SUPREME COURT OF THE UNITED STATES

In the Matter of:

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

vs.

ANTOLIN PUNSALAN PANGILINAN, ET AL.;

and

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

vs.

BONIFACIO LORENZANA MANZANO

No. 86-1992

86-2019

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IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,	:	
v.	:	No. 86-1992
ANTOLIN PUNSALAN PANGILINAN, ET AL; and	:	
IMMIGRATION AND NAUTRALIZATION SERVICE, Petitioner,	:	
v.	:	No. 86-2019
BONIFACIO LORENZANA MANZANO	:	

Washington, D.C.

Wednesday, February 24, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 3:00 p.m.

APPEARANCES:

ROBERT H. KLONOFF, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

DONALD L. UNGAR, ESQ. San Francisco, California; on behalf of the respondents.

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear raguments next in Numbet 86-1992, Immigration and Naturalization Service against Antolin Punsalan Pangilinan, and consolidated case.

Mr. Klonoff, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. KLONOFF, ESQ.

ON BEHALF OF THE PETITIONER

Mr. Chief Justice, and may it please the Court, the issue in this case is whether the Ninth Circuit was correct in ordering citizenship for the 16 respondents, all Philippine veterans of World War Two, under a statute that expired in 1946.

We submit that this Court has already answered that question in 1973 in INS versus Hibi. The Court in Hibi held that the Attorney General's action in withdrawing the vice consul from the Philippines and the government's failure to publicize the program did not give rise to an equitable basis for disregarding the December 31st, 1946, cutoff, and as I will explain during this argument, respondent's argument is nothing more than a change of label. The substantive argument made in this case is identical to that rejected in Hibi.

We further submit that Hibi was correctly decided and that there is no basis for this Court to overrule it.

To begin with, the relief ordered by the Ninth Circuit in this case is foreclosed by four naturalization statutes in addition to the 1946 cutoff in Hibi, and as I will explain, those statutes prohibit a court from ordering citizenship under the expired and repealed 1940 Act even as to those situations in which there was a timely application under the 1940 Act that was still pending and had not been ruled upon, and we submit that these naturalization statutes are dispositive for two reasons.

First, as this Court made clear in Fedorenko and indeed as early as the Ginsberg case, a court has no equitable authority to disregard statutory requirements for citizenship and more generally the Court of Appeals' invocation of its equitable authority in violation of statutory mandate is in fact an abuse of equitable authority. We submit it is well established that a court of equity may not order relief that is contrary to the legislative intent.

In addition, it is our position that the underlying premise of the Court of Appeals opinion is false. In our view the Attorney General's actions were entirely lawful and were within his discretion under the 1940 Act, and as I will explain, that is true for three reasons.

First, Section 705 of the Act left it to the Attorney General to decide where to place examiners, when to place them, and for how long. In addition, the decision

in this case, the revocation of the vice consul's authority was based on bona fide foreign policy concerns, and as this Court has made clear in numerous cases cited in the government's briefs, a high degree of judicial deference must be given in the context of executive foreign policy decisions, and that applies a fortiori. The Court is reviewing those decisions four decades later.

In addition, there is added discretion in this case because there is no evidence whatsoever that Congress disagreed with what the Attorney General did. In fact, as we have explained, all of the statutory enactments since the 1940 Act only confirm that the Attorney General acted lawfully in what he did.

QUESTION: And you say that despite the language of the statute.

MR. KLONOFF: The language of the '40 Act, you mean? Absolutely. First of all, as we have explained in our brief, it is anything but clear whether that statute was intended to apply to individuals who enlisted or were inducted in the Philippines, and the Attorney General had to answer a number of difficult issues before he even determined that it applied there, particularly in the context of the Philippine Commonwealth Army. It is anything but clear that Congress intended to authorize the naturalization of some quarter of a million individuals who are serving in their own army.

QUESTION: We have naturalized a lot of them, though, over there, didn't we?

MR. KLONOFF: We did, that's true, and in fact that serves to undermine respondent's argument that there was something invideous about what was being done. That only confirms that the decision was made for legitimate foreign policy reasons, but going beyond that, Justice Blackmun, the statute as described by the eight dissenting justices below is completely open ended. There is no mandate that the Attorney General place an examiner in any particular location or for any particular period of time. It is left up to his discretion, and as we have pointed out in our brief, the three-month period in which an examiner was actually placed in the Philippines before his authority was revoked compares quite favorably and is perhaps comparable to the post to post rotation system that was employed elsewhere in the world.

So ultimately it may be in fact that these respondents and others similarly situated had as much access to an examiner as soldiers elsewhere in the world, so we don't think there is anything in the statute that compelled the Attorney General to leave an examiner there, and indeed we submit it was entirely within his discretion to do what he did.

And again, I would point out that the subsequent Congressional statutes only confirm that. We have in 1946, while the statute was still in effect, we have Congress passing

a statute indicating that membership in the Philippine Commonwealth Army does not constitute membership in the United States armed forces. That directly contradicts the Ninth Circuit's assumption that the plain reading of the statute compelled the Attorney General to apply the program in the Philippines.

We have the 1948 statute which made clear that enlisting or being inducted in the Philippines does not entitled the individual to citizenship unless that person is later a lawful, permanent resident of the United States. The same provision in 1952. There is simply no evidence whatsoever that this program was intended to apply in the Philippines, and we challenged respondents to cite anything in the legislative history either to show that the program was initially intended to apply in the Philippines or some recognition on the part of Congress that the Attorney General had erred or engaged in misconduct, and they have not cited any, so we would submit in light of that complete absence of anything by Congress to contradict what the Attorney General did and given the foreign policy concerns that were the basis for the decision, it would be particularly inappropriate to second guess that decision 40 years later.

QUESTION: Maybe I don't really understand your argument. You said they didn't intend it to apply in the Philippines at all?

MR. KLONOFF: We are saying at the time the statute was enacted --

QUESTION: Which was when?

