DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

January 5,1989

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

This is an appeal from the Department of State's holding that appellant, M[redacted] C[redacted], [redacted] expatriated himself on June 17, 1952 under the provisions of section 401(f) of the Nationality Act of 1940 by making a formal renunciation of his United States nationality before a consular officer at the United States Embassy in Venezuela. 1/

The Department made a determination on February 8, 1953 that appellant expatriated himself. **An** appeal was entered therefrom thirty-five years later. The delay in taking the appeal raises an issue that must be resolved at the outset: whether there are any circumstances in this case that would warrant the Board's taking jurisdiction. For the reasons given below, we conclude that the appeal is time-barred and not properly before the Board. It is accordingly dismissed for want of jurisdiction.

I

Appellant acquired the nationality of the United States by virtue of birth at [redacted], [redacted] Since his father was a citizen of Venezuela, appellant also acquired Venezuelan nationality status. After living in the United States for nine years, appellant was taken by his parents to Venezuela. In 1947

1/ Section 401(f) of the Nationality Act of 1940, 54 Stat. 1169, provided that:

> 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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> . . .
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> (f) 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: . . .

he entered the Georgia Institute of Technology, travelling to the United States on an American passport. He spent a year at Georgia Tech and returned to Venezuela in 1948 where he was hired by the Shell Oil Company. In 1950 he married a Venezuelan citizen with whom he had a daughter. Having been offered a scholarship by Shell, appellant returned to Georgia Tech in 1951, again travelling to the United States on an American passport. He visited Venezuela in the summer of 1952.

On June 17, 1952, appellant, who states that he was accompanied by his father, made a formal renunciation of his United States nationality before a consular officer of the United States at the Embassy in Caracas. The oath of renunciation that appellant made read in operative part as follows:

> I desire to make a formal renunciation of my American nationality as provided by Section 401(f) of the Nationality Act of 1940, and pursuant thereto, I hereby absolutely and entirely renounce my nationality in the United States and all rights and privileges thereunto pertaining and abjure all allegiance and fidelity to the United States of America.

He also surrendered his United States passport.

The formalities of renunciation having been completed, the consular officer who presided executed a certificate of loss of nationality, as required by section 501 of the Nationality act of 1940. 2/ The officer

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2/ Section 501 of Chapter V of the Nationality Act of 1940, 54 Stat. 1171, provided that:

> 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

certified that appellant acquired the nationality of the United States by virtue of birth therein; and that he expatriated himself under the provisions of section 401(f) of the Nationality Act of 1940 by making a formal renunciation of United States nationality. It does not appear from the record that the consular officer reported to the State Department on the circumstances of appellant's renunciation; the only contemporary evidence of record consists of the certificate of loss of nationality and appellant's oath of renunciation.

The Department approved the certificate on February 8, 1953, an action that constituted an administrative determination of loss of nationality from which an appeal might be taken to the Board of Review of the Passport Division of the Department, pursuant to the then-applicable Departmental guidelines.

Shortly after renouncing his citizenship, appellant obtained a student visa in a Venezuelan passport and returned to Georgia Tech from which he graduated in 1954. In that year he returned to Venezuela where he worked for various companies in the field of chemical engineering. In 1974 he obtained a position with Miles Laboratories where he is still employed.

In June 1975 appellant applied for a United States passport at the Embassy in Caracas. In connection therewith he executed an affidavit which reads as follows:

> I have been told that I have the right to claim my American passport because I was born in U.S.A. I do recall that a certificate of loss of my U.S. citizenship was issued around

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2/ Cont'd.

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

> 1952 in which I expatriated my citizenship because of voting and/or something related to not serving in the U.S. Army.

He filed out a form titled "Information to Determine U.S. Citizenship," and completed a form titled "Application to Vacate a Certificate of Loss of Nationality [because of voting in a foreign political election] under Afroyim v. Rusk decision and to Have Present Nationality Status Determined." 3/ In the latter application, appellant indicated that he was unable to submit the certificate of loss of his nationality, but stated that he had been notified by the American consular office in Caracas that he had lost his United States citizenship by voting in a political election for president of Venezuela.

