DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] V[redacted] S[redacted]

E[redacted] V[redacted] S[redacted] appeals from an administrative determination of the Department of State dated June 29, 1983 that he expatriated himself on September 22, 1966 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the Philippines upon his own application. 1/

For the reasons given below, we reverse the Department's holding of loss of appellant's nationality.

I

Appellant, E[redacted] V[redacted] S[redacted], acquired United States citizenship under the provisions of section 201(e) of the Nationality Act of 1940 by birth of a United States citizen father on [redacted] at [redacted] 2/ Since his [redacted] appellant acquired the right to elect Philippine citizenship upon attaining his twenty-first birthday.

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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: ...

2/ Section 201(e) of the Nationality Act of 1940, 54 Stat. 1138, provided that:

> Sec. 201. The following shall be nationals and citizens of the United States at birth:
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> . . .

According to appellant, in 1955 when he was 11 years old his father took him and his brothers and sisters to the United States Embassy at Manila to be registered as United States citizens. There is no record in the extant files of the Embassy of such a visit. However, the records do show that appellant's father was registered at the Embassy as a United States citizen in 1952, 1957, 1959 and 1975. In 1976 appellant's father obtained a passport and went to the United States where he now lives.

Appellant continues that the consular officer who interviewed his father stated that his children could not be considered United States citizens because their mother was a Philippine citizen. An attorney, a relative of the elder

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2/ (Cont'd.)

> (e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person; ...

In its brief, the Department erroneously stated that appellant acquired derivative citizenship through his father under section 201(g) of the Nationality Act of 1940. Section 201(g) provided that a person born outside the United States and its outlying possessions of parents, one of whom is a citizen and the other an alien, shall be a citizen of the United States at birth. In order to retain citizenship, however, such person was required to reside in the United States or its outlying possessions for a period of five years between the ages of 13 and 21 years. The Department went on that the foregoing citizenship statutory retention requirements were subsequently amended to reduce the period o time required to be spent in the United States or its outlyin possessions to two years and to require that residency be completed by age 26. Thus, the Department submitted, appellant was required to take up residence in the United States or outlying possession prior to March 21, 1970 (hi 26th birthday) for at least two years to retain citizenship. Since plainly he did not do so, he would have lost citizenship in 1970 even if he had not elected to become a Philippine citizen, the Department concluded, pointing out that the retention requirements were repealed in 1978 but with prospective effect only.

Short, allegedly confirmed what the consular officer reportedly had said about the ineligibility of the children to be recognized as United States citizens. This attorney, appellant further submits, recommended that appellant (and the other children) become Phillippine citizens by election to avoid statelessness after attaining their majority. Appellant's father, two brothers and two sisters, all of whom are living in the United States as citizens, have attested to the advice the senior Short was allegedly given by a consular officer and the attorney.

Appellant states that in 1966 he graduated from college where he studied marine engineering. "But after graduation," he stated, "I was faced with a dilemma." 3/

> Had our application for American citizenship been accepted by the U.S. Government, I could have easily joined the U.S. Navy ... or apply for a job at the U.S. Air Force Base. But being stateless I could not even apply for any job in the Philippines either private or public. My family was financially hard-up with several of my brothers and sisters attending school. I wanted to help my father support my brothers and sisters in school, but I could not being jobless....Being jobless I still was dependent on my parents ... So in desperation I decided to take the board examination for Marine Engineers given by the Philippine Government. And in order to take that board exams /sic/ I had to go to a notary public to execute an affidavit that I was electing to become a Filipino citizen.

The Philippine Constitution of February 8, 1935 provides that "those whose mothers are citizens of Philippines and, upon reaching the age of majority /twenty-one/ elect of Philippine citizenship" shall be citizens. Articie IV, section 1(4). Appellant made such election as prescribed by law. On September 22, 1966 at Manila, he executed a sworn statement in which, after setting forth his filiation, he declared that: "having reached the age of majority, I have elected the citizenship of my mother, namely, Philippine, and by these presents do hereby make said election of Philippine

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3/ Letter to the U.S. Embassy, Manila, March 21, 1983, where his case was being processed.

citizenship." On the same day he made the prescribed oath of allegiance which reads as follows:

> I, [redacted] Of legal age, single resident 36-A Mariposa Street, Quezon City, Philippines, having elected the citizenship of my mother, namely, Philippine, do solemnly swear that I will support and defend the Constitution and Government of the Republic of the Philippines against all enemies, foreign and domestic: that I will bear true and faithful allegiance to the same; and that I take this obligation freely without purpose of evasion.
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> SO HELP ME GOD.

In order to have legal force and effect, the documents pertaining to election of Philippine citizenship must be registered at the local civil registry where the person concerned resides. Appellant's documents were duly registered in December 1966 at the registry in Quezon City.

