OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-849

TITLE UNITED STATES, Petitioner v.
SERGIO ELEJAR MENDOZA

PLACE Washington, D. C.

DATE November 1, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, :

Petitioner, :

v. : No. 82-849

SERGIO ELEJAR MENDOZA, :

Respondent. :

- x

Washington, D.C.

Wednesday, November 2, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

KENNETH S. GELLER, Esq., Washington, D.C.; on behalf of Petitioner.

DONALD L. UNGAR, Esq., San Francisco, Cal.; on behalf of Respondent.

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C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Mendoza. Mr. Geller, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case was brought by Respondent Mendoza in 1978 in an effort to become a naturalized American citizen. It's undisputed that Respondent is not entitled to naturalization under any provision of the immigration laws that are now in effect. It's also undisputed that the Immigration and Nationality Act expressly provides that an alien may not be naturalized under any expired provision of law.

Now, despite these seemingly insurmountable barriers to Respondent's naturalization, the district court granted that relief and the Court of Appeals affirmed. The lower courts held that the United States was collaterally estopped to oppose Respondent's naturalization because the constitutional argument presented by Respondent in support of his claim for citizenship had been decided adversely to the United States in a prior district court case involving other

unrelated aliens. And we've sought certiorari to challenge this unprecedented and we believe quite destructive application of collateral estoppel on an issue of law.

Now, the Court is familiar with the background of this case because it confronted essentially an identical situation in INS versus Hibi, which was decided in 1973. The case relates to events that occurred in the Philippines during the end of World War Two.

Briefly, in 1942 Congress passed the Second War Powers Act. Section 701 of that Act made it easier for aliens serving honorably in the United States Armed Forces to become American citizens, and Section 702 of that Act provided for the overseas naturalization of aliens who are eligible for citizenship under Section 701.

Now, naturalizations under Section 702 obviously were not possible in the Philippines until 1945, when the Japanese occupation ended. And in August 1945 the INS sent a designated naturalization examiner to the Philippines to begin performing naturalizations under Section 701 and 702.

QUESTION: Did the Act require the United States to send examiners outside the continental limits

for this purpose?

MR. GELLER: Section 702 contemplated that naturalizations would take place overseas.

QUESTION: And you maintain that it was required that the United States do that under the Act, not permitted but required?

MR. GELLER: Yes, although Section 705 of the Act gave the Attorney General tremendous discretion in how to implement the Act, and this Court held that in Hibi.

Almost immediately upon the designated naturalization examiner's arrival in the Philippines in August 1945, the Philippine Government objected. It was concerned that a large number of young Filipino men, perhaps as many as 250,000, would seek to become American citizens under this provision and leave for the United States on the even of Philippine independence, which was then scheduled for July 1946.

In response to this diplomatic complaint, Attorney General Tom Clarke, in consultation with the INS and the Department of State, revoked the authority of the naturalization examiner under Section 701 and 702 and naturalization ceased in the Philippines under these provisions around the end of October 1945.

The authority of the naturalization examiner

was reinstated nine months later in August of 1946 and naturalizations began once again in the Philippines and continued until December 1946, when Sections 701 and 702 expired by their own terms.

Now, Hibi, as the Court will recall, was a case brought by a Filipino veteran who did not seek naturalization under Section 701 and 702 until 1967, 20 years after those provisions had expired. But Hibi claimed that the United States was equitably estopped from relying on the expiration date of those statutes because of the Government's failure to station a naturalization examiner in the Philippines for the nine-month period between October 1945 and August 1946.

The Ninth Circuit agreed with that argument and held that the United States was equitably estopped. But this Court summarily reversed. The Court held that the Federal Government could not be estopped from enforcing the immigration laws passed by Congress, except perhaps if it had engaged in some affirmative Government misconduct. But the Court quickly added that the Government had not engaged in any affirmative misconduct in the way it had administered Section 701 and 702 in the Philippines, including by not having a naturalization examiner there for the nine-month period that's crucial to these cases.

Not long after Hibi was decided, a new group of Filipino veterans brought suit to try to obtain American citizenship under Sections 701 and 702. This is the so-called 68 Filipinos litigation in the Northern District of California.

QUESTION: Mr. Geller, why did the Government remove its examiners from the Philippines in '46?

MR. GELLER: The examiners were removed at the end of 1946 because by its terms Sections 701 and 702 expired and therefore there was no further statutory authority after December.

QUESTION: What role, if any, did the position of the Philippine leadership, the government, have to do with this interruption of service?

MR. GELLER: Well, the naturalization examiner was withdrawn for the nine-month period between October 1945 and August 1946 because of the objections of the Philippine Government. But the naturalization examiner was reinstated in August 1946 and he served until December 1946. At the end of 1946 the statute he was administering expired, and that's why at the end of 1946 he was withdrawn from the Philippines.

Now, in the 68 Filipinos litigation which was brought in the Northern District of California, even though this Court had just decided in Hibi that Attorney

General Clarke's actions in withdrawing this naturalization examiner for nine months did not constitute affirmative Government misconduct, the district court in 68 Filipinos held that this very same conduct constituted a violation of the due process clause, and the court therefore ordered the Government to grant citizenship to the Filipino plaintiffs in that case as a remedy for the due process violation.

It's important to mention at this point that 68 Filipinos was not a class action.

The Government took an appeal in 68 Filipinos and it filed its brief in the Court of Appeals. In the interim, however, a new Administration came into office. The new Commissioner of Immigration took a look at the case and recommended that the appeal in 68 Filipinos be withdrawn. The Commissioner did not suggest in his memoes to the Justice Department that the case had been correctly decided, but he suggested that it would be in keeping with the immigration policies of the new Administration to withdraw the appeal in that case and let those 68 Filipinos become citizens pursuant to the district court's order.