Having verified from its records that a certificate of loss of nationality had been approved by the State Department on February 8, 1953, the Embassy in June 1975 requested that the Department send it a copy thereof. For the next year and a half the Department searched in vain for the record in appellant's case. Meanwhile, in April 1976, the Embassy had forwarded to the Department appellant's application for a passport. In December 1976, the Embassy which was being pressed by appellant for an explanation of the delay in the Department's acting on his passport application, urgently requested guidance from the Department on what to tell appellant. The Embassy specifically inquired whether it should issue him a multiple entry visa, a full validity visa, or a U.S. passport. Having received no reply from the Department, the Embassy in February 1977, informed the Department that "given the impossibility of ascertaining the precise circumstances under which appellant expatriated himself" and "the many months that this issue...has been before the Department," the Embassy had accepted his statement as fact. "Thus," the Embassy stated, "there seems no doubt" that he had a claim to United States citizenship. It had therefore issued him a validity passport on February 10, 1977.

3/ Afroyim v. Rusk, 387 U.S. 253 (1967). In Afroyim the Supreme Court held unconstitutional the provisions of section 401(e) of the Nationality Act of 1940 which prescribed loss of nationality as a consequence of voting in a foreign political election.

The Department informed the Embassy in May 1977 that although it could not locate its record in appellant's case, information it had gleaned from various sources made it clear that appellant renounced his United States citizenship in 1952. His passport application accordingly had been disapproved. In a subsequent communication, in August 1977, the Department instructed the kbassy to retrieve the passport it had issued to appellant. The Department stated that it had located the record in appellant's case, and accordingly forwarded a copy of the approved certificate of loss of his nationality. The Embassy wrote to appellant later in August to enclose a copy of the certificate of loss of his nationality and request that he surrender the passport that had been issued to him in February.

On August 30, 1977, appellant wrote to a consular officer of the Embassy. He indicated that he had seen a copy of the certificate of loss of his nationality, but not a copy of his oath of renunciation. He stated that he was confused as to what had happened on the day he made a formal renunciation of his United States nationality, but gave the following recollection:

> ...I do recall that I was called in from[sic] the American Consul when I was a student at Georgia Tech and spending time in Venezuela (I believe that at that time I was already married and had a daughter) and was advised that I had been drafted and was to sign papers or otherwise lose my American nationality. I know that then I felt that Corean [sic] war made no sense to me and I did not want to be drafted. Even though I am not sure and all is vague to me, I believe I was married and did not want to lose the scholarship I had, however, I cannot state this is correct, but in any case my intention was to complete my education at Georgia Tech. If my voluntary expatriation (?) happened in June 1952, I was then married with a daughter, and obviously did not want to go to Corea [sic].
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> However, I do recall very clearly that I was told that either I accepted being drafted or that I would lose my nationality. Apparently, this last

> thing happened and I am sure then that I signed some papers and gave my passport. Exactly what happened I do not know, but from that date I have been granted my multiple visas to go to the United States.

He requested that the Department review and reconsider his case, stating that he understood that "today no one loses his American nationality if he desires not to be drafted." Was there not a possibility "that this can be considered?" While his case was being reviewed, he requested that the Embassy issue him a multiple entry visa.

In February 1978 the Department informed the Embassy that it had reviewed appellant's case. The Embassy was instructed to inform appellant that the record documented that his renunciation had been made in accordance with law. The legal effect of his act was not diminished by the fact that his action might have been caused by a wish to retain his scholarship. And the fact that his renunciation may have been motivated by a wish to avoid service in the Korean war did not, in the Department's opinion, render his act involuntary, citing Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1251 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1972). 4/ Even if his contention were substantiated, the Department concluded, the validity of his renunciation would in no way be affected.

Ten years after the Department had reviewed and affirmed its original decision in appellant's case, he entered on May 21, 1988 an appeal from the Department's 1953 decision that he expatriated himself. Oral argument was heard on November 30, 1988.

