

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1803

TITLE ATTORNEY GENERAL OF NEW YORK, Appellant V.
EDUARDO SOTO-LOPEZ, ET AL.

PLACE Washington, D. C.

DATE January 15, 1986

PAGES 1 thru 50



(202) 678-9300
20 F STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE ATTORNEY GENERAL OF THE :

4 STATE OF NEW YORK, :

5 Appellant, :

6 v. : No. 84-1803

7 EDUARDO SOTO-LOPEZ AND :

8 ELIEZAR BAEZ-HERNANDEZ :

9 - - - - - :

10 Washington, D.C.

11 Wednesday, January 15, 1986

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 2:00 o'clock p.m.

15 APPEARANCES:

16 ROBERT HERMANN, ESQ., Solicitor General of New York, New
17 York, N.Y.; on behalf of the Appellants.

18 KENNETH KIMEPLING, ESQ., New York, N.Y., on behalf of the
19 Appellees.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

ROBERT HERMANN, ESQ.

on behalf of the Appellant

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KENNETH KIMERLING, ESQ.

on behalf of the Appellees

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ROBERT HERMANN, ESQ.

on behalf of the Appellant -- rebuttal

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1 P R O C E E D I N G S

2 THE CHIEF JUSTICE: You may proceed.

3 ORAL ARGUMENT OF ROBERT HERMANN, ESC.,

4 ON BEHALF OF THE APPELLANT

5 MR. HERMANN: Mr. Chief Justice, and may it
6 please the Court:

7 The veterans' preference granted in New York's
8 Constitution was upheld by this Court a dozen years ago
9 against an identical challenge, that it impermissibly
10 discriminated against veterans who were not residents of
11 New York at the time they were inducted. That case was
12 called August against Bronstein.

13 The Second Circuit felt that August against
14 Bronstein was no longer good law in light of recent
15 doctrinal developments in this Court, specifically the
16 Zobel against Williams case, and presumably Hooper
17 against Bernalillo County, although that had not been
18 decided at the time.

19 We believe that these recent decisions do not
20 overrule the August, and that New York's classification
21 is reasonably designed to fulfill legitimate state
22 purposes.

23 Veteran preference laws have a long history in
24 this country, and their constitutionality is a well
25 settled matter. New York, as well as 15 other states,

1 conditions the award on veterans' preference credits on
2 residence in the state at the time of induction into the
3 military.

4 Since the 1920's New York has promised in its
5 Constitution that if a resident goes into the armed
6 services, serves during time of war, and is honorably
7 discharged, that person on passing a Civil Service
8 examination is entitled to five additional points in
9 competing for public employment.

10 That commitment has never been withdrawn, and
11 the commitment can only be withdrawn, we emphasize, by
12 amending the State Constitution.

13 QUESTION: Mr. Hermann, is there any time limit
14 imposed on the exercise of this privilege or benefit?

15 MR. HERMANN: No, I do not believe there is.
16 It's a one time privilege but there is no time limit on
17 its use.

18 We believe that whether New York's
19 constitutional provision is viewed as a right to travel
20 matter or as an equal protection matter, the result here
21 turns on whether at a minimum, New York's classification
22 rationally furthers a legitimate state purpose, and the
23 Court of Appeals, we know, is divided on this point.

24 We believe the essential error in the Second
25 Circuit's opinion was that it failed to perceive that New

1 York's law rationally does further legitimate state
2 purposes because the Second Circuit viewed the law simply
3 as a retrospective measure, a reward for past services.
4 It largely ignored the law's prospective function as an
5 incentive measure, one designed to encourage service in
6 the military, to encourage persons to return to the State
7 of New York, and to engage in public service thereafter,
8 and these are separate purposes which I'll discuss in a
9 moment.

10 But, unlike the New Mexico and Alaska statutes
11 struck down in recent cases of this Court, New York's
12 Constitution is and has been for a long time
13 forward-looking. Forty years ago, in an informal -- in a
14 formal opinion the State's Attorney General described the
15 law as largely self-executing, and by that he meant that
16 as part of the State's Constitution it guaranteed these
17 benefits, and the only function of the Legislature was to
18 prescribe the periods of award. And the Attorney
19 General's opinion 40 years ago specifically said that a
20 veteran of a war who would have a cause of action in New
21 York State courts for this right even if the Legislature
22 failed to determine time of award.

23 Thus, this is not an after the fact attempt by
24 the State simply to take care of its own, and we believe
25 that the fact that the Court of Appeals overlooked this

1 is the critical flaw in its whole --

2 QUESTION: Isn't the origin of that concept of
3 taking care of their own, as you put it, something that
4 goes back to at least the Civil War when the states
5 raised the troops and sent them in, and of course that
6 was true earlier?

7 MR. HERMANN: That is correct, Your Honor. We
8 discussed some of that history, both the constitutional
9 history and the legislative history, in our brief. New
10 York's statute goes back at least until the Civil War,
11 and I think it's worth observing that the Second Circuit
12 has no discussion whatsoever in its opinion of the nature
13 of that history, or of the important fact we rely on here
14 which is that it's a constitutional commitment.

15 The Second Circuit found that New York has no
16 legitimate interest in encouraging its residents to serve
17 in the military, but the Court offered no support or
18 citation for that conclusion in referring simply to
19 patriotism, as it described it.

20 We submit that New York has acted from
21 patriotic motives, and that the Second Circuit was wrong
22 in declaring illegitimate New York's interest in
23 encouraging its residents to serve.

24 QUESTION: May I ask this question, does it
25 apply to people who were drafted as well as those who

1 enlist?

2 MR. HERMANN: Yes, it does, Your Honor.

3 QUESTION: But you've said in that respect --

4 MR. HERMANN: As to people who are drafted, it
5 certainly doesn't serve to encourage service in the
6 military, but it does serve two subsequent functions of
7 encouraging them to return to the state and encouraging
8 them to engage in public service thereafter.

9 QUESTION: General Hermann, do you think that's
10 really what the Legislature had in mind when the people
11 adopted this part of the Constitution, all of these
12 rather fine-spun rationales for why the thing might pass
13 a court test? Isn't the usual motivation for -- it's
14 just kind of gratitude for people who have served in the
15 service and wanting to give them a little bit of a break
16 after they get out?

17 MR. HERMANN: Certainly that's one of the major
18 reasons why these statutes and these constitutional
19 provisions have been enacted, but the standard
20 justification given in most of the case law, Your Honor,
21 for these statutes is fourfold, and two of those purposes
22 -- at least one of the major purposes always described is
23 to encourage service in the military, and we do rely on
24 that as a motivation.