The appellant married a Philippine citizen. They have one child born in the Philippines.

In 1976, appellant states, he made inquiries at the [illegible] his citizenship status when his father obtained a passport to go to the United States. He and his siblings were informed by a consular officer that "we are entitled to follow our parents /sic/ citizenship and gave us forms to be filed o[illegible]

The record shows that in April 1978 appellant applied to be registered as a United States citizen at the Consulate in Cebu. At that time, he submitted certified true copies of the documents relating to his election of Philippine citizenship. "I wanted to be honest about it," he later stated. "I thought that by voluntary submission of the [illegible]

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4/ Letter to the Board, September 10, 1986. The record indicates that four of appellant's six brothers and sisters by his father's marriage to his first Philippine citizen wife are living in the United [illegible] Appellant alleges that all four previously elected Philippine citizenship.

establish the fact that it was never my intention to renounce my U.S. citizenship for Philippine citizenship." 5/

From April 1978 to September 1980 the Consulate at Cebu sought documentary proof of appellant's filiation. At the request of the Consulate, appellant completed a questionnaire to facilitate determination of his citizenship status on September 10, 1980. His file was then transferred to the Embassy which thereafter processed appellant's case. Six more months passed. In March 1981 the Embassy submitted appellant's case to the Department for decision. The Embassy stated that appellant refused to execute an affidavit of expatriated person becaue he "maintains he has not expatriated himself."

The Department instructed the Embassy in April 1981 to obtain official confirmation of appellant's election of Philippine citizenship, including the date and section of the law, from the Department of Foreign Affairs. 6/ After receipt of confirmation, the Embassy should send appellant the standard questionnaire to determine U.S. citizenship, and thereafter execute a certificate of loss of nationality.

In June 1982, the Department informed the Embassy that appellant's father had inquired about his case, as had appellant. The Embassy was instructed to report to the Department the status of its efforts to obtain the documentary evidence that the Department requested and execution of the certificate of loss of nationality. In August 1982 the Department again asked the Embassy what progress had been made in obtaining the documents, noting that appellant again had written to the Department about his case. The Embassy replied that it had just received the election documents from the Philippine authorities, adding "Mr. [redacted] will be requested to come to the Embassy to execute a cer ate of loss of nationality [sic] and documents will be forwarded to the Department ASAP."

Appellant completed the questionnaire and was interviewed by a consular officer. He again allegedly refused

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5/ Letter to the U.S. Embassy, March 9, 1983.

6/ There is no evidence of record that the Embassy made the requested demarche to the Philippine Foreign Ministry. Why the Department considered it necessary to obtain the documents when appellant had already submitted certified true copies to the Consulate at Cebu is not disclosed in the record.

to execute an affidavit of expatriated person. On December 3, 1982 the consular officer executed a certificate of loss of nationality (CLN) in appellant's name, as prescribed by section 358 of the Immigration and Nationality Act. 1/ Therein he certified that appellant acquired United States citizenship by virtue of his birth in the Philippines of a United States citizen father; that he elected Philippine citizenship; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

In January 1983, the Department instructed the Embassy to offer appellant an opportunity to submit any information he wished the Department to consider with respect to the issue whether he intended to relinquish citizenship, In two letters, dated March 9 and March 21, 1983, appellant explained the circumstances under which he elected Philippine citizenship and asserted that he did not intend to relinquish his United States citizenship. On June 29, 1983 the Department approved the CLN, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board. A copy thereof was forwarded to appellant in mid-August 1983.

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1/ 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.

[redacted] gave notice of appeal on September 10, 1986. 8/

II

As an initial matter, we must determine whether the Board should accept jurisdiction in this matter.

The Board's jurisdiction depends on whether the appeal was filed within the applicable limitation or may be deemed to have been filed within the limitation, for the courts have ruled that timely filing is mandatory and jurisdictional. See United States v. Robinson, 361 U.S. 220 (1961). With respect to the limit on appeal to the Board of Appellate Review, section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), provides that:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation under subpart c of Part 50 of this Chapter is contrary to law or fact shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

However, 22 CFR 7.5(a) provides:

> ... An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

22 CFR 50.52 provides that:

> When an approved certificate of loss of nationality or certificate of expatriation is forwarded to the person to

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8/ The disposition of this case has been beset by vicissitudes: difficulties in communicating with appellant in the Philippines; his attorney's withdrawal from the case; delays incident to the Department's efforts to obtain additional information about the case from the Philippine authorities.

> whom it relates or his or her representative, such person or representative shall be informed of the right to appeal the Department's determination to the Board of Appellate Review (Part 7 of this chapter) within one year after approval of the certificate of loss of nationality or the certificate of expatriation.

