August 30, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

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

De[redacted]t[redacted]ate determined on October 12, 1972 that C[redacted] P[redacted] P[redacted] expatriated herself on July 18, 1972 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 her United States nationality before a consular officer of the United States at Caracas, Venezuela. 1/ Mrs. P[redacted] entered an appeal from that determination in August 1989.

The delay in taking the appeal presents a threshold issue which must be resolved before the Board may proceed: whether the Board has jurisdiction to hear and decide the appeal. Having carefully reviewed the record and appellant's explanation of the delay, we conclude for the reasons given below that the appeal is time-barred and therefore must be dismissed for lack of jurisdiction.

I

Appellant, Mrs. P[redacted], acquired the nationality of the United States by virtue of her birth at New York City on May 30, 1929. As her father was a British subject, she also became

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

> Sec. 349. (a) From and after the effective date of this Act 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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> ...
>
> (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; ...

a British subject at birth. Through her mother, a citizen of Venezuela, she acquired the nationality of that country as well. Around age eight, she was taken by her parents to Venezuela where she lived until 1986.

Appellant grew up and was educated in Venezuela. In August 1952 she obtained a non-immigrant visa in a Venezuelan passport from the American Embassy at Caracas to visit the United States. At that time, she has stated, she was not advised that she was a United States citizen, even though her visa application showed that she was born in New York City.

In early 1955 she again applied for a visa at the Embassy. Asked if she had voted in a foreign election, she made a sworn statement, dated January 19, 1955, that she had done so in Venezuela in November 1952. In the statement, Mrs. P[redacted] also declared that she "realized that by so voting I w be subject to loss of my United States citizenship and voted with full knowledge of that;..." 2/

Based upon appellant's statement that she had voted in a foreign political election, an officer of the Embassy executed a certificate of loss of nationality in appellant's name, in compliance with the provisions of section 358 of the Immigration and Nationality Act. 3/ Therein he certified that

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2/ At the hearing on May 10, 1990 appellant said she did not know when she voted that she might jeopardize her citizenship. The statement she signed had been prepared by the Embassy and she did not fully understand it. Transcript of Hearing in tne Matter of Cecily Patricia Petzall, Board of Appellate Review, May 10, 1990 (hereafter referred to as "TR"). TR 25, 26.

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 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

appellant voted in the Venezuelan presidential election of 1952 and thereby expatriated herself under the provisions of section 401(e) of the Nationality Act of 1940, 54 Stat. 1169. The certificate was approved by the Department in February 1955. The Supreme Court in 1967 declared section 401(e) of the Nationality Act of 1940 unconstitutional. Afroyim v. Rusk, 387 U.S. 252 (1967). It appears that appellant did not learn until 1972 that loss of her United States nationality had been nullified by the Court's decision.

The next event of record in this case is appellant's visit to the Embassy in the summer of 1972. She described as follows the events incident to that visit in an affidavit executed on July 21, 1989.

> On July 18, 1972, I went to the U.S. Consulate with only one purpose in mind, which was to obtain a visa for a one week visit to the United States to join my husband, who at the time was working for Standard Oil of New Jersey affiliate in Venezuela and had been on extended work assignment with the parent company in New York for several months. With extremely short notice, I was given the opportunity to join him for one week and was able to make the necessary arrangements for that vacation. When I requested a visa, Mr. Howard T. Jackson, the consul, informed me that I still had the option to U.S. citizenship, by reason of being born in New York, which I thought I had lost because I had voted in the 1952 Venezuelan presidential election, that this action did not cause me to lose my U.S. citizenship and consequently, I could only travel with a U.S. passport. I was also told that the issuance of a U.S. passport would take so long that in effect

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3/ (Cont'd.)

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.

> it would be impossible for me to take the trip in the available time. I was also informed that my employment as the Head of a small department at the Geology Division of the Venezelan Ministry of Energy & Mines was incompatible with my U.S. nationality and that to apply for a U.S. passport, I would be required to give up my employment in the ministry. I was advised by the consul that the only way for me to enter the United States within the very tight travel schedule at my disposal at the time was to renounce my U.S. citizenship immediately and that after having done that, I would be in the preferred list of those who want to come to the U.S. and he could immediately issue me a visa. I was not advised of any other alternative.

