June 30, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: P[redacted] R[redacted] M[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, P[redacted] R[redacted] M[redacted] expatriated himself on July 28, 1964 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 before a ccnsular officer or the United Stares at Mexico, D.F., Mexico. 1/

For reasons stated below, we conclude that the appeal is time-barred and the Board lacks jurisdiction to consider it on the merits. The appeal is accordingly denied.

I

M[redacted] became a United States citizen upon his birth at [redacted] to a United States citizen mother and a Mexican citizen father. Through the latter he also acquired the nationality of Mexico. According to an affidavit M[redacted]' mother executed on August 25, 1985, he was a sickly infant, and after his birth she was having problems with his father. She therefore asked appellant's grandmother, her husband's mother and a citizen of Mexico, if she would care for the baby. Appellant's grandmother agreed, and took M[redacted] to live with her in Mexico City.

1/ Section 349(a)(5), formerly section 349(a)(6), of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), provides as follows:

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 --

. . .

(5) making a formal renunciation of his 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Public Law 95-43?, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of section 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of section 349(a) as paragraph (5).

Appellant's mother has also stated that she made a series of decisions over the years to allow her son to remain with his grandmother and, except for a brief period while appellant attended grammar school in Florida, not take him into her own household. In her affidavit, cited above, she explained the situation as follows:

> ...P[redacted] continued to live in Mexico City with his grandmother and since she had no one else but P[redacted], she continued to rely more and more on his companionship. Since P[redacted] had resided with his grandmother for such a long period of time and during those years I was experiencing additional marital difficulties, I thought it best to let P[redacted] continue to live with his grandmother so that he could take care of her in the later years of her life. I thought that this was the least I could do for the many years of fine care she provided to P[redacted]. I did not, however, at any time ever permit P[redacted]'s grandmother to legally adopt him.

The record shows that M[redacted] was regularly documented as a United States citizen by the Embassy at Mexico City, beginning in 1959. The last United States passport he neld was issued in August 1963.

When he had barely passed his 18th birthday, M[redacted] made a formal renunciation of his United States nationality at the Embassy in Mexico City. The date was July 28, 1964. The oath of renunciation appellant signed on that date indicates that he performed the act in the form prescribed by the Secretary of State. There is, however, no other documentation of the event, except the certificate of loss of nationality that the consular officer who administered the oath executed on August 4, 1964, as required by section 358 of the Immigration and Nationality Act. 2/ The consular officer

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2/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501 provides that:

> 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.

certified that M[redacted] was born both a United States and a Mexican citizen; that he made a formal renunciation of his United States nationality on July 28, 1964; and thereby expatriated himself under the provisions of section 349(a)(6) of the Immiqration and Nationali Act. The consular officer forwarded the certificate to the Departme with no commentary on the circumstances unaer which M[redacted] had appeared before him.

In an affidavit M[redacted] executed on September 5, 1985, he gave the following account of the reasons wh he surrendered his United States citizenship.

> In approximately May, 1964...I mentioned to my grandmother, then age 74, that I would like to return to the U.S. and enlist in the U.S. Army... She became quite upset at that statement and pleaded that I not leave her alone because she needed me to take care of her...it was just my grandmother and I residing together and she was looking exclusively to me for support, financial as well as moral. After all the years that my grandmother devoted to nurturing and raising me since the time I was 6 months old, I did not have the heart to desert her in her old age.
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> ...The effects of my comment that I wanted to join the U.S. Army, along with the personal problems with her son, J[redacted], apparently were much more traumatic to my grandmother that I realized. One day during July, 1964, she told me to accompany her to the American Embassy in Mexico without explaining the complete reason for such a visit. At the Embassy she stated that she needed me to take care of her and she was afraid that I would leave her and return to the United States. She told me to sign a form renouncing my U.S. citizenship. I signed the form, but did so without any intention whatsoever to renounce my citizenship and allegiance to the greatest country in the world - the U.S.A. I did not understand some of the language on the form because of my poor comprehension of English and I do not recall the representative at the Embassy asking me any questions....
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> The signing of the form was also an involuntary act because it was done under the pressure and duress of sincerely believing that if I did not comply with the wishes of my grandmother, who took such great care of me for 18 years, that

> she would become seriously ill and possibly even die, for such rejection and desertion on my part. Under these most difficult personal circumstances, I really did not believe that I had a free choice in the matter and had to sign the form renouncing my U.S. citizenship.