Notice of the right to make an appeal within one year after the Department approves a CLN is conveyed to an expatriate by information printed on the reverse of the certificate. In [redacted] case, the information about the right of appeal printed [redacted] reverse of the CLN that was sent to him in August 1983 read in pertinent part as follows:

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States

The cited regulations, 22 CFR 50.60-50.72, governed appeals from November 1967 to November 1979; on the latter date the present regulations went into force. The limitation on appeal prescribed by 22 CFR 50.60, was "within a reasonable time" after the affected person received notice of the Department's holding of loss of nationality.

Overlooking the fact that appellant had been informed, in effect, that he had not one year but a "reasonable time" after receipt of the approved certificate of loss of nationality, the Department argued in its brief that the appeal was time-barred; it had not been entered within the one-year limitation and there had been no showing of good cause why the time to file should be enlarged.

That appellant was not informed he had one year in which to make an appeal is central to our conclusion that we should accept jurisdiction. Federal regulations have the force of law. As such, compliance with their provisions by both parties to a loss of nationality proceeding is mandatory. Case law supports the distinction in terms of binding effect between formally published procedural safeguards designed to protect persons from arbitrary governmental action and procedural requirements not formally

published and not intended as a protection from adversarial, arbitrary official actions, See Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); and Vitarelli v. Seaton, 359 U.S. 535 (1959) which support the principle that regulations formally published by a government agency are binding upon it as well as the citizens.

Appellant did not make his appeal until three years after the Department approved the certificate of loss of nationality that was executed in his name, two years beyond the time allowed for appeal by the regulations presently in effect. It is arguable that if appellant had been informed he had a short, specific time within which to move for appellate review of loss of his nationality, he would have endeavored to comply with the condition. We are of the view that the Department had a duty to inform appellant promptly and correctly of his right to appeal to the Board the Department's determination of loss of nationality within one year after approval of the CLN. Although the Department informed appellant of his right to appeal, it failed to inform him of the "one year" time limit on appeal,

It could be argued with equal cogency that by making an appeal in 1986 appellant moved within a reasonable time after August 1983, when he received the approved CLN. What constitutes reasonable time depends upon the facts of each case, taking into consideration 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). In the case before the Board, the facts and circumstances are rather unique. Appellant asserted a claim to United States citizenship in 1978 by applying for a passport. Five years passed before the Department adjudicated his claim. The delay incident to the processing and adjudication of his case arguably was more prejudicial to appellant than appellant's delay to the Department.

Perceiving no prejudice to the Department in allowing the appeal, and persuaded that in the very special circumstances of this case the interest in finality is not paramount, we will accept jurisdiction of the appeal, and accordingly proceed to the merits.

III

The statute provides that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state voluntarily with the intention of relinquishing United States nationality. Section 349(a)(1) of the Immigration and Nationality Act. It is evident that appellant's election of Philippine citizenship constituted naturalization within the meaning of the Act. Furthermore, the record shows that appellant elected and obtained Philippine citizenship in accordance with

the laws of that country. The first issue to be addressed therefore is whether appellant's act was voluntary.

In law, it is presumed that one who performs a statutory expatriating act does *so* voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not voluntary. 9/

Appellant submits that his naturalization in the Philippines was involuntary. The essence of his case, as set forth in his brief, is that:

> The facts, records, and other evidences concerning the case at bar show beyond any shadow of doubt that Mr. [redacted] election as Filipi[redacted]sed directly by a wrong advice given to him and the other members of his family by the U.S. Consul who refused to register them as U.S. citizens in 1955.
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> ...
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> E[redacted] V[redacted] S[redacted] should therefore not be blamed for the ignorance of the U.S. Consul. And the U.S. Government must take full responsibility for the ignorance of its own officers. It is therefore submitted that the [redacted]ction of Filipino citizenship by Mr. S[redacted] was not voluntary.

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

> (b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done *so* voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

The only evidence appellant has submitted in support of his contention are affidavits of his father, stepmother, two brothers and two sisters which were executed 30 years after the alleged misinformation was given appellant. There is no record of the Embassy to verify that the citizenship of the S[redacted] children was discussed around 1955. Standing without corroborating evidence, his family's testimony in support of appellant's contentions, presented 30 years after the event, is entitled to very limited probative value. Furthermore, appellant waited eleven years before he acted on the alleged misinformation by electing Philippine citizenship. In that time he could have made further inquiries about his citizenship status, but did not do so.

A fair inference to be drawn from the sparse facts of record is that appellant decided to elect Philippine citizenship because he considered it to his advantage to do so, not because he had been given misleading advice eleven years earlier by an officer of the Embassy. Thus, it may be presumed that he had freedom of choice and exercised it. Where one has such an opportunity, there is no duress. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (5th Cir. 1971); cert. denied, 404 U.S. 946 (1971).

