September 29, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal from an administrative determination of the Department of State, dated September 7, 1965, that appellant, [redacted], expatriated himself on July 26, 1965 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 United States nationality before a diplomatic officer of the United States at Caracas, Venezuela. 1/ An appeal from the Department's determination was entered in 1988.

The passage of so much time from the date of the Department's adverse decision in appellant's case to the entry of the appeal raises a jurisdictional issue that must be resolved at the outset: whether the Board may hear and decide this case. For the reasons that follow, it is our conclusion that the appeal is time-barred and must be dismissed for want of jurisdiction.

I

Appellant, [redacted], acquired the nationality of the United States by virtue of his birth at [redacted] citizens of Venezuela, he also acquired the nationality of that country at birth. At the age of two months, appellant was taken by his parents to Venezuela. In 1954 they brought him back to the United States. The family resided here for about half a year and then returned to Venezuela.

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

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
>
> . . .
>
> (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; or . . .

In the summer of 1965 when he was 18 years old, appellant went to the Embassy at Caracas. The record shows that on July 26, 1965 before a diplomatic officer of the United States he subscribed to the oath of renunciation prescribed by the Secretary of State which read in operative part as follows:

> ... I desire to make a formal renunciation of my American nationality, as provided by section 349(a)(6) of the Immigration and Nationality Act 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.

Appellant explained his reasons for giving up United States nationality in an affidavit. An informal translation of the original Spanish, apparently made by the Embassy, reads as follows:

> I, [redacted] Born on [redacted] came to the American Embassy on July 26, 1965 to renounce the nationality which I acquired by birth.
>
> The reasons of this renunciation are the following:
>
> Residing all my life in Venezuela and being all my family Venezuelans.
>
> To have to opt at the age of 21 years for one of the two nationalities, American or Venezuelan according to the Venezuelan Constitution.
>
> And finally the obligation to serve in the Armed Forces of the United States, as well as in Venezuela.

In his appeal statement (February 13, 1989), appellant amplified the foregoing affidavit as follows:

> At the time I was asked to relinquish US citizenship I received pressure from both US and Venezuelan Army to serve in the Armed Forces.
>
> At that moment I was asked to make a decision where to serve.

> I was aware of the fact that as I was begining [sic] Medical school I was automatically excempted [sic] from serving the Army as per Venezuelan regulations.
>
> On the other hand I was affraid [sic] of being sent to south-east Asia as we were frequently told, if I asked for a US passport at that age.
>
> At that time I was making my first trip to the US as an adult, a country in which I had never lived since I was 3 months old, except a brief visit a [sic] age 7.

As required by law, the diplomatic officer who processed appellant's renunciation of citizenship executed a certificate of loss of nationality in his name. 2/ Therein the officer certified that appellant acquired the nationality of the United States by virtue of his birth therein; that he acquired the nationality of Venezuela by virtue of birth abroad of Venezuelan parents ; that he made a formal renunciation of his United States nationality before a diplomatic officer of the United States; and thereby expatriated himself under the provisions of section

---

2/ 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. 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.

349(a)(6) of the Immigration and Nationality Act. In forwarding the certificate to the Department, the Embassy reported that the officer concerned had explained to appellant the seriousness of his act.

The Department approved the certificate on September 7, 1965, an action that constituted an administrative determination of loss of nationality from which an appeal might be taken to the then-Board of Review on the Loss of Nationality, an adjunct of the Passport Division of the Department of State, predecessor of the Board of Appellate Review.

There is no record of any official dealings between appellant and United States authorities until 1988 when appellant, who was in the United States on a sabbatical, applied for and was denied a United States passport on the grounds of non-citizenship. When the Boston Passport Agency informed appellant that his application had been denied, the Agency informed him that he might inquire of the Board about taking an appeal.

Appellant gave notice of appeal in late 1988. In a statement, dated February 13, 1989, appellant explained why he wished the Board to review his case.

> Since 1965, I began to come to the US almost on an yearly basis, specially after the 1973-1977 period in which I made all my post-graduate medical training while living in Boston, and a time in which my 2 daughters were born, also in Boston.
>
> I have developped [sic] since then very close ties with many American Institutions, friends and families and the Country itself.
>
> I usually come several times a year and presently I am spending my sab-bathical [sic] year also in Univer-sities in Massachusetts.
>
> My daughters are going to school in Boston, and plan to study part of her [sic] college in the US, and I plan to travel frequently to the US and spend some time every year in this country.
>
> As the situation and my ties with the US have totally changed since 1965 I

have decided to appeal, and try to regain my US citizenship.

