May 7, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: R[redacted] S[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, R[redacted] S[redacted], expatriated himself on April 14, 1948, under the p[redacted]sions of section 401(f) of the Nationality Act of 1940 by making a formal renunciation of his United States citizenship before a consular officer of the United States in the form prescribed by the Secretary of State. 1/

I

Appellant, R[redacted] S[redacted], was born on [redacted] at S[redacted] F[redacted], C[redacted], thus acquiring United States citizenship at birth. Both his parents were citizens of Mexico. He has stated that in 1931, when he was six years old, he went to Mexico with his family.

S[redacted] apparently resided in Mexico from 1931 until 1946, when, according to the affidavit he executed on February 22, 1979, he entered the United States and worked in Arizona and California. While in the United States, appellant alleges, he registered for the draft and was classified 4-F. There is, however, no evidence before the Board to corroborate this statement. In the fall of 1947, S[redacted] states that he returned to Mexico, and in December attempted to re-enter the United States at San Ysidro, California.

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1/ Section 401(f) of the Nationality Act of 1940, 8 U.S.C. 801, reads:

> Sec. 401. From and after the effective date of this Act a person who is a national of the United States whether by birth or by naturalization, shall lose his nationality by:
>
> .*.
>
> (f) 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 (54 Stat. 1169; 8 U.S.C. 801)...

Appellant further alleges he was informed at that time by the U.S. Immigration Service officials who examined him at the border at San Ysidro, California that he had lost his United States citizenship by remaining outside the United States during a time of war or emergency. He further states that he was instructed to return for an appointment at the border in March 1948.

Meanwhile, according to the questionnaire S[redacted] executed in 1979 at the Consulate at Tijuana to [redacted]rmine his citizenship status in connection with his application for a United States passport, he had been inducted into the Mexican Army in which he served from January 31, 1948 to January 31, 1949.

On March 11, 1948, S[redacted] again proceeded to the border at San Ysidro wher[redacted] immigration official stamped his birth certificate "Debarred, San Ysidro, California, March 11, 1948." A further notation was made on appellant's birth certificate, presumably by the same official:

> No BBC or Temp Visitor's visa or PP. Forfeited citizenship under Sec. 401 (j) Nat. Law of 1940. "Remained abroad." 2/

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2/ Section 401(j) of the Nationality Act of 1940, 8 U.S.C. 801, reads:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> . * .
>
> (j) Departing from or remaining outside of the jurisdiction of the United States 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 land or naval forces of the United States.

The Supreme Court in 1963 struck down as unconstitutional section 401(j) of the Nationality Act and its successor provision, section 349(a)(10) of the Immigration and Nationality Act. Kennedy v. Mendoza-Martinez and Rusk v. Cort, 372 U.S. 144 (1963).

S[redacted] alleges in his affidavit of February 22, 1979, he was [illegible]ised that he would have to go to the United States Consulate at Tijuana to renounce formally his citizenship, which, the US Immigration officer allegedly informed him, he had already lost "for not returning to the United States in time of war." On April 6, 1948, in accordance with the instructions he was reportedly given by the immigration officers, S[redacted] acquired a form 5-C (identity card) from the Mexican [illegible]horities which he presented on April 8 to an immigration officer at the border. At that time an immigration officer made the following notation on the back of appellant's form 5-C:

> 4-8-48 ...R[redacted] S[redacted]-M[redacted], S.Y. 1611-6028; [illegible]at [illegible]li[illegible]d now referred to Consulate to execute renunciation under Sec. 401(f); board hearing at San Ysidro may be reopened thereafter and subject admitted for B/C privilege.
>
> Initials (Illegible).

On April 14, 1948, appellant made a formal renunciation of his United States citizenship in accordance with the provisions of section 401(f) of the Nationality Act of 1940 before a consular official at the United States Consulate at Tijuana. On the same day appellant also executed an affidavit of **loss** of nationality of citizenship of the United States in which he stated that he had voluntarily expatriated himself by making a formal renunciation of his United States nationality before a consular officer of the United States. We note that there is no official account in the record before us elaborating or explaining the circumstances surrounding appellant's execution of the foregoing instruments.

On April 14, 1948, as required by section 501 of the Nationality Act, 3/ the Consulate prepared and forwarded to the Department for approval a certificate of loss of nationality in appellant's case. The Consulate certified

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3/ Section 501 of Chapter V of the Nationality Act of 1940, 8 U.S.C. 901, reads:

> Sec. 501. 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 American nationality under any provision of chapter IV of this Act, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be 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 Department of Justice, for its 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.

that appellant was born at San Francisco, California on July 1, 1925; that he acquired United States citizenship by virtue of his birth in the United States; and that he expatriated himself under the provisions of section 401(f) of chapter IV of the Nationality Act of 1940 by making a formal renunciation of the nationality of the United States before a consular official of the United States. On August 10, 1948, the Department of State approved the certificate of loss of nationality, which constitutes the administrative holding of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

Appellant initiated this appeal through his attorney on May 13, 1980. Appellant contends that his renunciation of United States citizenship was involuntary, in effect coerced, and that since he had been informed prior to his act of renunciation that he had already lost his citizenship by remaining abroad during war or an emergency, the renunciation itself was without effect.