The Department on September 24, 1964 approved the certificate tne Embassy officer had executed in appellant's name, and a copy of the certificate, as approved, was sent on that day to the Embassy to forward to appellant. Approval of the certificate constitutes an administrative determination of loss of nationality from wnicn McManus was entitled to take an appeal to the Board of Review on the Loss of Nationality of the Passport Office of tne Department of State, the predecessor of the Board of Appellate Review.

Appellant states that shortly after he renounced his United States nationality his grandmother also induced him to obtain a certificate of Mexican nationality. He says he was conscripted into the Mexican Army in 1965; and visited the United States in 1966 and in 1972; all this time he was residing with his grandmother. In January 1975 his grandmother died. Thereafter he felt that he "could now proceed with my life and my dream of returning to the United States."

He states in his affidavit that in February 1975 he visited the Embassy "to request to have my U.S. citizenship restored." He was allegedly supplied with a form and told that "my U.S. citizen mother had to complete certain information for this form and then sign it and return it to the Embassy." Mc[redacted] affidavit continues:

> I sent the form in the mail to my mother in the United States. I waited and waited, but my mother never completed the form or returned it to me or the Embassy. She only sent a letter stating to 'forget' that I have a 'mother.' She never fully explained her reason for not assisting me in having my U.S. citizenship restored until a few years later. She then explained to me for the first time, the pure hatred she had for my father (her first husband) and she was convinced that my father was the motivating force behind me attempting to restore my U.S. citizenship. She could not offer any particular reason why she entertained sucn a thought; hut because she did hold that belief and because she wanted absolutely nothing to do with my father and, in fact, despised him, she completely ignored my request to compiete and sign the form necessary to initiate the procedure to have ? U.S. citizenship restored.

> My frustrations in attempting to have my U.S. citizenship restored and to return to the U.S., had reached the point where I was about to give up.
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> In March, 1975, my wife and I had our first of 3 children and this provided me with the necessary solace to overcome my frustrations and to continue to wait for the day that I could return to the country of my birth. I became more involved with my family with the births in 1977 and 1983 of the 2 other children. I also wanted to be a credit to the United States when I did return so I continued to work and study hard to make myself, my family and my fellow Americans, relatives and friends, proud of me when my day to return arrives....

In 1984 appellant went to Florida where he is living presently. On October 12, 1984 he applied for a United States passport at Miami In February 1985 the Department denied his application on the ground of non-citizenship. M[redacted] filed an appeal through counsel in March 1985. He contends that he did not sign the oath of renunciati of his United States nationality voluntarily since he did so under t undue influence of his grandmother. He further contends that he did not intend to relinquish his United States citizenship.

At the request of appellant and his counsel and with the agreement of the attorney for the Department, the Board heard oral argument by telephone on March 14, 1986.

II

In this case we confront a threshold issue - whether the Board may consider and decide an appeal taken twenty years after the Department determined that appellant expatriated himself.

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. Costell v. United States, 365 U.S. 265 (1961).

In 1964 when the Department approved the certificate of loss of nationality that was issued in this case, there was no limitation on appeal specified in the rules and procedures of the Department applicable to the Board of Review on the Loss of Nationality of the Passport Office, the predecessor of the Board of Appellate Review.

In 1966 federal regulations were promulgated which prescribed that an appeal to the Board of Review on the loss of Nationality might be made "within a reasonable time" after the affected person received notice of the Department's holding of loss of his nationality. Section 50.60, Title 22, Code of Federal Regulations, 31 F.R. 13539, Oct. 13, 1966.