There was substantial disagreement within the Justice Department as to this recommendation, but ultimately the appeal in 68 Filipinos was withdrawn in

November 1977. Now, almost immediately after the decision was made to withdraw the appeal the Justice Department began to reassess whether it had acted wisely. In part, this was due to the fact that the Commissioner of Immigration had been summoned to Capitol Hill to explain the reasons why the Government had decided to drop the appeal in the 68 Filipinos case, even though the district court's decision seemed to be inconsistent with Hibi.

The upshot of the Government's reassessment was that in April 1978 the Justice Department decided that henceforth it would continue to oppose the naturalization of Filipino veterans who, A, were not eligible for citizenship under current law, and who, B, had made no attempt to apply for citizenship under Section 701 and 702 during the period of time that those laws were in effect back in 1945 and 1946.

Now, Respondent Mendoza is one of that category of Filipinos. He is not eligible for citizenship under current law and he made no effort to apply for citizenship under Sections 701 and 702 during the period of time that those laws were in effect.

QUESTION: Mr. Geller, can I interrupt? In essence, what you did is accept category one of Judge Renfrew's decision and not category two.

MR. GELLER: That's correct.

QUESTION: Can you tell us, just out of curiosity, how many people are in the respective categories?

MR. GELLER: In the 68 Filipinos case?

QUESTION: Well, I know that. But I mean in the -- how many people are we talking about now and how many do you let in under category one? Do we know?

MR. GELLER: Well, it's hard to make an accurate assessment. At the time the memoes were written as to whether the appeal should be withdrawn, there was an estimate that there might be as many as 25,000 people who would be eligible for that relief. Now, later on when it was decided to reinstate the Government's position in the spring of 1978, further information led the Government to conclude that the numbers might be much larger, perhaps as many as 75,000, although I must say that the Government's concern --

QUESTION: But then the Commissioner Castillo testified that there were only about 100 actually.

MR. GELLER: Only about 100 had applied, although in part the concern was not so much with the number who had applied for relief under Sections 701 and 702, but with the fact that if these people became citizens then all of their relatives would be entitled

to a number of preferences under the immigration laws.

We have argued, we argued in the lower courts, that in part the decision to reinstate the Government's position in April '78 was due to a reassessment of the number of Filipino veterans who would be subject to these laws. But in part I think it's fair to say that the reassessment was based on the conclusion that it had been unwise as a matter of law to drop the appeal.

QUESTION: I wasn't questioning the wisdom of the Government's decision.

MR. GELLER: Yes.

QUESTION: I was just curious if we knew, as between category one and category two, what the relative sizes of the categories were.

MR. GELLER: Oh, category two is much, much larger than category one. There are very, very few people who fall into category one, a handful of people.

Now, as I said, the Respondent Mendoza is a member of this group, category two in Judge Renfrew's terminology. When he applied for citizenship in 1978, the Government opposed because he is not eligible for citizenship under the current law and because he had never made any attempt to apply for citizenship in 1945 and 1946 when the Sections 701 and 702 were in effect.

But the district court treated this case as

simply a routine application of offensive non-mutual collateral estoppel. The court held that, since the Government had had an opportunity to litigate the due process issue in the 68 Filipinos case, it shouldn't be allowed to relitigate the same legal issue in this case. And, as I mentioned earlier, the Ninth Circuit agreed with this analysis and affirmed.

We believe the Court of Appeals' decision is plainly wrong on a number of different levels. If we approach the case simply as a technical legal matter, it seems clear that the Ninth Circuit simply misapplied black-letter principles of estoppel law.

The Court of Appeals simply relied on this Court's decision in Parklane Hosiery, without realizing that Parklane really just talked about collateral estoppel on an issue of fact. Different considerations have always been applied to preclusion on issues of law.

The settled rule as set forth in this Court's cases, such as Moser, Montana, and as explained in the various Restatements of Judgments, is that estoppel on a pure or unmixed question of law is never appropriate unless, at a minimum, there are the same parties to the two lawsuits and the two lawsuits involve the same so-called "demand", to use the Moser and Montana

terminology.

Now, those requirements were plainly not met here because Mendoza was not a party to the 68 Filipinos litigation and by no stretch of the language can Respondent Mendoza's demand to become a citizen be considered the same demand as the naturalization claims of the unrelated aliens in the 68 Filipinos case.

QUESTION: Mr. Geller, when you use the term "collateral estoppel" you mean the doctrine that goes beyond res judicata.

MR. GELLER: Yes, issue preclusion.

QUESTION: Issue preclusion. But now, if one reads the Montana decision of this Court as being a holding that the Government was in privity the first time, now, that would be collateral estoppel but still as between the same two parties because it's a different lawsuit?

MR. GELLER: Yes, although in Montana the Court essentially said, using the Moser terminology, that the two lawsuits involved the same demand. So I think Montana is a correct application of the legal principles we're relying on here, because the two lawsuits in Montana involved the same parties and involved the same demand, whereas here neither requirement is met. The 68 Filipinos case and this case

don't involve the same parties.

QUESTION: Well then, why wasn't it res judicata in Montana, if you're right?

MR. GELLER: I think it was in a sense res judicata. The only reason it wasn't technically res judicata is because there were slightly different contracts involved. It wasn't really the same cause of action, and I think that's the difference between issue preclusion involving the same demand and res judicata. Res judicata requires that it be the same precise cause of action.

What was decided in 68 Filipinos was that those discrete plaintiffs had had their due process rights violated by what the Attorney General had done in 1945 and 1946. That was the distinct fact question --

QUESTION: Well, when you refer to that, what the Attorney General had done, do you mean his withdrawing --

MR. GELLER: Yes.

QUESTION: -- the examiners for nine months?

MR. GELLER: Yes, yes.

