DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: M[redacted] K[redacted]

This case is before the Board of Appellate Review on the appeal of M[redacted] K[redacted] from an administrative determination of the Department of State, dated January 19, 1950, that he expatriated himself on July 3, 1942 under the provisions of section 401(a) of Chapter IV of the Nationality Act of 1940 by recovering Japanese nationality upon his own application. 1/

K[redacted] entered this appeal in May 1987. His long delay in moving for review of the Department's decision raises an initial issue: whether the Board may entertain a case where so much time has passed between the Department's decision and entry of the appeal. For the reasons that follow, it is our conclusion that the appeal is barred by the passage of time and that the Board lacks jurisdiction to hear and decide it. The appeal is dismissed.

I

K[redacted] acquired United States citizensnip by virtue of birth at [redacted] As his parents were citizens of Japan, he also acquired the nationality of Japan at birth. He states that he grew up and was educated in California, graduating from the University of California, Berkeley in 1938.

Sometime before he graduated from university, appellant states, his father renounced his (appellant's) Japanese nationality at the Consulate of Japan in San Francisco. (Apparently this was a permissible practice under Japanese law then in effect.) In 1938 appellant obtained a passport at the San Francisco Agency and accompanied his parents on a

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1/ Section 401(a) of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 801, provided in pertinent part as follows:

> Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
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> (a) obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person:....

trip to Japan. He states that his parents returned to the United States in 1949, but that he decided to remain in Japan to take an intensive course in Japanese at Waseda University. In March 1940 [redacted] visited the United States Embassy to register as a United States citizen. His application for registration was approved on March 19, 1940, valid for two years. In the application for registration [redacted] stated that he did not possess Japanese nationality. On the reverse of the application, a consular officer made the following confirmatory statement:

STATEMENT CONCERNING DUAL NATIONALITY

American-born citizen of Japanese parentage residing in Japan

> The applicant states that he does not possess Japanese nationality.
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> This is borne out by the certified copy of his family census register, which shows that the Japanese registration authorities recognize that he has renounced Japanese nationality.

Appellant was still in Japan when war broke out in December 1941. Sometime before he graduated from Waseda University (September 1942), appellant began job hunting in Tokyo, and allegedly found that without Japanese citizenship it was impossible to obtain employment. He therefore applied in April 1942 to recover Japanese nationality. On July 3, 1942 his appiication was approved. The nature of the procedure to recover Japanese nationality in 1942 is not described in the record, but appellant alleges that he was not required to swear an oath of allegiance.

After the war [redacted] apparently was hired by the United States military occupation authorities, because he was bilingual, to accompany Niseis who were being sent to the United States from Japan. The year was 1949. His passport had long since expired and he was booked to board ship within one week he states. (Opening brief.) Additionally, he hoped to see his "ailing, aged parents again, who had been released from camps in the U.S." His brief continues:

> Mr. [redacted] went to the U.S. Consulate [at Yokohama] to renew his U.S. passport and was told that this process would take at least six months. The Appellant was informed the only way he could leave Japan on schedule and legally enter the United States was to travel on his Japanese passport with a visa. Additionally, the only way to obtain his needed visa was to have it determined that he had renounced his U.S. citizen-

> ship when he regained his Japanese nationality in 1942.
>
> The Consular Officer prepared the statement which the Appellant ultimately signed. Prior to signing Mr. [redacted] was assured tnat his loss of U.S. citizenship was not final, it was merely a 'presumption'. He signed the declaration....

The record shows that [redacted] executed an affidavit before a consular officer on December 27, 1949. In it he set forth a number of the facts stated above, and concluded by stating that:

> That he desires to maintain his residence in Japan, and that he does not intend to resume residence in the United States in the near future.
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> That he understands that he has lost American citizenship by recovering Japanese nationality in July 1942, and that he makes this affidavit in connection with his application for a visa to enter the United States as a temporary visitor ; and that he does not intend to contest this loss of nationalitiy.

The office of the Attorney General of Japan certified to the Consulate on December 28, 1949 that [redacted] application for recovery of Japanese nationality had been approved on July 3, 1942. The next day, December 29th, the consular officer concerned executed a certificate of loss of nationality in appellant's name. 2/ Therein he certified that appellant

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2/ Section **501 of** Chapter V of the Nationality Act of 1940, 8 **U.S.C. 901,** provided that:

> Sec. **501.** 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 American nationality under any provision of chapter IV of this Act, he shall certify the facts upon which such belief ***is*** based to the Department of State, in writing, under regulations to be 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 Department of Justice, for its information, and the diplomatic or consular office in which the report was made

acquired United States nationality by birth therein; that h recovered Japanese nationality upon his own application; an thereby expatriated himself under the provisions of sectio 401(a) of the Nationality Act of 1940. The memorandu transmitting the certificate to the Department read as follows:

> The Consul General has the honor to enclose a Certificate of Loss of the Nationality of the [redacted] ed States in the case of [redacted] Expeditious action of this Certi[redacted]te would be appreciated, as Mr. [redacted] has made arrangements to leave for the United States on February 4, 1950 and is applying for a temporary visitor's visa in order to make this trip.