25 QUESTION: You say it's given in the case law.

1 You think, then, the courts are probably the best finders
2 of legislative motivation in a case like this?

3 MR. HERMANN: I think the applicable standard
4 here, again we submit, is the rational basis standard so
5 that any basis which can be put forward to rationally
6 justify the statute should be sufficient to sustain its
7 validity.

8 In the initial -- in the August against
9 Bronstein decision, the Court found that these were the
10 four purposes which were served, and relying on the
11 opinion of Chief Judge Friendly in a case called Fussell
12 against Hodges we believe that the states do have a role
13 as states in encouraging service of their residents in
14 the military, and that the Constitution does give the
15 states the role as such in providing for national
16 defense, and we looked at two things specifically.

17 Under Article I, Section 8 of the Constitution,
18 the authority to raise militias according to the
19 discipline prescribed by Congress is reserved to the
20 states, and Clause 15 explicitly reserves to the states,
21 and I am quoting, "the appointment of the officers and
22 the authority of training the militia."

23 And similarly, the Second Amendment to the
24 Constitution recognizes that a well regulated militia is
25 necessary to the security of a free state, and under the

1 Constitution, Congress is empowered to call up and
2 historically has often called up the militia, the State
3 National Guard, in time of war to provide for the common
4 defense, and indeed at this time many of the nation's
5 combat-ready units are included in the state militias.

6 Thus, we believe the state as a state, under
7 our Constitution, has an interest in encouraging its
8 residents to serve in the military. Similarly, during or
9 just before a time of war, a military draft becomes a
10 greater probability than would otherwise be the case, and
11 of course much more important than would otherwise be the
12 case.

13 Under our draft laws, quotas are set for each
14 state based on the number of eligible persons in that
15 state and based on the number of eligible persons
16 nationwide, and a state under the Selective Service laws
17 gets credit for the number of persons currently in the
18 service. Thus, we believe that the state may validly
19 seek to encourage volunteer service both in order to
20 assist the nation and to assist the state in meeting its
21 quotas under the national defense system, and similarly
22 may seek to minimize the burden on non-volunteers who may
23 be providing important services to the state or to the
24 people of the state.

25 It seems to us that a critical error in the

1 Second Circuit's opinion is to assume that because New
2 York might have an interest in encouraging service of all
3 residents of the United States in the service, that
4 therefore it is illegitimate for New York to concentrate
5 its efforts on its lesser included interest, namely,
6 encouraging its own residents to serve.

7 No doctrine of which we are aware holds that a
8 state offering prospective incentives for participation
9 in a national program such as the draft must make those
10 promised benefits available to all persons residing
11 outside their borders, and as a practical matter, New
12 York law targets the residents of the State of New York,
13 simply because it is not much of an incentive to enter
14 into the military service for a teen-ager in Nevada, to
15 be offered public service employment in New York after
16 service in wartime.

17 The New York law also compensates veterans, as
18 Justice Rehnquist indicated, and compensation is
19 certainly one of its most important purposes. Again, the
20 Second Circuit viewed that purpose purely
21 retrospectively, failing to recognize, we submit, that
22 promise of compensation is an important incentive to
23 military service.

24 Even if one were to concede that rewarding
25 veterans after the fact for military service at some

1 point in the past is not a legitimate state purpose, it
2 does not follow, it seems to us, that promising to reward
3 them in the future for such military service doesn't
4 serve a legitimate state purpose. That purpose, we
5 submit again, is encouraging service in the military.

6 An additional important purpose that the New
7 York law and the New York constitutional provisions are
8 intended to fulfill is to encourage skilled veterans to
9 come home and to serve in the public service. A wartime
10 veteran, as I am sure this Court is aware, acquires
11 skills and experiences which make that person a very
12 desirable employee, whether for government or for anybody
13 else, and we would of course concede that that is true of
14 all veterans, whether they reside -- whether they have
15 ever resided in New York or not.

16 Nonetheless, we believe that New York has a
17 valid interest, unrelated to any desire to reward its own
18 people, to encourage former residents to come back to New
19 York after time of war and to engage in public service.

20 I think it's important to focus on the group
21 that New York is targeting with this provision, entirely
22 apart from the questions, that the incentive purpose of
23 going into the military for the person who is drafted,
24 for example. The group New York has always targeted with
25 the statute is the group which is by definition is

1 uprooted, New York residents who have gone to war.

2 Whether or not they have done so, again in
3 reliance on the promise of preferential consideration at
4 a later point, it is reasonable for the State to give
5 them some encouragement to return home and New York,
6 beyond that, is interested not only in getting residents
7 to return home but to engage in public service when they
8 do so, and this Court has frequently indicated that a
9 state's interest in maximizing the quality of its public
10 work force is an important one which may justify
11 restrictions that otherwise might be constitutionally
12 doubtful.

13 Quite arguably, based on this Court's
14 decisions, New York could not constitutionally make such
15 distinctions after the fact. An example is that New York
16 could not declare in 1986 that state residents -- that
17 persons who had gone to college in New York State in 1981
18 would receive tuition assistance grants, because that
19 would discriminate against persons who had become
20 residents of the State of New York subsequent to 1981.

21 But we submit there is no doubt that
22 prospectively in 1981, New York could have adopted
23 tuition support grants to persons who were residents in
24 the state at that time, as this Court's decisions in that
25 area have made clear.

1 We certainly concede that New York could have
2 drafted this statute and could have framed its
3 constitutional provision in such a way as to more closely
4 and more precisely retained its objectives, and perhaps
5 the plaintiffs in this case in fact are as well qualified
6 as some other people who received a preference under New
7 York statute.

8 But the distinction New York makes, we submit,
9 is a rational one in view of the critical incentive
10 purposes. New York's constitutional provision does
11 encourage service both in the military and in civil
12 service employment, and those are legitimate objectives
13 and this Court has frequently said that --

14 QUESTION: Is there anything in the record to
15 support that statement, the statement that it does
16 increase the numbers?

17 MR. HERMANN: No, Your Honor, there is nothing
18 in the record. The case came up on initial motions for
19 summary judgment.

20 QUESTION: It's just your statement?

21 MR. HERMANN: That's correct. It is an
22 incentive purpose that has historically been given for
23 the statute, and whether -- we don't know whether this
24 constitutional provision encourages one or 100 people to
25 do that, but I think it can clearly be said to do that in

1 some number of cases.

2 To return for a moment to the Zobel and Hooper
3 decisions, both the Alaska dividend statute and the New
4 Mexico property tax exemption, which were invalidated by
5 this Court, were after the fact enactments designed to
6 compensate prior status or prior conduct. Neither had a
7 prospective purpose related to some legitimate state
8 objective.