MR. KLONOFF: 1942.

QUESTION: And what was going on in the international world at that time?

MR. KLONOFF: We would concede that there were battles --

QUESTION: Wasn't the main fighting by the American forces at Bataan at that time?

MR. KLONOFF: There was significant fighting there, but one --

QUESTION: Significant? I mean, wasn't that the part of the war we were most interested in at that time?

MR. KLONOFF: That is correct, but it is simply -- there is no reflection in the legislative history that we have found or that respondents have found that Congress was acting to reward those indivdiuals, the 250,000 people.

QUESTION: Well, who were they rewarding?

MR. KLONOFF: They were rewarding, there were some 80,000 people who were naturalized around the world, in Iceland, England, members of the --

QUESTION: You think they are the people Congress was thinking about in early 1942?

MR. KLONOFF: We think so. We think the fact that

in 1946 Congress specifically said that membership in the Commonwealth Army does not constitute membership in the armed forces for purposes of government benefits would support it. All we are saying, we don't know what Congress intended. Congress wasn't clear. They were clear in the World War One statute. They specifically mentioned the Philippines. They weren't clear in the World War Two statute.

All we are saying is, you have a statute that on its face has a 1946 cutoff, and as this Court said in Hibi, the public policy underlying that cutoff is clear and must be recognized, and that has to be balanced against what at most is an uncertain Congressional intent as to whether the statute was meant to apply to the Philippines at all.

QUESTION: Well, what if we disagree and think it was intended to apply to the Philippines?

MR. KLONOFF: Then we still think for several reasons that that is not dispositive. In fact, let me take it at several different levels. The Second Circuit in Olegario, the reasoning of which we agree with on the statute, assumed for purposes of the decision that the statute was intended to apply to the Philippines, but what the Court said was, that is only the beginning of the question, because the President in revoking his authority had discretion to do so under Section 705 of the statute, and more particularly as a result of the foreign affairs concerns that were the basis for

the revocation. So it would be our submission that even if Congress had been clear that the statute was intended to apply to the Philippines, that in light of the foreign policy issue that faced the executive and in light of the very reasonable and tailored response of the Attonrey General, that was within his authority under the 1940 Act.

Furthermore, even if the conduct is considered to be erroneous, in other words, if the Attorney General had acted under a misperception, we think that Hibi still forecloses the claim because it is not enough to simply err. As the court indicated, there was no affirmative misconduct thre and accordingly no basis for ordering equitable relief four decades later, so we think that Hibi would be dispositive regardless of whether or not this Court agrees with us on the interpretation of the statute.

We bring that out about whether the program was intended to apply in the Philippines only to reinforce our position that this Court has to weigh on the one hand a clear Congressional intent expressed over the years from the 1940 statute itself through 1961 and repeated statutes of the public policy that the '40 Act expires, it is revoked, and that all petitions have to be considered under current law, and the Court has to balance that against a rather vague, at best, intention on the part of Congress.

And as we indicated, if Congress was so concerned

about the individuals in the Commonwealth Army obtaining citizenship it would have been astonishing for Congress to come along in 1948 and explicitly made clear that enlistment or induction in the Philippines does not qualify someone for citizenship unless he later becomes a lawful, permanent resident.

QUESTION: That is a different Congress, of course. You are talking as though Congress is one Congress out there.

MR. KLONOFF: That is ture, but it is very close in time, Justice Scalia. In fact, the cutoff date, 1946 cutoff date was established in 1945 as an amendment, and then we are talking about a Congress three years later. We are actually talking about a Congress one year later, because the recision Act which said that the statute, the Commonwealth Army is not to be treated as the United States Army, that was 1946, one year later, and I would note furthermore, as explained to the Court in Olegario, the Congress in 1945 that passed the cutoff amendment, during the course of its deliberations Senator Hayden made the remark that it was his understanding of current law that Philippine veterans or soldiers were not eligible for citizenship unless they later came to the United States, and as the Olegario Court points out, no one in Congress expressed any disagreement with that observation.

Again, our analysis our our submission in no way depends on that, as I have explained to Justice O'Connor.

We just think it is important to point out that the Ninth Circuit, which based its opinion on what it called "the expressed intent of Congress" is not expressed at all. It is at most implied, and it really requires a good degree of reading to --

QUESTION: Maybe you will touch it, but why was the '46 law passed?

MR. KLONOFF: The '46 law?

QUESTION: Yes.

MR. KLONOFF: In part it was passed, Justice Marshall, because of a concern by Congress about various kinds of monetary benefits going to --

QUESTION: They didn't want the Philippinos to get it.

MR. KLONOFF: They didn't want the --

QUESTION: So it was aimed at to get rid of them.

MR. KLONOFF: No, I don't think so. I think what the concern was is that the Congress hadn't really focused on the fact that --

QUESTION: That just in case they might get it, they are going to make sure they don't get it. That's what Congress did.

MR. KLONOFF: But what Congress was focusing on, Justice Marshall, was the fact that their enactments were premised on membership in the United States armed forces.

The Commonwealth became -- was brought into the service of the United States Army only by executive order, and it really hadn't been focused by Congress on the fact that you were bringing in a quarter of a million people who were therefore going to be eligible to all these benefits. But let me say, Justice Marshall, one thing that is extremely interesting is that in the course of passing the 1946 legislation, actually it was a statement afterwards and we have quoted it at length in our brief, Senator Hayden, who was one of the co-sponsors of that bill, pointed out that one of the intents behind it was to make clear that members of the Commonwealth Army were not entitled to citizenship, that those people were fighting primarily to serve the independence of their own country, and that in fact it would be no service to these individuals to bring them here where they were --

QUESTION: Let's not discuss Senator Hayden, please.

MR. KLONOFF: Let's not --

QUESTION: Let's not discuss it here. I mean, I know some of his reasons for this.

MR. KLONOFF: I am not sure what Your Honor is --

QUESTION: Right. Find out.