The Department approved the certificate on January 19 1950. On January 23rd the Department informed the consula office that it had approved the certificate, and the next day it sent a copy of the approved certificate to the Department of Justice, tor its information, and to the consular office at Yokohama to forward a copy to appellant.

Over 30 years passed.

Appellant alleges that he applied for a United State: passport in 1986 in Tokyo and was informed that the process would be easier if he were to apply in the United States. He entered the United States on an E-1 visa (treaty trader) and in October 1986 applied for a passport at the Los Angeles Passport Agency. On March 30, 1987 the Agency refused to issue him a passport on the grounds of non-citizenship. Two months later in May 1987 counsel for appellant entered this appeal on her client's behalf.

Appellant contends that he recovered Japanese nationality under duress; that he lacked the specific intent to relinquish his United States nationality; that recovery of Japanese nationality does not constitute naturalization within the meaning of the Immigration and Nationality Act: and that appellant relied, to his detriment, on erroneous statements of the consular officer concerned.

II

We confront a threshold issue: whether the Board may assert jurisdiction over a case where an expatriate has waited thirty-seven years to seek relief. Since timely filing is

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2/ Cont'd.

> shall be directed to forward a copy of the certificate to the person to whom it relates.

mandatory and jurisdictional United States v. Robinson, 361 U.S. 220 (1960), the Board may consider the merits of the cause only if we determine that the appeal was taken within the limitation prescribed by the applicable regulations. If we find the appeal untimely, we must dismiss it.

In 1950 when the Department approved the certificate of loss of nationality executed in this appellant's name, the Board of Appellate Review did not exist. There was, however, a Board of Review on the Loss of Nationality, an entity of the Passport Division of the Department, to which persons who had been held to have expatriated themselves might address an appeal.

Prior to 1966 there was no specified time limit on appeal to the Board of Review on the Loss of Nationality. In 1966 federal reguiations were promulgated prescribing that an appeal to the aforementioned Board should be made "within a reasonable time. 3/ When the Board of Appellate Review was established in 1967, regulations promulgated at that time adopted the "reasonable time" limitation. 4/ The regulations of the Board of Appellate Review were further revised in November 1979. They prescribe that an appeal be filed within one year of approval of the certificate of loss of nationality. 5/ Believing it would be unfair to apply in this case the current regulations as to the tine limit on appeal, we will apply the standard of "reasonable time".

"What constitutes reasonable time," the 9th Circuit said in Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981),

> depends upon the facts of each case, taking into consideration the interest in finality,

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3/ Section 50.60, Title 22, code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13539 (1966).

4/ Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR 50.60, provided that:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law of 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.

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

> the reason for the 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, 1067-68 (10th Cir. 1980).

Appellant urges that he appealed within a reasonable time, "as he was not aware of any final determination regarding his loss of citizenship until last year when he applied for a US passport and was denied." With respect to the statement appellant made in his affidavit of December 27, 1949 (that he understood that he had lost his United States citizenship), appellant asserts that: "This signed acknowledgment is not denied. What is in error here is that the statement and those events at the consulate, on that day in 1949, were not the final decision upon the loss of the citizenship." Appellant points out that no final determination of loss of nationality could be made until the Department of State had reviewed and adjudicated the case. So, after his visit to the Consulate in 1949, appellant thought he was still a United States citizen. Appellant also points out that the consular officer involved had a legal duty to send him a copy of the approved certificate of loss of nationality. "This," [redacted] claims, "was not done;" the Consulate had his address and he had not moved. Appellant thus denies that he was on notice of loss of his nationality, as the Department maintains. He concludes his argument that he appealed within a reasonable time by asserting:

> Mr. [redacted] was not an active participant nor did he have knowledge. All he had was the information given to him by the consular officer. He was not told of a possible time frame. For all he knew it could have taken years for a final decision to be made in his case. It was the duty of the consulate to give notice of the determination, not for Mr. [redacted] to inquire.

