No. 99-259

In the Supreme Court of the United States

ALBERTO O. LOZADA COLON, PETITIONER

v.

DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of mandamus directing the Secretary of State to issue him a Certificate of Loss of Nationality under 8 U.S.C. 1501.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 170 F.3d 191. The opinion of the district court (Pet. App. 4-10) is reported at 2 F. Supp. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1999. A petition for rehearing was denied on May 20, 1999 (Pet. App. 11). The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Puerto Rico on November 2, 1952, thereby becoming a citizen of the United States under the terms of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See Pet. 9; Pet. App. 5;

8 U.S.C. 1101(a)(38), 1401(a). Petitioner is a lawyer, and in 1996 he ran for Mayor of the city of Mayaguez as a member of the Puerto Rican Independence Party. Pet. 9.

On September 23, 1996, petitioner appeared at a United States Consulate in the Dominican Republic and stated that he desired to renounce his United States nationality, as permitted by Section 349(a)(5) of the INA, 8 U.S.C. 1481(a)(5). See Pet. App. 5. After speaking with a consular officer, and in conformity with procedures prescribed by the Secretary of State, petitioner executed a written "Oath of Renunciation of the Nationality of the United States" and a separate "Statement of Understanding." C.A. App. 23-24; Pet. App. 5; see 22 C.F.R. 50.50(a).[1] He also submitted a separate written statement explaining his reasons for seeking to renounce United States citizenship, as permitted by the Secretary's procedures. C.A. App. 25. In his supplemental statement, petitioner asserted that he is a "Puerto Rican citizen" with an "inalienable right" to live in Puerto Rico, even after renouncing his United States citizenship. *Id.* at 25 (original statement in

[1] The form of oath states in substance that the declarant "absolutely and entirely renounces his U.S. nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining." 22 C.F.R. 50.50(a). The form of "Statement of Understanding" signed by petitioner recites, among other things, the declarant's understanding that "Upon renouncing my citizenship I will become an alien with respect to the United States, subject to all the laws and procedures of the United States regarding entry and control of aliens," and that "If I do not possess the nationality of any country other than the United States, upon my renunciation I will become a stateless person and may face extreme difficulties in traveling internationally and entering most countries." C.A. App. 24.

Spanish), 32-33 (quoting portions of statement as translated into English).

Section 358 of the INA, 8 U.S.C. 1501, provides that when a consular officer has reason to believe that an individual who is outside the United States has lost United States nationality under the terms of the Act, he or she

> 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 [her] 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. Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of United States nationality under this chapter, subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503 of this title.

See also 22 C.F.R. 50.50(b).[2] In accordance with these provisions, the consular officer who received peti-

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[2] Although 8 U.S.C. 1481(a)(5) provides for formal and explicit renunciations of citizenship, Section 1481(a) sets out a number of other acts, such as taking an oath of allegiance to a foreign state or serving as an officer in a foreign army, that will result in loss of citizenship if performed "with the intention of relinquishing United States nationality." An individual who objects to the Secretary of State's initial conclusion, on the basis of facts reported by a

tioner's renunciation papers forwarded them to the Department of State in Washington, together with a draft Certificate of Loss of Nationality (CLN). See Pet. App. 5. The Secretary of State took no immediate action with respect to petitioner's case. On August 13, 1997, petitioner filed this action in the United States District Court for the District of Columbia, seeking a writ of mandamus "compelling the Department of State to enter a decision" with respect to his renunciation and "ordering [the Department] to issue forthwith to [petitioner] a certificate of loss of nationality." C.A. App. 17, 20; Pet. App. 5-6.

2. On January 27, 1998, the Department of State informed petitioner that it would not issue him a CLN. Pet. App. 6; C.A. App. 32-33. The Department explained that it was "unable to reconcile" petitioner's asserted intention to relinquish United States citizenship with his statements concerning his "Puerto Rican" citizenship and his right to continue to live in Puerto Rico, or with its understanding that since the time of his "renunciation" petitioner had been "living in Puerto Rico and ha[d] made no effort to be documented as an alien under the [INA]." *Id.* at 32. To the contrary, the Department determined that "the intention to relinquish U.S. nationality" for purposes of 8 U.S.C. 1481(a) "does not exist where a renunciant plans or claims a

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diplomatic or consular officer, that he or she has performed an expatriating act with the requisite intent may appeal that determination to the State Department's Board of Appellate Review, and may challenge a final adverse determination by the Department under procedures set out in 8 U.S.C. 1503 (1994 & Supp. IV 1998). In any proceeding concerning loss of nationality, "the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." 8 U.S.C. 1481(b).

right to reside in the United States, a right that is inherent in U.S. nationality, unless the renunciant demonstrates that residence will be as an alien properly documented under U.S. law." C.A. App. 33. Because it considered petitioner's "statements and actions to be inconsistent with an intent to relinquish U.S. citizenship with all the rights and privileges pertaining thereto," the Department concluded that petitioner had "not met the burden, established by Section 349(b) of the INA [8 U.S.C. 1481(b)], of showing by a preponderance of the evidence that [he] intended to relinquish U.S. citizenship when [he] executed the Oath of Renunciation." C.A. App. 32.