MR. KLONOFF: I was responding --

QUESTION: You were answering my question.

MR. KLONOFF: Yes, I was responding as to what was behind --

QUESTION: And I am trying to tell you that that won't help me.

MR. KLONOFF: Let me --

QUESTION: Let me ask you this, Mr. Klonoff. Isn't it correct that the '46 Act was to make sure that the Philippinos were not eligible under the GI Bill of Rights? Isn't that basically what it was?

MR. KLONOFF: That was in large part, but what I am saying is --

QUESTION: I mean, it would have been very, very expensive to add this additional group of veterans to that entitlement.

MR. KLONOFF: Well, the statute was worded in a very open-ended fashion. It said that subject to --

QUESTION: I mean, wasn't that the central purpose of it?

MR. KLONOFF: That was, and all I am pointing out is that a later remark about one of the purposes of the statute being to make clear that for purposes of the citizenship program members of the Commonwealth Army were not to be treated as in the armed forces.

If I could turn back just briefly to the Hibi point, the veteran in Hibi made essentially a two-part argument in the Court of Appeals and in this Court. His argument was, Number One, that the Attorney General deliberately violated

the 1940 Act, and that Number Two, present day citizenship was therefore appropriate as an equitable remedy. Now, the Ninth Circuit in Hibi adopted this two-part analysis, and we submit that if the case caption of the name and the references to parties were removed, the Ninth Circuit's opinion in Hibi is virtually a carbon copy of its current opinion. There is really no analytical distinction. The Court first said that the Attorney General violated the will of Congress, and secondly that citizenship was appropriate as an equitable remedy.

Now, this Court summiarily reversed and held that the conduct of the Attorney General at issue was not affirmative miscoduct and therefore could not have stopped the enforcement of the statutory cutoff date, and in the conclusion of its opinion the Court stated in no uncertain terms the responden's effort to claim citizenship under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail.

And now we have somebody coming in with the same identical arguments, the same two-part analysis, and arguing for citizenship, and we think that Hibi is controlling, and we agree with the dissenting judges below that there is simply no meaningful difference between saying that the government is equitably estopped from raising a statutory cutoff and disregarding the cutoff as a matter of equity.

Furthermore, we would submit Hibi is not only dispositive of the statutory arguments, but is dispositive of the constitutional arguments. Now, let me say at the outsent that it is important to emphasize that the Court of Appeals did not reach the constitutional issues, so it simply makes no sense to distinguish Hibi on the ground that these parties are raising constitutional issues. That would only be a distinction as a way of defending the Court of Appeals case if the Court of Appeals had in fact decided the case on constitutional grounds.

But in any event, as we point out, the constitutional argument is in essence the same argument that was made before, simply new labels being attached to old argument, and the policies in Hibi about why a court should not on that occasion 20 years later now 40 years later ignore the public policy of a cutoff apply equally well whether you label the claim equitable estoppel, equitable relief, or due process.

And in fact numerous of this Court's decisions dealing with equitable estoppel would confirm that. For example, in Immigration and Naturalization Service versus Miranda, where the Court held that the government was not equitably estopped because of its delay in processing an application for adjustment of status, it would be rather odd if the alien in that case could coe back in and say that that delay violated his constitutional rights and he is therefore

entitled to adjustment of status. Based on the same allegation, the same thing would be true in Schleicker versus Hansen. The erroneous advice leading an individual not to get benefits for a period of time, the Court held there was no equitable estoppel there, it would be rather odd if the person could come right back in, put the label due process on, and suddenly be eligible for all these -- for all these benefits.

If I could, if there are no questions on the Hibi point, turn to the equitable issues, and it is important to emphasize in all of these statutes that I am discussing the reason we are discussing them is because this Court in numerous of its foreign affairs decisions has looked to the Congressional response, Congressional acquiescence in determining whether or not the Attorney General did something that violated the will of Congress. And as we have pointed out, you have an array of statutes, most compellingly the '48 statute, which states in no uncertain terms that even individuals who had applied under the 1940 Act and who had their applications pending, that those applications were to be decided under the 1948 Act.

Now, if Congress was willing to see individuals who had made timely applications have their rights or benefits, rather, dealt with under the '48 statute, it could not have intended that individuals such as those here would be eligible for citizenship 40 years later. It is important

to emphasize --

QUESTION: Mr. Klonoff, then it is your submission that the 1948 act cut off the claims of some people who had made application to the earlier act and would have qualified under the earlier Act?

MR. KLONOFF: That is exactly our submission. That is clear from the face of the 1948 Act, that individuals who had applied under Section 701 before the December 31st cutoff, those applications were to be treated not under the '40 Act but under the '48 Act. And our submission is that it is an a fortiori. If individuals who had met the cutoff had their benefits cut off under the '40 Act, it could not be that individuals such as respondent who, Number One, didn't apply during the period, and Number Two, didn't even know about overseas naturalization, Congress could not have intended that those individuals be eligible 40 years later.

It is important to emphasize we are dealing with what has now come to be called Category Two. These phrases were coined by a district judge in the '68 Philippinos case. Category Two are individuals who made no efforts whatsoever prior to the cutoff to obtain citizenship, and in fact it is clear from the record in this case that not a single one of the 16 respondents even knew about the program, and in fact one of our submissions here in this Court is, it is difficult to understand how the respondents can claim they were injured

when they didn't even know about the program. Had there been an examiner there, we do not understand how they can claim injury when they did not even know about the program.

The subsequent statutes are as clear as the 1948 Act. The '52 Act specifically lists the territories that are included within the concept of the United States and its territories, and it excludes the Philippine islands. So once again, and again, just like the '48 statute, that applies to applications that were pending under the 1948 Act. Congress explicitly stated in the '52 statute that applications under the '40 Act that were pending but had not been ruled upon were to be decided under the '52 statute, and again you have the same a fortiori. If the pending applications were to be treated under the '52 Act, it could not be the case that Congress anticipated applications that had not even been filed until decades later should be treated under the '40 Act rather than the '52 Act.

