January 6, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] B[redacted] A[redacted]

This matter comes before the Board on appeal from an administrative determination of the Department of State dated December 18, 1969 that appellant, P[redacted] B[redacted] A[redacted], expatriated himself on July 11, 1963 under the provisions of section 349(a)(2) of the Immigration and Nationality Act by making an oath of allegiance to the British Crown when he was naturalized in Canada upon the petition of his father. 1/ The appeal was entered on April 6, 1984.

Upon review of the applicable law and the facts of record, the Board finds that appellant could not have lost his United States nationality in 1969, and therefore that no final determination of loss of nationality, from which an appeal may be taken, has, to date, been made in this case. The appeal is therefore dismissed. The Board, however, invites the Department to re-examine the case and take such action as may be appropriate in the circumstances.

1/ Section 349(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 United States citizen by birth in [redacted]. Appellant's father was a native born United States citizen; his mother, a native born Canadian. When appellant was a few months old, his parents took him to Canada where the family continued to live throughout appellant's childhood. When appellant was 16 years old, his father, who had obtained naturalization in Canada in 1953, petitioned for naturalization for his son under section 10(5) of the Canadian Citizenship Act. 2/ A certificate of Canadian

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2/ Section 10(5) of the Canadian Citizenship Act of 1946, as amended, provided that the competent minister might at his discretion grant a certificate of Canadian citizenship to a minor child of a person to whom a certificate of citizenship had been granted under the Act.

In his brief, appellant explained as follows why his father had petitioned on his behalf for the grant of Canadian citizenship:

> On approximately July 11, 1963, Mr. and Mrs. A[redacted] and their son Peter were due to depart Canada for a trip abroad to Europe. At that time it was discovered that the young Peter had no passport of his own and would thus immediately need to receive a passport or there would be a delay in their travel plans. Peter's parents at this time both assured him that he was in no way giving up his claim to U.S. citizenship and was merely applying for a Canadian passport so that he could travel. Under some duress then, the sixteen-year old [redacted] A[redacted] acquired Canadian nationality and did what was necessary in order to obtain this passport in the fastest amount of time. Within 24 hours, he was issued a Canadian passport and was in no way led to believe his U.S. citizenship was affected.

citizenship was granted on July 11, 1963 on which date he swore allegiance to the British Crown. 3/

From 1964 to 1968 appellant attended Williams College in the United States. Shortly after appellant reached the age of 18, he registered for the United States Selective Service at the United States Embassy in Ottawa. However, according to appellant, his parents "believed very strongly -- fervently," that he should not be involved in any way in the Viet Nam war, and they "applied heavy pressure on him to avoid military participation and renounce his U.S. citizenship." At his parents' insistence (and with his mother's guidance), appellant stated, he wrote to Local Board 100 (Foreign) of the United States Selective Service System, on January 16, 1969, stating that he had been improperly classified; "since the age of 16, I have been a Canadian citizen." 4/ Appellant enclosed a statement from the Canadian Citizenship Registration Branch dated July 23, 1968, attesting that he had been

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3/ Section 12 of the Canadian Citizenship Act of 1946, as amended, provided that the certificate of citizenship should not take effect until the applicant subscribed to the following oath of allegiance:

> I, A.B., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> So help me God.

4/ It appears that appellant had received a delinquency notice from Local Board 100 for failing to report for an armed forces physical examination in July 1968.

granted a certificate of Canadian citizenship on July 11, 1963 and had on that day made the prescribed oath of allegiance to Queen Elizabeth 11.

The Department of State subsequently instructed the Embassy to ascertain whether appellant had taken any voluntary steps to divest himself of United States citizenship. The Embassy was, however, unable to reach appellant. Then, on August 28, 1969 appellant visited the Embassy and inquired about his citizenship status. According to a report the Embassy made to the Department on August 29, 1969, appellant "stated that he believed he had lost his United States citizenship since the time he obtained Canadian citizenship, July 11, 1963." He further reportedly stated that if the United States still considered him to be a U.S. citizen he would renounce.

Appellant completed a questionnaire to facilitate the determination of his citizenship status, and executed an affidavit wherein he stated:

> The question will undoubtedly arise as to why I registered for the draft if I believed myself to be Canadian. The answer is this: I was enrolled at Williams College in Massachusetts and thought I therefore must register. I realize now that this procedure was not necessary, and in fact probably in error. Nevertheless I assumed that upon graduation and permanent return to Canada, I would lose my eligibility for selective service.

He declined to complete Form 176 (application for registration/passport), the Embassy reported, "on the basis that he believes himself not to be a U.S. citizen." 5/

5/ In his brief, appellant states that he refused to fill out Form 176, because he took it to be "the final renunciation form." "In his mind," he states, "there was a big difference between saying one would renounce as a sort of strategic compromise between the demands of family and state and, actually performing such a serious act." As appellant put it, he was in a bad emotional state at this time; his parents were in the throes of separation and he did not want to cause them further aggravation. He thus went along with their repeated requests that he state his loyalties as being Canadian.