Now, that was the distinct fact question or right distinctly adjudged, to use the Moser terminology. Now, the Government does not wish to relitigate that issue in this case. It's quite

irrelevant whether somebody else's due process rights were violated in Respondent Mendoza's case. Respondent Mendoza has to show that some Government action violated his rights and that he is entitled as a result to the relief of citizenship.

Now, that fact question or right, whether Respondent Mendoza's has had his due process rights violated and whether he's entitled to the remedy of citizenship, was never distinctly adjudged in the 68 Filipinos litigation, nor could it have been because he wasn't even a party to that litigation.

There are, we believe, strong practical and policy reasons why the strict and traditional restrictions on the collateral estoppel doctrine as applied to issues of law should be strictly adhered to. Collateral estoppel, of course, is an equitable doctrine. The courts have discretion whether to apply it, and one of the guiding principles is that the doctrine should not be applied where it would not be in the public interest to do so or where its application would, as the Court said in Parkland, for any reason be unfair or unjust.

QUESTION: Mr. Geller, do you think Montana versus the United States was correctly decided?

MR. GELLER: I think it probably was a correct

application of the principles that we rely on here, because --

QUESTION: In looking at your brief, it appeared that you might be asking us to make some modifications in that.

MR. GELLER: No, I don't believe so, Justice O'Connor. I think that the principles that we're relying on here are fully consistent with the Court's decision in Montana, because in Montana there was an identity of parties between the first and the second lawsuit, and the Court's analysis showed why it was the same "demand", to use the Moser terminology. And here neither of those requirements are met.

QUESTION: Well, you can still accept the principles in Montana and disagree with the result.

MR. GELLER: Well, the Government did argue for a different result in Montana, Justice White.

The principal reason for the collateral estoppel doctrine, as the Court has mentioned in Parklane, I think we all agree, is to prevent needless relitigation, needless relitigation. Now, when the issue involved is one of fact I think we can all understand why there is no great public interest served by allowing the losing party to have a second shot at trying to explain why a particular fact situation is as

he alleges it to be, rather than as the first court found it to be.

But when we're dealing with a legal issue, and particularly when we're dealing with an issue of constitutional dimensions as we are in this case, it's really hard to conclude that relitigation in cases involving other parties is needless. Quite the opposite would seem to be true. It would appear quite foolish or perverse to allow collateral estoppel to perpetuate what might be an erroneous rule of law.

QUESTION: As distinct from a res judicata situation?

MR. GELLER: Yes.

QUESTION: You would certainly be precluded from --

MR. GELLER: We don't challenge, yes.

QUESTION: -- raising legal issues that might have been raised in the first court.

MR. GELLER: If the second case involved the same cause of action.

QUESTION: Yes.

MR. GELLER: That's of course correct.

QUESTION: Well, in strictly a res judicata sense, if it were the same litigant on both sides and the same claim, you would also be precluded from

relitigating a legal question.

MR. GELLER: We would be precluded from litigating anything in a second case based on the same cause of action. But that really doesn't raise any of the concerns that we have about freezing the development of the law that issue preclusion does.

We think it would substantially disrupt the development of the law if a legal principle could not be challenged or reassessed by a coordinate court in a second case. Constant re-examination of legal rulings by coordinate courts is, we think, a healthy and wholesome development.

In fact, I think it's fair to say that this Court particularly would be ill served if it regularly had to decide legal issues without the benefit of divergent lower court opinions, which often serve to highlight or sharpen the legal issues. The Court has often remarked on the value of having a legal issue mature through the lower courts before it's finally resolved here.

Now, perhaps the Ninth Circuit's rule, if applied to private parties, wouldn't be all that harmful, because most private parties don't litigate a legal issue more than once, and most private litigants don't forego an appeal when they think their legal

arguments are sound. But we think that the Ninth Circuit's rule would have a devastating effect on the conduct of institutional litigants, and particularly the Federal Government.

The Federal Government is constantly involved in litigating legal issues on a nationwide basis. In fact, many legal issues, such as the immigration issues in this case and most constitutional issues, really only can arise in Government litigation. And if the Government were compelled to abide by the first decision adverse to its position, we submit it would have a number of unfortunate results.

For one thing, the Government would have to abandon its traditional, and we think quite salutary, policy of carefully screening the cases it takes on appeal, and particularly the cases it takes to this Court. And I daresay it would impose a substantial burden on this Court if it knew that it had to grant review of the first petition drafted by the Government on a legal issue or else the lower court's decision would become forever binding on a nationwide basis.

In fact, I guess to the extent the Ninth Circuit's rule requires that appeals be taken that wouldn't otherwise be taken, it really retards rather than advances one of the --

QUESTION: Do you think the Ninth Circuit rule applies to when the Solicitor General confesses error? I hope it doesn't apply to that.

MR. GELLER: I would think that it would; if the Government has announced its legal position in the course of litigating a case and that works its way into a court judgment, that the Government would be bound.

QUESTION: It'd be barred from forever raising that point?

MR. GELLER: That is a permissible reading of the Ninth Circuit's position, and that's what has us troubled.

There are other harmful consequences as well, I think, that flow from the Ninth Circuit's ruling. If the Government were allowed only one legal bite at any legal issue, it would tend to petrify or freeze the law quite unnaturally and often quite unfairly. This Court pointed out in Standefer that litigation over public rights stand on a decidedly different footing than private litigation when it comes to applications of the preclusion doctrine.

Preclusion on a legal issue might prevent the Government from bringing or defending some lawsuit that we would all agree would be in the public interest. In fact, I suppose the Ninth Circuit's rule would allow one

Administration to bind a future Administration on an issue of constitutional law or statutory construction, simply by not appealing some adverse decision.