And then perhaps the most compelling statute of all in some sense because it is in essence an overall umbrella of these other statutes is the 1961 statute, where Congress said that all applications for naturalization have to be considered under the 1952 Act. That was Section 310(e) of the '52 Act in 1961.

So, the Court of Appeals in order to order equitable relief in this case not only had to ignore the 1940

Act, the '46 cutoff, but it had to ignore all of these other statutes as well, and we share the concern of the dissenting judges below that there is something wrong if a court just by putting on a hat that says equity can order a remedy that violates a whole series of statutes that could not be more explicit.

Let me turn to the issue now of whether in fact the Attorney General violated the 1940 Act. The Ninth Circuit had little problem concluding there was such a violation, but as the dissenting judges noted and as the Court in Olegario noted, the statute gave the Attorney General considerable discretion in deciding where to place the examiners. There is nothing in the statute that said examiners had to be placed at specific locations for specific periods of time. You then have the added layer of the foreign policy decision that was involved here, and the contemporaneous historical documents are quite clear as to what happened.

The Attorney General initially made a decision even though the statute did not require it after consultation with his subordinates that he would apply the statute in the Philippines under a generous and reasonable interpretation of the statute. It was only when the foreign policy issue arose that the decision was made to revoke the examiner.

There is a document which is quoted in a number of the court decisions in this area from September 1945 to

Attorney General Tom Clark indicating that the Philippine government had expressed its concern that if the naturalization program were carried out, as many as a quarter of a million people, the best young men for the Philippines, would suddenly leave that newly emerging country for the United States, and you would have a country that would not have a nucleus of its own, an army of its own.

And it was only upon obtaining this memorandum that the Attorney General initialed the memorandum and made the decision that he would revoke the naturalization authority.

After Congress made clear that being in the Commonwealth Army did not qualify an individual for the benefits of being in the United States armed forces, the Attorney General again reinstituted the authority of the naturalization examiner in the Philippines, because at that point since it was then being applied to members of the Scouts rather than the Commonwealth, which was a much smaller number, the concerns that had initially been raised by the Philippine government were no longer a problem.

So we would urge the Court then to follow the reasoning of the decision in Olegario and to hold that the Attorney General's conduct was permissible under the '40 Act, and if I could just briefly touch upon the Court's Miranda decision, since that was relied upon quite heavily by the Court of Appeals, we strongly agree with the dissenting

judges below that the Court could not have intended in a decision that did not raise any question involving Philippine veterans to in effect decide that citizenship was now going to be available for thousands of Philippine veterans. It was simply not an issue in the case. And we would urge the Court that, but we have offered an explanation of the language in Miranda. The Court in Miranda in saying that the action was error was referring not only to Hibi but also to the Court's Montana decision, and a reading of the Montana decision leaves grave doubt as to whether or not there was any error. That was a situation the Court may recall where a consular official indicated to a woman that she should not travel in her condition. She was pregnant at the time. And there was a question of whether or not that was inappropriate advice. But it is anything but clear, as the Court itself indicated in Miranda, whether this was error or was simply well-intended advice that she shouldn't travel in that condition.

So Montana itself confirms that the Court did not mean to necessarily declare that there was error, and we would submit that the point being made in Miranda was simply to emphasize that in Miranda you simply had delay or negligence whereas there were deliberate acts involved in Hibi. So we don't think this Court intended in a context where the issue is not even before it to resolve these difficult questions.

Finally, I would not briefly one of our submissions

that in this kind of siutation where you are awarding equitable relief the Court of Appeals seemed to believe that once it had decided there was a wrong it had to find a remedy, and we submit that that is simply an erroneous understanding of the role of an equitable court. A court in effect has to balance the equities, and one thing that could not be stronger against the position of the respondents is that they did not assert their claimed entitlement to citizenship until 40 years later, or 30 years later at the least.

And as we have explained, individuals who knew about the program back in the 1940s are guilty of laches for waiting so long, and the individuals who did not even learn about the program until the 1970s or '80s can hardly claim that they were prejudiced or injured as a result of the decision. In fact, we have cited some Law Review articles that analyze this Court's Hibi decision as at bottom a balancing of the equities. But the Court of Appeals apparently was of the view that once it decided there was a wrong it didn't have to balance the equities, so we would urge the Court if it reaches that issue, and we submit there is no reason to get to the issue of remedies, but if the Court reaches that issue, we urge the Court to hold that at this late date, given the potential disruption of the immigration system, the delay in asserting the claimed of citizenship, and so forth, that there is no basis for equitable relief.

I would reserve the balance for rebuttal, unless there are any questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff.

We will hear now from you, Mr. Ungar.

ORAL ARGUMENT OF DONALD L. UNGAR, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. UNGAR: Mr. Chief Justice, and may it please the Court, there are three things I hope you will do when you decide these cases. The first of these is to tell the government you really meant it when you said the Attorney General's error was clear when he made it impossible for qualified World War Two veterans to be naturalized in the Philippines in 1945.

The second is to take a closer look at just what the error was, and to recognize that it was more than the ordinary neglect or oversight that the majority opinion described it as in the Hibi case. Rather, it was an intentional, deliberate decision by the Attorney General of the United States to keep the offer of citizenship away from qualified veterans. It was a decision, in other words, to prevent the enforcement of the law as Congress had written it.

QUESTION: Are you asking us to overrule a part of Hibi?

MR. UNGAR: I am asking you to take another look at the facts in Hibi. I think in Hibi the majority opinion

looked at the facts in a more traditional equitable estoppel context. In a typical equitable estoppel argument against the government an applicant is suggesting that he was misled to his indetriment by some erroneous advice that a government official may have given him. Mr. Hibi couldn't make that kind of argument bcause there was no misleading of him. No immigration officer or federal official went out to him and said to him erroneously that you are not eligible for naturalization, and so the court or the majority in that case seemed to conclude that because there was no affirmative act which misled Mr. Hibi, that there was no estoppel. It could give rise to no estoppel.