9 QUESTION: You think that's the bright line
10 between those cases and this one?

11 MR. HERMANN: Yes, I do, that in both
12 instances, whether for a defined objective such as
13 rewarding past military service or an undefined objective
14 such as simple residence in the state, both enactments
15 were entirely retrospective and served no incentive
16 function of the kind that we're describing here. In
17 fact, in Hooper there wasn't even a claim that they did
18 serve any such prospective function.

19 QUESTION: While I have you interrupted, does
20 New York have difficulty in recruiting people for public
21 service?

22 MR. HERMANN: No, it doesn't, as far as I'm
23 aware. New York has a very large public service force,
24 larger than some citizens would like it to be.

25 QUESTION: Are there long waiting lines to get

1 jobs?

2 MR. HERMANN: It frequently does, yes.

3 QUESTION: So that, your argument about wanting
4 all these people back in public service rings a little
5 hollow.

6 MR. HERMANN: Well, it's twofold. It's wanting
7 them to come back to the state, and wanting them to come
8 back to the state to utilize their special attributes in
9 the public service. It's not because New York is short
10 on public sector applicants. It's because New York does
11 feel some debt of gratitude to those people and wants
12 them back.

13 QUESTION: If the jobs are all full, it's a
14 little hard to get in no matter how hard you work?

15 MR. HERMANN: Certainly, one of the underlying
16 justifications is not only that veterans should be
17 compensated, but that they are an especially important,
18 desirable part of the work force, and this --

19 QUESTION: And you give them an advantage over
20 other people?

21 MR. HERMANN: Yes, we do. We give veterans an
22 advantage and disabled veterans get an additional
23 preference.

24 QUESTION: So, that advantage would be true if
25 someone comes from Puerto Rico too, that served in the

1 Armed Services?

2 MR. HERMANN: That's true. We certainly don't
3 claim that that person doesn't possess the attributes
4 necessary to perform public service effectively in New
5 York.

6 I would point out that the Court in Hooper did
7 explicitly recognize that veterans' benefit statutes
8 which conditioned residency -- which conditioned the
9 granting of preferences to residency in the state at the
10 time of induction might indeed present a wholly different
11 consideration from the ones -- from the statute under
12 consideration there, and that's noted in both the
13 majority and the dissenting opinions.

14 QUESTION: But in terms of encouraging
15 movement, coming back to New York and going to public
16 service, if you granted this to all veterans you might
17 attract other veterans that weren't born, and who didn't
18 go into the service from New York, to move to New York
19 and to go into public service there.

20 MR. HERMANN: That's correct, and New York does
21 not attempt to discourage persons from doing so.

22 QUESTION: You don't give them this advantage?

23 MR. HERMANN: We don't give them this
24 advantage, but neither does New York fence them out.

25 QUESTION: But it would encourage this movement

1 if you did, to give them that advantage? It would
2 encourage it just as much as it would encourage veterans
3 to return?

4 MR. HERMANN: Well, it would not give the
5 incentive as effectively to those people who had been New
6 York residents to come back home, if the preference were
7 more widely available to persons from the other 49
8 states. But even if that's correct, that there is no
9 special attribute to a New York -- to a prior New York
10 resident who has served in the military, it does not
11 follow, it seems to us, that the law does not serve the
12 rational purpose for which it was intended, and the
13 objective of getting those residents to --

14 QUESTION: I know, but shouldn't there be, in
15 terms of their objectives shouldn't there be some
16 difference between the two classes that you're
17 comparing? I mean, it may serve that, but the people
18 you're alleged to be discriminating against would serve
19 the purpose just as well.

20 MR. HERMANN: Well, I think we would contend
21 that it wouldn't serve it just as well but that the law
22 would fail to -- if that were the policy, the law would
23 fail of its other purpose which is to encourage service
24 in the military in the first place by New York residents,
25 and the additional purpose, of course, of encouraging

1 residents to return home.

2 QUESTION: Do you think the law should be
3 upheld solely on the single purpose of encouraging
4 service in the military by New York residents?

5 MR. HERMANN: We think that's sufficient, yes.
6 I think the New York law furthers legitimate additional
7 purposes, but I believe that the strongest justification
8 for the law is encouraging service.

9 QUESTION: It just means that if you happen to
10 be a resident on a certain time --

11 MR. HERMANN: It is not a durational residency
12 requirement.

13 QUESTION: But it is residence at a certain
14 time?

15 MR. HERMANN: It's a fixed point residency
16 requirement and indeed we think that's crucial in terms
17 of the right to travel argument, because we believe New
18 York's provision does not penalize the --

19 QUESTION: Doesn't that have its roots in the
20 business of granting bounties as they did in the Civil
21 War and earlier?

22 MR. HERMANN: I think it does.

23 QUESTION: No one would suggest that New York
24 had any obligation to grant a bounty to somebody from New
25 Hampshire to join the army, but they could limit it to

1 their own?

2 MR. HERMANN: I think has historically done so.

3 QUESTION: That suggests that if they do it
4 after the event they can have the same limitation?

5 MR. HERMANN: I believe that's correct,
6 although I believe New York's promise as a part of its
7 Constitution is a clearly prospective one. In terms of
8 the right to travel, we believe that the provision cannot
9 be said to penalize the right to travel and that --
10 certainly it wasn't true in this case.

11 I just point out, this is not a class action.
12 This is an action brought by two individuals who had been
13 residents of the State of New York for more than ten
14 years before applying for the veterans' preference
15 credits here. Ultimately one of them did obtain civil
16 service employment, as do many non-residents and
17 non-resident veterans.

18 But this Court's decisions, I think, make clear
19 that the claimed penalty on the right to travel has to be
20 examined on a case by case basis in view of the
21 objectives of the statutes and the requirements of the
22 statute. New York's Constitution as noted seeks to
23 encourage several things.

24 Anyone contemplating service in the military
25 during wartime or any other time is free to move to the

1 state to help the state fulfill that purpose, if they
2 subsequently wish to collect that reward, and in terms of
3 the right to travel, we submit that that is the critical
4 time and the three-judge Court opinion in August against
5 Bronstein, we submit, was correct in analogizing this
6 situation to this Court's decision in 1973 at the time it
7 was deciding these durational residency cases. In Spatt
8 against New York, it was a summary affirmance of this
9 Court upholding the restriction of New York State tuition
10 grants to New York residents only.

11 We submit that the claim that the plaintiffs
12 advance in this case is analogous to a claim that might
13 be made on behalf of the California resident who, having
14 gone to a state college in New York at some previous
15 time, subsequently moved to New York to claim the tuition
16 refund. The claimed inequality doesn't exist because it
17 ignores the incentive purposes of the law, the purpose of
18 the law in the tuition situation being to encourage state
19 residents to go to state colleges.