It would also prevent the Government from changing policies over time in response to changes in outlook or experience, and this case is in many ways a textbook example of what I'm talking about, because the decision to drop the appeal in 68 Filipinos and then the decision to reconsider that decision and to begin -- and to enforce the immigration laws in a particular way, is the sort of constant reassessment of administrative and legal positions, enforcement positions, that the Government frequently undertakes, and that we would all agree the Government should be encouraged to undertake in a democratic society.

Now, in a sense perhaps I've been a trifle unfair in describing the Ninth Circuit's rule, because to be fair the Court of Appeals did say that there may be certain circumstances where it would not be appropriate to collaterally estop the Government on an issue of law. The court suggested that estoppel was appropriate here because it found no "critical need" to re-examine the legal issue and no great public interest in opposing Respondent's naturalization.

We obviously disagree with both of these

contentions on the merits. But the more important point for these purposes is that the Ninth Circuit's test is totally unworkable. When the Government has to make its decision whether to appeal an adverse ruling, it would be hard to predict how a court later on might decide whether there was a critical need for re-examination or whether the issue was important. We don't know of any instance in which district courts or Courts of Appeals are empowered to refuse to decide legal issues because they don't consider them important enough.

Now, I just want to add one more word about the Ninth Circuit's collateral estoppel ruling in this case. Even if the Court were to disagree with everything I've said up until now, we think it would still have to reverse the Court of Appeals because the Ninth Circuit has precluded the Government from litigating not only issues that were raised and decided in the 68 Filipinos case, but also a number of quite significant legal issues that were never litigated in 68 Filipinos.

Even as applied to an issue of fact, collateral estoppel has never been taken that far. I think the Ninth Circuit confused collateral estoppel with res judicata.

We've mentioned in our brief a number of the

significant legal issues that were never raised in 68 Filipinos that we would like the opportunity at the very least to raise in Respondent's case, involving laches and the effect of Section 1421(e), an important legal issue as to whether, even if a due process violation occurred, a court has the power to order citizenship as a remedy.

I do want to mention one specifically because I think it particularly shows the unfairness of the application of collateral estoppel in this case. Even if the Government were precluded from challenging the due process holding in the 68 Filipinos case, there would still be a substantial question as to whether this Respondent is entitled to the relief that the 68 Filipinos plaintiffs received, because the 68 Filipinos plaintiffs had all been in the Philippines during the nine-month period that the naturalization examiner was absent, whereas Respondent Mendoza was in the United States for six of those months and could easily have applied for citizenship under Section 701 simply by going into any United States district court.

So it's very hard to understand why, at the very least, the Government is estopped from litigating whether this Respondent is entitled to the substantial benefit of citizenship, when there are substantial legal

and mixed questions that were never litigated in the 68 Filipinos case.

QUESTION: May I ask you one other question? I know you don't have figures on how many people are in this category two. Can you tell me, are there any other cases pending? How many other cases like this are there pending in the court, do you know?

MR. GELLER: I don't know of any other cases. There was, of course, the Olegario case, which involved an identical situation and was decided in the Government's favor in the Second Circuit.

QUESTION: Second Circuit. How many people were involved in that case?

MR. GELLER: That was just, I believe, one alien.

QUESTION: So as far as the public records go, there are really perhaps only a handful of people that are affected by it?

MR. GELLER: Yes, but I think it's probably unfair to suggest that the public interest in this case is in some respect --

QUESTION: Oh, I understand your legal contention.

MR. GELLER: Yes. I don't think there are very many Filipino aliens who would still take

advantage.

QUESTION: Because this is -- they're rather senior citizens for the most part at this point?

MR. GELLER: Yes, yes, I think so.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Ungar.

ORAL ARGUMENT OF DONALD L. UNGAR, ESQ.,

ON BEHALF OF RESPONDENT

MR. UNGAR: Mr. Chief Justice and may it --

CHIEF JUSTICE BURGER: Mr. Ungar, you may raise the lectern if you wish.

MR. UNGAR: It's all right this way, Your Honor. Thank you.

Mr. Chief Justice and may it please the Court:

My client, Dr. Mendoza, is a man who cannot understand why the Government is making it so hard for him to become an American citizen when it has already agreed to the naturalization of other Filipino veterans who fought side by side with him in places like Bataan and Corregidor and who were naturalized just as he was filing his own application under the very same law that's at issue in this particular case. In his opinion

that's simply unfair.

QUESTION: Well, since you raise that, doesn't he, or you to this Court, have an obligation to explain why he didn't make an application in the six months when he was in this country studying medicine?

MR. UNGAR: Well, he's testified at the district court that he didn't apply because he didn't know about it. Of course, that raises a question that Mr. Geller brings up, about his presence in the United States.

Obviously, he was present in this country for a time during 1945 when he might have applied had he known about it. But what Mr. Geller doesn't explain and leaves us guessing is why that should make a difference. And I say that because there was nothing in this particular wartime naturalization law which compelled a soldier or sailor to apply while he was in the United States, or that he had to apply at any particular place, or that he had to apply at any particular time during the statutory period.

As a matter of fact, one of the major points of this law was that soldiers and sailors who were on duty overseas could apply overseas. So that if Dr. Mendoza had known about this law at the time, it would have been perfectly reasonable for him to make a

decision that he would apply or decide to apply when he returned to the Philippines. There's a lot of considerations which go into whether someone could apply for naturalization.

QUESTION: But that really goes to the merits of your client's claim, doesn't it, rather than whether or not the Government should be estopped from litigating the merits?

MR. UNGAR: Well, in a sense it does, Justice Rehnquist. But on the other hand, the Government is claiming that that fact makes this case different and therefore the Government ought to be excepted from the rule of collateral estoppel under the traditional collateral estoppel doctrine.