In response to the Embassy's request for an opinion on appellant's case, the Department informed the Embassy on October 31, 1969 in part as follows:

> ...The Certificate of Canadian Citizenship issued to P[redacted] B[redacted] A[redacted] on July 11, 1963, when he was sixteen years old, was granted under section 10(5) of the Canadian Citizenship Act. It is not considered naturalization within the meaning of Section 349(a)(1) of the Immigration and Nationality Act because he was under the age of twenty-one. However, the oath of allegiance to the Queen, which he voluntarily took on July 11, 1963 when he obtained a Certificate of Canadian Citizenship, is considered an affirmative act within the meaning of section 349(a)(2) of the Immigration and Nationality Act.. ..

The Department instructed the Embassy to prepare a certificate of loss of nationality in appellant's name, showing his expatriation under section 349(a)(2) of the Immigration and Nationality Act, with an effective date of July 11, 1963. The Embassy executed such certificate on November 12, 1969. 6/ The certificate recited that appellant acquired United States citizenship by birth at Brookline, Massachusetts; that he acquired the nationality of Canada by naturalization; that he subscribed to an oath of allegiance to Queen Elizabeth II on July 11, 1963; and thereby expatriated himself under section 349(a)(2) of the Immigration and Nationality Act. The Department approved the certificate on December 18, 1969, and subsequently sent a copy of the approved certificate to the Embassy for transmittal to appellant.

It appears that in 1981 or 1982 appellant applied for a United States passport at the Consulate General in Toronto. On

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6/ 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

February 9, 1982, appellant's Toronto solicitors wrote the Department's Passport Office inquiring why their client had been advised that when he applied for a passport, "the computer directs the consulate to 'hold' the application." In June 1983 the Department informed the Consulate General, in response to its inquiry, it had been determined in 1969 that appellant had expatriated himself. The Consulate General was instructed to inform him of the procedures to take an appeal to this Board.

An appeal was entered through counsel on April 6, 1984. Appellant contends that the determination of his loss of citizenship is contrary to fact; he did not think he had taken any steps which would lead to loss of United States citizenship. Until approximately February 1982, appellant asserts, he "functioned on the belief that he was a United States citizen, residing in Canada with Canadian nationality as well."

6/ Cont'd.

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.

II

Section 349(a)(2) of the Immigration and Nationality Act provides that a person shall lose his nationality by taking an oath of allegiance to a foreign state. 7/ Section 349(a)(1) of the Act, 8 U.S.C. 1481(a)(1) provides in pertinent part that: "... A person who is a national of the United States ... shall lose his nationality by (1) obtaining naturalization in a foreign state ... upon an application filed on his behalf by a parent ... provided, that nationality shall not be lost by any person under this section as the result ... of a naturalization obtained on behalf of a person under 21 years of age by a parent ... unless such person shall fail to enter the United States to establish a permanent residence prior to his 25th birthday ..." (Emphasis added).

In 1969 when [redacted] was found by the Department to have lost his United States citizenship by virtue of his having taken an oath of allegiance to Queen Elizabeth in 1963, he was 22 years old. The record is absolutely clear that the oath of allegiance [redacted] took was in conjunction with his naturalization as a Canadian, upon the petition of his father. Although the Department maintains in this case that the taking of the oath of allegiance may be an action separable from the naturalization proceeding, such a conclusion would render null and void [redacted] statutory right to negate the effect of his Canadian naturalization upon his United States citizenship prior to his 25th birthday. The Department's position on the separability of coincident acts cannot be sustained when its effect is to render a statutory right null and void.

7/ Supra, note 1.

The statutory provision upon which the Department of State relied in 1969 was the general provision of 349(a)(2) of the Immigration and Nationality Act which states that any person loses his naturalization by taking an oath of allegiance to a foreign state. But the Department overlooked then and continues to ignore the fact that section 349(a)(1) specifically protects minors such as [redacted] from the consequences of their acts in particular situations, viz those in which the naturalization was the consequence of another's overt action rather than their own. 8/

8/ See Gordon & Rosenfield, Immigration Law & Procedure, section Z0.9 (c), at 20-68 and 20-69 (1970):

> Although the Act of 1952 also fixes the age of maturity for some purposes of 18, it also imposes a requirement for reaffirmation of American nationality after attaining that age. 23/ The statute specifies that the 18 year age limitation applies only to expatriation by oath of allegiance, foreign government service, voting and formal renunciation of allegiance, and specifies that a person who has performed such acts will not be deemed to have expatriated himself if he asserts his claim to American citizenship within 6 months after attaining the age of 18, in the manner prescribed by the Secretary of State's regulations. 24/ These special provisions do not apply to acts of expatriation not specifically designated in this statute, and the age of maturity in relation to such acts of expatriation generally continues to be the common-law standard of 21 years. 25/ However, he /sic/ statute makes some special dispensations in particular situations. Thus, a person does not lose citizenship when he is naturalized through action of his parents while he is under 21, unless he fails to establish permanent residence in the United States prior to his 25th birthday. 26/
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> 23/ Sec. 351(b), Act of 1952, 8 U.S.C. 1483(b).
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> 24/ Id.
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> 25/ ....
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> 26/ See 349(a)(1), Act of 1952, 8 U.S.C. 1481(a)(1).