20 Her right to travel, we submit, would not be
21 penalized by such a limitation because she was free at
22 the time she lived in California to move to the State of
23 New York to obtain state scholarship assistance if she
24 wanted.

25 I would point out one more thing about the

1 statute, and that is that it's in terms of the right to
2 travel that its effect is quite modest, as Judge Friendly
3 described it in that opinion I mentioned a moment ago,
4 and dissipates over time. It's a provision that can be
5 used on one occasion for one appointment and that the
6 class of veterans who are eligible for this benefit is
7 steadily diminishing, I would point out, because for the
8 past ten years at least no one has been able to satisfy
9 the requirement of service during time of war.

10 Thus, this case is not like the Zobel case, we
11 submit, where there was an ever-increasing class of
12 persons who were given preferential treatment based
13 solely on their length of residence.

14 Again, in terms of the right to travel, we
15 believe that Justice Brennan's concurring opinion in
16 Zobel illustrates here why there was no denial of the
17 right to travel, for the same reason that there was no
18 denial of equal protection, and that is that the State's
19 concern was not solely with rewarding past conduct,
20 whether -- or past contributions whether those
21 contributions were defined or undefined.

22 Here, as that concurring opinion put it, the
23 business of the state was not with the past or with the
24 present, and one such item of business which the Court --
25 which that opinion noted was filling current needs, and

1 we submit that New York's statute and New York's
2 constitutional provision are clearly aimed at doing so
3 and do not depend entirely on a post hoc past
4 contributions rationale to support them.

5 I believe they are there for --

6 QUESTION: Mr. Hermann, I suppose that like all
7 those rationality cases, there are inequalities here.
8 Suppose a young man grew up on a farm in North Dakota and
9 didn't like it and decided to come to the big city, and
10 went there and lived there for a year, he was a resident,
11 and the war came along and he enlisted. After the war
12 his father died in the meantime so he went back to the
13 farm in North Dakota, spent a lot of time there, got his
14 brother interested in the farm and discovered this about
15 the advantage in public service, his bonus points, and
16 after 20 years came back to your city and lived there for
17 six months.

18 He's entitled to bonus points?

19 MR. HERMANN: He would be entitled to claim
20 them.

21 QUESTION: In contrast to the two respondents
22 here who have lived in your state a number of years who
23 are not entitled to them?

24 MR. HERMANN: That's correct.

25 QUESTION: It is unequal in application?

1 MR. HERMANN: Well, it is differential in its
2 application. We think that New York targets a specific
3 group for a specific person. I think this Court's
4 decisions don't make clear that that kind of imprecision,
5 perhaps exemplified by the facts in this case, is not
6 fatal, however, under a rational relationship standard.

7 I would reserve the balance of my time.

8 CHIEF JUSTICE BURGER: Mr. Kimerling.

9 ORAL ARGUMENT OF KENNETH KIMERLING, ESQ.

10 ON BEHALF OF THE APPELLEES

11 MR. KIMERLING: Mr. Chief Justice, and may it
12 please the Court:

13 Let me briefly review the facts here as they
14 assist in our understanding of the irrationality of New
15 York's veterans' preference system. In order to qualify
16 -- be treated as a veteran in New York, you must, one,
17 serve in the armed forces during time of war. Two, you
18 must be honorably discharged from that service. Three,
19 you must pass a civil service examination. Four, you
20 must be a present resident of the state of New York and
21 fifth, and lastly, you must have been a resident at the
22 time of induction.

23 It is this past and present residency
24 requirement that is at issue here, and which denies the
25 plaintiffs here from being treated as veterans.

1 Plaintiff Baez Hernandez entered the armed forces from
2 Puerto Rico and served from 1958 through 1960, at which
3 time he was dishonorably -- excuse me, honorably
4 discharged and entered the reserves.

5 He moves to New York in 1963, settles in New
6 York, and in 1970 he's called up from the reserves,
7 serves in active duty, is injured, and receives a
8 service-related disability, but he's not a veteran. If
9 he had not joined the reserves but had come to New York
10 and then re-enlisted in 1970 he would have been treated
11 as a veteran, but because he did his patriotic duty and
12 stayed in the reserves he's not a veteran.

13 The result of that, in 1981 and in 1982 he's
14 denied three appointments, which his ten points as a
15 disabled veteran would have gotten him. Those
16 appointments were cancelled when it was learned that he
17 entered the service from Puerto Rico and not from New
18 York.

19 Mr. Soto-Lopez entered the service also from
20 Puerto Rico in 1961 and served through 1963. Also this
21 was in time of war. The 1973 service of Mr.
22 Baez-Hernandez was his time of war service during the
23 Vietnam era. Mr. Soto-Lopez, after serving during the
24 Vietnam era, in 1965 comes to New York, settles and
25 becomes a resident of the state of New York. Thus he's a

1 veteran serving during time of war, honorably discharged,
2 present resident for 15 years, and then in 1982 is denied
3 being treated as a veteran because he had not been
4 inducted from New York.

5 The original defendants here were agencies of
6 the City of New York who would have been plaintiff's
7 employers. They have not appealed. the appellant is only
8 the Attorney General who intervened pursuant to 28 U.S.C.
9 24-03-B, solely to defend the constitutionality of these
10 provisions.

11 None of the relief that plaintiffs have
12 obtained or have sought runs against this appellant.

13 QUESTION: What inference do you draw from that
14 fact that's relevant to the argument here?

15 MR. KIMERLING: I think the inference is that
16 this Court lacks jurisdiction. And let me amplify on
17 that if I could, a moment. This question, that is
18 whether or not the 24-03 grants standing in this
19 situation has never been resolved by a court. It was
20 raised previously in this Court and a decision in 1943 in
21 United States versus Johnson, but left unresolved.

22 The issue is very simply that there is no case
23 of controversy between the plaintiff and the appellant
24 here. The case of controversy is between the plaintiff
25 and the City of New York but was not appealed.

1 QUESTION: Who was the Attorney General
2 representing?

3 MR. KIMERLING: He is here in his ex officio
4 capacity solely to defend the Constitution. There is no
5 monetary, or no other claim that runs against the
6 Attorney General.

