DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] H[redacted]

as s to the Board of Appellate Review on appeal by P[redacted] H[redacted] from an administrative determination of the Department of State that she expatriated herself on April 24, 1972 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making a formal declaration of allegiance to Mexico. 1/

The Department made its decision of loss of appellant's nationality on August 28, 1972. The appeal was entered on July 5, 1984. For the reasons stated below, we conclude that the appeal is time-barred. Lacking jurisdiction to consider the appeal, we dismiss it.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481 (a)(2), provides:

Section 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 --

. . .

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

I

Appellant became a citizen of American citizen parents at [redacted] As a consequence of her birth in Mexico, she also acquired the nationality of that country. A consular report of appellant's birth as a United States citizen was issued by the Embassy in 1952. Appellant registered as a United States citizen in 1970 and was issued an identity card, She was issued a United States passport in 1971.

In June 1970 appellant married a Mexican citizen. Appellant informed the Board that shortly after her marriage "I had to get my Mexican passport extended." She proceeded to have it renewed, "as I had done many times before," but reportedly was told that because she was a dual national (she was then a few months over the age of eighteen) "I was going to have to sign some papers. When those officials were unable to satisfy me as to the implications or exact nature of those papers, I became upset and left the office without signing,.." She then sought legal counsel. Appellant continued:

> ...The attorney explained that in order not to jeopardize my right to take possession or /sic/ property and other assets in the event something happened to my husband, A commercial pilot for AeroMexico, I would have to reaffirm my Mexican citizenship. He also explained that I would encounter problems just living in Mexico if I didn't sign those papers. During this entire procedure, he never said anything about the implications for my U.S. citizenship and neither my mother nor I thought to ask until I actually signed the papers. At that time, I noted the language which said that I was forsaking other nationalities and I asked the attorney what it meant for my U.S. citizenship. The attorney responded very aggresively /sic/ and preached to me to the effect that I'd been born in Mexico and he couldn't understand why I would be reluctant to sign a document reconfirming the Mexican nationality which I had acquired at birth, After he assured me and my mother that the papers I was signing had no meaning outside of Mexico, I signed the papers....

A document ("constancia"), issued to appellant by the Department of Foreign Relations dated August 4, 1972, attests that she applied for a certificate of Mexican nationality on April 24, 1972, and expressly renounced her United States citizenship and all allegiance to the United States.

Presumably the Department of Foreign Relations informed the United States Embassy that appellant had made application for a certificate of Mexican nationality, for appellant states that she received a letter from the Embassy requesting that she appear for an interview. Appellant later recounted her visit to the Embassy as follows:

> I went to the Embassy and spoke with the consul Nancy Koch who told me that the papers I had signed, had, in addition to reaffirming my Mexican nationality, also jeopardized my U.S. citizenship. It's been about 13 years since those meetings and I don't recall all of the details. In any case I do remember that I was intimidated by the consul and even frightened at the prospect of losing my U.S. citizenship. If my memory serves me well, I said little, particularly after I was told I would be stripped of my U.S. citizenship. After Consul Nancy Koch had spoken to us for a while, I was just numb and depressed at the thought of losing my U.S. citizenship. She had me fill out a number of papers, all of which I signed unquestioningly. They were presented to me as a fait of compli /sic/, and I felt that I had no other recourse but to sign. During my meeting with Mr. Gonzalez /a consul at the Embassy with whom appellant discussed her case in 1983/ he showed me a paper I had signed called the statement of expatriated person, I all /sic/ sincereity /sic/, I don't recall signing it, but it was my signature on the paper. I suppose I signed everything because I felt it was futil /sic/ to protest and that I was going to be stripped of my U.S. citizenship no matter what.

During her interview on August 9, 1972 appellant signed an affidavit of expatriated person in which she stated that she had made a formal declaration of allegiance to Mexico on April 24, 1975; that she had done so voluntarily and with the intention of relinquishing her United States nationdlity. She also completed a form for determining United States citizenship. Therein she explained that she made the declaration of allegiance because: "I plan to live in Mexico the rest of my life. I cannot hold allegiance to two countries." On the basis of the foregoing evidence, the consular officer prepared a certificate of loss of nationality on August 9, 1972. 2/ The certificate recited that appellant acquired 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.

nationality of both the United States and Mexico at birth: that she made a formal declaration of allegiance to Mexico on April 24, 1972; and thereby expatriated herself on that date under the provisions of section 349(a)(2) of the Immigration and Nationality Act.

