DEPARTMEMT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] W[redacted]

This is an appeal from an administrative determination of the Department of State dated August 13, 1965 that [redacted] expatriated himself on December 9, 1964 by obtaining naturalization in Canada upon his own application. 1/ [redacted] entered an appeal from that determination in 1988.

A threshold issue is presented here: whether the Board may entertain the appeal. For the reasons given below, we conclude that the appeal is barred by the passage of time and that the Board lacks jurisdiction to consider it. The appeal is accordingly dismissed.

I

Appellant, [redacted] acquired United States nationality by virtue of his birth at [redacted] on [redacted]. Since his father was a citizen of Canada, he also acquired Canadian citizenship at birth, subject to certain retention requirements. (See note 2 infra).

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

> 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 --
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> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ....

In October 1964, while living in Texas, appellant applied for resumption of Canadian citizenship pursuant to section 6 of the Canadian Citizenship Act of 1946. 2/ He was granted a certificate of Canadian citizenship on December 9, 1964 "effective on and from August 19, 1962" (his 24th birthday).

On February 5, 1965, appellant made a formal renunciation of his United States nationality before a consular officer of the United States in the Consulate General in Vancouver. Pursuant to law, a consular officer executed a certificate of loss of nationality in appellant's name on February 5, 1965. 3/ Therein the officer certified that appellant acquired United States nationality by virtue of his

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2/ Appellant was considered to be a natural born citizen of Canada under section 4(1)(b) of the Canadian Citizenship Act of 1946 as of January 1, 1947, the date the Act went into effect. Under section 4(a) of the Act, appellant ceased to be a Canadian citizen on his 24th birthday, August 19, 1964, because on that date he was not living in Canada and had not previously filed a declaration of retention of Canadian citizenship. Section 6 of the Act, which made provision for a person who filed a petition for resumption of Canadian citizenship, stated that "if the petition is approved by the Minister [the applicant may] be deemed to have resumed Canadian citizenship as of the date of such approval or as of such earlier or later date as the Minister may fix in any special case, and the Minister may issue a certificate of citizenship accordingly."

Source: Letter from the Clerk, Court of Canadian Citizenship, Canadian Citizenship Registration Branch, Vancouver, dated April 14, 1965, to the United States Consulate General, Vancouver.

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

birth therein; 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 (INA).

The Department agreed that appellant expatriated himself but on what date and under what section of the INA was not, it informed the Consulate, clear. It therefore instructed the Consulate General to ascertain from the Canadian authorities the facts about appellant's resumption of Canadian citizenshp. (It appears that in the processing of his case by the Consulate General he indicated that he had resumed the Canadian citizenship he acquired at birth.)

After the Consulate General obtained information about appellant's resumption of Canadian citizenship from the Canadian authorities (see note 2 supra) and so informed the Department, the Department informed the Consulate General that it considered appellant's act amounted to naturalization in a foreign state within the meaning of section 349(a)(1) of the INA. Since his naturalization in Canada occurred prior to the date upon which he formally renounced his United States nationality, the Department stated, the latter act of expatriation was null and void. As the Department requested and in compliance with section 358 of the INA (note 3 supra), an officer of the Consulate General executed a second certificate of loss of nationality, certifying that appellant lost his United States nationality on December 9, 1964 under section 349(a)(1) of the Act. The Department approved that certificate on August 3, 1965, approval constituting an administrative determination of loss of 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 of loss of nationality to the Consulate General on August 13, 1965 to forward to appellant. The Consulate General did so on August 30, 1965. Appellant has not disputed that he received a copy thereof shortly thereafter.

3/ (cont'd.)

> 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.

The events in appellant's life from 1965 to 1976, while obviously of moment to him, are tangential to the disposition of his appeal, and therefore need not be examined in detail. Suffice it to state that appellant was tried by court martial in 1966 for desertion from the United States Army and ordered discharged from the Army. Being an alien not properly admitted to the United States, he was deported to Canada in 1967 by the Immigration and Naturalization Service after a hearing.

In April 1976 appellant, who was living in Ontario, wrote to the State Department. He referred to the Department's determination that he expatriated himself and to his subsequent deportation from the United States "without hearing - to Canada...." He had recently learned that loss of his citizenship and deportation might have been in error and "in opposition to decisions of the U.S. Supreme Court during the past 10 years." "Would you please inform me of my status & citizenship," he asked, "and advise me as to whether my family and I can return to the United States."