The record shows that on July 18, 1972 Mrs. P[redacted] executed a statement of understanding in the presence of a consular officer. 4/ In the statement she declared, inter alia, that she had decided voluntarily to exercise her right to renounce her United States citizenship; acknowledged that upon renouncing she would become an alien toward the united States; noted that she had been afforded an opportunity to make a written statement of the reasons for her renunciation; and stated that the extremely serious nature of renunciation had been explained to her by the consular officer concerned and that she fully understood the consequences; and finally stated that she had read the contents of the statement and fully understood them. Appellant's statement of the reasons for her renunciation reads as follows:

> By the present, I C[redacted] K[redacted] P[redacted], declare that while applying for a turist /sic/ visa to go to the United States, with my Venezuelan passport, I was informed that I still enjoyed the option to the American citizenship, by

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4/ Although the jurat on statement of understanding stated that appellant "appeared personally and read the statement in the presence of these witnesses,' the statement of understanding apparently was not witnessed by two individuais, as prescribed by the Department's guidelines, but only by the consular officer.

> being born in New York, which I though /sic/ I had lost by voting in the Venezuelan presidential elections of 1952, in accordance with the attached document dated Jan. 20, 1955.
>
> Since this action does not cause /sic/ to lose the American citizenship, it was pointed out to me that I still could, if I wished so, to opt for the American citizenship.
>
> since I live in Venezuela since I was a child and I have my family here, my ties and close family are in this county /sic/, I have taken the decision to renounce to my American citizenship, by personally considering a disloyal act to both countries the enjoying of two citizenships at the same time. 5/

Appellant thereafter made the prescribed oath of renunciation of United States nationality before the consular officer. On August 3, 1972, the officer executed a certificatz of loss of nationality in appellant's name as required by section 350 of the Immigration and Nationality Act. 6/ After setting forth that appellant acquired the nationality of the United States at birth and the nationality of Venezuela as well, the officer certified that she expatriated herself on July 18, 1972 under the provisions of section 349(a)(6) of the Immigration and Nationality Act by making a formal renunciation of her United States nationality.

The Embassy forwarded the certificate to the Department under cover of a memorandum, dated August 3, 1972 which reads in relevant part as follows:

> She has been notified that the loss /of her citizenship for voting in a foreign election/ has been vacated and her United States citizenship restored, but she stated that she has no desire to retain United States nationality and prefers to

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5/ Informal translation from the Spanish made by the Embassy.

6/ See note 3 supra.

renounce her nationality. An informal translation of her self-explanatory statement is attached.

The seriousness of the act and its consequences were explained to her and she then read and signed the statement of understanding before signing the Oath of Renunciation. She expatriated herself on July 18, 1972 under provision of Section 349(a)(6) of the Immigration and Nationality Act of 1952 by making a formal renunciation of her united States nationality before a consular officer of the united States.

She does not have a valid passport.

In 1986 appellant and her husband moved to Texas where he is working under a contract with the American affiliate of a German concern.

In December 1988 appellant applied for a United States passport at the Houston Passport Agency. Her application was denied on March 14, 1989 on the grounds that she was not entitled to a passport, it having been determined in 1972 that she expatriated herself. In informing appellant of the denial of her passport, the Houston Agency stated that if she wished to appeal from the Department's adverse decision of 1972, she might write to this Board. She was advised, however, that the Board would only consider her case if it determined that her appeal had been filed within the limitation prescribed by the applicable regulations.

In August 1989 counsel for appellant gave notice of appeal to this Board. Oral argument was heard on May 10, 1990.

II

The initial issue presented is whether the Board may consider and determine an appeal entered nearly seventeen years after appellant received notice of the Department's administrative determination of loss of her nationality. To exercise jurisdiction, the Board must be able to conclude that the appeal was or may be deemed to have been filed within the limitation prescribed by the governing regulations, since the courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960).

Under existing regulations, the time limit for filing an appeal from the Department's administrative determination

of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." 7/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certificate. 8/ The present regulations, however, were not in force on October 12, 1972, when the Department approved the CLN that was issued in appellant's case.

The regulations in effect in 1972 with respect to the limitation on filing an appeal prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's administrative holding of loss of nationality. 9/ We believe that the reasonable time limitation should govern in appellant's case, rather than the limitation of one year after approval of the CLN under existing regulations, for it is generally accepted that a change in regulations shortening a limitation period operates prospectively, in the absence of an expression of a contrary intent to operate retrospectively.

"What constitutes reasonable time" the Court of Appeals 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 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).

7/ Section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1) (1989).

8/ 22 CFR 7.5(a) (1989).

9/ 22 CFR 50.60 (1967-1979) provided that:

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

See also PRC Harris, Inc. v. The Boeing Company, 700 F.2d 894, 897 (2nd Cir. 1983) where the court said that in determining whether a motion, made under a federal rule allowing motions to be filed within a reasonable time after the making of a judgment, is timely, "we must scrutinize the particular circumstances of the case, and balance the interest in finality with the reasons for the delay."