The consul dispatched the certificate and underlying evidence to the Department without accompanying commentary on appellant's case, merely noting that appellant's passport had been retained and would be destroyed upon approval of the certificate of loss of nationality.

The Department approved the certificate on August 28, 1972, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A copy of the approved certificate was sent to the Embassy to be forwarded to appellant who has acknowledged its receipt.

In April 1974 appellant obtained a Mexican passport. A certificate of Mexican nationality was issued in her name on May 6, 1974.

In March 1981 appellant's mother filed a petition on behalf of appellant, her husband and children for preference immigrant visas. As of March 1981 no numbers were available for issuance of visas in the category applicable to appellant and her family. Appellant's mother died in April 1982. In May 1982, while in California, appellant applied for a passport, but in June of that year wrote to the Los Angeles Passport Agency that "due to the delay on my passport application, I wish to cancel my application for now." Coincident with appellant's letter, the Department informed the Passport Agency that she had lost her citizenship in 1972 and that a passport might not be issued to her.

On July 5, 1984 appellant addressed a letter to the Board to enter an appeal which was forwarded to the Board by a consular officer of the Embassy at Mexico City who informed the Board that:

> Mrs. Heredia informed me [In 1983] that she had lost her U.S. citizenship and asked if I would not review her case to see if there was not anything she could do to recoup her lost U.S. citizenship. Shortly there after, *Mrs.* Heredia came to the Embassy and exhibited the package

> of documents which she had been given when she had been expatriated. A careful review of the documents, including the Certificate of Loss, did not contain any information concerning her right to appeal.
>
> It is this officer's opinion, and barring information to the contrary in her passport file, that Mrs. Heredia was never formally advised concerning her right to appeal her loss of nationality. I am thereby, forwarding Mrs. Heredia's appeal for your consideration.

Appellant does not contend that she acted involuntarily in applying for a certificate of Mexican nationality, but maintains that she did not intend to relinquish her United States citizenship when she made a pledge of allegiance to Mexico.

II

Before proceeding we must decide whether the Board may hear an appeal entered twelve years after the Department of State determined that appellant expatriated herself, In order to do so, the Board must conclude that the appeal was filed within the limitation prescribed by the applicable regulations.

Timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). If an appellant fails to comply with a condition precedent to the Board's going forward to determine the merits of his claim, i.e., does not bring the appeal within the applicable limitation and adduces no legally sufficient excuse therefor, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

In 1972 when the Department approved the certificate of loss of nationality that was executed in this case, the limitation on appeal was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality. 22 CFR 50.60 (1967-1979). Consistently with the Board's practice in cases similar to the one now before us, we will apply the standard of "reasonable time" in this case rather than the present limitation of one-year after approval of the certificate of loss of nationality (22 CFR 7.5(b)).

Ashford v. Steuart, 657 F. 2d 1053, 1055 (9th Cir. 1981) defines reasonable time as follows:

> What constitutes "reasonable time" depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co,, 542 F. 2d 928, 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F. 2d 1062, 1967-68 (10th Cir. 1980).

Appellant justifies her delay solely on the grounds that she was never advised of her right to appeal the Department's determination of loss of her nationality until 1983 when she spoke to a consular officer about her case. The appeal, she maintains, should therefore be deemed timely in the circumstances of her case.

