March 8, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal taken by [redacted] from an administrative determination of the Department of State that he expatriated himself on July 2, 1975, under the provisions of section 349 (a)(6), now section 349 (a)(5), of the Immigration and Nationality Act by making a formal renunciation of his United States nationality at the American Embassy at London. 1/

The appeal was taken on May 17, 1982, more than six years after the Department's holding of loss of nationality. The initial question thus presented in this case is whether the appeal was filed within a reasonable time. We find that the appeal was not timely filed. Lacking jurisdiction to consider the case, we will dismiss the appeal.

1/ 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 --

. . .

(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, renumbered paragraph (6) of section 349(a) of the Immigration and Nationality Act as paragraph (5).

I

Appellant was born in [redacted], Oregon on [redacted], [redacted], and acquired United States citizenship at birth. Because his parents were Philippine nationals, he also acquired the nationality of the Philippines under the laws of that country. Shortly after his birth, he was taken by his parents to the Philippines.

In 1969, appellant visited the United States using a Philippine passport. He resided in the Philippines until 1972, when he went to England to study at Trinity College, Cambridge. He traveled there on his Philippine passport.

Early in March of 1975, appellant went to the American Embassy at London to obtain a visitor's visa to enter the United States. He wished to visit certain graduate schools that offered advanced degrees in economics and business administration and that he might possibly attend following his graduation from Cambridge. When it was disclosed that appellant had been born in the United States and therefore would not be eligible to receive a visa, the Embassy denied his visa application. Distressed at this development, appellant sought advice and assistance from his family in the Philippines.

Appellant returned to the Embassy on March 11, 1975, and again presented his visa application. He was granted a single entry visitors's visa pending a determination of his citizenship status by the Department. In that connection, appellant executed on March 11, 1975, at the request of the consular officer, an application for registration as a citizen of the United States and a supplemental application to assist the Department in determining whether he had a valid claim to United States citizenship. On the application form, he indicated that he did not ever intend to return to the United States.

Appellant alleges that the Embassy issued him a visa only after he agreed, in writing, to divest himself of his United States citizenship status, should the Department determine that he had a claim to such citizenship. Appellant submitted a copy of an unsworn statement, which he

signed on March 11, 1975, and which was witnessed by Lloyd C. DeWitt of the Embassy. 2/ The statement read:

> I, [redacted], born [redacted], in [redacted], Oregon, U.S.A., do hereby declare that, if I am granted a nonimmigrant visitor's visa for a month visit to the United States, I will, immediately upon my return to England, make an appointment to divest myself of U.S. nationality if it should be determined that I obtained it through my birth in the United States. I have no interest in maintaining any claim to United States citizenship and wish only to be considered an alien under the terms of the Immigration and Nationality Act of 1952.

2/ The Department of State case record that was submitted to the Board did not include a copy of appellant's statement of March 11, 1975, allegedly made in connection with his visa application. The Department observed in its appeal memorandum that the statement of March 11, 1975, may have been part of appellant's visa file, rather than citizenship file; and, because nonimmigrant files are not retained by the Department, "this document cannot be verified as part of the record."

Upon his return to England from the United States, appellant visited the Embassy on May 2, 1975, to clarify his citizenship status. He completed a citizenship questionnaire and executed an affidavit before the U.S. consul at London. He declared in the affidavit that he never took an oath of allegiance to a foreign country nor served in a foreign armed force, that he did not wish to reside in the United States but would like to visit and study there, and that "if it is established that I still have a claim to U.S. citizenship, I would like to renounce it."

In June 1975, the Department instructed the Embassy that appellant had a claim to United States citizenship. The Embassy informed appellant, accordingly, on June 26, 1975, that his registration application of March 11, 1975, might be approved upon presentation of his original birth certificate, and that he might apply for a U.S. passport, if he so desired The Embassy also brought to appellant's attention section 350 of the Immigration and Nationality Act, regarding the divestiture of United States nationality in certain circumstances of dual nationals. This section of the law was subsequently repealed. 3/

On July 2, 1975, appellant made a formal renunciation of his United States citizenship before a consular officer at the Embassy. The oath of renunciation, which he executed, read as follows:

3/ Section 350 of the Immigration and Nationality Act provide In part, that a person, who at birth, acquired the nationality of the United States and a foreign state and who sought the benefits of his or her foreign nationality, lost United State: citizenship if the person resided for three years after the age of 22 in that foreign state, unless he or she took an oath of allegiance to the United States. Section 350 of the Immigration and Nationality Act was repealed, effective October 10, 1978. Pub. L. 95-432 (Oct. 10, 1978) 92 Stat. 104

> That I desire to make a formal renunciation of my American nationality, as provided by Section 349(a) (6) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

Prior to his renunciation, appellant executed a sworn statement of understanding attesting that the American consul explained to him the extremely serious nature of his contemplated act of renunciation and that appellant fully understood the consequences of his renunciation. Appellant also executed a separate affidavit at the same time explaining his reasons for renouncing United States citizenship. Appellant stated:

> I understand that to obtain entry into the United States under my status as an American citizen, by virtue of my having been born there on February 25, 1954, I would have to hold a United States passport. This would involve renouncing my Philippine citizenship according to the law of the Republic of the Philippines which I do not wish to do under the circumstances. I understand therefore, that in future I will have to obtain entry into the United States as an alien with a non-immigrant status.

Following appellant's formal renunciation, the Embassy prepared a certificate of loss of nationality, as required by section 358 of the Immigration and Nationality Act. 4/ The

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4/ 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.