In Lairsey v. Advance Abrasives Co., 542 F.2d 928 (5th Cir. 1976), the court was called on to determine whether a motion had been filed within a reasonable time after a judgment was entered. The court noted that the rule allowing the motion set up an outside limit of one year and prescribed a reasonable time standard "which by its nature invites flexible application in varying circumstances." 542 F.2d at 930. Continuing, the court quoted 11 Wright & Miller, "Federal Practice and Procedure," section 2866 at 228-29:

> '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.

To determine whether the appeal now before the Board was filed within a reasonable time after receipt of notice that the Department had made its decision, we must apply the criteria set forth in the foregoing decisions, principally whether appellant has offered a substantial reason for the delay and whether allowing the appeal would prejudice the Department of State. The weight to be given the interest in finality is a function of the conclusions that the Board reaches with respect to the other criteria. .

The rationale for granting one a reasonable period of time within which to appeal an adverse citizenship determination is fair and pragmatic. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, and makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from acting promptly. At the same time the rule penalizes excessive delay. For delay may be prejudicial to the rights of the opposing party; passage of an appreciable period of time before moving for review

inevitably obscures the events surrounding performance of the expatriative act.

Appellant submits that if all the circumstances of the case are considered her delay in seeking review of her case before this Board is not inordinate.

Her essential reasons for the delay are set forth in an affidavit she executed in July 1989.

> The Certificate of Loss of Nationality is dated August 2, 1972; seventeen years have elapsed since then. I do believe I am filing a timely appeal 'within a reasonable time' and my reasons are as follows:
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> The Certificate of Loss of Nationality was mailed to me without any accompanying instructions for taking an appeal. This led me to believe that the Certificate of Loss of Nationality was final and complete; that nothing more could be done. In the following years, whenever I request a U.S. visa to travel to the United states from Venezuela, my Venezuelan passport was alsways stamped at the U.S. Consulate and nothing more was mentioned of my renunciation and loss of nationality. This made me further believe that the Certificate of Loss of Nationality is indeed final and irrevocable,
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> Furthermore, my upbringing in Venezuela instilled in me a belief that no one goes against a decision of the U.S. Government or its federal agencies.

In her reply brief, appellant stated that she had no indication in 1972 that her renunciation was in anyway flawed. She contends that it was the agent of the Department of State who

> erroneously informed Mrs. P[redacted]
> that her employment at the [redacted]try
> was incompatible with her United
> States citizenship, and who impro-
> perly advised her to renounce her
> citizenship in order to obtain a visa,
> and who failed to inform her of her
> right to remain a dual national, and
> who failed to follow the proper pro-
> cedures in the renunciation itself,
> and finally, failed to advise her on
> her right to appeal the State Depart-
> ment's decision.

At the hearing, appellant stressed in particular that her upbringing in Venezuela taught her not to question the decisions of those in authority, In Venezuela one might use influential friends to try to change adverse decisions, but she believed that once the American Department of state had made a decision, that was that. 10/ So until she came to the United States in 1986 and started talking to people she did not realize that in the United States one might question authority by appealing from an adverse decision.

The basic question is whether appellant has justified not seeking appellate review of her case within a reasonable time after she was informed that the Department had approved the certificate of loss of nationality that was executed in her name.

Appellant acknowledges that she received the certificate of loss of nationality that was approved in her name. She was therefore placed squarely on notice that she had lost her citizenshp. But, she submits, she was not given information at that time that she might take an appeal from the Department's decision. We note that the CLN in this case did not carry information about appeal. The form the Embassy used was superseded in 1972; from then on information about the right of appeal was printed on the reverse of the CLN form. Before 1972 consular officers were under instructions to apprise expatriated persons in writing of the right of appeal at the time the approved CLN was forwarded to them. See 8 Foreign Affairs Manual 224.21 (Procedures) (1972). These instructions did not, however, have the force of law. Still, fairness of course required that this appellant like all other expatriates be informed promptly and clearly of the right of appeal.

10/ TR 35, 47, 48, 67.

Without questioning appellant's sincerity, we must note that at this distance from 1972 it is obviously difficult, if not impossible, to establish definitively whether the Embassy enclosed a statement about the right of appeal in the communication it sent appellant with the CLN or whether it did so in a subsequent communication. While it could be argued, and we will so presume, that the Embassy carried out its duty as prescribed by the Department's guidelines with respect to informing expatriates of the right of appeal, (as is well-known, public officials are presumed to execute their duties correctly and faithfully), we will, for the purpose of analysis, assume that appellant did not for some reason beyond the Embassy's control receive notice of the right to take an appeal to this Board. If that be the case, the question then arises whether she is to be relieved from taking any action sooner to ascertain what her rights might be.