> The Department **of** State asserts that Mr. [redacted] should be barred from filing this appeal and lists three cases to substantiate this assertion. All three cases should not be given weight as tney are all "Dec. Bd. App.R." cases which are not available in public law libraries nor from the **US** Government Printing Office, and not available to the appellant to review and refute. Therefore the assertion by the Department of State should be viewed as without substantia-

tion and given little credence, if any. 6/

A careful study of the record that was submitted to the Board shows that [redacted] must have received notice in 1950 that the Department had approved the certificate of loss of nationality that was executed in his name. No visa, non-immigrant or other, might legally issue to him until the Consulate had been informed by the Department that it had determined [redacted] was no longer a U.S. citizen. In his affidavit of December 27, 1949, [redacted] said ne made the affidavit in connection with his application for a visa to enter the United States as a temporary visitor. As tne Consulate noted in its report to the Department, [redacted] had made plans to leave Japan on February 4, 1950 en route to the United States. On January 23, 1950 the Department sent a communication to the Consulate stating that it had approved the certificate of loss of nationality. We may therefore reasonably assume that sometime between January 23 and February 4, 1950 when the Consulate put a visa in his Japanese passport it advised him that it was authorized to issue the visa precisely because the Department had approved the certificate of loss of his nationality.

We also take note that appellant has offered no evidence to substantiate his claim that the Consulate at Yokohama did not send him a copy of the certificate ***of*** loss of his nationality. The record shows that shortly after the Department approved the certificate of loss of nationality, it sent a copy to the Consulate which that office was required by law to forward a copy to [redacted] There is a well-settled presumption that public officials execute their official duties faithfully, efficiently and in the manner prescribed by law and regulation, absent evidence to the contrary. Boissonnas v. Acheson, 101 F.Supp. 138 (S.D.N.Y. 1954). We are thus entitled to assume that the Consulate complied with the law. Of course, the Consulate's communication with the certificate might have gone astray in the post; however, after so many years how could one possibly get the answer to tnat question?

In the circumstances **of** this case, we agree with the Department that appellant had an affirmative duty to make

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6/ As will be evident from the disposition we make of this case, the Board has not cited or relied on any of its previous decisions to which appellant objects because they were not readily available. Nonetheless, we are constrained to point out that appellant's counsel could easily have obtained copies by requesting that the Board make copies available, as it is required by law to do upon demand.

inquiry about the status of his case long before he did so. Can it be denied he knew at least that his citizenship was in jeopardy? He averred that he had lost American citizenship in his affidavit of December 27, 1949. Since we have no reason, on the basis of the record before us, to doubt that the consular official carried out his duties properly (although, arguably, unsuccessfully), we may fairly impute a correlative duty to appellant to inquire about his citizenship status long before he did so. Appellant (through counsel) dismisses as inapt the commercial cases cited by the Department for the proposition that appellant had a duty to make inquiry. The fact remains, however, that under established legal principles, one who knows of has reason to believe that a right or privilege he held has been lost or endangered through his own action may not excuse himself from not acting sooner to verify whether the right of privilege has in fact been lost, merely by asserting that an official who had a duty to inform him of the actual loss might have been unsuccessful through no fault of his own in executing that duty. At least natural curiosity should have moved appellant to act sooner. We simply cannot accept his contention that for thirty-five years he was justified in remaining in blissful, innocent ignorance that he had lost or probably lost his United States citizenship.

In brief, we are of the view that appellant knew as early as 1950 that a final determination of loss of his citizenship had been made and that he has presented no viable reason for delaying thirty-seven years to take an appeal. We also believe that if we were to allow the appeal the Department would be prejudiced in carrying its burden of proof. Appellant rests his case on allegations that he recovered his Japanese nationality under duress and that he lacked the requisite intent to relinquish his United States nationality. How, at this remove from 1942, can the Department conceivably address appellant's contention that he was forced to obtain naturalization in order to live? Appellant has submitted no proof of the alleged duress. The Department surely cannot now inquire into appellant's particular circumstances in 1942. Appellant may remember.. well the events of 1942, but memory can be a self-serving instrument. The Department not only has no such memory; it lacks the means to reconstruct the circumstances in which this particular appellant found himself. And the Department would be helpless to begin to undertake its burden of proof that appellant intended to relinquish his United States citizenship.

In the circumstances of this case, the interest in finality, stability and repose is clearly substantial. Taking into account the elements that constitute "reasonable time," it is our conclusion that the appeal is clearly barred by the

passage of time and that the Board lacks jurisdiction to hear and decide it.

III

Upon consideration of the foregoing, we hereby dismiss the appeal and thus do not reach the substantive issues presented.

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Mem

Howard Meyers, Member