IV

It remains to be determined whether appellant's acquisition of Philippine citizenship was accompanied by an intent to relinquish United States nationality.

Whether a citizenship-claimant intended to relinquish United States citizenship is an issue that the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 263, 267 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent the government must prove is the party's intent at the time he or she performed the expatriative act. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981. Under the "preponderance of the evidence" rule, the government must prove that a party intended, more probably than not, to relinquish United States nationality. 10/

In the case before the Board, the only contemporary evidence bearing on appellant's intent is the fact that he obtained naturalization in the Philippines and made an oath of allegiance to a foreign state. Although these facts may constitute evidence of such intent, they are not conclusive on the issue. Vance v. Terrazas, supra, at 261; King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972).

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10/ McCormick on Evidence, section 339, 3rd Ed.

The Department places reliance on appellant's conduct after he elected Philippine citizenship to demonstrate that he probably intended to relinquish United States citizenship.

> Appellant's intent can be clearly inferred from his subsequent course of conduct which when viewed in its entirety is susceptive only of one inference - behavior which is not that of a person desirous of maintaining his U.S. citizenship.
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> Although appellant claims now, many years after, that he was forced against his will to make an election, the fact remains that the only evidence available at the time of his naturalization is his statement and the oath of allegiance which states, 'I take this obligation freely without purpose of evasion.; Since 1966 he has never represented himself as a U.S. citizen.

It is true that the record shows that from 1966 when he elected Philippine citizenship, to 1978, when he applied for a United States passport appellant did nothing to establish a claim to United States citizenship. But the reason he gives for not doing so is that until around 1976 he did not know what his correct citizenship status was. Thus, he did not take such actions as register his child, or filing U.S. income tax returns which would attest to an intent to preserve his citizenship.

The Department noted in its brief that despite appellant's disclaimer that he knew before 1976/1978 that he was a United States citizen, he replied to a question in a citizenship questionnaire in 1980 as follows: (1)(d) "When and under what circumstances did you first become aware that you might be a citizen of the United States?' Answer: "My father, [redacted] R. S[redacted], Sr. an American said so as I wanted to take a gov[redacted]nt Board examination in the Philippines whe I was in my college days. (1(e) "Have you ever informed any local or national official of a foreign state that you are a citizen of the United States?" Answer: "Yes. I informed Atty. Fernando V. Reyes, Quasha Law Office, Escorta, Manila, Philippines, on September 22, 1966." 11/

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11/ Appellant gave similar answers to the same questions in the citizenship questionnaire he exeucuted in November 1982 at the Embassy.

Appellant has not explained why he answered those questions the way he did, and the record yields no clues. Conceivably he was confused or did not understand the questions. In any event, we note that in the marriage contract he and his wife executed in July 1972, he listed his citizenship as "Fil. by Election." That statement, which was made closer to the date of his election of Philippine citizenship than his answers to the citizenship questionnaires in 1980 and 1982, tends to substantiate his contention that he did not think he had a claim to United States citizenship until the mid or late 1970's.

Even if one were to assume that appellant knew or probably knew he was a United States citizen in 1966 when he elected Philippine citizenship, what relevance would such knowledge have to the issue of whether he intended at that time to relinquish his United States citizenship? We see none. It does not follow that simply because he knew he was a U.S. citizen or had reason to believe that he had a claim to United States citizenship, he probably intended to relinquish that citizenship when he decided to become a Philippine citizen by election. As is well known, many American citizens obtain foreign naturalization without harboring any intention to divest themselves of citizenship. Furthermore, even if appellant knew he was an American citizen, there is nothing in the record to indicate he had been cautioned officially or otherwise that obtaining naturalization in a foreign state is expatriative. Aware or not that he was a United States citizen in 1966, the record shows no affirmative act by appellant after that time that could reasonably be construed as manifesting an intent to divest himself of American citizenship.

In sum, the contemporary evidence bearing on the issue of appellant's intent when he elected Philippine citizenship consists only of his performance of an expatriative act and an oath that leaves ambiguous his intent, for it attests to little more than that appellant promised to be a loyal Philippine citizen. Nor will his proven conduct after 1966, devoid as it is of actions expressly derogatory of United states citizenship, support a finding of an intent to forfeit citizenship. The Department has not proved appellant intended to relinquish United States citizenship.

V

Upon careful consideration of all the evidence, we conclude that appellant did not expatriate himself on September 22, 1966. Accordingly, we reverse the Department's

holding of loss of his United States citizenship.

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Member

George Tafft, Member