Upon the instructions of the Department, the Embassy at Ottawa replied to appellant's letter on July 2, 1976. The Embassy informed appellant that the Department considered that he voluntarily brought himself within the provisions of section 349(a)(1) of the INA by petitioning for resumption of his Canadian citizenship, and had thus duly expatriated himself. As a result of the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967), the Attorney General had issued an interpretation of the Court's opinion, the Embassy's letter continued. Under that interpretation loss of nationality could result when a person performed an expatriative act if he voluntarily relinquished United States nationality by conduct manifesting an intention to abandon allegiance to the United States. The letter concluded as follows:

> If you feel that the determination of your loss of nationality should be set aside, you should contact this office and request an administrative review of your case. At that time you will be requested to submit any statements or affidavits which might establish that your obtaining naturalization in Canada was done without the intent of relinquishing your United States citizenship. While careful examination will be given to all new information, it should be noted that under the Attorney General's interpretation certain acts are deemed to be, in and of themselves, highly per-

> suasive evidence of an intent to relinquish United States citizenship. Naturalization in a foreign state upon one's own application is one of these acts.

Appellant replied to the Embassy's letter on July 15, 1976, stating that he formally requested "a review (administrative) of my case." He asserted that it was not his intention to cause a loss of nationality when he applied to "retain" Canadian citizenship. Further, he claimed that he had filed a timely declaration of intent to retain Canadian citizenship, and therefore could not be said to have applied for citizenship of a foreign state.

After reviewing appellant's letter, the Department instructed the Embassy in August 1976 to inform appellant that if he believed that he had made a timely application for retention of Canadian citizenship, he should take the matter up with the Canadian authorities. The Embassy was also instructed to ask appellant to complete the applicable information forms to enable the Department to evaluate his claim that he did not intend to expatriate himself. At this point the Consulate General at Vancouver entered the case and sent appellant forms to complete to facilitate determination of his citizenship status, inviting him to submit any additional evidence he might wish the Department to consider.

Appellant declined to complete all the forms, although he filled out one and enclosed a copy of the "brief" he used at his deportation hearing in 1966. He protested the Consulate General's involvement in his case because "it was in error from the beginning (1965), and he was concerned about "possible inherent prejudice." He added that "a legal brief is now under preparation for submission to the U.S. Federal Court, which, in part, will seek relief from the loss of my U.S. citizenship and the initial actions of the U.S. Consulate in Vancouver...."

In March 1977 appellant initiated an action in the United States District Court for the Western District of Washington against the United States requesting judicial review of a number of alleged wrongful acts by the United States Army; his deportation in 1967 to Canada after his dishonorable discharge from the U.S. Army; loss of his United States citizenship; and denial of entry into the United States.

On September 20, 1977 the District Court granted the government's motion for dismissal of appellant's action on the grounds that all appellant's claims were barred, except that for restoration of his citizenship, by the statute of limitations. As to appellant's request for judicial review of loss of his citizenship, the court stated:

> It is further the opinion of the Court that the plaintiff cannot pursue an action for the loss of his United States citizenship until he has exhausted his administrative remedies. Title 8, United States Code, Section 1503, sets out the proceedings for a declaration of United States nationality following a denial of rights and priviliges [sic] as a United States citizen. See also Title 22, Code of Federal Regulations, Part 50. Plaintiff has failed to allege that he has complied with the procedures required by this section.
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> This conclusion does not represent a holding on the merits of Plaintiff's claim to United States citizenship, nor is it meant to preclude the plaintiff in any way from pursuing his claim with the appropriate administrative agencies.

At the request of the district court and the Assistant United States Attorney for the Western District of Washington, the State Department wrote the following letter to appellant on November 3, 1977:

> We note that you have inquired about the possible effect of the President's Order of January 21, 1977 upon your situation. The Presidential Pardon and Executive Order of January 21, 1977 does not restore or in any way affect the United States citizenship of an individual who has commited an expatriative act under Section 349(a)(1) of the Immigration and Nationality Act of 1952. The Executive Order pertains only to Selective Service violaters and military absentees. Since you have complied with your military obligation and received your discharge, the Executive Order does not apply to your situation.
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> We also wish to inform you that a holding of loss of nationality may be appealed to the Board of Appellate Review within the Department of State. The regulations governing appeals

> are set forth in Title 22, Sections 50.60 - 50.72 of the Code of Federal Regulations. A pamphlet containing these provisions is enclosed for your convenience. Additional questions regarding an appeal should be addressed to the Board of Appellate Review, Department of State, Washington, D.C. 20520.