When asked to elaborate on why she did not appeal earlier, appellant informed the Board as follows:

> ...I was never advised that I had any re-course when I was stripped of my U.S. Citizenship, Mr. Gonzalez, the current Embassy's Chief of Citizenship, received the intire /sic/ package of papers given to me by the Embassy and no where, I repeat, no where was there any suggestion let alone specific information to the effect that I could in any way challenge the State Department's action in taking my U.S. Citizenship away from me.
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> When I went to speak to Mr. Gonzalez he too asked me why I hadn't appealed my loss of U.S. Citizenship immediately after I was told that I had lost. It came as a complete surprise to me when Mr. Gonzalez told me that I had one year from the date the document which said I'd lost had been signed. I told him that had I known, I would have taken the steps to appeal my loss.
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> Not only was I not informed that I had the right to appeal, Nancy Koch's demeanor served to discourage me from asking any

> questions. Again, the meeting/interview ~~appellant~~ presumably refers to the interview she had with the Consul in August 1972 was one sided and conducted in such a manner that I believed there was nothing I could do to effect or challenge the outcome. If you have my record, and Mr. Gonzalez has informed me that you do, you will not find any suggestion let alone information to the effect that I was advised of my right to appeal.

In replying to the Department's brief, counsel added that:

> ...A relevant fact not discussed by Mrs. Heredia in her letters is that within a few months after receiving her CLN she returned, with her mother, to the United States Embassy and talked to Consul Nancy Koch. Ms. Koch told her that she could go to live in the United States anytime she wanted to and that nothing else could be done to regain her United States citizenship. Ms. Koch failed to inform *Mrs.* Heredia of her right to appeal her loss of citizenship.
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> ...The State Department has stipulated that *Mrs.* Heredia was not informed of her right to appeal her loss of nationality. The State Department's own internal operations instructions mandated that each person served with a CLN be notified in writing of the right of appeal. Mrs. Heredia was not so informed in clear contravention of the policy. When she returned with her mother within a few months after the issuance of the CLN to the American Embassy to seek out the expert advice of Consul Koch, she was unaware of her right to appeal. Mrs. Heredia's rights were unquestionably prejudiced by the State Department's failure to have written notice affixed to her CLN. The State Department had four chances to rectify the omission: (1) the initial preparation of the certificate, (2) its subsequent approval in Washington, D.C., (3) final review in the Embassy prior to service on Mrs. Heredia, and (4) Mrs. Heredia's

> later meeting with Ms. Koch. *Mrs.* Heredia's unawareness of her right to appeal explains why no appeal was taken in 1972.
>
> ...
>
> The injustice of the situation is obvious. When Mrs. Heredia inquired of the State Department official, a purported expert in the field of citizenship, what could be done to reverse her loss of nationality, that public servant informed her that nothing could be done, knowing all the while that she had a right of appeal to the Board of Appellate Review. It is unfair for the State Department to complain that there was no justifiable reason for delay in bringing the appeal, when, in fact, it is the State Department's fault that no appeal was brought based upon the advice of a State Department official, The State Department's own memorandum of September 20, 1984, by William B. Wharton recognizes the reason for delay, stating, "We have just received appellant's letter of 9-1-84, which lends support to her excuse for unreasonable delay." In referring to the omission of the notice of right of appeal, the brief simply states, "The Department expresses its utmost apologies to appellant for this error." *An* apology cannot make up for loss of citizenship, particularly when the government agency which caused the loss also caused Mrs. Heredia to lose her right to appeal.

There is no dispute that the copy of the approved certificate of loss of nationality sent to appellant did not bear information about procedures for taking an appeal to this Board. Prior to January 1973, the form of certificate of loss of nationality (FS **348**) did not carry such information, Under Departmental guidelines, 8 Foreign Service Manual **224.21(a)** (March 1977), essentially unchanged since at least 1954, however, consular officers were under instructions when forwarding the certificate of loss of nationality to inform the affected person in **writing** of the right of appeal, Appellant implies that she received no letter from the consul in charge of her case informing

her of the right of appeal. We note, however, that there is a legal presumption that government officials execute their assigned duties faithfully and correctly, absent evidence to the contrary. Boissonnas V. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951). At this distance from 1972 the facts are, however, probably unknowable.

There is no corroboration in the record of appellant's recent allegations that in 1972 the consular officer expressly informed appellant that she had no recourse of any kind from the Department's decision on loss of her citizenship, and we are not prepared to assume that the consul flatly denied that there was an administrative appeal procedure.

Even if it were proved that the consul did not specifically tell appellant about the appeal procedures, we do not consider such failure to be material error.

