December 17, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State that appellant, C[redacted] M[redacted] G[redacted], expatriated himself on June 4, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

The Department determined in 1976 that G[redacted] expatriated himself. He appealed that determination in 1986. For the reasons set forth below, we find that the appeal is barred by the passage of time and not properly before the Board. Accordingly the appeal is dismissed for lack of jurisdiction.

I

G[redacted] became a [redacted] Sometime after graduating from the University of Nebraska he moved to Canada. In his opening submission he explained why he left the United States.

> ...Upon graduation from college I took employment in Winnipeg, Manitoba and subsequently applied for landed status in Canada. I was granted landed status in August 1968. It was my intent to live in Canada until the Vietnam conflict was resolved. Although I did not receive draft papers for induction to the army, no doubt I became listed as a draft-evader as I did not inform my draft bureau of my Canadian address.

G[redacted] was indicted twice for violation of the Military Selective Service Act of 1967 and warrants for his arrest were issued by the United States District Court for the District of Nebraska in 1969 and 1970. In 1974 the United States Attorney for Nebraska requested that the Department establish G[redacted]'s citizenship status (and that of others who were subjects of arrest warrants), specifically, that the

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

> 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 --
>
> (1) obtaining naturalization in a foreign state upon his own application, . . .

Department determine whether he had renounced his citizenship or obtained Canadian citizenship. (Apparently, [redacted] family had disclosed to the U.S. Attorney's office that [redacted] was in Canada.) The **U.S.** Attorney's request was communicated to all diplomatic and consular posts.

In October 1975 the Consulate General at Winnipeg (the Consulate) inquired of the Canadian citizenship authorities whether [redacted] had obtained naturalization, and was informed that he had done so. The Canadian authorities stated that [redacted] had taken the prescribed oath of allegiance on June 4, 1974 and on that day was granted a certificate of Canadian citizenship. The oath of allegiance prescribed by the applicable Canadian citizenship act read as follows:

> **I** _____ swear that **I** will be faithful and bear true allegiance to her Majesty, Queen Elizabeth **11,** her heirs and successors according to law and that **I** will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen. So help me God.

[redacted] has explained as follows why he solicited Canadian citizenship.

> **I** was eligible for Canadian Citizenship in 1973 but chose to keep my **U.S.** citizenship. When in 1975 **I** was forced to get Canadian citizenship or lose my livlihood [sic] as a teacher. As the enclosed letter [fro e Manitoba Department of Education to [redacted] May 24, 1972] states - after five years of teaching my certificate to teach would not be renewed and **I** would be relieved of my teaching position. At the top of the letter please note that **I** was also called by telephone making me aware of the situation. At the time **I** was married with two children and did not have the luxury of returning to the U.S. Consequently **I** applied for and obtained Canadian citizenship in 1975.

After receiving confirmation from the Canadian authorities **of** [redacted] naturalization, the Consulate wrote to him on November 24, 1975 at an address in Vital, Manitoba. The Consulate informed [redacted] that he might have expatriated himself by obtaining naturalization in Canada. He was offered an opportunity to submit evidence for the Department to consider in determining his citizenship status and was asked to complete a form for determining U.S. citizenship. **If** he wished to discuss his case with a consular officer, an appointment would be made for him.

The Consulate's letter was twice returned marked undeliverable, address unknown. Since G[redacted] did not reply to the Consulate's letter, an officer of the Consulate executed a certificate of loss of nationality in his name on January 6, 1976. 2/ Therein he certified that G[redacted] acquired United States nationality at birth; that he obtained naturalization in Canada upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Consulate forwarded the certificate to the Department with the statement of the Canadian authorities confirming G[redacted]'s naturalization and its letter to G[redacted] to which the envelopes marked address unknown were attached.

The Department did not act on the certificate of loss of nationality but instructed the Consulate to send [redacted] a "first loss of nationality letter" (presumbably along the lines of the letter that was sent to [redacted] on November 24, 1975) simultaneously to two addresses the Department had been given by the U.S. Attorney at Omaha.

The Consulate wrote such a letter on April 12, 1976; a postal receipt dated April 13, 1976 and signed [redacted] indicates that the letter reached one of the addresses the Department had given the Consulate.

As instructed by the Department, the Consulate again wrote to [redacted] on June 15, 1976 in the same vein as its previous letter. This time it appears it indicated that if he did not respond within 30 days, his silence would be taken as acquiescence in the Department's making a determination of his nationality on the basis of information then on hand. [redacted] himself signed for the letter on or about June 17. In his letter to the Board entering the appeal he stated: "When sent a questionnaire concerning the circumstances under which I became a Canadian I did not return the questionnaire." Since he did not respond by July 17th the Consulate executed another certificate of loss of nationality in [redacted] name on July 22, 1976, as instructed

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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.

by the Department, in order to reflect the current facts in his case.

The Department approved the certificate on November 11, 1976. In sending a copy to the Consulate to forward to [redacted] the Department called attention to the fact that the Consulate had used an obsolete form of certificate of loss of nationality; specifically, the procedures for taking an appeal to the Board of Appellate Review were not printed on the reverse of the certificate. The copy the Department sent to the Consulate to forward to [redacted] bore the appeal instructions on the reverse. [redacted] has acknowledged that he received the certificate.

As a result of President Carter's 1977 amnesty, [redacted] was pardoned on January 27, 1977.

There is no record of any contact between [redacted] and United States authorities until 1986 when on January 2nd he wrote to the Board indicating that he wished to appeal the Department's determination of his expatriation. [redacted] contends that his naturalization was involuntary in that he was forced by the laws of the Province of Manitoba to become a Canadian citizen or lose his teaching position. Further, he did not intend to relinquish his United States citizenship.