7 QUESTION: Is he representing the State of New
8 York?

9 MR. KIMERLING: He is representing the State of
10 New York in its effort --

11 QUESTION: And it is the State of New York
12 whose statute this is?

13 MR. KIMERLING: That is correct, but what I
14 think is instructive --

15 QUESTION: You make the jurisdictional argument
16 in your brief?

17 MR. KIMERLING: No, we have not. It's frankly
18 an issue that arose and became apparent to me in
19 preparing for the argument, and --

20 QUESTION: You've only got a half an hour.

21 MR. KIMERLING: Well, let me continue then, if
22 I may, briefly. I think what helps assist this Court in
23 reaching the issue, whether or not there is
24 justiciability, is the Muskrat case, one of the first
25 cases that dealt with advisory opinions.

1 In Muskrat, as this Court recalls, Congress
2 tried to set up a jurisdictional provision to allow for
3 the tests of constitutionality of legislation. In
4 Muskrat, in 1902, Congress granted certain Cherokee
5 Indians rights. In 1904 and '06, those rights were
6 diluted by giving additional people benefits that the
7 1902 people had for themselves.

8 So, in 1907 Congress said, let's see whether
9 this subsequent legislation, 1904 and '06 legislation, is
10 constitutional. So, it said, we grant jurisdiction to
11 the Court of Claims. We grant jurisdiction to the
12 Supreme Court on appeal to hear a claim by four
13 plaintiffs who are the beneficiaries of the 1902
14 legislation. They can come to court as class
15 representatives of those people, and the defendant shall
16 be the Attorney General of the United States.

17 This Court in Muskrat then said there was not a
18 case of controversy under Article 3, as the United States
19 Attorney General did not have sufficient interest under
20 Article 3 to create a case of controversy in regard to
21 the real interest of the plaintiffs in the Muskrat case.

22 I think, in addition, this Court might want to
23 look at the Boston Towboat case versus United States
24 which is a 1943 decision. The Boston Towboat Company,
25 the company that intervened in a lower court case between

1 the Cornell Steamboat Company and the United States, the
2 ICC, the ICC had said that Cornell is covered by the
3 Interstate Commerce Act.

4 Boston intervened in that case because it was a
5 tugboat company in Boston, Cornell -- there was a tugboat
6 company in New York harbor. It intervened, obviously, to
7 hope to avoid a precedent which would say that tugboat
8 companies should be covered under the Interstate Commerce
9 Act.

10 After an adverse decision against Cornell, the
11 Boston Tugboat Company, the intervenor, appealed to this
12 Court and this Court denied and dismissed the appeal
13 saying the intervenor who had come in solely because he
14 was concerned about the precedential value as it would
15 run against him, and indeed he was in court in
16 Massachusetts against the Interstate Commerce Commission,
17 there was no appeal jurisdiction. And, I should point
18 out that there was cert granted to the Cornell Steamboat
19 Company at the same time.

20 Lastly, I think that the other case that helps
21 in resolving this question is maybe the earliest decision
22 about advisory opinions, the Hay-Burns case.

23 QUESTION: Who filed the Notice of Appeal in
24 this case?

25 MR. KIMERLING: Only the Attorney General.

1 QUESTION: On behalf of whom?

2 MR. KIMERLING: Only on behalf of themselves,
3 to defend the constitutionality of these provisions.

4 QUESTION: Did he file -- his jurisdictional
5 statement names New York City.

6 MR. KIMERLING: He had to amend that when the
7 Clerk pointed out to him that that was not the case.
8 There is a letter, indeed, from the Clerk to the City,
9 saying they are not appellants.

10 QUESTION: But you don't claim that the fact
11 that the Attorney General is the appellant is any
12 different than if the State of New York were appellant?

13 MR. KIMERLING: I don't think it makes a
14 difference, that's correct, as long as the only issue is
15 the precedential value of the --

16 QUESTION: And it's your position that
17 notwithstanding the statute that permits the State
18 Attorney General to intervene in actions, to defend the
19 constitutionality of the statute, if he loses in the
20 state court, he cannot appeal that decision?

21 MR. KIMERLING: That's correct. That's
22 absolutely correct, and I think a tangential issue that
23 arises from that is whether he is bound by that opinion,
24 having been a party. I think this Court, in *Mendoza*,
25 *United States versus Mendoza*, sort of resolves that by

1 saying the Government is not bound in a non-mutual
2 collateral estoppel situation, applied to the United
3 States government. I don't think principles there would
4 be different.

5 QUESTION: What do you deal with -- in rules of
6 this Court which say that all parties to the proceedings
7 in the Court from which judgment appeal is being taken
8 shall be deemed parties in this Court, unless the
9 appellants have notified the Clerk of this Court in
10 writing, the appellants' belief that one or more of the
11 parties before has no interest in the outcome of the
12 appeal?

13 MR. KIMERLING: One, I would point out that
14 there is such a letter to the Clerk.

15 QUESTION: I don't have it.

16 MR. KIMERLING: I'm sorry. It's dated June
17 17th, 1985.

18 QUESTION: It's in where?

19 MR. KIMERLING: It says, "Dear Sir," to Mr
20 Stevens.

21 QUESTION: Where is that?

22 MR. KIMERLING: Excuse me, where is that?

23 QUESTION: Is that in your file?

24 MR. KIMERLING: It's in my file.

25 QUESTION: Well, I don't have your file.

1 MR. KIMERLING: I appreciate that. We did not
2 raise this issue. It's become an issue that Justice
3 Rehnquist --

4 QUESTION: I appreciate some of your views on
5 the merits.

6 MR. KIMERLING: Fine. I'll be happy to turn to
7 the merits. The issue to be resolved here --

8 QUESTION: Is that all, to my question?

9 MR. KIMERLING: I'm sorry.

10 QUESTION: Have you raised before this Court
11 the fact that they are not parties?

12 MR. KIMERLING: No, we have not. We have not
13 presented it in our brief opposing the appeal, or in the
14 merits brief. It was, as I said, an issue that became
15 apparent to me in preparing for the oral argument, and
16 when Justice Rehnquist raised the obvious question, I
17 answered that question.

18 QUESTION: May I ask you before you go on to
19 the merits, who wrote the letter of June 17th?

20 MR. KIMERLING: The Chief of the Appellate
21 Division of the Corporation Counsel of the City of New
22 York, Leonard Kerner.

23 QUESTION: And he in substance says he has no
24 interest in the case?

25 MR. KIMERLING: I'm sorry, I --

1 QUESTION: I think it responds to Justice
2 Marshall's quotation of the rules. I don't want you to
3 read a long letter, but --

4 MR. KIMERLING: No, I'll read the first line.
5 "In reference to the above case," which is this,
6 obviously, "we wish to inform the Court that the City of
7 New York is not participating in the appeal."

8 Let me go further, Justice Marshall. I think
9 that even if they had not written that letter and were
10 appellees here under that applicable rule, which they are
11 not, I still think that there would be still a sincere
12 article on the issue as to whether or not there is a case
13 of controversy, because the appellant is the one
14 presenting it and not the City of New York, but I don't
15 think we have to reach that.