The following are the grounds of the appeal. Although he concedes that he signed the oath of renunciation of his nationality voluntarily, he did not sign it with the necessary intention of relinquishing United States nationality. Citing appellant's testimony

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4/ In Jolley, the court stated that: "While we comprehend Jolley's argument and contention concerning his plight [that he had renounced to avoid the draft which he found abhorent] so long as the draft remains a valid obligation of citizenship, it cannot constitute duress."

at the hearing, 5/ counsel for appellant contended that his client had no idea on June 17, 1952, that he had relinquished his United States nationality. 6/ Appellant did not know what he was signing: no one explained the proceedings to him which lasted only a few minutes. Counsel added: "All we have is the execution of this document [the oath of renunciation] and the events that occurred after it." 7/

II

We confront a threshold issue: whether the Board may entertain an appeal taken thirty- five years after the State Department made a determination that appellant expatriated himself by formally renouncing his United States nationality. Passage of so many years might, of itself, warrant our dismissing the appeal as time-barred. Nonetheless, we are prepared to consider whether there might be extenuating circumstances that would warrant our entertaining the appeal.

The Board's jurisdiction is dependent upon a finding that there are legally sufficient grounds to permit the Board to deem that the appeal was filed within the limitation prescribed by the applicable regulations. 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).

Under current federal regulations (promulgated in 1979), the limitation on an appeal is one year after approval of the certificate of loss of nationality. 8/ The regulations further provide that an appeal filed after the time limit shall be denied unless the Board, 'for good cause shown, determines that the appeal could not have been filed within the prescribed time.

5/ Transcript of Hearing in the Matter of [redacted] before the Board of Appellate Review, November 30, 1988 (hereafter referred to as "TR"). pp6-17.

6/ TR 25.

7/ TR 27, 28.

8/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1987).

In 1953, when the Department of State approved the certificate of loss of nationality that was issued in appellant's name, this Board was not in existence. There was at that time a Board of Review on Loss of Nationality ("Board of Review") within the Passport Office to consider appeals from adverse administrative holdings of the Department in nationality cases. The rules of procedure of the Board of Review did not prescribe a time limit on an appeal. 9/ However, in 1966, there were promulgated for the Board of Review federal regulations, which prescribed that an appeal be made "within a reasonable time" after receipt of notice of loss of nationality. 10/ We consider the limitation of "within a reasonable time" to govern in appellant's case, rather than the limitation of one year after approval of the certificate of loss of nationality, as prescribed in current regulations of this Board.

Thus, if we conclude that appellant did not initiate his appeal within a reasonable time after he received notice of the Department's adverse decision in his case, the appeal would be time barred and the Board would lack authority to entertain it.

9/ Foreign Service Serial No. 1019, September 13, 1949.

10/ 22 CFR 50.60 (1966); 31 Fed. Reg. 13539 (1966) read:

> See. 50.60 Appeal by nationality claimant.
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> 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 Review on Loss of Nationality.

In 1967, the limitation of "within a reasonable time" was incorporated in the Department's regulations promulgated for the then newly established Board of Appellate Review, and remained in effect until the regulations were revised in 1979. 22 CFR 50.60 (1967-1979): 44 Fed. Reg. 68825 (1979).

The question whether an appeal is taken within a reasonable time depends upon the circumstances in each individual case. Generally, reasonable time means reasonable under the circumstances. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). Courts take into account a number of considerations in determining whether the facts of a particular case indicate that the affected party moved within a reasonable time, including 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 the other party. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980); and Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-31 (5th Cir. 1976). 11/

The rationale for allowing a reasonable time to appeal an adverse decision is to afford an appellant sufficient time upon receipt of such decision to assert his or her contentions that the decision is contrary to law or fact, and to compel appellant to take such action within a reasonable time so as to protect the adverse party against a belated appeal that could more easily have been resolved when the recollection of events upon which the appeal is based is fresh in the minds of the parties involved. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete, or lost, or obscured by the passage of time. Further, it should be noted that the period of a reasonable time begins to run with the receipt of notice of the Department's holding of loss of nationality, and not at some subsequent time, years later

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11/ In Lairsey v, Advance Abrasives Co., the court quoted 11 Wright & Miller, Federal Practice & 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.

542 F.2d at 930-31.

when an appellant, for whatever reason, may seek to regain or re-establish his or her United States citizenship status.