II

The first issue we must decide is whether the Board may entertain an appeal entered more than nine years after appellant was informed that the Department of State determined that he lost his United States nationality by performing a statutory expatriating act.

Whether the Board may assert jurisdiction is dependent upon a finding that the appeal was filed within the limitation prescribed by the applicable regulations. This is *so* because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello **v.** United States, 365 U.S. 265 (1961).

In 1976 when the Department approved the certificate of loss of nationality that was issued in this case, federal regulations prescribed the following limitation on appeal:

> 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 within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 3/

Consistently with the Board's practice in cases where a determination of loss of nationality was made prior to November 1979, we will apply the foregoing limitation in this case. 4/ Thus, under the applicable limitation, if we find that appellant did not initiate the appeal within a reasonable time, the appeal would be time-barred and the Board would be without authority to entertain it.

What constitutes reasonable time depends on the facts of the case, taking into account a number of considerations: the interest in finality, the reason for the delay, and prejudice to other parties . Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice and Procedure section 2866 at 228-229:

> '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.

In his initial submission, G[redacted] stated that he would have appealed in 1977 when President Carter issued his amnesty to draft evaders "but thought it was a closed issue." In 1983 he met some people who thought the circumstances of his becoming a Canadian citizen were such that he might have grounds for an appeal. He then discussed the matter with the Consulate at Vancouver. He continued:

> First I am bringing to light new evidence in my case which was not considered at the time of my loss of nationality. Specifically that I was forced to obtain Canadian citizenship or lose my livlihood [sic].
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> Secondly, according to law a U.S. citizen cannot lose citizenship if they were subject to 'duress' of any kind while relinquishing citizenship. The fact that I was subject to duress is proven by the attached letter from the Ministry of Education.

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

4/ On November 30, 1979 new federal regulations were promulgated for the Board of Appellate Review. 22 CFR Part 7. 22 CFR 7.5(b) prescribes a limitation on appeal of one year after approval of the certificate of loss of nationality.

> Thirdly, the facts in order of happening are proof of my intent to keep U.S. citizenship. In 1968 I moved to Canada. In 1973 I was eligable [sic] for Canadian citizenship but declined. I only obtained it in 1975 because I had to. In 1977 draft evaders received amnesty. In 1983 I heard of the possibility of appeal and I am now making a formal appeal.
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> I have been teaching in Canada for 17 years but still identify myself as an American. I feel that my conscience is clear in regards to my actions.

At the Chairman's request, [redacted] amplified the reasons for his delay in taking an appeal in a letter to the Board in March 1986.

> ...According to information sent to me by the U.S. Consulate when I became a Canadian citizen I had one year to appeal. A copy of this information is also enclosed verifying same. I could not appeal at that time. As a husband and father of two I had to maintain my livlihood as a teacher. I naturally assumed U.S. Consulate information to be accurate and final.. ..from my perspective the jurisdictional aspects of this case appear as a technicality. A wrong was done and my constitutional rights were violated. Under duress of loss of livlihood I was forced to become a Canadian citizen. This right should be the priority right. On the basis of the appeal procedure I believe my case should be heard on the basis of the new evidence I am presenting. To not judge this case on the facts but dismiss it on a technicality is not fair or logical....The average person is not a lawyer and the intent of the law in my case is surely to protect american citizens from being forced to take citizenship in another country and not to fault them for their lack of legal knowledge in appeal proceedings. I have proved that this was the fact in my case and on this basis my appeal should be upheld. If I had known an appeal was possible I would have appealed in 1977 when amnesty was granted. I ask you which is the greater wrong? My ignorance of the appeal procedure or my forced loss of citizenship? I also ask you which happened first?
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> In defense of my ignorance of the appeal procedure I can only say that when I was sent

> loss of nationality status I was informed of a one year appeal procedure only. There was no mention that appeals could be made past that date based on new information. My ignorance as so stipulated is based on U.S. Consulate information. In essence I'm told that there is a 1 yr appeal procedure. Then I find out years later than an appeal is possible after 1 yr. But if my case is not considered it's because I didn't appeal fast enough after the 1 yr. What should I have done? - not believe the U.S. Consulate in the first place? Surely a man can't go around hiring lawyers to find out about laws that he doesn't even know exist.

The reasons [redacted] gives for his delay in taking an appeal are not, in our judgment, legally sufficient to excuse such an appreciable delay.

[redacted] does not deny that he received the certificate of loss of nationality shortly after the Department sent it to the Consulate to forward to him. As noted above, the procedures for taking an appeal were set forth on the reverse of the certificate. [redacted] thus was on notice of the fact that the Department had determined he expatriated himself and that there was a procedure he could avail himself of to challenge that determination. He was given the address of the Board of Appellate Review, general information about how to present a cause of action and citation to the applicable federal regulations. In this respect, the requirement of due process and the statute were duly met.

It is understandable that [redacted] might not have wished to take an appeal in 1976 when he was probably in trouble with the Selective Service System. Indeed, as he candidly stated in his reply brief, "I couldn't appeal then as amnesty had not been granted." He has not, however, adequately explained why he did not appeal after President Carter granted draft evaders amnesty in January 1977. His statement that he would have appealed then if he had known he might appeal simply is not convincing.

Even less persuasive is his statement that "when I was sent loss of nationality status I was informed of a one-year appeal procedure only." As noted above, the one-year limitation on appeal did not enter into force until November 30, 1979 (supra, note 4). Foreign Service posts were not informed until early 1980 that the limitation on appeal had been changed from "within a reasonable time" after receipt of notice of the Department's decision to one year after approval of the certificate. possibly [redacted] is confused about when he was told about the one-year limitation.