Embassy certified that appellant acquired United States nationality by virtue of his birth at Portland, Oregon; that he acquired the nationality of the Philippines by virtue of birth abroad of a Philippine citizen father; that he made a formal renunciation of his United States citizenship before an American consular officer on July 2, 1975; and that he thereby expatriated himself under section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act. The Department approved the certificate of loss of nationality on August 13, 1975.

In the fall of 1976, appellant commenced his graduate studies at the University of Pennsylvania, and received, in 1979, a Master of Business Administration degree. On October 1981, appellant's counsel informed the New York Passport Agency of appellant's intention to submit a passport application to re-establish his claim to United States citizenship, and sought advice how best to proceed. Upon being advised by the Department on November 8, 1981, that appellant's passport application, if made, would be denied as a consequence of his expatriation in 1975, and that the proper procedure in seeking a review of that citizenship determination would be an appeal to the Board of Appellate Review, appellant's counsel filed this appeal on May 17, 1982. He requested a hearing which was held on December 9, 1983.

Appellant maintains that the Board has jurisdiction to hear the appeal, and contends that his renunciation was involuntary, and was not done with the intent to relinquish his United States citizenship. He further argues that the Department is estopped from divesting him of his United States citizenship by reason of the affirmative misconduct of the U.S. consular office in processing his case.

II

The issue confronting the Board in the first instance is whether the appeal taken here was timely filed. As the Chairman of the Board informed appellant's counsel on May 19, 1982, the Board, in order to determine its jurisdiction to entertain the appeal, must first determine the timeliness of the appeal. Unless the appeal was filed within the prescribed time limitation, the Board would lack jurisdiction to consider the case.

Under the existing regulations of the Department, the time limitation for filing an appeal is one year after approval of the certificate of loss of nationality. 5/ The regulations further provide that an appeal filed after the one-year period shall be denied unless the Board for good cause shown determines that the appeal could not have been filed within that period. These regulations, however, were not in force on August 13, 1975, the date the Department approved the certificate of loss that was issued in this case.

The regulations that were in effect in 1975 prescribed that an appeal be taken within a reasonable time after receipt of notice of the Department's holding of loss of nationality. That regulation read:

> Sec. 50.60. 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. 6/

5/ Section 7.5 of Title 22, Code of Federal Regulations, 22 CFR 7.5. The existing regulations relating to the Board of Appellate Review were promulgated on November 30, 1979 (22 CFR Part 7; 44 F.R. 68825, November 30, 1979).

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

We consider this time limitation of "reasonable time", rather than the existing limitation of one year after approva of the certificate of loss of nationality, governing in this case. It is generally recognized that a change in regulation shortening a limitation period is presumed to operate prospectively, and not retrospectively. Thus under the applicab time limitation, if appellant did not initiate his appeal within a reasonable time after receipt of notice of the Department's holding of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to entertain it.

It appears from the record that appellant first endeavored to re-establish his United States citizenship afte he consulted legal counsel in 1980. In a "letter-brief" submitted on March 8, 1983, appellant's counsel stated that appellant could not have possibly brought an appeal until he learned that his statement of March 11, 1975, was "unconstitutional, impermissible, and coercive." In that statement as noted above, appellant declared that, if granted a nonimmigrant visitor's visa, he would divest himself of his United States citizenship if the Department determined that h acquired such citizenship at birth. Counsel further stated that following such consultation in late 1980, appellant promptly began a lengthy process of obtaining his records from the Department, and, after receipt of such records, submitted a request for a United States passport, which was refused. Appellant's counsel argues that under—such circumstances the filing of an appeal in 1982 was within a reasonab time. We find the argument unpersuasive.

What is a reasonable time depends, as the courts have enunciated, upon the circumstances in a particular case. Generally, a reasonable time means reasonable under the circumstances. It has been held to mean as soon as circumstances permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. This does not mean, however, that a party be allowed to determine a time suitable to himself. Nor should reasonable time be interpreted to permit a protracted delay which is prejudicial to either party. Reasonable time doubtless will

vary with the circumstances, but it is clear that it is not set by a party to suit his or her own purpose and convenience. 7/

As we have seen, the Embassy informed appellant on June 26, 1975, that he could be documented as a United States citizen and given a United States passport. Notwithstanding, he renounced his United States citizenship on July 2, 1975, the most unequivocal of expatriating acts. He was in no doubt as to his loss of United States nationality. If he believed thereafter that the Department's holding of loss of nationality was contrary to law or fact, he could have easily ascertained from U.S. consular offices in England and the Philippines or from the Department, while in the United States, the procedure for taking an appeal and file one. He had ample opportunity following his renunciation to take a timely appeal, if he had second thoughts about his renunciation. His lack of diligence in taking an appeal can hardly be ascribed to any unawareness or doubt that he had committed an act of expatriation.

The rationale for giving a reasonable time to appeal an adverse decision is to afford an appellant sufficient time to assert his or her contentions that the decision is contrary to law or fact and to compel appellant to take such action when the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. Appellant here permitted a substantial period of time to elapse before taking an appeal in 1982. The period of "within a reasonable time" commences to run with appellant's notice of loss of nationality in 1975 and not several years thereafter when appellant, for whatever reason, considers it appropriate or when advised by counsel to take an appeal. In our opinion, appellant's delay of approximately seven years in taking an appeal was unreasonable in the circumstances of this case.

7/ See Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931); In re Roney, 139 F. 2d 185 (1943); Appeal of Syby, 460 A. 2d 749 (1961); Ashford v. Steuart, 657 F. 2d 1053 (1981).

III

In light of the foregoing, we are of the view that the appeal was not taken within a reasonable period after appellant had notice of the Department's holding of loss of nationality. Accordingly, we find the appeal time barred. The appeal is hereby dismissed.

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

Alan G. James, Chairman

/Edward G. Misey, Member

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Warren E. Hewitt, Member