What we're suggesting is that not every factual distinction warrants an exemption from that doctrine, but only material facts. And when Dr. Mendoza was returned to the Philippines during the period of time in which the naturalization examiner was forbidden from naturalizing qualified veterans there, his circumstances, his situation, became identical to that of the veterans involved in the 68 veterans case, and he suffered the very same injury that Judge Renfrew found to exist in the 68 veterans case.

In any event, I bring up the matter of the

inequity in this situation not merely to remind the Court that an inequity like that exists. Obviously it does. But I hope it will also remind the Court that it's --

QUESTION: Doesn't the same inequity apply when nobody applies for citizenship?

MR. UNGAR: Well, it could. But I think here we have --

QUESTION: Wouldn't the same inequity apply?

MR. UNGAR: If a person did not apply for citizenship and other people were naturalized, it might be characterized as an inequity. But here the inequity was created by the Government's on-again, off-again attitude about the whole Filipino war veterans litigation.

QUESTION: Plus the fact that he didn't avail himself.

MR. UNGAR: Well, he didn't avail himself in 1945 when he didn't know about it, sure.

QUESTION: That's what I'm talking about. So I have trouble with the inequity there.

MR. UNGAR: The inequity that I'm referring to --

QUESTION: It was available, a remedy was available.

MR. UNGAR: He could have, had he known, applied while he was in the United States, that's true, had he chosen to do so.

QUESTION: So he could have applied, not if he knew. He could have applied.

MR. UNGAR: He could have applied had he known.

QUESTION: You know about ignorance of the law.

MR. UNGAR: I'm sorry, I couldn't hear you.

QUESTION: You know about ignorance of the law?

MR. UNGAR: Well, sure, I know about ignorance of the law. But that's not the issue that I see as being involved in this case. The issue is that, whether or not that factual distinction makes his case different or materially different from the case of the 68 veterans for purposes of collateral estoppel.

QUESTION: Doesn't it go to the prejudice that he suffered, whether he suffered prejudice, which is an element of any due process claim? And it could well be that your client was not prejudiced by the absence of the naturalization officer from the Philippine Islands because he was here. So obviously it could be quite different --

MR. UNGAR: He was here -- excuse me, I didn't mean to interrupt. He was here for part of the time, that's true. But as I indicated, he didn't know at that time.

And the important point, I believe, is that he was in fact in the Philippines during the time when the naturalization examiner was forbidden from naturalizing people. And that's the injury that he suffered, that he was there at the critical time and therefore he was in an identical situation to that of the 68 veterans in that particular sense. He suffered the same injury that the 68 veterans suffered.

QUESTION: Mr. Ungar, I'm sure you must be aware that the Court's primary interest in this case is in the collateral estoppel issue, not in the individual, its impact in the individual case.

MR. UNGAR: Right. But I merely bring that up at the beginning, and I didn't mean to spend quite as much time on that particular issue, simply to remind the Court that it's the Government's inconsistent conduct of this litigation as much as Judge Renfrew's decision in 68 veterans which warrants the application of collateral estoppel to the extraordinary circumstances of this case.

And in that sense, I don't believe Judge

Renfrew's decision should be treated as just another district court opinion which we're trying to blow up out of all proportion. I say that for several reasons.

First of all, 68 veterans was the first case to raise the due process issue, and it was the first case to reach a Court of Appeals. And it involved 68 people. It wasn't just one veteran coming along and applying for naturalization. There were 68 people who were involved in that particular case.

And what happened in that particular case, the Government comes in, having won the Hibi case, and makes the same arguments. It says that if Mr. Hibi were naturalized and it said that if the 68 veterans were naturalized, suddenly there would be tens of thousands of applications made by other veterans and they would impose an intolerable burden on the nation's immigration system.

The Government argued also that the ruling in 68 veterans, a ruling which favored 68 veterans, would necessarily constrain the Government's foreign -- the Government's or the Executive's power to conduct foreign policy.

QUESTION: Mr. Ungar, was 68 veterans a class action?

MR. UNGAR: No, it was not.

QUESTION: Just the 68?

MR. UNGAR: That's correct. They each filed separate petitions for naturalization.

But of course, in that sense, Your Honor, I think everyone expected that 68 veterans would not end at the district court level, and that it probably would come back to this Court, because after all, as Mr. Geller reminds you, the Government won the Hibi case, but had every incentive at that time to fully litigate the issues that were raised in 68 veterans. They knew that there were others who were going to apply. They were raising what they called significant issues. They won in the Hibi case. And they had every incentive to go ahead and litigate that, that particular issue.

And yet, on the eve of oral argument in the Ninth Circuit they suddenly dropped their appeal. And they tell us now that they dropped it because they discovered that the numbers of veterans who might apply wasn't really very large after all, and also that these veterans as a matter of fairness should have been naturalized back in 1945.

And of course, as Mr. Geller reminded you, that would have been in keeping with the Government's policy of compassion and amnesty to refugees who were then coming to the United States by the tens of

thousands.

QUESTION: He said it was that Administration's policy.

MR. UNGAR: Yes, he did. And it's that same Administration which reversed that policy and decided to contest the naturalization of others as well soon after the case of 68 veterans were decided and the others were grandfathered into that.

QUESTION: Well, you wouldn't suggest that that reversal alone would estop the Government, would you?

MR. UNGAR: That the reversal?

QUESTION: Of that policy?

MR. UNGAR: Well, I think ordinarily, in ordinary circumstances, I don't think the Government's decision to change its mind about something would warrant an estoppel. I think it does in the facts of this particular case because the Government had already won the Hibi case --

QUESTION: You're just saying, you're saying then that the Government itself may be estopped if it's too unfair?

MR. UNGAR: Well, no, I'm not saying that, either, although obviously I think they're being unfair here. But I'm saying that when a -- and this is the

gist, it seems to me, of collateral estoppel: did a party have a full and fair opportunity to litigate an issue in the first case? Did it avail itself of that opportunity?

