June 5, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

This is an appeal from an administrative determination of the Department of State holding that appellant, P[redacted] M[redacted], Jr., expatriated himself on August 16, 1977 under the provision 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 consular officer of the United States at Monterrey, Mexico. 1/.

In January 1978 the Department made a determination that appellant expatriated himself. He entered an appeal from that determination in July 1986. A threshold issue must be decided before we may proceed: whether in the circumstances of this case the appeal may conveivably be deemed to have been taken within the limitation of the applicable regulations. For the reasons that follow, we conclude that the appeal is time-barred and should he dismissed.

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

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Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed paragraph (5) of subsection 349(a) of the Immigration and Nationality Act, and redesignated paragraph (6) of subsection 349(a) as paragraph (5).

Public Law 99-653, approved November 14, 1986, 100 Stat. 3655, amended subsection 349(a) by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his naationality by;".

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Appellant acquired United States citizenship by virtue of his birth to a United States citizen father at [redacted]. He also acquired the nationality of Mexico by virtue of *his* birth therein. A certificate of United States citizenship **was** issued to appellant on April 7, 1960. He enlisted in the United States Army in June 1960 at San Antonio, but deserted in January 1962 and returned to Mexico. He was officially separated from the **Army** some years later.

The next event of record is appellant's formal renunciation of United States nationality on August 16, 1977 at the Consulate General at Monterrey, Mexico when he was **46** years of age. On that day appellant first executed in both Spanish and English a statement of understanding in which he declared inter alia, that: he had decided voluntarily to renounce his United States nationality; he realized renunciation would leave him an alien **in relation** to the United States; the consular officer concerned had explained to him **the** serious consequences of renunciation, **and** that he understood those consequences. The oath of renunciation was then administered to appellant in the presence of two witnesses. As he indicated in the statement of understanding he wished to **do,** appellant executed the following affidavit explaining why he wished to renounce his United States nationality.

> In order to arrange the status of my residence and since it is more convenient for me to renounce my nationality than to obtain it for my wife and children, I request the Government of the United States to accept (my renunciation) to **my** American citizenship.
>
> I reside permanently in Mexico, I married in this country and I work at the University of Nuevo Leon.
>
> I will apply for a visa to visit the United States. **2**

2/ English translation of affidavit **of** [redacted] dated August 16, 1977, United States Consulate General, at Monterrey, Mexico.

4s required by law, the consular officer who administered the oath of renunciation executed a certificate of loss of nationality on August 24, 1977. 3/ Therein he certified that appellant acquired the nationality of the United States and Mexico at birth; that he made a formal renunciation of his United States nationality; and thereby expatriated himself under the provisions of section 349(a)(6) (now section 349(a)(5)) of the Immigration and Nationality Act. The consular officer forwarded the certificate and supporting documents to the Department without commenting on the facts and circumstances surrounding appellant's renunciation. /

The Department approved the certificate on January 13, 1978, approval constituting an administrative determination of loss of United States nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The Department sent a copy of the approved certificate to the Consulate to forward to appellant. The appeal was entered on July 25, 1986. Appellant submits that 'his renunciation was not valid. He said that he did not want to renounce his United States citizenship but that his "sick mind" led him to perform the expatriating act. He also stated that he was treated by a psychiatrist after he renounced.

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At the outset, we are confronted with the question of the timeliness of the appeal. If the appeal was not filed within the

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3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

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. IE 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.

prescribed period of time, the Board would lack jurisdiction to consider the case. The courts have consistently held that the taking of an appeal within the prescribed time limitation is mandatory and jurisdictional. 4/

Under existing regulations of the Department, the time limit for filing an appeal is one year after approval of the certificate of loss of nationality. 5/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of tie certifica e. 6/ These regulations, however, were promulgated on November 40, 1979, and were not in force in 1978 at the time the Department approved the certificate of loss of nationality that was issued here.

The 1978 regulations on filing an appeal had the following provision:

> 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. 7/.

It is generally recognized that a change in regulations shortening a limitation period, as existing regulations prescribe, operates prospectively, in the absence of an expression of intent to the contracy. If a retrospective effect were given, an injustice might result or a right that was validly

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4/ See United States v. Robinson. 361 U.S. 220 (1960); Costello v. United States, 365 U.S. 265 (1961).

5/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b).

6/ Section 7.5(a) of Title 22, Code of Federal Regulations, 22 CFR 7.5(a).

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

acquired under former regulations might be disturbed. In the circumstances, we consider the limitation in effect in 1978 to govern in the instant case, and not the current limitation of one year after approval of the certificate of loss of nationality.

Thus, a person, who contends that the Department's holding of loss of nationality is contrary to law or fact, is required to take an appeal from such holding within a reasonable time after receipt of notice of the holding. If the appeal is not initiated within a reasonable time, the appeal would be barred by the passage of time and the Board would have no alternative but to dismiss it for lack of jurisdiction. The limitation of "within a reasonable time" is fundamental to the Board's exercise of jurisdiction in this case. 8/

The determination of what constitutes a reasonable time depends on the facts and circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Generally, a reasonable time means reasonable under the circumstances. It has been held to mean as soon as circumstances will 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." In re Roney, 139 F.2d 175, 177 (1943). What is a reasonable time also takes into account the reason for the delay, whether the delay is injurious to another party's interest, and the interests in the repose, stability, and finality of the prior decision. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co., 542 F.2d 9928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice and Procedure section 2866 228-229:

8/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board the power...to review actions taken long ago. 22 CFR 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expiration.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972.