II

Before the Board may properly act on this appeal, we must first determine whether the Board has jurisdiction to entertain it. Initially the Board must decide whether the appeal has been timely filed before proceeding to consideration of the merits of the case. If the appeal was not filed within the prescribed period of time, the Board would lack jurisdiction over the case.

Under the current regulations of the Department, which were promulgated on November 30, 1979, the time limitation for filing an appeal is one year from the date of approval of the certificate of loss of nationality. 4/ The regulations further provide that an appeal filed after that time shall be denied unless the Board for good cause shown determines that the appeal could not have been filed within the prescribed period of time. These regulations were not, obviously, in effect in 1948 when the Department approved the certificate of loss of nationality that was issued in this case.

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4/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFR 7.5.

The regulations which were in effect from November 29, 1967, the date of the establishment of this Board, until November 30, 1979, provided as follows:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 5/

We consider the latter time limitation to be applicable in this case. Thus, under the governing time limitation, a person who contends that a holding of the Department of loss of nationality is contrary to law or fact is required to appeal such holding to the Board within a reasonable time after receipt of notice of the holding of loss of nationality. If a person does not initiate his or her appeal to the Board within a reasonable time, the appeal would be barred and the Board would be without jurisdiction to entertain it.

The question of whether an appeal is filed within a reasonable time depends on the facts in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as the circumstances will permit and with such promptitude as the situation of the parties will allow. It does not mean, however, that a party will be allowed to determine a "time suitable to himself." In Re Roney, 139 F.2d 175 (1943). Nor should reasonable time be interpreted to permit a protracted and unexplained delay which is prejudicial to either party. Smith v. Pelton Water Wheel Co., 151 Cal. 393 (1907). Thus, the rationale for allowing a reasonable time within which to appeal is that an appellant should be allowed a due period of time to prepare a cause of action showing that a holding of the Department of loss of nationality was contrary to law or fact. While the term "reasonable time" makes allowance for the intervention of circumstances beyond appellant's control which may impede him or her from prosecuting his or her appeal in timely fashion, it presumes that an appeal will be prosecuted with the diligence and prudence of an ordinary person, Dietrich v. U.S. Shipping Board Emergency Fleet Corp., C.C.A. N.Y. 9 F.2d 733 (1926).

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5/ Section 50.60 of Title 22, Code of Federal Regulations, 22 CFR 50.60 (1967-1979).

Furthermore, a reasonable time begins to run with receipt of notice of the Department's holding of loss of nationality, not at some subsequent time years later when an appellant for whatever reason may seek to restore his or her United States citizenship status.

In this case the certificate of loss of nationality was approved on August 10, 1948. Thirty-two years later appellant initiated his appeal. Appellant has offered no explanation for his delay in taking an appeal. Moreover, there is no record of any interest on his part in re-establishing his claim to United States citizenship until April 17, 1979, when he executed an application for registration as a United States citizen at the Consulate at Tijuana. At that time appellant stated in the question-naire completed to determine his citizenship status:

> I never had the intention to relinquish my U.S. citizenship, but did not know I could do anything about it until I spoke with my attorney in January 1979.

He has not elaborated on this vague reason for delay.

In our view, appellant's failure to question his loss of nationality for almost thirty-two years demonstrates convincingly that his delay in seeking an appeal was unreasonable. Whatever the meaning of the term "reasonable time" as used in the regulations may be, we do not believe that such language contemplates an unexplained delay of thirty-two years.

In its legal memorandum of February 23, 1982, the Department stated:

> Although the Department's file has been located and Mr. S[redacted] has provided additional documentary evidence, there is now no way of obtaining corroborating evidence or testimony from any source in the Department or the Immigration Service Border Patrol on the critical issue of voluntariness or intent.

The Department's defense of laches is, in our view, well taken. Since the Department bears the overall burden of proving expatriation, an unexplained delay of thirty-two years in taking an appeal to this Board has clearly prejudiced the Government's ability to carry its burden of proof.

Although the record does not indicate whether appellant was informed in 1948 of his right to appeal the Department's determination of loss of nationality, there is no reason why, had he felt strongly about the matter, he could not have inquired about a right of recourse by calling any diplomatic or consular post in Mexico. In 1948 there was a Board of Review in the Passport Division in the Department which had been in existence since 1940 with authority to consider precisely such appeals. Nor should there have been any question in appellant's mind about the fact that he had lost his citizenship, for he performed the most unequivocal act of expatriation -- formal renunciation of his citizenship before a consular official of the United States, In light of this fact, his lack of diligence in taking an appeal can hardly have been the result of uncertainty that he had expatriated himself.

On the basis of the foregoing analysis, we find that appellant did not file his appeal in a reasanable time after receipt of notice of the holding of his lass of citizenship. Accordingly, the appeal is time barred and the Board is without jurisdiction to consider it.

We therefore find it unnecessary to make other determinations with respect to this case.

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Member

J. Peter A. Bernhardt, Member