3. On April 23, 1998, the district court granted respondents' motion to dismiss petitioner's mandamus action. Pet. App. 4-10. Although the court noted that petitioner had sought an order compelling the Secretary not only to take some action in petitioner's case, but to issue a CLN, the court concluded that the Secretary's refusal to issue a certificate amounted to final agency action on petitioner's request, and that there were means of challenging that decision other than a petition for a writ of mandamus. *Id.* at 6-7. In any event, the court held that the language of 8 U.S.C. 1501 "makes clear that the issuance of a certificate depends upon the Secretary's approval of the consular officer's report." Pet. App. 8. Thus, "[t]he approval, or disapproval, of the issuance of certification is committed by statute to the discretion of the Secretary," and accordingly that decision was "not subject to th[e] Court's mandamus jurisdiction." *Ibid.*

Finally, the district court rejected petitioner's "quasi-constitutional argument that the Secretary must approve his [CLN] because of his inherent, natural right to expatriate." Pet. App. 8. The court reasoned that

expatriation depends in part on a finding of the requisite intent to relinquish all the benefits of United States citizenship, so that even if there is a "fundamental right" to expatriate, the Secretary "still would have the discretion to determine whether an individual has adequately renounced affiliation with the United States so as to trigger that right." *Ibid.* The court noted that, as the Secretary had determined, petitioner asserted a continuing right to remain a resident of Puerto Rico, without complying with the alien admission or documentation requirements of the INA, and thus had "demonstrated no intention of renouncing all ties to the United States" or rights and benefits of United States citizenship. *Id.* at 9. The court concluded that while petitioner might have "strong political views with regard to Puerto Rican independence," his objection to the Secretary's decision not to issue a CLN turned on "the much debated political question as to the status of Puerto Rico and its nationals in relation to the United States," which was "not an issue for [the] Court to decide." *Id.* at 9-10.

4. The court of appeals affirmed. Pet. App. 1-3. In a brief per curiam order, the court observed that a writ of mandamus may be granted only to enforce a "clear and indisputable" duty to perform a "ministerial," nondiscretionary act. *Id.* at 2. The court agreed that such a writ could not be granted in this case because Section 1501 "clearly affords the Secretary discretion to determine whether a Certificate of Loss of Nationality should be issued." *Ibid.* The court also found "no merit" in petitioner's equal protection claims, which had been raised for the first time on appeal. *Ibid.* The court noted that it had no need to address "any issues concerning the availability of judicial review for persons

denied a [CLN]," and it reserved judgment on those issues. *Id.* at 2-3.

ARGUMENT

Petitioner in this case originally sought "an order compelling the Department of State to enter a decision on the approval of his petition for loss of nationality and declaring that the challenged agency *in*action is unlawful." C.A. App. 17 (emphasis added). That claim became moot in January 1998, when the Department advised petitioner that it would not approve the issuance of a Certificate of Loss of Nationality in his case. See *id.* at 32-33; Pet. App. 6. To the extent that petitioner now seeks judicial review of the substance of the Department's determination, the courts below correctly held that such review may not be obtained by way of a petition for a writ of mandamus. That decision does not conflict with any decision of this Court or of another court of appeals, and there is no reason for review by this Court.

1. A writ of mandamus may issue only to compel the performance of a "clear nondiscretionary duty," *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449 (1999) (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)), and only where the petitioner can show that his right to relief is "clear and indisputable," *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)). Moreover, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (quoting *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)); see also *United States* v. *Wilbur*, 283 U.S. 414, 420 (1931) (Mandamus "will issue only where the

duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.").

The courts below correctly recognized that the INA authorizes, but does not require, the Secretary of State to approve a diplomatic or consular officer's report of facts giving "reason to believe" that an individual may have lost his or her United States citizenship. See 8 U.S.C. 1501 ("*If* the report * * * is approved by the Secretary of State, a copy of the certificate shall be forwarded," etc.) (emphasis added); see also 22 C.F.R. 50.40(e), 50.50(b). Loss of citizenship is an extremely serious matter, and the Secretary does not approve the issuance of a CLN unless she is satisfied, after due consideration, that all the requirements for expatriation have been met. Under the Constitution and the INA, those requirements include not only that an individual perform specific acts (such as the taking of an oath of renunciation, or becoming an officer in a foreign army), but also that he or she perform them both voluntarily and "with the intention of relinquishing United States nationality." 8 U.S.C. 1481(a); *Vance* v. *Terrazas*, 444 U.S. 252, 258-263 (1980); *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). The Secretary's obligation to consider each case of possible loss of nationality reported to her and to make appropriate factual and legal determinations cannot be fairly described as "ministerial," and the statute plainly imposes no duty on her to issue a CLN in any given case. See *Heuer* v. *Secretary of State*, 20 F.3d 424, 427 (11th Cir.) (approval of a CLN requires "more than a mere ministerial 'rubber stamp'"), cert. denied, 513 U.S. 1014 (1994); compare *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 235 n.5 (1986) (statements in committee report describing