When the Board of Appellate Review was established in 1967, the federal regulations promulgated to govern its activities adopted the "reasonable time" limitation of the previous regulations. 22 CFR 50.60, 32 F.R. 15359, November 29, 1967. On November 30, 1979 the regulations governing the Board were revised and amended. They prescribe that an appeal shall be filed within one year after approval of the certificate of loss of nationality. 22 CFR 7.5(b). As to the applicable limitation on appeal, we believe the norm of "reasonable time" should govern. Plainly, it would be unfair to apply the present limitation of one year in this case, for an amendment shortening the time for appeal is usually considered to apply prospectively not retroactively.

Whether appellant's delay of twenty years in challenging the Department's determination of loss of his United States citizenship was reasonable in the circumstances of his case is therefore the first issue we must consider.

The factors to be evaluated in determining whether an appeal has been filed within a reasonable time after the affected person had notice of the decision are succinctly stated in Ashford v. Steuart, 657 F. 2d 1053 (9th Cir. 1981);

> 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). 657 F. 2d at 1055. 3/

3/ In Lairsey v. Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & Procedure, section 2866 at 228-29:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner. 542 F. 2d at 930.

In his brief appellant argued that his delay in taking an appeal was not unreasonable because he never received a copy of his oath of renunciation or the certificate of loss of nationality that was approved by the Department, and because he had not been informed of his right of appeal. He was not, he stated, indifferent to his loss of citizenship. Although he felt compelled morally and emotionally to remain with his grandmother until her death, he promptly visited the Embassy after her death (February 1975) "to attempt to restore his citizenship." Noting that this attempt met with frustration because of his mother's non-cooperation, appellant asserts that he acted reasonably and "sought solace in his family." His responsibilities to his family from 1975 to 1984 "reasonably delayed any further inquiries on Appellant's part to have his citizenship restored," (Emphasis in original.)

During oral argument on March 14, 1986 counsel for appellant said he was now convinced that M[redacted] had no conception that an appeal process was open to him; M[redacted] visit to the Embassy in 1975 was not for the purpose of making an appeal but simply to inquire about how to get United States citizenship. 4/ When appellant's mother did not return the form he had been given, "he didn't think about going back to appeal, because he didn't even think of 'appeal' to begin with." TR 9, 10. Finally, in 1984 when [redacted] travelled to the United States, "he did not come to appeal because that wasn't even a word he even thought about in his case." Id. Only after he applied for a passport and was refused did he consult present counsel and learn that there was an appeal process. Id. Furthermore, [redacted] never received a copy of the certificate of loss of his nationality or notice of any appeal rights. Id.

[redacted] himself stated that he had not realized he had lost his United States citizenship by making a formal renunciation. TR 28. He thought that "it was like pending." Asked by counsel for the Department to explain the word "pending," [redacted] replied: "That it wasn't -- that I hadn't renounced my citizenship, that is /sic/ was just a separate form that I had, that I could go back again and just say that I am an American citizen, and I want to establish again that I am an American citizen." TR 31.

We are unpersuaded that appellant did not realize in 1964 that he had renounced his United States citizenship. In his brief and supporting affidavit he stated that in February 1975 he went to

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4/ Transcript of Hearing in the Matter of [redacted] Mc[redacted] Board of Appellate Review, March 14, 1986 [hereafter refe[redacted] to as "TR"). pp. 8, 9.

the Embassy to seek "restoration" of his citizenship. But at the hearing he tried to convey the impression that he had been unaware for many years that he had forfeited his citizenship. There is an inconsistency in his submissions which raises in our minds the question whether appellant recalls accurately what happened in 1964. Moreover, we are of the view that the consular officer who administered the oath of renunciation to [redacted] undoubtedly explained to him what a serious act he was about to perform and asked him to confirm that he wished to renounce and did so voluntarily. There is a legal presumption that in the absence of evidence to the contrary public officials execute their duties in the manner prescribed by law and regulations. Boissonnas v. Acheson, 101 F. Supp. 138 (S.D. N.Y. 1951). [redacted] has submitted no evidence to rebut that presumption.