QUESTION: Well, the change of policy is irrelevant in that context.

MR. UNGAR: The change of policy I don't think is --

QUESTION: It's irrelevant in terms of collateral estoppel.

MR. UNGAR: -- unfair or irrelevant in that sense.

I'm sorry, I didn't hear you.

QUESTION: For the purposes of collateral estoppel, that change of policy argument is just irrelevant.

MR. UNGAR: If that were all that was concerned in a particular case. And as I said, I think there is more to it in this particular case because of the numbers of people, the foreseeability of future litigation, the fact that the Government had won in this case already -- in the other case.

QUESTION: Mr. Ungar, your client is relying on offensive estoppel. Do you recognize a difference between offensive and defensive collateral estoppel?

MR. UNGAR: Well, I read about it. I'm not sure I recognize it.

QUESTION: Do you think there is a difference?

MR. UNGAR: Well, offensive obviously is a much newer sort of theory. But I think they both rest ultimately on this question of fairness, and fairness goes to such matters as whether or not the party had a full and fair opportunity to litigate, were the issues the same in the prior case.

QUESTION: And even though the parties are different?

MR. UNGAR: Even though the parties are different, sure.

QUESTION: Well, when there's no mutuality, as I take it there wasn't here, do you think that your client really has a fairness argument? I thought that when you get beyond mutuality the argument really was it saves the time of the courts. But certainly your client is being given an opportunity to litigate.

MR. UNGAR: Sure he is. He's given an opportunity to litigate that question. But I'm a little puzzled about the argument about the identity of parties that Mr. Geller has raised, because if he's insisting that collateral estoppel will not apply unless there is

an identity of parties, then it seems to me he would revert back to the mutuality rule, which this Court abandoned in Parklane and the Blonder-Tongue cases.

And unless that happens, if you're going to insist on identity of parties, it would be difficult to conceive of a situation where another opponent can come in and raise the doctrine of offensive collateral estoppel as Dr. Mendoza wishes to do in this situation.

QUESTION: Well, my only point was that when you do depart from mutuality I don't think you have the same fairness argument that you have in -- you have basically a judicial economy argument. I mean, it's not unfair to Dr. Mendoza to require him to litigate his claim once, is it?

MR. UNGAR: Well, I think it's unfair for the Government to have one policy with respect to certain veterans and to say, okay, you people can be naturalized, and to take people like Dr. Mendoza and to say, sorry, you can't be naturalized, although the circumstances are virtually identical. In that sense I do think there's a fairness argument to be made.

QUESTION: Mr. Ungar, let's look at prosecutorial discretion for the moment. A prosecutor refuses to prosecute a man for burglary, and the next month he does prosecute a man for burglarizing the same

place.

MR. UNGAR: Two different people?

QUESTION: Yes. Does he have any estoppel?

MR. UNGAR: No, because, first of all, we're talking about --

QUESTION: You're sure he doesn't?

MR. UNGAR: Pardon?

QUESTION: You're sure he does not?

MR. UNGAR: I would say he does not have an estoppel argument there.

QUESTION: Well, isn't it true that whether or not the Government appeals the case is determined by the Solicitor General?

MR. UNGAR: Yes.

QUESTION: And if he doesn't appeal one case he can't appeal any other?

MR. UNGAR: I'm not saying that. I'm really not going that far. I'm saying on the facts of this case --

QUESTION: You're getting kind of close, I think.

MR. UNGAR: Well, I don't think so. I think this case is unique, and we have the situation where --

QUESTION: How unique is it? How many people are there in this same category?

MR. UNGAR: Category two, who have applications pending at the present time?

QUESTION: The category of Dr. Mendoza.

MR. UNGAR: Okay. As far as I know -- and I only have unofficial information based on some informal conversations with people in the immigration office in San Francisco, where I practice law -- there are approximately 230 applications pending, I am told. Cf course, San Francisco is the center. This is the place where all of this litigation really started and where most of the litigation is taking place.

QUESTION: You mean that's where all the Filipinos are?

MR. UNGAR: I wouldn't say all, obviously. But there's -- for geographical reasons, obviously, most of them are in California, and the litigation started there and most of the people who are applying are there.

And I think it's important to keep in mind that this litigation has been going on now for 15 years or so, since the Hibi case began. So if there are only a couple hundred people who have applied, the numbers who are going to apply ultimately can't be very large.

QUESTION: Mr. Ungar, the American Law Institute has suggested that the only principle that we

should apply in a situation like this, where the Government is a party, is stare decisis. I take it you think that we should apply the same policy when the Government is a party as between private litigants?

MR. UNGAR: No, I don't. I think obviously the stare decisis wouud be the ordinary rule. It's not an absolute. I don't believe the Restatement talks of stare decisis as an absolute when applied to the Government.

But I think when the Government has changed its position and wants to come back into court, the least it could do would be to come forward with evidence or a showing that there really is some significant recurring national issue that makes the Government different. And after all, that really is why the Government should be treated differently than private litigants.

It's supposed to represent the public interest. If that's so, then at least it should come to court and say, look, there really is a public interest here. I can't see how they've done that in this case.

They come in and they talk about how this decision would impinge upon the President's powers and how it would impinge upon the power of Congress to provide a uniform rule of naturalization. But it should

be obvious that Judge Renfrew's decision in this case is going to be limited by the extraordinary facts of this case.

It' a really extraordinary set of circumstances, because this circumstance is simply not going to happen again, realistically. The Government is talking about a recurring national -- a recurring issue of national significance. How can that be when the facts are not going to recur? It seems to me that in any future litigation Judge Renfrew's decision can easily be distinguished on the facts.