In such cases, section 349(a)(1) very specifically establishes the right of a minor to undo any expatriating effect of the action taken by his parent or guardian while he was a minor and extends that opportunity to him until the time of his 25th birthday. 9/

The Department fails to show, and indeed does not contend, that except in the context of his naturalization as a Canadian in 1963 [redacted] swore allegiance to Queen Elizabeth. In this case the oath cannot be separated from the act of naturalization. Naturalization could not have been concluded without the oath. Supra, note 3. Consequently, we cannot accept the Department's contention that in this case the taking of an oath has any independent standing.

9/ It is relevant to note that in 1970 the Department itself appears to have recognized the impropriety of such a determination, for just a few months after its issuance of a certificate of loss of nationality for [redacted] the Department, in consultation with the Immigration and Naturalization Service, concluded that persons naturalized in Canada under section 10(5) of the Canadian Citizenship Act were subject to the proviso of section 349(a)(1) of the Act. "The oath of allegiance," the Department informed a consular office in Canada in May 1970, "is considered an inseparable incident to that naturalization and is not expatriating." In the case of one who had obtained naturalization on the petition of his father, the Department instructed the post concerned, to inform the person that he was subject to the proviso of section 349(a)(1) and "will expatriate himself on his twenty-fifth birthday should he fail to comply with the provisions to retain his United States nationality." This interpretation was incorporated in the Foreign Affairs Manual, 8 FAM 225.2 (4/15/74).

This being so, A[redacted] had until the age of 25, that is until 1972, in which to negate the expatriating effect of his father's petition upon his own nationality. Until such time as it was known whether or not he would avail himself of that opportunity, by establishing a permanent residence in the United States, the Department had no basis on which to determine whether or not A[redacted] had expatriated himself. In 1969, when [redacted] inquired about the status of his citizenship, he gave every indication that he was not considering establishing a permanent U.S. residence or taking any other action to assert United States citizenship. However, a determination on those matters could not, as a matter of law, have been made prior to Mr. [redacted] 25th birthday. Nevertheless, the Department proceeded to approve the certificate of loss of nationality that had been issued by the Embassy.

III

Upon consideration of the foregoing, it is our conclusion that no final determination of appellant's loss of nationality was made in 1969, and that there is no basis for the appeal as filed.

The appeal is dismissed. But having dismissed the appeal on the grounds stated, we consider it only fair to invite the Department to re-examine [redacted] case and take such action as it may deem appropriate in the circumstances.

Alan G. James, Chairman

Mary E. Hoinkes, Member

Dissenting Opinion

I cannot agree with the majority that the Department has not made a final administrative determination from which an appeal, if timely made, may be taken to this Board.

The record shows that the Department held on December 18, 1969, that appellant lost his American nationality under Section 349(a)(2) of the Immigration and Nationality Act by taking an oath of allegiance to a foreign state. Since that time the Department has held to that position and has rejected the argument that appellant was protected by the provisions of Section 349(a)(1). The Department has not backed away from that position while the appeal was being considered by the Board. The majority argues that the Department's determination is not final because as a matter of law a determination of loss could not be made in this case until appellant was twenty-five years of age. The majority holding would prevent the Board from taking jurisdiction where the Department has manifestly made an error in interpreting the law, no matter how timely the appeal may be. I cannot share that view. Surely, if we had the same set of facts except that the Department made the same determination last week and appellant filed his appeal this week, the Board would not refuse jurisdiction on the grounds that the Department's determination was not final, Certainly, I would hope it would remand it to the Department with appropriate instruction. For, if the Board did not take jurisdiction, the non-action of the Board would be tantamount to denying its jurisdiction in any case where the Department had manifestly made an error in law.

The majority's opinion is difficult to comprehend in light of the wording of its own regulations as to timeliness applicable when the Department made its determination. Those regulations (Section 50.60 of Title 22 of the Code of Federal Regulations) provided: "A person who contends that the Department's administrative holding of loss of nationality or expatriation 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.,.." (Emphasis supplied.) Thus, clearly the regulations foresaw and made provision for appeals to the Board where the Department manifestly made an error in law, as the majority says the Department did in this case, One cannot negotiate around this reef simply by asserting that the determination is not final some sixteen years after the Department made the determination, especially since the Department continues to hold to its position.

The majority holding is especially disturbing because it implies that where the Department has made an error in law, that determination may be upset at any time and the passage of years even decades may be ignored no matter what the effect is on availability of evidence and no matter how much the decisions of the Department's officers in the field may be challenged unfairly with self-serving declarations whose veracity cannot be reasonably put to question with evidence contemporaneous with the allegedly expatriating act. The majority would risk opening up a Pandora's box of ill-founded claims to American nationality which the regulations regarding timeliness were designed to prevent.

In my considered view, the Board does lack jurisdiction in this case. It lacks jurisdiction not because the Department has not made a final administrative determination but simply because appellant did not appeal to the Board within a reasonable time and no convincing evidence has been produced to excuse the appellant for delaying some fifteen years in filing the appeal. I would therefore dismiss the appeal on the grounds that it is time barred.

James G. Sampas, Member