DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: G[redacted] C[redacted]

This case is before the Board of Appellate Review on an appeal brought by G[redacted] C[redacted] from an administrative determination of the Department of State that he expatriated himself on December 29, 1943, under the provisions of section 401(f) of the Nationality Act of 1940 By making a formal renunciation of his United States nationality before a consular officer of the United States at Monterrey, Mexico. 1/

The threshold issue presented on appeal is whether the Board has jurisdiction to entertain an appeal brought to the Board close to forty years after the Department approved the certificate of loss of nationality that was issued in appellant's name. We find the appeal barred by time. Thus lacking jurisdiction, we will dismiss it.

I

[redacted]ed States citizenship by birth on [redacted]. He also acquired the nationality

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

> Section 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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> . . .
>
> (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: . . .

of Mexico through his Mexican citizen father. In 1931 his parents took him to Mexico where he has since resided, On December 29, 1943, appellant, then age nineteen, appeared at the Consulate at Monterrey where he made a formal renunciation of his United States citizenship before a consular officer of the United States. In an affidavit executed on December 29, 1943, appellant stated, inter alia, that he was voluntarily expatriating himself; that although he had dual nationality, he bad always considered himself to be Mexican; and that he neither desired nor intended to preserve his allegiance to the United States,

On the same day, December 29, 1943, the consular officer prepared a certificate of loss of nationality in appellant's name, as required by section 501 of the Nationality Act of 1940. 2/ The Consular officer certified

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2/ 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 offfce 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 expatriated himself under the provisions of section 401(f) of the Nationality Act of 1940 by voluntarily making an oath of renunciation of the nationality of the United States before an officer of the Consulate at Monterrey in the form prescribed By the Secretary of State. The certificate was forwarded to the Department for approval on December 30, 1943.

On January 24, 1944, a three-member Board of Review in the Passport Division of the Department of State approved the certificate of loss of nationality. Five months later, on July 6, 1944, the Department informed the Consular Officer in Charge at Monterrey that his action in submitting the certificate had been approved, and requested him "to deliver one copy to the expatriate." The record does not show whether or when appellant received a copy of the approved certificate of loss of nationality. He has not, however, indicated that he did not receive it, It may therefore be assumed that he had notice of the Department's holding of loss of his nationality sometime in 1944. There is no further recorded contact between appellant and the Department of State from 1944 to 1982, a period of thirty-eight years.

Then, on November 17, 1982, appellant applied for a United States passport at San Antonio, Texas, The Department of State informed appellant on March 25, 1983, that his application had been denied on the grounds that he had expatriated himself in 1943. Appellant brought this appeal through counsel on April 26, 1983.

Appellant's central argument is that his formal renunciation of his United States citizenship is void because such renunciation was performed involuntarily as a consequence of the duress exerted upon him by his father. In an affidavit executed on November 9, 1982, the latter stated:

> I instructed Gustavo to sign the documents which were prepared by the consul at my request for the reason that I did not want Gustavo to someday leave our family and return to the United States..,. I needed Gustavo to help me in my business...,without his help I would not have been able to provide for my family.... It was not Gustavo's free choice to appear at the consulate. It was also not his free choice to sign the documents... he was only doing what I pressured him into doing,

The basic issue raised at the outset is whether this Board has jurisdiction to entertain an appeal entered nearly forty years after a statutory act of expatriation occurred and thirty-nine years after appellant's right to appeal the Department's holding of loss accrued.

II

In 1944 when the Department approved the certificate of loss of nationality issued in appellant's name, the Board of Appellate Review did not exist, There was then in existence a so-called Board of Review in the Passport Division, established on November 1, 1941, to review "all cases" involving the loss of nationality under the nationality laws of the United States. The Board of Review provided "a forum for hearings and discussions in order to obviate as far as may be practicable hardships and inequities in the application of the new Nationality Act of 1940...." 3/ It was not strictly an appellate review body to bear and decide appeals. Relatively little information is available regarding the early functioning of the Board of Review, and apparently no formal rules or procedures were ever published by the Department.