Secretary of Commerce's statutory duty to certify to the President that foreign nationals are fishing in a certain manner "whenever he determines the existence of such operations" are "not the words of a ministerial duty, but [of] the imposition of duty to make an informed judgment"); but see *Whitehead* v. *Haig*, 794 F.2d 115, 118 (3d Cir. 1986) (characterizing Department's functions under Section 1501 as "ministerial" and issuance of CLN in a renunciation case as "automatic").[3]

Petitioner concedes that the Secretary must exercise discretion in the issuance of some CLNs, but he con-

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[3] As petitioner notes (Pet. 15), *Heuer* and *Whitehead* expressed different understandings of the nature of the administrative process involved in determining whether or not to issue a CLN, at least in express renunciation cases. Compare *Heuer*, 20 F.3d at 427-428, with *Whitehead*, 794 F.2d at 118. The issue in both cases was whether the issuance of a CLN constituted a "denial" of a "right or privilege as a national of the United States" for purposes of the limitation provision applicable to actions to establish nationality under 8 U.S.C. 1503(a) (1994 & Supp. IV 1998). *Whitehead* characterized the administrative function in express renunciation cases as merely ministerial, and concluded that the issuance of a CLN in such a case did not start the running of the limitation period. *Heuer* characterized the administrative process as a substantive one, and held that the period of limitation did begin to run when a CLN was issued. Congress ultimately resolved that conflict by amending Section 1501 to specify that approval of a CLN by the Secretary of State "shall constitute a final administrative determination of loss of United States nationality * * * and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503." 8 U.S.C. 1501, as amended by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, Tit. I, § 106, 108 Stat. 4309; see also Br. for the Resp. in Opp. at 6-7, *Heuer* v. *United States Secretary of State*, *supra* (No. 94-161). (We will provide petitioner with a copy of our brief in opposition in *Heuer*.)

tends that there is no such discretion in express renunciation cases. Pet. 14. The terms of 8 U.S.C. 1481 and 1501 provide no basis for the distinction that petitioner suggests. Moreover, while it is true that 22 C.F.R. 50.40(a) provides for a general "administrative presumption" that "[a] person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship," no similar language appears in 22 C.F.R. 50.50, which deals more specifically with express renunciations under Section 1481(a)(5). If the two situations were to be distinguished, the more logical construction of the regulations, read together, would be that the presumption set out in Section 50.40(a) applies in cases in which the affirmation of intent follows one of the separate expatriating acts specified in Section 1481(a) (which would itself provide strong, independent evidence of the relevant intent), but not in cases in which a written renunciation, and any contemporaneous supporting statements, are the only evidence before the Department as it seeks to determine whether the putative renunciant understands the consequences of loss of citizenship and in fact intends to incur them. In any event, nothing in the INA or the regulations relieves the Secretary of the responsibility for making an independent judgment, before she issues a CLN, that any potentially expatriating act (including renunciation) was committed voluntarily and with the requisite intent to relinquish all the benefits of citizenship. Concomitantly, nothing disables the Secretary from taking all relevant facts and circumstances—including a putative renunciant's expressed intention to continue living in the United States without being documented

as an alien—into account in making the necessary determinations in each case.

2. Petitioner argues (Pet. 15-17) that a writ of mandamus should issue in this case because he is entitled to a determination that he has lost his United States citizenship, and because there is no other judicial mechanism available for him to litigate that claim. As the court of appeals recognized (Pet. App. 2-3), however, mandamus is unavailable in this case in any event, because petitioner has no "clear and indisputable" right to compel the Secretary of State to conclude that petitioner has met the statutory and constitutional requirements for expatriation, or to issue any document purporting to certify that she has reached such a conclusion when in fact she has not. The court of appeals accordingly found it unnecessary to consider whether petitioner might have other means of seeking a judicial determination concerning his citizenship, and there is no more reason to pursue that question here.[4]

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[4] We note that there is no obvious reason why a judicial forum would be available to consider petitioner's contentions so long as the Secretary's determination to continue regarding him as a citizen has only consequences that would normally be regarded as benefits, rather than burdens, to petitioner (such as recognition of his right to vote in national elections, or to live and work in Puerto Rico without having been documented as a resident alien under the INA). Should the United States seek to compel petitioner's performance of some affirmative duty to which only citizens are liable, such as serving on a jury, then presumably petitioner could seek to establish, as an affirmative defense to enforcement of that duty, that his 1996 renunciation of citizenship was effective under the Constitution and the INA, notwithstanding the Secretary's determination to the contrary. Cf. 8 U.S.C. 1481(b) (imposing burden of proof on any loss-of-nationality claim on the party who claims that loss took place).

Similarly, there is no reason for this Court to entertain petitioner's unsupported (and barely elaborated) claim that the Secretary of State's determination not to issue a CLN in his case represents "discriminat[ion] against [petitioner] based on his Puerto Rican nationality" (Pet. 17). As the court of appeals observed (Pet. App. 2), petitioner waived that meritless allegation by failing to raise it in the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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