It appears that appellant contemplated taking an appeal from the order of the district court to the Circuit Court of Appeals for the 9th Circuit, but abandoned the idea, apparently because of the expense.

Eleven years passed. In 1987 appellant applied for a United States passport while in Missouri. On September 27, 1988 his application was denied on the grounds of non-citizenship. The denying passport agency suggested that he communicate with the Board of Appellate Review if he believed the Department's holding of loss of his citizenship was in error.

Appellant initiated this appeal in October 1988.

II

We are faced at the beginning with the issue of whether the Board has jurisdiction to consider and determine this appeal. To exercise jurisdiction, the Board must conclude that the appeal was filed within the limitation prescribed by the governing regulations. The courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960), Costello v. United States, 365 U.S. 265 (1961). Therefore, if an appellant does not enter an appeal within the applicable limitation and does not show good cause for filing after the prescribed time, the Board would lack jurisdiction to consider and determine the appeal.

Under present regulations, the time limit for filing an appeal from an administrative determination of loss of nationality by the State Department is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." 4/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that

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4/ Section 7.5(b) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b) (1988).

the appeal could not have been filed within one year after approval of the certificate. 5/ These regulations were not, however, in effect in 1964 when the Department determined that this appellant expatriated himself. Nor did the Board of Appellate Review then exist; it was established in 1967. In 1964, there was a Board of Review on the Loss of Nationality of the Passport Division of the State Department with jurisdiction to hear and decide all cases where the Secretary of State had made a determination of loss of nationality. Prior to 1966, there was no prescribed time limit for taking an appeal to the Board of Review on the Loss of Nationality, however, it was customary to apply the common law rule that where there is no specified limit on appeal, an appeal must be taken within a reasonable time after the affected party received notice of an adverse decision with respect to his nationality. The first mention of a time limit on entering an appeal from a determination of loss of nationality appeared in the regulations of the Department promulgated on October 30, 1966, with respect to the Board of Review on Loss of Nationality within the Passport Division. The regulations provided that an appeal to the Board of Review on Loss of Nationality be made "within a reasonable time." 6/ This "reasonable time" provision was adopted in the Department's regulations promulgated in 1967 for the Board of Appellate Review and remained in effect until the regulations were revised and amended on November 30, 1979. 7/

The current revised regulations require that an appeal be filed within one year after approval of the certificate of loss of nationality. Believing that the current regulation as to the time limit on appeal should not apply retrospectively, we are of the view that the Department's regulations on time limitation which were in effect prior to November 30, 1979, should govern in this case.

5/ 22 CFR 7.5(a) (1988).

6/ Section 50.60, Title 22, Code of Federal Regulations (1966), 22 CFR 50.60, 31 Fed. Reg. 13549 (1966).

7/ 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 request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

Under the "reasonable time" provisions, a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file a request for review within a reasonable time after receipt of notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be time barred and the Board would lack jurisdiction to consider it. In brief, the reasonable time provision presents a jurisdictional issue. 8/

The question whether an appeal has been taken within a reasonable time depends on the facts and circumstances in a particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). It has been held to mean as soon as circumstances will permit and with such promptitude as the situation of the parties 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); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976). The reasonable time limitation thus makes allowance for the intervention of unforseen circumstances beyond a person's control that might prevent him or her from taking a timely appeal. In loss of nationality proceedings, the time limitation begins to run when the citizen claimant has notice of the Department's holding of loss of nationality in his or her case.

Appellant contends that he is "blameless in the matter of filing an appeal 'within a reasonable time'." He maintains

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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 C.F.R. 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 expatriation.

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

that: "The opposing party - here the Department of State - has had numerous 'fair opportunities' to defend the many appeals initiated, without a decision being rendered." His case should be heard by the Board on the merits, appellant asserts. The Board should, in his opinion, "finally conclude actions of appeal which have been initiated since 1966 through 1977 and from which the U.S. Government has withdrawn through its own request and actions/inaction."