> 'What constitutes reasonable time must of necessity depend upon the Eacts 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 reason for his failure to take appropriate action sooner.

Appellant does not deny that he received a copy of the approved certificate of loss of nationality executed in his name not long after the Consulate General forwarded it to him. On the reverse of the certificate the procedures for taking an appeal were clearly set forth. He did not enter the appeal until eight years later.

Appellant submits that his appeal should be deemed timely. We may summarize his reasons for *so* contending as follows:

> --He was not conscious that he had made a formal renunciation of his citizenship; he was sick and neurotic in 1977-1978, and required psychiatric treatment;
>
> --the information on the reverse of the certificate of loss of nationality did' not specify a time limit on appeal;
>
> --he was outside the United States and unfamiliar with the applicable regulations;
>
> --fundamental rights like citizenship may not be abridged simply because of the passage of time.

We do not find the foregoing considerations sufficient to excuse a delay as long as the one in this case.

Appellant has not established that after he made his renunciation and received the certificate of loss of nationality he was mentally incapable of taking timely action to contest the Department's holding of loss of his citizenship. It does appear that between 1977 and 1978 he underwent psychiatric treatment; the psychiatrist who treated him has submitted a declaration to that effect. The latter stated, however, that:

> ?or ethical reasons, I withhold the diagnosis I established at the time to describe Mr. [redacted] psychological problems, but I can affirm that at all times he behaved courteously, sincerely, and respectfully and was certainly in full contact with reality. It was never necessary to prescribe medication, and our professional relationship was

> in accordance with the parameters of a psychoanalytically-oriented psychotherapy,
>
> Even though I have not treated or seen Mr. Ma[redacted], since 1978, I know that he is socially productive, responsible, and emotionally normal person. 9/

Furthermore, appellant himself has conceded that in that tine period "I was not exactly off the reality."

That appellant may not have *been* familiar with the applicable federal regulations or aware that the limitation on appeal in 1978 was "within a reasonable time" after he received notice of the Department's decision in his case, hardly excuses, his delay. The federal regulations were cited on the reverse or tie certificate and the address of the Board was set forth as well. If appellant thought his renunciation was defective and sincerely wanted to challenge the Department's determination, surely he would at least have written to the Board to inquire how he might go about doing so. It is hard to escape the conclusion that not until he filed his appeal did appellant have sufficient interest in attempting to recover his United States citizenship to impel him to act.

In asserting that citizenship is' such a fundamentl right that it may not be extinguished by passage of time, appellant seems to suggest that the Board should ignore the limitation on appeal prescribed by federal regulations and proceed to consider the merits of his case. This we **may** not do. The Board is empowered to "take any action it considers appropriate and necessary to the disposition of cases appealed to it." 22 CFR 7.2(a). The Board's authority under section 7.2(a), however, may not be construed so as to nullify other preconditions established by 22 C.F.R. Pact 7 for the Board to exercise jurisdiction over the merits of an appeal, including the requirement that an appeal be timely filed under section 7.5(b), or comparable provisions of predecessor regulations. Once the Board determines that it lacks jurisdiction over an apeal as time barred, the regulations require dismissal of the appeal.

9/ English translation of statement of Dr. Manuel Contreras Ramos, dated December 4, 1986, Division of Language Services, Department of State, LS No. 121111 (EL/RHC, Spanish) 1987.

It is beyond dispute that appellant permitted a substantial period of time to elapse before taking an appeal, The record shows that the appeal was not filed with this Board until July 1986 mote than eight years after the Department's determination of loss of nationality. There is no record of any interest by appellant in re-establishing his claim to United States citizenship prior to his filing the appeal. In our view, his failure to take any action before then demonstrates convincingly that his delay in seeking appeal was unreasonable. Whatever the meaning of the term "reasonable time" as used in the regulations may be, we do not believe that such language contemplates a delay of ten years in taking an appeal.

The rationale for giving a reasonable time to appeal an adverse decision is to allow appellant suficient time to assert his or iiec contentions that the Department's holding of loss of nationality is contrary to law or fact. It is intended to compel one to take such action when the recollection of events upon which the appeal is grounded is fresh in the minds of the parties involved. It is clear that appellant had ample opportunity to take an appeal prior to 1986. The period of a reasonable time commences to run with appellant's receipt of the holding of loss of nationality in 1978. In our opinion, appellant's delay of eight years in taking an appeal was unreasonable in the circumstances of this case.

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On consideration of the foregoing, we are unable to conclude that the apeal was taken within a reasonable time after receipt of the Department's administrative holding of loss of nationality. We find the appeal time barred, and, as a consequence, the Board is without jurisdiction to consider the case. The appeal is hereby dismissed for want of jurisdiction.

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Member

G. Jonathan Greenwald, Member