1977, the Embassy informed Mrs. L[redacted] of the Department's decision and of her right to appeal.

On September 27, 1979, appellant gave notice of her appeal to the Board of Appellate Review. She contended that her formal renunciation of United States citizenship in 1961 was not voluntary or intentional and that it was made under a misapprehension as to her true citizenship status. She explained the circumstances regarding her renunciation in an affidavit dated October 16, 1975, as follows:

> That I had assumed and believed in good faith that because of my marriage to a citizen of the Philippines, I had lost my U.S. nationality and acquired my husband's Philippine citizenship, and that it was in this belief that I voted in the Philippine elections of 1959 in Cebu City;
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> . . .

That sometime later, I was told that my voting in 1959 was a sufficient cause for the loss of my U.S. nationality, although I could still be prosecuted for violation of the Philippine election laws;

That because of my fear of being so prosecuted, and in the hope of evading this trouble, I decided to execute a renunciation of my U.S. nationality, which I did in January 1961; that I did this also in the thought that I was not giving up anything because I was informed that anyway I had lost earlier such nationality by voting as above stated;

That sometime after I executed the above-mentioned renuncation, I received a communication from U.S. authorities confirming the information that I had lost my U.S. citizenship for having voted in the Philippine elections of 1959, and so it was not necessary for me to have renounced my U.S. citizenship; for this reason, I decided not to take any action to retract the renunciation;

It is undisputed that appellant voted in a political election in the Philippines in 1959 and that the Department determined in 1964 that she thereby expatriated herself under section 349(a)(5) of the Immigration and Nationality Act. The Department thus concluded that she lost her United States citizenship status on November 10, 1959. It is also undisputed that appellant made a formal renunciation of her United States nationality on January 24, 1961, and that the Department determined in 1970 that she lost her American citizenship under section 349(a)(6) of that Act. There is doubt, however, as to the validity of her renunciation in light of the Department's previous determination of loss of citizenship.

Section 349(a)(6) of the Immigrationa and Nationality Act provides for loss of citizenship by making a formal renunciation before a diplomatic or consular officer of the United States in a foreign state. This provision of law is predicated upon the assumption that a person

desiring to renounce United States nationality is a United States national at the time. As noted above, the Department determined that appellant expatriated herself by voting in a foreign political election. Thus, appellant lost her United States citizenship status on November 10, 1959, and did not possess United States nationality on January 24, 1961, when she took and subscribed to an oath of renunciation.

This presumably was also the position of the Department in 1964, when it approved the certificate of loss of nationality based on appellant's voting in a political election. The Department was certainly aware at that time of appellant's renunciation in 1961, having been so informed by the Embassy. The Department took no action in 1964 on her act of renunciation. Instead, the Department approved the certificate of loss of nationality based on her having voted in a political election on November 10, 1959. It follows, therefore, that renunciation was not possible in 1961. At the time, according to the Department's own determination, appellant was not a United States citizen, and consequently had no United States nationality to renounce. Appellant lost her citizenship on November 10, 1959, by voting in a foreign political election, which was prior to January 24, 1961, the date on which she attempted to renounce. In legal effect, her renunciation was a nullity. It could not result in expatriation in 1961, because she had no United States citizenship to renounce.

The Department in its appeal memorandum of February 19, 1980, alluded to the fact that it was not until after her renunciation in 1961 that the Consulate and Embassy first became aware of her voting in the Philippines in 1959. The Department took the position in its appeal memorandum that appellant's oath of renunciation "was effective because at the time it was taken Mrs. [redacted] was considered to be a United States citizen." This position is, of course, flatly contradictory with the Department's holding of September 21, 1964, that she lost her United States citizenship status on November 10, 1959, by voting in a foreign political election. The fact remains that in January 1961, when appellant performed an act of renunciation, she was not then a national of the United States.

Moreover, appellant's expatriation under section 349(a)(5) of the Immigration and Nationality Act took place automatically on November 10, 1959, when the statutory act of expatriation occurred, that is, when she voted in a political election in the Philippines. 4/ The Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164 (1963), recognized at the time that expatriation statutes "automatically -- without prior court or administrative proceedings -- impose forfeiture of citizenship...".

We appreciate that all prior determinations of loss of nationality based upon voting in a foreign political election were rendered void as a consequence of Afroyim v. Rusk. We also appreciate that while Afroyim v. Rusk had the legal effect of reviving or reinstating the citizenship status of one who had lost it by voting in a foreign election, it does not have the effect of reviving or reinstating the acts of the citizen, for example, the subsequent act of renunciation. In the Board's opinion, the Department's determination of appellant's citizenship status was conclusive during the period from November 10, 1959, until May 29, 1967, the date of the Supreme Court's decision in Afroyim. This being so, appellant's attempt in 1961 to renounce United States nationality was, in our judgment, without legal effect.

On consideration of the foregoing, we are unable to conclude that appellant's oath of renunciation on January 24, 1961, was legally effective, and, accordingly, reverse the Department's administrative holding of expatriation based on section 349(a)(6) of the Immigration and Nationality Act.

Julia W. Willis
Julia W. Willis, Chairman

Edward G. Misey
Edward G. Misey, Member

Alan G. James
Alan G. James, Member

4/ 3 Gordon and Rosenfield, Immigration Law and Procedure, Sec. 20.10b (rev. ed. 1976).