QUESTION: It not only seemed to conclude, it did conclude.

MR. UNGAR: Well, that is not the way the majority characterized what happened. The majority characterized what happened as a mere failure to publicize the availability of this wartime naturalization law and a mere failure to station an examiner in the Philippines during all of the time that veterans like Mr. Hibi were eligible to apply.

But it wasn't just a mere failure, and if the majority was saying a mere failure does not give rise to an estoppel, it certainly did not consider the issue of whether a deliberate decision to disregard the law would give rise to estoppel. In that sense, I think you can look back at Hibi

and come to a different conclusion.

QUESTION: But our opinion in Hibi concludes as the Solicitor General has reminded us saying that the respondent's claim must fail, and yet the Ninth Circuit has gone back and said, no, it need not fail.

MR. UNGAR: Well, in Hibi the majority said it must fail because there was nothing more than neglect, and it was obvious from the opinion that the majority considered it nothing but a matter of neglect because the Hibi decision was based upon the old Utah Power and Light case.

QUESTION: Do you think it is open to a lower court to recanvass facts that have been characterized by this Court in a particular way?

MR. UNGAR: I don't think this Court characterized that in the way that the court below saw it. The court below saw it as a deliberate violation of a statutory obligation by the Attorney General. This Court didn't --

QUESTION: Were there new facts presented to the Ninth Circuit that had not been presented earlier?

MR. UNGAR: No, the facts are identical. Mr. Hibi's facts and the facts presented by the respondent is identical. But the analysis that was applied by this Court was not the analysis provided by the court below and it was not inconsistent with --

QUESTION: Yes, but ordinarily when the Ninth Circuit

analyzes a case one way and we analyze it another, we prevail. But apparently that isn't the case here.

MR. UNGAR: Well, I think it is important how perception of what happened determines how one analyzes the case, and the majority in Hibi perceived the case as nothing but mere neglect, whereas the true facts were much more than mere neglect. In any event, I hope you won't consider Hibi to be dispositive, because the veterans in this case have raised a different legal issue. That is, they have raised the due process issues that Mr. Hibi did not raise and were not considered in his particular case.

QUESTION: Is the Solicitor General correct or incorrect in saying that the Ninth Circuit did not pass on these constitutional issues?

MR. UNGAR: No, he is correct. The Ninth Circuit did not pass on it, and as we have indicated in our briefs, we believe that this Court may pass on those issues if it so chooses, or remand it for consideration of those issues if it comes to that conclusion.

Let me turn first to the question of error. The Solicitor General suggests that the Attorney General did have the authority to halt the naturalization program in the Philippines in 1945. I think the place to start first of all is with the fact that what Congress had done here was to enact a statute in the exercise of its exclusive naturalization

authority. Congress and only Congress can determine who is to be naturalized. That is not the function of the Attorney General of the United States. And in this particular place, if we look at the language and the purpose of the statute and the means that Congress chose to implement that statute, it seems to me that it is quite clear that the Attorney General did have the obligation to carry out that law by naturalizing any qualified veteran.

The language of the statute is clear. It says that any qualified veteran may be naturalized. The purpose of the statute was to provide naturalization for qualified veterans in exchange for the service that they provided to the United States armed forces during the war. And the means to make sure that soldiers and sailors overseas would have the opportunity to apply, the statute Section 705 specifically called upon the Attorney General and the Commissioner of Immigration to take whatever action is appropriate to make appropriate rules and regulations for the purpose of carrying the law into effect, not to frustrate the purpose of the law. That is the mandate that Congress provided in the 1942 amendments to the 1940 Act, and I think it is clear from what happened that during the war itself, from 1942 onward throughout the war the Attorney General recognized that that was his obligation.

The Commissioner of Immigration sent representatives

all over the world during the war to naturalize qualified veterans.

QUESTION: Or that he was authorized to do it.

MR. UNGAR: I beg your pardon?

QUESTION: All that that necessarily acknowledged was that he had the authority to do it, not that he was obliged to do it.

MR. UNGAR: I think it is more than just --

QUESTION: It doesn't necessarily prove that he was obliged to do it.

MR. UNGAR: Well, he looked upon it that way, and I think certainly the language of the statute said he is authorized to do this, but in the context of the statute, the purpose being to naturalize veterans overseas, Congress certainly made that intention clear, and since they set up this mechanism for doing it, it seems to me it was apparent that he had to follow and implement the statute by following that mechanism.

QUESTION: Other things being equal. There are a lot of reasons why, if he didn't have enough money to send them to all countries, he would have to select some countries, and what he is saying here is that there is another factor that came into account, some foreign affairs factor.

MR. UNGAR: Right. Well, I think --

QUESTION: But the statute was not mandatory. It

didn't say, he shall station these examiners. It just authorized it.

MR. UNGAR: I think there is a difference between saying that he didn't have to send an examiner to a particular country because he didn't have the fund or he didn't have the manpower or because of the exigencies of war he couldn't send people to certain parts of the world. I think there is a big difference between that and a situation where he says I have the manpower, there is a vice consul on the scene, the law says that these people are entitled to be naturalized, but I am going to take it away from them to prevent the offer from being accepted.

QUESTION: Mr. Ungar, I dropped a stitch somewhere. Did your veterans serve in the armed forces of the United States?

MR. UNGAR: Yes.

QUESTION: Well, the Solicitor General constantly refers to the Commonwealth Army of the Philippines. What is the difference?

MR. UNGAR: Well, there are two segments of the armed forces insofar as it applied to Philippinos who were residing in the Philippines. One was a unit called the Philippine Scouts, which was a direct part of the United States Army from the very beginning.

QUESTION: Were your veterans in the Philippine Scouts?