The first formal procedures of the Board of Review were set forth in an intra-Department communication in 1949. 4/ That document simply stated that persons who did not accept a Department's holding of loss of nationality, "may be informed that appeal may Be made to the Board of Review of the Passport Division," No formal application or petition for reconsideration of a case was required to be made; an appellant, however, was required to submit at least a statement indicating the grounds for appeal. There was no specified time limitation. 5/

3/ Departmental Order 994, Department of State, October 31, 1941.

4/ Foreign Service Serial No. 1019, September 13, 1949, Department of State.

5/ In the absence of a specified time limit on appeal, it may be assumed that the common law rule on the time for bringing an appeal governed. The limitation on appeal therefore was in essence within a reasonable time after the expatriate received notice of the Department's holding of loss of his nationality.

By 1954 the procedures for bringing an appeal to the Board of Review on Loss of Nationality within the Passport Office (successor to the Board of Review) had been made more precise. Guidelines for informing a person of his right of appeal were incorporated into the Foreign Service Manual as Chapter 2, section 238.1 "Advice on Making Appeals."

In 1966 Departmental regulations were promulgated prescribing that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 6/ When the Board of Appellate Review was established in 1967, regulations promulgated at that time adopted the "reasonable time" limitation. 7/

The regulations of the Board of Appellate Review were further revised in November 1979, and required that an appeal be filed within one year of approval of the certificate of loss of nationality. 8/

Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply in the case now before the Board.

6/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

7/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, provided:

> 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.

8/ Section 7.5(b), Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

Under the limitation of "reasonable time", a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is jurisdictional. 9/

OR May 2, 1983, in acknowledging appellant's notice of appeal, the Chairman of the Board of Appellate Review informed counsel:

> The requirement that an appeal to this Board be filed within a reasonable time is mandatory and jurisdictional, The Board would have no alternative but to dismiss an appeal if it found it was not timely filed, whatever the ostensible merits of the case. It is therefore extremely unlikely that the Board [redacted] able to entertain Mr. C [redacted] appeal, unless an extraordinarily persuasive explanation were presented for the extremely long delay entailed.

9/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon The Board /of Appellate Review/ the power to... review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1973.

Counsel replied to the Chairman's letter by introducing an affidavit of appellant dated June 17, 1983, which stated in pertinent part:

> It was not until approximately October 1982 that my present attorney, Enrique Valdez, informed me that under certain circumstances such as those present in my case, It could be possible for me to seek review on the Issue of voluntariness and intent....
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> It was not until I informed my attorney of the fact that I had been born in the United States, and of the facts surrounding my renunciation that he advised me that renunciations were not in all cases irrevocable and that I had the right to appeal the loss of my United States citizenship. If I had known of this right, I certainly would have undertaken whatever recourse was appropriate to regain my citizenship.

Counsel argues therefore that appellant's delay in seeking an administrative review of his expatriation is reasonable in view of the totality of the circumstances of his case and "because he was never apprised of his statutory right to such a review."

III

Applying judicially established standards, we must determine whether appellant's delay of nearly forty years in bringing his appeal was reasonable or not in light of his contention that the reason he did not bring an appeal until many years had passed was that he did not know he had a right of appeal.

The rule on reasonable time is well settled. Whether an appeal was lodged within a reasonable time[10/] depends

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10/ See, for example, Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1907); Appeal of Syby, 66 N.J. Super. 460, 160 A. 2d 749 (1961).

on the circumstances of the particular case. It has been held to mean as soon as the circumstances and with such promptitude as the situation of the parties will permit, A party may not be allowed to determine a time suitable to him or herself. Further, the rule presumes that an appellant will pursue an appeal with the diligence of an ordinary prudent person. A protracted and unexplained delay, particularly one which is prejudicial to the interests of either party, generally is fatal. Where an appeal has been long delayed it has been held that the appellant must show a valid excuse. Reasonable time begins to run with receipt of notice of the Department's holding of loss of citizenship, not at some later date when the appellant for whatever reason may seek to restore his or her citizenship.