Through counsel, appellant argues that his delay in taking an appeal is reasonable, given the circumstances of his case. Appellant alleges he did not receive a copy of the certificate of loss of his nationality after its approval by the Department in February 1953. In 1975 when advised by employees of the Embassy at Caracas that he might be eligible for a United States passport, he applied for and was issued one in 1977. But the passport was recalled, and appellant was left in confusion about his actual citizenship status. Although there was no ostensible reason for him to take an appeal in 1977, he delved into the issue through the assistance of the office of a Member of Congress. That effort led to his being sent in 1984 a copy of the certificate of loss of nationality and his oath of renunciation by an officer of the Embassy in Caracas who informed appellant that he had expatriated himself. It is argued that the limitation on appeal should be deemed to run from the date on which appellant saw both the certificate of loss of nationality and his oath of renunciation, that is, in 1984. In those circumstances, appellant argues, the delay should be considered reasonable and the Board should allow the appeal.

We do not think that appellant has justified the long delay in asking this Board to review his case.

Perhaps, as he asserts, appellant did not receive a copy of the certificate of loss of his nationality until many years after he renounced his nationality. There is no way at this remove from 1952/1953 to determine whether he did receive the certificate. But even if he did not receive the certificate, he should have known he had renounced his United States nationality. We find it difficult to understand how a young man then attending an American university could not grasp the significance of the act he performed on June 17, 1952. Assume, however, arguendo, that he did not realize the import of what he did on June 17, 1952. Surely he so understood sometime between 1975-1977 when he applied for a passport, received one and then was asked to surrender it. At that time, twenty-five years after he renounced his citizenship, he received a copy of the certificate of loss of nationality, although, as he avers, perhaps not of the oath of renunciation. The certificate stated clearly that he had expatriated himself by making a formal renunciation of his nationality and noted that tile oath of renunciation was attached to the certificate. That information was

sufficient to lead appellant in August 1977 to request that the Department review and reconsider its decision in his case.

The Department did review his case, and in 1978 determined, as it instructed the Embassy to inform appellant, that its original decision should stand. Appellant alleged at the hearing that he was never informed of the Department's decision after it had reviewed his case. The record neither contradicts him nor bears him out. The question therefore arises whether he should have taken further action in 1978 to challenge loss of his United States citizenship. In our opinion, appellant should have acted in 1978 or very shortly thereafter. If, as he alleges he was not informed that the Department had affirmed its original decision in his case, he should have taken the initiative to inquire what disposition had been made of his request for review. Had he done so, he would have learned of the Department's decision. If at that point he was concerned about loss of his citizenship and believed he had grounds to warrant a reversal, would he not have inquired at the Embassy, or consulted legal counsel about what options remained to him? He took no action until six more years passed when he solicited the assistance of the office of a member of Congress. In 1984 he again was informed that he had expatriated himself in 1952. Yet he allowed four additional years to elapse before the appeal was entered.

We perceive no obstacles in appellant's way to take an initiative at a much earlier date to find out what recourse he might have. He should have acted within a reasonable time after 1953 when the Department approved the certificate of loss of his nationality. For nearly twenty-five years afterwards he received visas to enter the United States. An evidently successful business man, can appellant have doubted that from 1953 to 1977 he was regarded by the United States as an alien? Can he have doubted the reason why? We do not think so.

Appellant has failed to make a convincing argument why his delay in taking an appeal should be excused.

Although he alleges that the Department is not prejudiced by his delay, we simply cannot agree. His principal substantive argument is that in 1952 he was confused about what he did at the Embassy; he was rushed through a proceeding that lasted but a few minutes. In a word, he did not knowingly and intelligently renounce his United States nationality. How can the Department address those arguments after the passage of thirty-six years? The consular officer who presided at appellant's renunciation may or may not be alive. If he were, is he

likely to recall what transpired on that day? We do not think so. Appellant's father who was with him on June 17, 1952 is deceased. To allow the appeal would so blatantly prejudice the Department that no elaboration of the point is required.

In the circumstances, where there has been no showing that factors beyond appellant's control barred him from taking a timely appeal and where there would be such obvious prejudice to the opposing party if the appeal were allowed, the Board declines to entertain the appeal, The interest in finality and stability must have precedence over re-opening the case.

III

Upon consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after appellant had good cause to move for review. The appeal is time-barred and not properly before the Board. The Board thus lacks jurisdiction to entertain it. The appeal is hereby dismissed.

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

Edward G. Misey, Member

J. Peter A. Bernhardt, Member