I think the same is true about the Government's argument that somehow Judge Renfrew's decision stands for the proposition that courts may impinge upon the Congressional power to provide a rule of naturalization. That's not what Judge Renfrew's decision really stands for, and of course it really amazes me that the Government would come in here with that sort of argument when it thwarted the will of Congress itself back in 1945 when it refused to let these people be naturalized who should have been naturalized under that law.

But Judge Renfrew's decision in any event doesn't stand for that proposition. All it stands for is the proposition that when a person has been denied an

opportunity to apply for naturalization under a law that Congress provided for that person's benefit and that denial amounts to a denial of due process, then no statute can stand as a bar to his naturalization anyway.

So it seems to me the Government has failed totally in coming before this Court and establishing that there really is an issue that would be of recurring national significance. And it seems to me that if the Government is to be treated as different from private litigants, it has to be treated that way because of the public interest that it represents. If it can't come forward with a real public interest argument, then why not apply collateral estoppel to the Government?

QUESTION: May I ask you a question on the facts? I don't recall from the papers. I understand the doctor testified that he didn't know about the law while he was in the United States.

MR. UNGAR: That's correct.

QUESTION: Did he testify that he found out about the law after he got back to the Philippines?

MR. UNGAR: No. He didn't know about it then, either. He testified that he didn't learn about it until he heard of the 68 veterans litigation. And of course, it's ironic, of course, too, because Dr. Mendoza

would be a citizen today if he had only filed his petition a few days earlier. It was just as the 68 were being naturalized that Dr. Mendoza was filing his naturalization application.

QUESTION: It's his position that he was here for six months and he never thought of inquiring as to whether he could become a citizen or not?

MR. UNGAR: Sure. That's true on the facts, Justice Marshall. I can't argue with that. That's true.

But I think it's important to look back at conditions that existed at that time. It was just after the war. He was sent here. He had been in a prison camp, in the Japanese prison camp for years in the Philippines. After the liberation, he rejoins the American Army. He's sent here for some training. He's sent to someplace in Pennsylvania and he's there for a few months.

I mean, it's only reasonable and understandable that he's not going to know about the law that exists at that --

QUESTION: All that your argument tells me is that if I had all of that I would try to find a way to get to this country, where those things don't happen.

MR. UNGAR: But they can't get to this

country. Filipinos at that time, Your Honor, were subject to an immigration quota that limited the number to 100 people each year who could come to the United States.

QUESTION: Did he know that?

MR. UNGAR: It was an absolute impossibility.

QUESTION: Did he know that?

MR. UNGAR: Well, I don't know whether he knew that or not. But whether he'd known it or not, he couldn't have gotten here.

QUESTION: While he knows one part of it, he doesn't know the other part?

MR. UNGAR: I'm sorry, I didn't hear that.

QUESTION: He knows one part of the immigration law, but he doesn't know another part.

MR. UNGAR: I don't think he knew any part of it. I mean, he didn't know anything --

QUESTION: I don't see where it helps my decision as to whether or not we should grant estoppel here, the fact that "he didn't know about it".

MR. UNGAR: With all due respect, Your Honor, I don't think that's the question. I think the question is whether his presence in the United States and whether he knew about it or not distinguishes his case materially from the case of the 68 veterans. And for

the reasons which I've mentioned earlier, I don't think it does, because he was in the Philippines during that time, that critical time when the examiner was forbidden from naturalizing people, and that's the basis on which Judge Renfrew made his decision in 68 veterans.

QUESTION: He was a part of the 68 case?

MR. UNGAR: In effect, he was in identical circumstances.

QUESTION: That's what you're saying.

MR. UNGAR: Yes, that's what I'm saying.

Let me turn for a moment to the other argument that Mr. Geller is making here, and that is that if Dr. Mendoza is naturalized the Government somehow is going to have to flood the courts with unnecessary appeals. Well, I think that that argument is as exaggerated as the argument the Government has made about the numbers of people who would apply when they were arguing the Hibi case and when they were arguing 68 veterans.

It's difficult for me to belief that if Dr. Mendoza is naturalized as an American citizen, somehow the Solicitor General of the United States is going to be unable to recognize what cases to appeal and what cases not to appeal. In fact, the considerations that he says himself he takes into account in deciding whether to appeal or not would be similar to those

issues he would have to take into account in deciding whether there's a danger of estoppel if an appeal is not taken.

For example, the significance of the issues, the foreseeability of future litigation, whether the stakes in the two cases were virtually the same, or whether there's some overriding public interest involved. Those are the same considerations, of course, that this Court held in Parklane were the kinds of considerations that the trial court should take into account in the application of offensive collateral estoppel.

In response to what Justice O'Connor requested, it seems to me it's difficult also to think of situations where the Government is going to be estopped very often, as a matter of fact, because they will have the public interest. My point is simply that they have not established a public interest in the circumstances of this particular case.

QUESTION: Well, maybe the interest is the concern that some might have with the use of -- the application of offensive collateral estoppel as a principle against the Government. And the Ninth Circuit Court of Appeals certainly clearly stands for that, and perhaps that motivates a re-examination.

MR. UNGAR: Well, I can only say that I'm not sure the Government has made that particular argument. But I would suggest that it's not the kind of issue of enduring national significance that the Government is talking about when it says this case ought to be relitigated on the merits.

I think they're talking about this question of the effect of what Judge Renfrew decided in 68 veterans with respect to the powers, the Executive powers in the field of foreign affairs and the impingement on the Congress' authority to provide a uniform rule of naturalization.

QUESTION: Mr. Ungar, where is the doctor now?

MR. UNGAR: I believe he's on a trip to the Philippines. He's taking a vacation there.

(Laughter.)

QUESTION: Is he living in this country?

MR. UNGAR: Yes, he is.

QUESTION: Where?

MR. UNGAR: In the Los Angeles area.