MR. UNGAR: Some were and some weren't. Some were also in the Philippines Commonwealth Army, which was an army raised by the Commonwealth of the Philippines prior to its independence. Now, what happened was that under the Philippines Independence Act of 1934, the President of the United States was given the authority in time of emergency to take the armed forces of the Philippines commonwealth and make it a part of the United States armed forces, which he did. President Roosevelt in 1941 issued an executive order taking the Philippines Commonwealth Army and bringing it into the armed forces of the United States. They all served under the same flag. They all wore the same uniform once the war started. And they were all considered part of the armed forces of the United States, and I think it has been suggested here in 1946 the purpose of the 1946 Act was to save money. Congress realized at that point perhaps that it would cost them a lot of money to provide GI Bill and other benefits for the commonwealth soldiers among others, and so it wrote into the law that legislation which barred them from being considered for certain monetary benefits that other soldiers and sailers were entitled to.

QUESTION: It was argued in Hibi; was it not, although it doesn't appear in our opinion, the argument was made that it was unlawful for the Attorney General not to station these officers in the Philippines? Indeed, that --

MR. UNGAR: The argument was made that it was unlawful for him to withdraw the officer --

QUESTION: Right.

MR. UNGAR: -- for the avowed purpose of preventing people who were entitled to be naturalized, for the avowed purpose of preventing them from being naturalized.

QUESTION: And that was the basis for the Ninth Circuit's holding that time around.

MR. UNGAR: That was the Ninth Circuit's -- in addition the Ninth Circuit's --

QUESTION: So it is not a new legal point you are bringing up. You just want to recharacterize it as not estoppel now but what, we can remedy it by our equitable powers.

MR. UNGAR: Well, you can also remedy it --

QUESTION: Is there any new legal issue that is before us in this case?

MR. UNGAR: I am sorry, I missed the last --

QUESTION: Is there any new legal issue that is before us in this case other than the difference between estoppel and equitable discretion?

MR. UNGAR: I think there is a difference between estoppel and equitable discretion perhaps on the one hand and due process arguments on the other.

QUESTION: The due process argument. Right, I agree.

MR. UNGAR: I think there is a difference there, and I think that is an important difference, because if you are considering the due process violation, this issue of affirmative misconduct is irrelevant. One doesn't have to find affirmative misconduct on the part of federal officials in order to find a constitutional violation. The error is enough. I think it is important in that respect. And also the due process argument is also important because of subsequent post-war legislation, because the Congress cannot legislate away, so to speak, a constitutional injury to these people. So that would also be important for that reason.

Getting back to the issue of error, whether the Attorney General had the authority to withdraw the examiner from the Philippines during that time, the government says, first of all, that perhaps the Philippinos who were serving there were not entitled to naturalization in the first place. I think what Mr. Klonoff is forgetting is that the Attorney General made that determination in 1945 that Philippinos, like these respondents, were eligible for naturalization. That is not really an issue before the Court any more. They were determined to be within the scope of this particular statute.

As to the foreign affairs authority, it is true that the executive department has great authority in the field of foreign affairs, but here we have a statute under which Congress, exercising its naturalization powers, said these

people shall be naturalized. There is no case which says that the executive branch can take action in the field of foreign affairs, despite an Act of Congress which provides an opposite intent. I don't think the foreign affairs powers really goes that far.

As to the fact that Congress did not discuss specifically the issue of what it would want to do in the event of objections by the Philippines government as part of the foreign affairs issue, so to speak, it seems to me that it is hard to believe that Congress would have wanted to take away the offer of citizenship from Philippinos in the Philippines for such reasons, because when Congress enacted this law it made it specifically applicable to persons who were residing in the United States or its territories or possessions, and of course at that time the Philippines was the largest of the United States' possessions. They used language in the law that a person who served in the armed forces and who was not a citizen, rather than using the term "alien" is significant that Congress meant to include Philippinos, because Philippinos were then by far the largest number of people who were neither citizens nor aliens, but non-citizen nationals. The use of that language certainly indicates an intent to include Philippinos who were residing in the Philippines within the scope of this statute.

As Justice Stevens has pointed out, this law was

enacted at the very moment that the battles of Bataan and Coregedor were making headlines all across the country. Congress must have known that the Philippines was going to become independent at some future date. It must have known that President Roosevelt had brought all of these people into the Army. To suggest that Congress did not want these particular people to be naturalized seems to be inconsistent with all those particular ideas, and that if Congress really had wanted to exclude those Philippinos under these circumstances it would have made that intention explicit. It certainly didn't do that.

I think I have touched on the idea already about whether the Attorney General had an implied delegation of authority to withhold the benefits of the naturalization law from people in the Philippines. Section 705, as I have indicated, did delegate a certain amount of authority to the Attorney General and the Commissioner of Immigration to place representatives in various parts of the world.

As I pointed out before, there is a big difference between the authority to do that, the obvious discretion that he would have to have in light of scheduling and manpower problems and what was going on in the war, there is a big difference between that and deliberately removing an examiner who is already there for the purpose, the express purpose of taking away the offer of citizenship that Congress

had made to them. It seems to me if the Attorney General felt that there were reasons not to grant citizenship to Philippinos in the Philippines in 1945 it was for Congress to make that decision, because only Congress can determine who is to be naturalized, and that when the Attorney General made his decision, he really crossed the constitutional line between his role as a person who is supposed to faithfully execute the law with Congress's role to make the laws, particularly in the area of naturalization.

QUESTION: Mr. Ungar, would you comment on your opponent's argument that they could not have been prejudiced if none of them even knew about the program?

MR. UNGAR: Well, the government suggests that none of these people were injured because we don't know whether they ever would have found out about their opportunity to apply had the examiner remained on duty in the Philippines during that particular period of time. Well, of course, none of us will ever know that, but it seems to me that that sort of argument is putting these respondents in an impossible position. It is the government that is responsible for that. The government is saying, how can you tell us that you would have heard about this law when we, the government, have taken away the only way, the means that you could have applied. The only way thatyou could have learned presumably would be if we had left an examiner there. It is possible that word of

mouth would have reached these people.