In arguing that his client was never informed of his right of appeal, counsel implies that appellant was denied due process, and consequently that his long delay in appealing should be excused.

It may be observed that the regulations of the Department in effect in 1944 did not require that a diplomatic or consular post inform a person in whose case a certificate of loss of nationality had been issued and approved that he or she had a right of appeal. It was not until 1979 that the Department's regulations stipulated that when an approved certificate of loss of nationality is forwarded to the person to whom it relates, such person shall be informed of the right to appeal the Department's determination to the Board of Appellate Review. 11/ As noted above, however, an appeal process has been in continuous existence since 1941.

11/ Section 50.52, Title 22, Code of Federal Regulations, 22 CFR 50.52, reads as follows:

> When an approved certificate of loss of nationality or certificate of expatriation is forwarded to the person to whom it relates or his or her representative, such person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review (Part 7 of this Chapter) within one year after approval of the certificate of loss of nationality or the certificate of expatriation.

We do not consider that the fact that appellant may not have been informed of a right of appeal in 1944 constitutes denial of due process.

Due process does not contemplate the right of appeal. District of Columbia v. Calwans, 300 U.S. 617 (1936). While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. National Union of Cooks and Stewards v. Arnold, 348 U.S. 37 (1954).

In this case appellant did, of course, have a right of appeal, but alleges that he was not informed of that right, It is well established that whatever puts, or should put, a party upon inquiry is sufficient notice of a right of redress where the means of ascertaining the existence of such redress is at hand. Here, appellant was duly put on notice of his loss of nationality from the very day of his formal renunciation of his United States citizenship. Consequently, he was, or should have been, put upon inquiry at that time. And the means of knowledge that redress existed were at hand. He could have ascertained that fact any time after 1944 from any United States diplomatic or consular establishment in Mexico, had he exercised reasonable diligence in asserting a claim to his lost citizenship.

A claim by appellant that he was denied due process may not stand.

As to counsel's contention that appellant has a meritorious claim which the Board should determine, we note that "good cause" to enlarge the time for bringing an appeal requires not only a demonstration that there is a substantial meritorious question involved, but also a showing of a valid excuse for a delay in bringing an appeal. Appeal of Syby, (note 8, supra). The Board is of the view that appellant has not presented a sufficient excuse for a delay of nearly forty years in lodging his appeal.

The passage of time in bringing this appeal unquestionably prejudices the Department's ability to meet its burden of proof, and laches would be a proper defense to appellant's cause of action. There are no available official records or contemporaneous accounts of appellant's visit in December 1943 to the Consulate at Monterrey. After so long a time facts inevitably become clouded and memories dim.

It is generally recognized that the principal purpose of a limitation provision is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against stale and belated appeals that could more easily have been resolved when the recollection

of events upon which the appeal is based is fresh in the minds of the parties involved and records are available. This is not the situation here.

In the circumstances of this case where there has been no showing of a requirement for an extended period of time to prepare his case, or any obstacle beyond appellant's control in taking a timely appeal, it is obvious that the norm of "reasonable time" cannot extend to a delay of nearly forty years.

IV

On consideration of the foregoing, we conclude that the appeal was not taken within a reasonable time after appellant received notice of the Department's holding of loss of his United States citizenship. Accordingly, we find the appeal barred by the passage of time and not properly before the Board. The appeal is hereby denied.

Given our disposition of the case, we do not reach the other issues presented. 12/

Alan G. James, Chairman

Mary E. Hoinkes, Member

George Taft, Member

12/ Since the threshold issue posed in this case was whether the Board had jurisdiction to entertain the appeal, the Board proceeded on the basis of appellant's submissions and the Department's case record. Had we found that we had jurisdiction, and thus were able to reach the substantive issues involved, we would have asked the Department to file an appeal brief to which appellant might have replied, Thereafter we would have set a date for a hearing on the substantive issues, as counsel for appellant requested.