16 QUESTION: Counsel, may I suggest that your
17 time is almost half gone now, and you haven't touched the
18 merits yet.

19 MR. KIMERLING: Fine. Thank you for reminding
20 me of that.

21 As I started to say, I think that the issue
22 here is what interest if any does the State of New York
23 have in differentiating between its past and present --
24 between its resident veterans based on past and prior
25 residency, whether New York must show a compelling state

1 interest or a substantial interest or must meet some
2 lesser standard, need not be decided by this Court, as
3 New York had been unable to articulate even a legitimate
4 state interest.

5 The Court's decisions recently in Hooper and
6 Zobel make it clear that states cannot legitimately
7 distribute rights and benefits based on prior and past
8 residency, and that's what's at issue here. Plaintiffs
9 stand in the same shoes as every other veteran. They
10 served in the armed forces, honorably discharged, present
11 residents of the State of New York.

12 The only difference between them and those that
13 obtained these benefits is their past and prior
14 residency, so that the class that we're looking to that
15 is the people who have past and prior residencies get the
16 benefit. Those that don't get the benefit, that is
17 exactly what was at issue in --

18 QUESTION: Mr. Kimerling, did this provision of
19 New York operate prospectively?

20 MR. KIMERLING: Let me address that, because
21 obviously the Attorney General relies heavily on that.
22 It does not. Let me make it -- it operates
23 retrospectively in the very same ways that the provisions
24 in Hooper and Zobel operated retrospectively.

25 That is, they looked back to prior or past

1 residency to determine the beneficiaries of certain
2 provisions. It is this looking back that was significant
3 to the Court in those decisions. It was not --

4 QUESTION: I thought this was adopted before
5 anybody went off to war to take advantage of it.

6 MR. KIZERLING: That's right. The
7 retrospectiveness should be distinguished from after the
8 fact, or retroactive legislation. Indeed, in Hooper the
9 Court noted that one of the purposes of encouraging
10 resettlement in the state could not have been served
11 because there was retroactive legislation.

12 But, what the Court noted in footnote 8 of that
13 opinion was, it did have, although not raised by the
14 parties, some prospective effects, some encouraging
15 effects. It encouraged people who had moved to the state
16 before '76 to remain, it encouraged people who had lived
17 in New Mexico prior to '76 to return. So, it did have
18 prospective effects.

19 Yet, the Court said in that footnote, it still
20 could not meet the constitutional barrier because it
21 still distinguished people based on past or prior
22 residency. In Zobel as well, I think if you look at the
23 concurring opinions there, although the majority opinions
24 did not reach the issue, the concurring opinions indicate
25 that those -- Alaska could have said, okay, in 1980 we're

1 going to start distributing benefits and anybody who is a
2 resident in 1980 has got one share. By 1981 you've got
3 -- people who are living in 1980 have got two shares and
4 the person that moves in 1981 has got one share.

5 This would not have, obviously, changed the
6 results of the concurring opinions since it would still
7 have relied on past or prior residency for distributing
8 benefits, albeit prospective legislation -- it is not the
9 after the fact nature of the legislation but rather, it's
10 retrospective looking back at past or prior residency
11 which is important. And that's exactly how New York's
12 legislation is like that in Hooper and Zobel.

13 Let me turn to what New York argues very
14 strenuously, is the purpose here, and that is to
15 encourage service in the armed forces. It's not quite
16 that. They're arguing, it encourages enlistment in the
17 armed forces because they argue that at the time of
18 enlistment we vest or distribute rights to future
19 benefits. That's their argument, and therefore they say,
20 that's a crucial juncture in time, and therefore we can
21 vest, you know, we can impose a bona fide residency
22 requirement.

23 But, let's look -- it's clear that that is not
24 what is happening here in these provisions, and even if
25 it were, it still wouldn't meet constitutional muster.

1 Look at the language. It doesn't define these as
2 enlistee benefits. It doesn't define an enlistee.

3 The provisions define a veteran, and the
4 criteria for obtaining these benefits is not enlistment,
5 it's service in the armed forces and honorable discharge
6 and passing the Civil Service examination.

7 QUESTION: Let me ask you, supposing the
8 statutes, instead of giving veterans' benefits, provided
9 that a person shall be deemed a veteran if he, one, is a
10 New York resident at the time of enlistment; two, is a
11 New York resident at the end of the war; and three, is
12 honorably discharged.

13 If within 30 days after those things all
14 happen, the veteran asks for \$100, the state will give it
15 to him. Would that be unconstitutional, in your view?

16 MR. KIMERLING: Yes, it would. It would. It
17 would be different from what we have here.

18 QUESTION: Yes, I understand that.

19 MR. KIMERLING: And it would be
20 unconstitutional because, as the Second Circuit pointed
21 out, New York has no interest in encouraging the service,
22 only its own. New York's interest is in a common defense.

23 QUESTION: How does the Second Circuit know
24 what New York's interest is in a case like this? Why
25 doesn't New York have an interest in encouraging its own

1 people to volunteer?

2 MR. KIMERLING: Oh, it does. It does, but it
3 doesn't have an interest in exclusion of encouraging
4 others, because it has an interest in a common defense.

5 QUESTION: But why doesn't -- isn't New York
6 able to deal with its own, and perhaps hope that other
7 states will deal with their own?

8 MR. KIMERLING: They could, if they had
9 legislation that did that. It's not this legislation.

10 QUESTION: Well, supposing this were December
11 7th, 1941, and the New York Legislature were in session,
12 said, we want to do something to encourage New York
13 people to enlist now or to go in the service and not be
14 conscientious objectors if they're drafted, and get to be
15 veterans, come back to New York and participate in public
16 life in New York. We want to do it constitutionally.

17 What could they do?

18 MR. KIMERLING: I think they could have a
19 bounty at that time for anyone who showed up in the State
20 of New York without any bona fide residency requirement.

21 QUESTION: Well, we could have this law without
22 the last requirement, namely, being a resident?

23 MR. KIMERLING: Being a prior resident as
24 opposed to a present resident at the time the bounty --

25 QUESTION: Well, are you saying that they

1 couldn't limit it, then, to people who enlisted in New
2 York when the Legislature sits down on December 8th,
3 1941, they couldn't limit their benefit to people who
4 enlisted when they were residents of New York?

5 MR. KIMERLING: No, because as I said, I think
6 their interest has to be in everyone being in the armed
7 services.

8 QUESTION: But then, for all practical
9 purposes, the state can really do nothing by way of
10 encouraging enlistment or encouraging its residents to
11 become veterans and return? If they've got to give it to
12 everybody, then it's just fiscally impossible to
13 administer?