QUESTION: Practicing now?

MR. UNGAR: Practicing medicine? No, he's not. He's 75 years old and he's retired.

QUESTION: That's young.

(Laughter.)

MR. UNGAR: I hope I'll say that when I'm 75, too.

I think I'd like to turn for a moment to the argument that Mr. Geller made with respect to the Moser exception that's discussed in the Montana case in this matter of not only identity of parties, but the applicability of that Moser exception to unmixed questions of law that are based upon a different demand.

In my opinion, Moser -- that Moser exception really ought to be interpreted, as I think the Court interpreted it in Montana, in light of the purpose and objectives of that particular exception or that particular rule. And it seems to me the purpose and objective of that particular rule was simply that a rule of law should not be applied to facts and circumstances that are different, significantly different from facts and circumstances that led to adoption of the rule in the first place.

If that were the case, then constitutional doctrine would be frozen, development of the law would be hindered, because the law couldn't adapt to changing times and changing circumstances. But in my opinion there's no danger of freezing the law in this particular

case when the facts are identical, and if the facts are identical or substantially identical in time and subject matter there really isn't this danger that the Court was talking about in Moser and Montana.

Certainly that's no danger in the circumstances of this case, when the factual -- the historical facts that gave rise to the rule of law by Judge Renfrew in his opinion, those historical facts are really identical, and there's no danger that the Court was concerned about in Moser and Montana of freezing constitutional doctrine.

That's all I meant when I said in our brief that this term "different demand" that's used in Moser doesn't mean that a demand is different simply because another litigant comes along. It seems to me if that were the case then the Moser exception is never going to apply, because there's always going to be a different party coming along.

It seems to me a demand is different when the historical facts of the second case are substantially different, are substantially unrelated from the facts of the first case, because if they are that would thwart the purpose or objective of the rule in the first place. But when they're not substantially unrelated, then it seems to me that objective is satisfied.

I think as long as I have a moment or two left, I would like to mention just one or two other points with respect to the Hibi case on the issue here. It seems to me what we're talking about here is issue preclusion, and the due process issue that was raised in 68 veterans and in Dr. Mendoza's case was not an issue that was addressed by the Court in Hibi.

Obviously, the facts were pretty much the same. But the fact that the facts were the same doesn't mean that the issue was the same. The only issue that was addressed by the Court was the equitable estoppel issue and not the due process issue.

And I think it's interesting to note what this Court said about Hibi in the Miranda case, which is cited in the Government's brief, INS versus Miranda. In INS versus Miranda, this Court recognized that what the Government did here was an error, a clear error, in failing to allow the naturalization examiner to carry out his duty in the Philippines in 1945. Obviously, the Court didn't feel that that error rose to the level of affirmative misconduct which would trigger the application of equitable estoppel.

But this concept of affirmative misconduct really has nothing to do with the issue of due process. Since equitable estoppel was the only issue that was

addressed and adjudicated by this Court in Hibi, it seems to me Hibi does not have any preclusive effect on the case here.

QUESTION: Do you suppose that the judge was aware that the Philippine Government had requested the United States to terminate its activities?

MR. UNGAR: Whether Judge Renfrew was aware of that? Yes, he was. That was a matter of the record, although he accepted the Government's --

QUESTION: It didn't seem to carry much weight with him, did it?

MR. UNGAR: Well, I think --

QUESTION: The United States was being unfair when it responded to the request of an ally and friendly country?

MR. UNGAR: Well, I think the answer to that, Justice Burger, is that that may have been an important consideration in 1945. In Judge Renfrew's opinion, and obviously in my opinion, that was no longer an important issue in 1969, 1970, and so on. That happened 20 years ago. Our relationship with the Philippines Government is certainly not going to --

QUESTION: Does it not bear on the argument of unfairness in 1945 and 1946? That's when the action of the Government must be judged, must it not?

MR. UNGAR: Well, but I don't think the issue in 1945 or 1946 would have been an issue of fairness. The issue in 1945 and 1946 would be whether the Attorney General had the power to do what he did. The unfairness issue comes in only on the collateral estoppel question, which is the specific issue in the Mendoza case.

One last point. Mr. Geller makes a point of saying that there were certain issues that were not addressed in 68 veterans which were addressed in the Mendoza case, and he refers to laches and the effect of Section 1421(e) of Title 8.

Well, I've re-examined the record in 68 veterans. It may be true that laches was not argued at the district court level. There's nothing in the papers that I've looked at which suggests that it was argued, although it may have been at oral argument.

In any event, laches was not argued by the Government in the Mendoza case. So it seems to me it's kind of ironic for the Government to make that argument when it didn't raise laches in the Mendoza case. And you can look at the record yourself on that point, which is set forth in the Government's petition for certiorari in the Litonjua case which is now pending before the Court on a petition for certiorari, where the Government points out that in the recommendation of the immigration

examiner to the district court there's no mention of laches.

As for Section 1421(e), of course, that was what this case was all about, and the question was whether 1421(e) barred the 68 veterans from being naturalized. And that certainly was raised in 68 veterans, as it was raised here.

And evidence of that fact, of course, is in the Government's brief to the Ninth Circuit in 68 veterans, where they raise this issue of 1421(e). Obviously, they wouldn't be raising that issue on appeal for the first time. They would have had to raise in the district court. And as I said, that's the whole argument on the merits, is whether or not 1421(e) ought to bar the veterans from being naturalized.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

REBUTTAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF PETITIONER

MR. GELLER: I'd just like to clarify one answer I gave to Justice Stevens. There is in fact one case that is proceeding through the courts that raises this identical issue. That is the Litonjua case that counsel referred to, in which the Ninth Circuit simply

applied its Mendoza rationale. We have filed a protective certiorari petition here. It's No. 82-1877.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:58 a.m., the argument in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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