Appellant knew one vital fact: that she had expatriated herself, Such information should have been sufficient, if she had the will to act on it, to lead her to the knowledge that an appellate procedure was available. It is settled that: "/K/nowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945, 948 (6th Cir. 1939). See also U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). There is nothing of record to show that appellant made any effort to contest the Department's decision until around 1988 when she retained legal counsel.

But, appellant argues, she was brought up to be deferential to authority, and assumed that once the United States Department of State had made a decision the correctness of the decision could not be challenged. We do not find sucn an argument persuasive. The impediment appellant describes was plainly self-imposed. There is no evidence that anyone positively counseled her against, or prevented her from, taking some action to assert a claim to retain citizenship. We are also impressed that appellant is an educated professional woman, presumptively capable of making decisions to safeguard her rights. It is difficult, without more, to accept that her orientation was an absolute bar to her even trying to find out how she might seek restoration of her citizenship, If she perceived expatriation to be a grievious loss, we think she would have at least asked questions at the Embassy. She asked none.

Appellant further suggests that she did not appeal sooner because she did not perceive until she consulted American counsel that the Embassy had acted improperly, that is, she did not think she had grounds on which to base an appeal. Once

again, deference to authority deterred her from even conceiving, until much later, that the consular officer who handled her case might have erred.

The simple answer to such an argument is that if in 1972 or a reasonable time thereafter appellant had at least protested loss of her citizenship, asked questions of the Embassy, or sought competent legal advice, she would have learned that on appeal she might argue, for example, that she had not acted voluntarily, was confused, was hurried into a decision, or that she really never intended to relinquish her United States citizenship. In short, the timely exercise of minimal initiative would have disclosed to appellant a possible basis on which to challenge loss of her citizenship.

Thus we are of the view that appellant may not excuse her considerable delay in coming to this Board by contending that she was justified to remain passive for so long. Persons of ordinary prudence faced with loss of an important civil right presumably would act with dispatch to try to recover that right, no matter if they were not expressly informed that they might seek review of their loss and how to do it.

To countenance her argument that because she was not expressly informed of the right of appeal (where there was no legal duty to do so) she was justified in remaining inactive with respect to her citizenship status would be contrary to public policy, for it would sanction allowing an appeal no matter how hoary and no matter how little diligence the actor showed in trying to seek review of a decision he or she believed unfair or unreasonable.

Our view that the appeal is untimely is reinforced by the obvious prejudice to the Department of State that would result if we were to follow the appeal. Appellant makes a number of allegations about the processing of her case in 1972. These the Department would find difficult attempt to rebut, given the passage of so much time. There is a limited contemporary record, and the consular officer who handled appellant's case cannot be located; the Department states it tried to do so. We agree with the Department that even if he were available to testify, it is hardly likely he would be able to shed much light on what transpired so long ago.

The difficulties which both the government and the trier of fact confront in long delayed appeals were aptly stated by the court in Maldonado-Sanchez v. Shultz, 706 F.Supp. (D.D.C. 1989):

> The Court agrees with defendant's [the Department of State] 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.

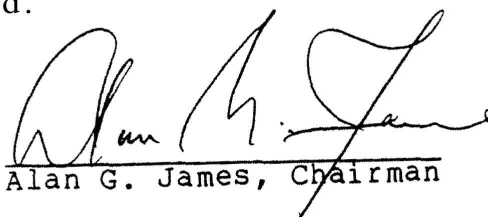
Seventeen years is an extraordinarily long period of time for one to wait to assert a right to citizenship. Appellant has not demonstrated any extraordinary circumstances which would justify our holding that she sought review of her case within a reasonable time after she received notice that the Department had made its adverse decision. Since it would be prejudicial to the Department of State to allow the appeal, we must give the interest in finality great weight.

Balancing the principal elements which the courts hold must be taken into account in determining whether an appeal has been filed within a reasonable time after the making of the decision, we conclude that the delay in taking this appeal was excessive. The appeal is time-barred.

III

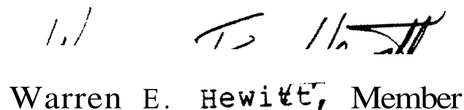
Since the appeal is time-barred, the Board is without jurisdiction to consider and decide it. Accordingly the appeal is dismissed.

Given our disposition of the case, we do not reach the substantive issues presented.



Alan G. James, Chairman

J. Peter A. Bernhardt, Mem



Warren E. Hewitt, Member