Specifically, appellant observes that:

> ...the issue of appealing the loss of U.S. nationality was first initiated in 1966 at a deportation hearing held in the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas. It was also one of the primary issues in an application for Writ of Habeas Corpus in 1966, and scheduled for hearing by the Tenth Circuit Court of Appeals. Additionally, the matter was a key issue in the Application for Presidential Pardon as the loss of nationality was an inextricable part of the U.S. Military Courts Martial of 1965. The request for Presidential Pardon initiated with President Nixon and was not completed until 19 Jan. 1977 by President Ford. The matter at the loss of U.S. nationality was also submitted for hearing on 29 August 1977 before U.S. Immigration Judge Newton T. Jones. In each case, the loss of U.S. nationality has been appealed in a timely manner (1965-1977) and on three occaisions [sic] the U.S. Government has asked for and received, a continuance, without resolving the matter....

We begin by noting that the Department of State approved the certificate of loss of nationality that was issued in this case on August 13, 1965. A copy of the approved certificate was mailed to appellant on August 30, 1965 by the Consulate General at Vancouver. He does not contend that he did not receive the certificate. In 1965 consular officers were under instructions to inform persons

who had expatriated themselves of the right to appeal the Department's decision to the Board of Review on the Loss of Nationality. The record does not indicate whether information about taking an appeal was sent to appellant when the certificate of loss of nationality was sent to him, but it would not be unreasonable to presume that such information was sent to him. It is generally accepted that a presumption of regularity attaches to the actions and procedures of the government and agencies thereof in the daily conduct of public affairs. The presumption of regularity of official acts of public officers supports their official acts, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. See Boissonnas v. Acheson, 101 F. Supp. 138 (S.D.N.Y. 1951).

Whether appellant received information about appeals is probably now unknowable. He was, in any event, on notice that he had expatriated himself. He thus had facts which should have led him to inquire whether he had any recourse from the Department's decision, assuming, of course, that loss of United States citizenship was a matter of moment to him. It is firmly settled that implied notice of a fact is legally sufficient to impute actual notice to a party. The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (1939). Appellant took no action between 1965 and 1976 to seek recourse from the Department, the agency which made the adverse decision on his nationality. 9/

As we have seen, in April 1976, appellant wrote to the Department to inquire about his citizenship status. As we have also seen, the Department through its agents explained to appellant fully and clearly what he should do to obtain administrative review of the Department's decision. For reasons he considered good and sufficient, appellant chose not to follow the Department's procedures to obtain an

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9/ The issue of appellant's nationality came up at his general court martial in 1966 and during deportation proceedings in 1966 and apparently in 1977. That his citizenship status was raised in those proceedings is irrelevant as far as the issue of the timeliness of this appeal is concerned.

administrative review of loss of his nationality. Instead, he elected to go into federal court to seek judicial review of loss of his nationality and his other grievances against the United States. After dismissal of appellant's action for judicial review of his expatriation, the Department in November 1977 carefully explained to appellant that he might seek relief by taking an appeal to this Board, and gave him all the information he would require to communicate with the Board about an appeal. There can be no doubt that appellant received the Department's letter; for it was sent to an address where appellant had been living for some time and from which at about the same time as the Department wrote him he addressed a letter to Senator Magnuson requesting assistance regarding loss of his citizenship and denial of entry into the United States.

Despite the explicit advice the Department gave appellant, he took no action to seek review of his case by this Board until his application for a passport was denied in 1988. He does not explain why he did not move until eleven more years passed.

Even if we were to excuse appellant's failure to act between 1965 and 1976, which we are not prepared to do, the fact remains that he allowed a substantial period of time to pass from 1977 to 1988 without offering any legally sufficient reason. In short, whether the delay in taking an appeal be reckoned as twenty-three or eleven years, it is manifestly unreasonable in the circumstances.

The principal purpose of the requirement for timely filing of an appeal is to compel the taking of such an action within a reasonable time when the recollection of the circumstances or events upon which the appeal is grounded is fresh in the minds of witnesses and records are still available. Limitations are also designed to insure the finality and repose of decisions. 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. As the court said in Maldonado-Sanchez v. Shultz, Civil No. 87-2654, D.C.C. 1989) at 10:

> The Court agrees with defendant's argument that to allow plaintiff to challenge [loss of his nationality] 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.

III

Upon consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time after appellant received notice of the Department's administrative holding of loss of nationality. The appeal is therefore time barred, and, as a consequence, the Board lacks jurisdiction to consider the case. The appeal is hereby dismissed as untimely.

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

Alan G. James, Chairman

Warren E. Hewitt, Member

Mary Elizabeth Hoinkes, Member