14 MR. KIMERLING: They can do it here. It's not
15 fiscally impossible. Most states do not have this prior
16 residency requirement. Who comes to those states as
17 veterans gets the benefit. It's not unmanageable.

18 QUESTION: But then it doesn't encourage people
19 from New York to serve?

20 MR. KIMERLING: Oh, yes, it does

21 QUESTION: Equally?

22 MR. KIMERLING: Equally.

23 QUESTION: How does it do that, if someone
24 could have served from other states and simply come to
25 New York afterwards?

1 MR. KIMERLING: Because they're all then
2 treated equally as veterans.

3 QUESTION: And if it encourages anybody it
4 would encourage New Yorkers as much as anybody else?

5 MR. KIMERLING: Absolutely. Absolutely,
6 Justice White.

7 But, I think it's important to point out that
8 that's not what's at issue here. I think Justice White
9 pointed out, it's not only enlistees who are
10 beneficiaries, it's draftees. Moreover, it's not only
11 those that enlist during time of war who are the
12 beneficiaries.

13 You can enlist at any time as long as you serve
14 during time of war and that's why these are, as you
15 pointed out, Justice Rehnquist, really provisions to
16 reward and compensate for that service. That's what's
17 determinative.

18 QUESTION: I just wasn't entirely clear. Here
19 you've got two residency requirements, before the war and
20 after. Are you saying either one would be enough to
21 knock it out, or do you rely on both?

22 MR. KIMERLING: Well, we certainly don't have
23 to look at the second because our clients are present
24 residents, but I think the first one, the prior
25 residency, is the one that's at issue here.

1 QUESTION: Well, suppose you didn't have that
2 but you had a postwar residency requirement?

3 MR. KIMERLING: I think you have an altogether
4 different question there. You have a privileges and
5 immunities question of residents versus nonresidents.

6 QUESTION: You have to be a resident to work
7 for the city, don't you?

8 MR. KIMERLING: No, that is not correct.

9 QUESTION: You can live outside the state?

10 MR. KIMERLING: That's correct.

11 QUESTION: You have to be a resident to get the
12 bonus points?

13 MR. KIMERLING: That's correct, yes. So,
14 there's a distinction.

15 QUESTION: In order to --

16 MR. KIMERLING: Well, there may be another
17 issue here, but it's not presented by plaintiffs. There
18 is a State Court challenge, by the way, on that issue,
19 ongoing. But again, the provisions that we've been
20 talking about hypothetically aren't what's at issue here.

21 One is, the language doesn't lend itself to
22 that in any way. Two, draftees and enlistees are treated
23 differently -- are treated the same. Thirdly, regardless
24 of when you enter the service, whether it's a time of war
25 or not, you are entitled to the benefits. Fourthly, if

1 we look at the fact that disabled people are given
2 additional benefits, thus indicating clear intent to
3 compensate as opposed to encourage, the state is not
4 encouraging people to become handicapped.

5 Lastly, as in Hooper, the legislation here is
6 largely retroactive. During the Civil War -- excuse me,
7 during the Vietnam War, it was three years after what New
8 York deemed at the beginning of the war that they
9 retroactively recognized the war in Vietnam.

10 So, for a three-year period, people who either
11 enlisted or served were not encouraged by this
12 legislation, and the state had not acted, but yet these
13 were beneficiaries because they had served, and that's
14 what the purpose was.

15 QUESTION: May I ask this question.

16 MR. KIMERLING: Yes.

17 QUESTION: It's probably irrelevant to your
18 case, but was there ever a declaration of war against
19 North Vietnam?

20 MR. KIMERLING: No, there was not.

21 QUESTION: How, then, could your client have
22 any claim to be a veteran in the course of a war?

23 MR. KIMERLING: In only that the State of New
24 York has defined the Vietnam War era, beginning on
25 January 1st, 1963 and running through May of '75.

1 QUESTION: Well, we refer to it as a war, but
2 Congress never declared it as a war and Congress only has
3 authority -- only the Congress has the authority to do
4 that.

5 MR. KIMERLING: That's why defendant's reliance
6 -- appellant's reliance on that 1946 Attorney General's
7 opinion is really not very strong because you didn't have
8 undeclared wars. Now you have undeclared wars and it has
9 to be defined to be self-executing. It can't be
10 self-executing.

11 People that served in Grenada and in Lebanon
12 are not veterans, albeit they were shot at and some
13 killed, obviously, but because New York hadn't deemed it
14 a time of war, veterans from those eras are not covered.

15 But, let me go back to this retroactivity issue
16 because I think it's parallel to what this Court looked
17 at in Hooper. In June of 1973 the New York State
18 Legislature said, the Vietnam War is over, March 1973,
19 the war is over. Therefore if you enlist from now on,
20 there are no benefits.

21 In 1983, it retroactively amended to be May of
22 1975. Many of the men and women who enlisted in '73, '74
23 and '75 were not encouraged by this legislation at all.
24 They were discouraged if anything by New York's statement
25 that the war was over in Vietnam, yet as of 1983 they are

1 the beneficiaries.

2 So, I think it's clear that this new
3 refinement, albeit of the Attorney General, really
4 doesn't mesh with what the statute provides. It is not
5 what anyone was talking about then in terms of vesting
6 benefits at the time of enlistment.

7 I've spent a good deal of my time on the equal
8 protection arguments and how these provisions violate
9 plaintiff's rights under the Equal Protection clause.
10 Let me turn briefly to the right to travel provisions,
11 because I think under those provisions as well, New York
12 State veterans' credit provisions fail to meet
13 constitutional muster.

14 When states set up categories of present
15 residents and then they distinguish among them based on
16 past or prior residency, they distinguish based on newly
17 migrated versus older residents, and these kinds of
18 distinctions are the very kinds that the right to travel
19 most appropriately deals with, and the right to travel
20 here is substantially penalized and substantially
21 burdened contrary to the appellant's suggestion.

22 Veterans' credits mean often the difference
23 between unemployment and employment in a Civil Service
24 career with all the attendant securities and benefits
25 that those kinds of careers lend themselves to. Not only

1 can these credits be used at the entry level point, but
2 veterans optionally can use them on promotional
3 examinations, and finally at the time of layoff, a
4 veteran is entitled to as many as five years additional
5 seniority at the time of layoff to allow them to
6 withstand layoffs.

7 So, these are substantial benefits, certainly
8 more substantial than the \$50 at issue in Zobel, and
9 therefore the right to travel has been burdened here. If
10 we apply the equal protection analysis, New York must
11 meet the compelling state interest test or at least some
12 heightened scrutiny, and unable to articulate even a
13 legitimate state purpose, they obviously cannot meet the
14 compelling state interest test.