QUESTION: Well, didn't the government have a duty to tell them?

MR. UNGAR: I think so, and I think there was an obligation to do that.

OUESTION: So that is like the guy that was charged with murdering his parents and pleading he was an orphan. That is the argument that the government is making. We didn't tell you about it, so you didn't apply, so now you are out.

MR. UNGAR: Yes, I think it is significant there, too, because other soldiers elsewhere were notofied of the opportunity of applying. There was a War Department circular that called upon --

QUESTION: That is a pretty hard argument to make in light of Hibi, isn't it?

MR. UNGAR: It is a hard argument under that -- I agree with you in that respect. I think in all farness it is difficult, too, because -- for another reason, and that is that these people, these men who were in the Philippine Scouts and the Philippine Army, and they were captured after the fall of Bataan and Coregedor and spent time in prison camps were stranded in the Philippine Islands during the war.

It would have been difficult to get notice to them, and when they came back --

QUESTION: They were on a march across the island.

MR. UNGAR: I beg your pardon?

QUESTION: They were on a march clean across the island.

MR. UNGAR: That's correct.

QUESTION: No food, no anything.

MR. UNGAR: They certainly were. So I think that underscores the injustice of what was done here. They were people that put their lives on the line for the United States at a very critical time in the war. They were promised American citizenship in exchange for that service, and when the war ended, for reasons which the Attorney General seemed to think were okay, we simply said, well, it is too bad, the war is over, we will forget about your opportunity to apply for naturalization.

QUESTION: But, Mr. Ungar, Congress itself changed its mind in 1948, didn't it?

MR. UNGAR: That is true.

QUESTION: It is not as if this had always been on the books. This was a statute that was in effect for a very short time and then Congress, which is the source of authority, changed its mind.

MR. UNGAR: Well, first of all, that was another Congress, and secondly, this was 1948, and I think there is no evidence in this record to show that Congress knew that the Attorney General had violated his duty under the 1942 Act.

I think the 1948 Act, the enactment of that bill, one can presuppose that Congress assumed that everybody who was covered under the 1942 Act would have had a fair chance to apply, and here the war is --

QUESTION: Well, but if the Solicitor General is correct, I would think maybe that isn't right, because I understood him to say that those whose applications were pending and qualified, some of them were cut off under the 1948 Act.

MR. UNGAR: That is true, and it is interesting also, Your Honor, that Mr. Klonoff refers to the Category Two veterans and Category One veterans. Category One veterans are those who learned about the opportunity to apply during the war and made an effort to apply but were told that they were ineligible to do so.

Now, the government is acquiescing in their naturalization even today on the theory that they made an effort to do it and there was some sort of -- as an equitable matter they should be naturalized today. If one followed Mr. Klonoff's argument to its logical conclusion they shouldn't be naturalized either because the 1948 Act would have cut them off, but I think the main point is that 1948 was two years after Philippine independence. Congress could have looked at the situation and said, look, we gave you people an opportunity to apply for naturalization during the war and

right afterl the war. You had a fair chance to do that, and if you chose not to accept American citizenship, we are just not going to extend it any more. There is no indication here that Congress knew that these people were deprived of their opportunity to apply in 1945 and 1946. Had they known that maybe there would have been a different result, but I don't think it's fair to suggest that because there was an enactment in 1948, that Congress really meant to cut off the rights of someone who was injured by governmental conduct prior to that time.

QUESTION: Of course, the whole thing might have been a mistake from the beginning. We don't really know for sure that when Congress said the military or naval forces of the United States it meant to include the Commonwealth Army.

MR. UNGAR: One could have made that interpretation, I suppose, and if they had made that interpretation I guess we wouldn't be here today, but the fact is that that was the intepretation that the Attorney General made in 1945.

QUESTION: I understand, but it makes the injustice, if that is what it was, seem a little less acute when it was a dicey question whether that language would have been interpreted to include Philippinos in any event.

MR. UNGAR: Well, that question has never really --

QUESTION: To -- one group of people on the basis of race and denied them something, I don't know what

else you can call it.

MR. UNGAR: I think that is also true. That is a separate issue. Only Philippinos as a class were discriminated against in the operation of this particular law.

QUESTION: Yoi can't make it -- paint it over.

QUESTION: Well, it wouldn't be on the basis of race. It would be on the basis of what army they served in. whether they served in the Army of the United States or an army that was not an army. That is how the statute --

MR. UNGAR: I don't think that is true at all. They were barred from becoming citizens because they were Philippinos, and we didn't want them coming to the United States for whatever reason at that time.

QUESTION: These people all served under General McArthur, didn't they?

MR. UNGAR: Yes, they did.

Just to get back to Justice Stevens' question about the injury, again, I think it iks really asking the respondents to prove the impossible to say that they would have heard about this law had the examiner remained on duty in the Philippines in 1945.

And I hope the outcome of this case is not going to turn on that particular question. We will never know what could have happened if the examiner had stayed there. But it seems to me that is -- the reason we don't know is the

government's own error, and that shouldn't prejudice these respondents in that particular light, and I think it is also important to remember in that context that these veterans were cut off during the war from all opportunity to learn about the law. All this happened as the war was drawing to a close and they were scattered throughout the Philippines. There was only one examiner in Manila who was doing this and there was no official notice to these people as there was to others, and the fact is that some people did find out about it.

The Category One people that we have referred to did find out about their opportunity, and they must have found out about it through word of mouth, so it seems to me logical to assume that had the offer remained there there certainly was a better chance that these people would have found out about their opportunity to be naturalized and would have taken whatever steps were appropriate to apply.

QUESTION: May I ask, is there any evidence as to whether there is any publicity in newspapers, even in Army papers, you know, the GI -- I can't remember the name of it now, but this program wasn't discussed?