II

We confront a threshold issue: whether the Board may assert jurisdiction over a case in which the expatriate waited twenty-three years to seek appellate relief. Since timely filing is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1960), the Board may only consider the case on the merits if we determine that the appeal was filed within the limitation prescribed by the applicable regulations. If we find that the appeal is untimely, we must dismiss it.

The passage of so many years after appellant performed the expatriative act would in itself justify our dismissing the appeal out of hand. Nevertheless, we think it fair to determine whether there are any circumstances that would warrant our deeming the appeal timely.

In September 1965 when the Department approved the certificate of loss of nationality executed in 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 Office of the Department, to which persons who had been found to have expatriated themselves might address an appeal. In 1965 there was no limitation on appeal in the rules governing appeals to that Board. But in 1966 federal regulations were promulgated which prescribed that an appeal should be taken "within a reasonable time" after the affected party received notice that the Department had made an adverse determination of his nationality. 3/

When the Board of Appellate Review was established in 1967, the regulations then promulgated 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

---

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:

> 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

of the certificate of loss of nationality. 5/ Believing that the current regulations as to the time limit on appeal should not apply retroactively, we are of the view that the standard of "reasonable time" should apply here.

"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, 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). 6/

When appellant gave notice of appeal, the Chairman of the Board explained to him what the limitation "within a reasonable time" connoted, and suggested that if he decided to pursue an appeal, he should explain fully and in detail why he did not appeal much sooner.

Appellant has not developed the reasons why he did not move sooner. He has merely stated that: "Until very recently

---

4/ (cont'd.)

> 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).

6/ 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 930-931.

I was totally unaware of this possibility [of taking an appeal] and that is the reason why I never tried it earlier in the last decade." We assume he means that until the Boston Passport Agency gave him the address of the Board, he had no knowledge that an appeal process was open to him. Appellant further alleges that he "either lost or never received a copy of that certificate [certificate of loss of nationality]...."

The foregoing reasons are patently insufficient to excuse such a long delay in seeking review of the Department's holding of loss of his nationality.

The record shows that the Department sent a copy of the approved certificate to Caracas on September 7, 1965 for the Embassy to forward to appellant. We may assume that the certificate reached the Embassy and that the Embassy forwarded it to appellant. We cannot be sure, however, whether it arrived at appellant's address.

Let us assume that appellant did not receive the certificate. Can there be any doubt that he knew he had expatriated himself? For, as his affidavit of July 26, 1965 indicates, he was fully aware that he was surrendering his United States citizenship. He thus was in possession of information sufficient to move him to find out how he could challenge loss of his citizenship, assuming he believed that his renunciation was in some way flawed. Yet, he apparently saw no reason in 1965 or for years thereafter to attempt to recover his citizenship.

That appellant may not have been aware until denial of his passport application in 1988 that he had recourse to this Board does not excuse the long delay in seeking review of the Department's holding of loss of his citizenship. The Department's long standing instructions to consular officers to inform an expatriate of the right of appeal to the Board of Review on the Loss of Nationality and later to this Board did not have the force of law. Therefore failure, if failure there was in appellant's case, to inform one of the right of appeal does not constitute reversible error. He had, as noted above, sufficient information to lead him to take the initiative to find out what recourse he might have, but did not do so.

In his appeal statement appellant indicates with complete candor that since he now finds it would be nice to recover his United States citizenship, he has decided to appeal its loss. Such a reason plainly will not justify our excusing a delay of twenty-three years in contesting loss of his citizenship.

Further, to allow the appeal would be prejudicial to the interests of the Department of State, for the reasons set

forth by the court in Maldonado-Sanchez v. Shultz, memorandum opinion, Civil No. 87-2654 (D.D.C. 1989):

> The Court agrees with defendant's argument that to allow plaintiff to challenge his renunciation some twenty years after the fact is contrary to public policy. It places a tremendous burden on the government to produce witnesses years after the relevant events and to preserve documentation indefinitely. Moreover, a reasonable statute of limitations period serves the important function of mandating a review of the issuance of the CLN when the relevant events are fresh in the minds of the participants.

The essential purpose of a limitation on appeal is to compel the timely exercise of the right while recollection of the events surrounding the performance of an expatriating act are still fresh in the minds of the parties involved. Appellant has not shown a requirement for an extended period of time to prepare an appeal, or any obstacle beyond his own control preventing him from taking one in a timely fashion. In our view, appellant's delay in taking an appeal is unreasonable.

No legally sufficient excuse having been presented by appellant and the potential prejudice to the Department being so obvious, the interest in finality and stability of administrative determinations must be served in this case.

III

Upon consideration of the foregoing, we conclude that the appeal is time-barred and not properly before the Board. It is hereby dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

Warren E. Hewitt, Member