15 If we evaluate it under the privileges and
16 immunities clause of Article 4, again New York State
17 could not meet the two part test there, having been --
18 they are not able -- certainly not even attempting, but
19 certainly not able to demonstrate that plaintiffs are
20 some kind of evil, as I have already indicated. They
21 have all the attributes of every other veteran, and
22 therefore there is no reason to exclude them and
23 certainly the provisions here are not substantially
24 related to the exclusion of them from civil service.

25 And lastly, if we had a balancing test that

1 sort of looked at the state's interest in restricting the
2 right to travel or burdening it versus the rights of free
3 interstate travel and the benefits to be attained by
4 that, New York's inability to articulate a legitimate
5 state interest simply would allow the scales to tip in
6 favor of equal treatment.

7 QUESTION: Do you have any comment on this
8 Court's summary affirmance of the August case?

9 MR. KIMERLING: The comment is simply that this
10 Court's decision in Hooper and Zobel obviously indicated
11 a doctrinal difference between the law at that time and
12 the law as it existed --

13 QUESTION: It certainly wasn't overruled, was
14 it?

15 MR. KIMERLING: It was not overruled
16 explicitly, that's correct.

17 In conclusion, New York has no legitimate
18 interest in benefiting its own. When plaintiffs move to
19 New York they become New York's own. It's the center of
20 our Constitution that when someone moves to a state, they
21 become its own and prior residency cannot stand as a
22 barrier for them to be treated equally --

23 QUESTION: May I ask on that question, I
24 realize your case is not a cash benefit case, but I like
25 to try to think of the different forms of benefit.

1 I take it we have to knock out the prior
2 residency. Can you have a durational residency
3 requirement to qualify for the postwar benefit?

4 MR. KIMERLING: Let's say there is a legitimate
5 state interest served by post-residency requirement.

6 QUESTION: Well, I'm just -- maybe this
7 argument doesn't acknowledge much of a state interest.

8 MR. KIMERLING: Well, I'm not --

9 QUESTION: It seems to me that if you --

10 MR. KIMERLING: No, the state has --

11 QUESTION: Prewar residency requirement, and
12 once you have a post-war durational requirement, it seems
13 to me your client could move from state to state,
14 collecting bonuses, and why not? Might have gotten one
15 in Puerto Rico, and one --

16 MR. KIMERLING: One, many states have
17 provisions which disallow that. If you get the benefits
18 in one, you can't collect in another. But secondly,
19 while I say there is a question, I'm not confident that
20 this Court would agree with me.

21 The reason I say that is in the Camden County
22 case, the Construction and Building Trades Council of
23 Camden County, this Court raised an issue as to whether
24 or not limits on public service jobs could -- that
25 excluded nonresidents could survive a privileges and

1 immunities challenge.

2 It said it still had to go through the
3 analysis. It didn't say it would clearly survive because
4 a state's interest in civil service only being the state
5 civil service and therefore benefiting only its own
6 residents, or whether or not it would not survive a
7 privileges and immunities challenge.

8 But, it said that the question had to be
9 answered, and that's why in terms of post-residency
10 requirements, there is a question on the privileges and
11 immunities clause which is very distinct from the prior
12 residency requirements we are talking about and how that
13 really goes to the heart of the right to travel and the
14 heart of the equal protection clause, and the equality of
15 citizenship that comes from someone who migrates to the
16 state.

17 QUESTION: Mr. Kimerling, to get back to the
18 old question, isn't it true that the state intervened as
19 a party defendant, and was a party defendant below?

20 MR. KIMERLING: That's correct.

21 QUESTION: Well, didn't that answer my
22 question, if you had told me that?

23 MR. KIMERLING: I'm sorry, I didn't understand
24 that to be your question. The intervenor is a party
25 below, but let me point out that in the Boston Towboat

1 case that was the same factual setting. Boston
2 intervened in the three-judge bench decision involving
3 the Cornell Steamboat Company, so that they had standing
4 below as an intervenor.

5 The question is whether they can independently
6 appeal, and that's the question that this case presents,
7 albeit in that case there wasn't a clear statutory
8 provision as there was here under 2403, but nevertheless
9 in Muskrat despite a very clear direction from Congress
10 in Muskrat about jurisdiction, this Court found that
11 Article III did not -- Article III overcame that -- thank
12 you, Mr. Chief Justice.

13 CHIEF JUSTICE BURGER: You have nothing
14 further, Mr. Solicitor General?

15 MR. HERMANN: Yes, Your Honor.

16 ORAL ARGUMENT OF ROBERT HERMANN, ESQ.

17 ON BEHALF OF THE APPELLANT -- REBUTTAL

18 MR. HERMANN: Just on the retrospectivity
19 point, New York has, as I have mentioned, both a
20 constitutional commitment and a statutory commitment.
21 Part of the reason for having these provisions in both
22 places is that it's obviously necessary for the
23 Legislature frequently to define and redefine time of
24 war, but also New York wanted to emphasize the
25 fundamental nature of its commitment.

1 Obviously, any statute which has a requirement
2 of service during time of war must at some point be
3 amended to define that time of war. I'm sure the State
4 of New York would have preferred to define prospectively
5 in 1967 the end of the Vietnam War, but of course it was
6 unable to do so, so that built into any such requirement
7 is that -- is the obligation of the State Legislature at
8 certain points in time, to define time of war.

9 What New York did here, unlike what New Mexico
10 did in Hooper against Bernalillo, is frequently during
11 the Vietnam period to define time of war as including the
12 past six months, the past year or whatever, and it did
13 that repeatedly through the course of that time, and
14 indeed those frequent amendments to the New York statute
15 show the depth of New York's commitment to this policy.

16 Just to answer Justice Powell's question about
17 the Vietnam War and its being an undeclared war, New
18 York's provision on this tracks very closely, as does New
19 York statute, the federal provisions which define
20 veterans' benefits in terms of time of war. Congress --
21 the relevant federal statute speaks of the Vietnam era,
22 and the President declared several times during the
23 course of the early '70s the end of the Vietnam era, and
24 for statutory purposes that sufficed under federal
25 programs.

1 New York adopted the same terminology as far as
2 treating the Vietnam era as a time of war, since the
3 federal government had done the same thing, in essence.

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

6 (Whereupon, at 2:56 o'clock p.m., the case in
7 the above-entitled matter was submitted.)
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CERTIFICATION

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

#84-1803 - ATTORNEY GENERAL OF NEW YORK, Appellant V. EDUARDO SOTO-LOPEZ,
ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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