MR. UNGAR: There is no evidence at all that I could find to show that these people in the Philippines were notified about their opportunity to apply for naturalization.

Mr. Klonoff refers to the Fedorenko and the Ginsberg cases as suggesting that a court is not allowed to look beyond

What the statute provides with respect to naturalization. It seems to me there is a difference between those cases in determining -- there is a difference, in other words, in determining whether an individual is eligible for naturalization, in which case obviously a court has to look at the naturalization statute as Congress provided. What happened here was different. It wasn't a question of whether these Philippino veterans were eligible for naturalization. Rather, it was a decision to bar them from even applying. I think there is a big difference which allows the Court to provide a remedy whether on a constitutional or an equitable basis.

QUESTION: May I ask one other question that goes to the remedy matter? Do we know how many people have an interest in the outcome of this case?

MR. UNGAR: No, we really don't know. I think the government has been arguing large numbers from the very beginning in the Hibi case when they filed their petition for certiorari in the Hibi case -- he was a Scout, by the way, in the much smaller unit, and at that time the government was suggesting that as many as 30,000 Philippino Scouts were still alive and would apply and 80,000 dependents would apply, and that is only the Scouts.

Now, here it is 20 years later, since -- the reason that many of these people found out about the law in later years was the Hibi litigation and the '68 veteran ligitation.

All this has been going on for 20 years, and at most we have a couple of thousand people who have come forward now to make application, so it seems to me the numbers involved are very small. I don't know what the exact numbers are. There are certain petitions pending in various courts around the country. But clearly they are small in terms of overall immigration. We invite as many as 800,000 people a year into the country legally. It is small in terms of the two million or so people we have invited to come in and apply for amnesty. Common sense tells us that it has to be a small number because these are an aging group of people. I mean, in this particular case the youngest man is 64. The oldest is in his eighties. There aren't that many more who are going to be able to come here.

I think one has to start out with --

QUESTION: I assume that is irrelevant to our decision, of course.

MR. UNGAR: Well, I think it is relevant perhaps in the sense of balance.

QUESTION: I mean, whether we will provide justice to a lot of people or just a few people.

MR. UNGAR: I beg your pardon?

QUESTION: I am not sure it is, when you weigh the equities in a case like this, I think one might consider the public consequences. I am not sure it is totally irrelevant.

MR. UNGAR: That is the point I was going to make.

QUESTION: On the remedy issue.

MR. UNGAR: It may be relevant in a balancing of equities situation. What I am trying to suggest is the weight to that particular argument ought to be very small because there can't be very many who are going to benefit --

QUESTION: What about the children?

MR. UNGAR: The children are not going to benefit. These are men in their sixties, seventies, and eighties. The only kinds of children who would benefit under our immigration laws would be unmarried minor children who would come here to the United States outside of the quota system. The present quota system from the Philippines is so oversubscribed that any aduilt child of an Amerncan citizen has to wait ten years or more to come here.

QUESTION: I suppose, but if they had had a chance to qualify and be naturalized wayback when, then the children would have --

MR. UNGAR: They would have been born in this country and they would be natural born citizens. That is true.

QUESTION: Yes. Well, how come equity wouldn't reach them?

MR. UNGAR: Persons who were born in the United States? I am not sure I follow your --

QUESTION: Persons -- children of these aging men who if they had been naturalized way back when would have been citizens of the United States.

MR. UNGAR: That is probably true.

QUESTION: Why won't equity protect them?

MR. UNGAR: Well, it is another step forward, and I think it would be a much harder argument.

QUESTION: That would be the next case.

QUSTION: You mean they can only come to this country without their children?

MR. UNGAR: Well, they could only come to this country --

QUESTION: You are going to tell them you can leave the Philippines so long as you leave your family there?

MR. UNGAR: At that time, if they were still young enough and these people were naturalized they could have come. the fact is, if you are weighing the equities and balancing the equities, you have to do it as of today, and as of today there aren't going to be very many children of these veterans, if any, who are going to come to the United States under --

QUESTION: Well, as of today the law is expired.

MR. UNGAR: I think the law may have expired, but for the reasons I have indicated, the Court has the authority to remedy the wrong that was done to these people either on

constitutional or equitable principles. I think the bottom line in this case, I have always felt, is that Congress made a promise to these people back in 1942 that they could become American citizens if they served in the armed forces. These people did serve in the armed forces of the United States. They were entitled under the law to be naturalized. The Attorney General did not give them the authority to -- did not allow them to do that. He violated his authority under that law, which was contrary to the intent of Congress, and since he had no authority to do that, I think the Court has the authority to provide a remedy despite the many considerations that Mr. Klonoff has referred to in terms of subsequent legislation, and so on.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ungar.

Mr. Klonoff, you have one minute remaining.

ORAL ARGUMENT OF ROBERT H. KLONOFF, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. KLONOFF: Very briefly, on the Hibi point I would just refer the Court to Page 3 of our reply brief, in which it is quite clear that the arguments made in Hibi by the respondent in the memorandum in opposition, which was the pleading before the Court since it was summarily reversed are identical to the arguments made here, the characterization of the case.

QUESTION: Mr. Klonoff, on the equitable discretion point, how did these Class One veterans who had applied but not yet been naturalized, how did they get in if there is no equitable power to ignore the subsequent repealer of the law?

MR. KLONOFF: That is a very good question. The decision on Category One was made as a policy matter, and quite frankly, that is a policy decision that, depending on how the Court analyzes the issue, is going to have to be reconsidered in the future.

QUESTION: You mean the executive has that equitable power but the courts don't?

MR. KLONOFF: Well, the executive doesn't rule on naturalization. The executive makes a recommendation, and all that was happening is that the executive wasn't affirmatively opposing naturalization. It is a decision that is made by the courts.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff. The case is submitted.

(Whereupon, the matter in the above-entitled case was submitted at 3:59 p.m.)

REPORTER'S CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 3/1/88

Margaret Daly
Official Reporter

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