Being reasonably satisfied that [redacted] knew he had actually renounced his United States citizenship, we are therefore unable to accept his argument that his delay was justified because he did not receive the certificate of loss of nationality that the Department had approved in his name. The record shows that the Department duly sent a copy of the approved certificate to the Embassy to forward to appellant. There is no record of the disposition of the certificate after it reached the Embassy, as we may fairly assume it did, But, in the absence of evidence to the contrary, we may assume that the Embassy carried out its duty and forwarded the certificate to [redacted] at his last known address. Boissonnas v. Acheson, supra. Let us assume, however, that appellant did not, for some undisclosed reason, receive the certificate of loss of nationality. Formal renunciation of United States nationality is the most unequivocal act of expatriation. Knowing that he had in fact renounced his citizenship, [redacted] may not shelter behind an alleged but unproved contention that he was never advised he had been found to have expatriated himself. He had facts which he should have used without undue delay to ascertain what his actual citizenship status was, regardless of any alleged lack of actual notice of the Department's ministerial act confirming the renunciation of his citizenship. The rule is well-settled that where anything appears that would put an ordinary person upon inquiry, the law presumes that such inquiry was actually made and fixes notice upon the party as to all the legal consequences. Hux v. Butler, 339 F. 2d 696 (6th Cir. 1964). See also Nettles v. Childs, 100 F. 2d 952 (4th Cir. 1939).

Counsel has asserted that appellant was denied procedural due process of law because the Department did not advise him of his appeal rights. We disagree. First of all, due process does not contemplate a right of appeal. District of Columbia v. Calwans, 300 U.S. 617 (1936). Giving notice of the right of appeal is therefore not a requirement of due process, unless

expressly prescribed by law or regulations having the force of law. Second, in 1964 Departmental regulations provided that consular officers should inform an expatriate of the risht of appeal when forwarding the certificate of loss *of* nationality to him. 8 Foreign Affairs Manual 224.21(a), April 20, 1962. With the passage of time one cannot know for certain whether the consular officer in this case complied with Departmental guidelines, but here too we may assume. in the absence of evidence to the contrary, that he did include with the certificate *a* letter on appeal rights, as prescribed by the FAM. But even had the consular officer failed to do so, this cannot be material error, for the Department's guidelines did not have the force of law.

In sum, [redacted] in all probability knew he had forfeited his citizenship. He apparently made an effort in 1975, then eleven years after his renunciation, to recoup his citizenship, but did not follow through because of considerations that we do not find sufficiently weighty to justify such a long delay in taking an appeal.

Not only has M[redacted] failed to demonstrate that he was justified in not taking *an* appeal until twenty years had Gassed, but also his delay would be prejudicial to the interests of the other party - the Department - were we to hear it on the merits. Appellant's case rests on his unsupported contention that his grandmother forced him against his will to renounce his United States nationality and morally constrained him for eleven years from making any attempt to contest loss **of** his citizenship. At this distance from the events of 1964 about which there is virtually no contemporary evidence except that of an ostensibly validly performed act of renunciation, how could the Department rebut appellant's contention that he was coerced into performing an expatriating act and restrained from acting promptly for many years by one who is now dead? The disadvantage at which the Department would be placed is all too plain.

Finally, there is another important consideration to be weighed here. The interest in finality, stability and dignity of administrative determinations is entitled to considerable weight, absent circumstances excusing such a protracted delay in appealing.

On all the evidence, [redacted] delay in taking an appeal was legally unjustified, prejudices the Department and flouts the rule on finality, stability and dignity of decisions. We conclude therefore that the appeal is time-barred and not properly before the Board.

III

Upon consideration of the foregoing, the Board hereby dismisses the appeal for want of jurisdiction.

Alan G. James, Chairman

G. Jonathan Greenwald, Member

George Taft, Member