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). A fortiori, giving notice of the right of appeal is not a requirement of due process, unless giving such notice is expressly mandated by law or regulations having the force of law, 3/

The Department's internal guidelines in effect in 1972, 8 Foreign Affairs Manual 224.21(a), which required consular officers to advise an expatriate of the right of appeal, did not have the force of law. See Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F. 2d 21 (1st Cir. 1979), and U.S. v. Kline, 366 F. Supp, 994 (D.D.C. 1973).

If we understand appellant correctly, she is saying that because no official told her she might appeal, but actually discouraged her from believing recourse was available, she was totally justified in remaining passive for many years until someone knowledgeable finally spelled out how she might contest the Department's decision of loss of her nationality. We are not persuaded that such an argument has merit on the evidence available in this case,

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3/ Since November 30, 1979 there has been a requirement with the force of law that an expatriate be informed in writing of the right of appeal within one year after approval of the certificate of loss of nationality issued in his case. 22 CFR 50.52.

Elementary fairness, of course, dictates that a person in the position of appellant be informed of her available rights where they exist, but in the circumstances of this case, appellant may not absolve herself of any responsibility to ascertain readily ascertainable facts.

In her submissions appellant writes warmly of her feelings of loyalty to the United States, and describes how she and her family through the years lived in an American style in Mexico. If she felt deeply concerned in 1972 about loss of her American citizenship, how explain why she passively accepted her situation? In 1983 appellant approached a knowledgeable and apparently responsive Embassy official asking him to review her case. It is difficult to understand why she did not in 1972 or shortly thereafter try to see any official other than the consul whose demeanor she found forbidding. She had received legal advice before signing the application for a certificate of Mexican nationality, and says she was told that doing so would have effect only in Mexico. When she learned of her loss of United States nationality why did she not return to the attorney and ask his or another attorney's help to seek a way to recover the citizenship she did not realize she might lose?

It is settled that the law imputes knowledge where opportunity and interest coupled with reasonable care would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, F. 2d 952 (4th Cir. 1939). Appellant was or should have been put on inquiry in 1972. She did not exercise due diligence in attempting to assert a claim to her lost citizenship.

Counsel disputes the Department's contention that it suffers prejudice by appellant's delay in appealing. As he put it in appellant's reply brief:

> ...In fact, it is Mrs, Heredia's case that has been prejudiced by the passage of time. Her mother, who could have testified to the meeting between Mrs. Heredia and Ms, Koch, is now deceased. The Mexican attorney, who advised Mrs. Heredia that the oath of allegiance to Mexico would have no effect outside of Mexico, is also deceased. Furthermore, the State Department could not be prejudiced by lack of a record of a conversation concerning possible expatriative acts without a showing that any such record ever existed, which is extremely unlikely.

We do not agree with counsel. Under the rule in Vance v, Terrazas, 444 U.S. 252 (1980), the Department of State has the burden of proving that appellant intended to relinquish her United States citizenship when she performed the statutory expatriating act at issue, In our judgment, appellant, not the Department, was responsible for the fact that an appreciable period of time elapsed in this case: she has not adduced a legally sufficient reason for failing to move sooner. The passage of so much time inevitably increases the difficulty the Department faces in carrying its burden of proof on the key substantive issue presented by this appeal - appellant's intent in 1974 with respect to her United States citizenship. Had appellant acted diligently and promptly to ascertain how she might challenge the Department's decision, the evidence of her mother and her Mexican attorney might have been available, and the recollection of the events of 1974 fresh in the minds of all parties concerned. That is not now the case. Even appellant concedes that; "it's been about 13 years since those meetings /with the consul who handled her case/ and I don't remember all the details."

In the circumstances of this case, where there has not been a showing of sufficient cause for the delay of twelve years in taking the appeal and there is at the very least colorable prejudice to the Department by the delay, the Board must accord great weight to the interest in finality and stability of administrative determinations.

III

Upon consideration of the foregoing, it is our conclusion that the appeal was not taken within a reasonable time after appellant received notice of the Department's holding of loss of her United States citizenship. Accordingly, the appeal is time-barred. Lacking jurisdiction to consider it, the appeal is hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member