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NATURALIZATION OF FILIPINO WAR VETERANS

During World War II, Congress expanded naturalization opportunities for thousands of foreign soldiers across the world. To avoid potential political embarrassment, however, the INS purposefully deprived Filipino veterans of the opportunity to apply for American citizenship. This Comment examines the efforts of the Filipino veterans to secure the hard-earned benefits of the wartime naturalization legislation — nearly forty years after its expiration.

INTRODUCTION

Naturalization of Filipino war veterans is a remarkable story of struggle between competing legal and political interests. These veterans, who served alongside American soldiers in some of the bloodiest battles of World War II, seek naturalization as United States citizens under the provisions of a statute which expired nearly forty years ago. The United States government, initially grateful for the deeds performed by the Filipino veterans, later feared their naturalization would precipitate a diplomatic crisis with the new Philippine government. In apparent response to international pressures, the United States government suspended the naturalization program in the Philippines and effectively deprived thousands of Filipino servicemen of the opportunity to become American citizens. Recently, as courts have attempted to address these problems, several important legal issues have arisen from the controversy.

This Comment examines the legal issues concerning naturalization of Filipino war veterans, providing a basis of inquiry and analysis for the practicing attorney. The historical background of the problem is summarized. Additionally, the development of case law in the area is examined to determine the nature and status of the issues involved in the naturalization of the Filipino veterans. Finally, future issues and possible directions in these cases are explored.
The problems of Filipino war veterans arise from a series of events in the aftermath of World War II. In 1942, sections 701 and 705 were added to the Nationality Act of 1940 (the Act) by the Second War Powers Act. Section 701 of the Act exempted aliens who served with United States Armed Services during World War II from normal residency and literacy requirements for naturalization. Eligibility for naturalization under the liberalized provisions required that the alien be in active service at the time of application. Under the provisions of section 702, the Immigration and Naturalization Service (INS) was directed to provide for overseas naturalization of those eligible under section 701 who were in active service in the military but outside the jurisdiction of any court authorized to naturalize aliens. Additionally, section 705 directed the INS, under the Attorney General’s authority, to implement procedures and regulations necessary to carry out the Act’s provisions. Subsequent
amendments to the Act required that all petitions for naturalization under these provisions be filed no later than December 31, 1946.6

Between 1943 and 1946, INS officers were sent to overseas military posts to naturalize eligible members of the United States Armed Forces. In the Philippines, however, Japanese occupation of the islands initially precluded naturalization of alien servicemen. By the end of 1944, American troops landed and regained control of the Philippine Islands, capturing Manila in March 1945.7 However, no INS representative was sent to the Philippines to naturalize aliens pursuant to Section 702 until August 1945.8

Unfortunately, political considerations soon complicated the Philippine naturalization effort. Under section 10(a) of the Philippine Independence Act of 1934,9 the Philippines was to become an independent country on July 4, 1946. Apparently concerned that the naturalization program would adversely affect United States relations with the new Philippine government, the INS Commissioner requested the Attorney General to revoke all naturalization authority of the INS representative in the Philippines.10 The Attorney General granted the Commissioner’s request, and naturalization efforts were subsequently discontinued in late October 1945.11 Although another naturalization agent was later assigned to the Philippines from August 1946 to the expiration of the Act, eligible Filipinos were denied the opportunity to apply for naturalization for nine months. Because section 701 required present service in the Armed Services,12 all Filipinos who were discharged from the United States Armed Services during the period were ineligible for naturalization under the provisions of the Act when the program was reinstated.13 However, dur-

7. 19 ENCYCLOPEDIA BRITANNICA 1009 (1975).
12. See supra note 3.
13. The INS was well aware that the suspension of the naturalization program would deny the Filipinos an opportunity to take advantage of the Act. As disclosed in an INS internal memorandum, the revocation of naturalization authority left “the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits under the Act we have, from an administrative standpoint, made it impossible for such persons to acquire these benefits.” Memorandum to Ugo Carusi, Commissioner
ing the time that INS representatives were stationed in the Philippines after August 1946, more than 4,000 Filipinos took advantage of sections 701 through 705 of the Act.\textsuperscript{14}

As a result of government suspension of the Philippine naturalization program, Filipino veterans continue to seek naturalization under the provisions of the Act, even though the authorizing statute has long since expired. Government estimates place the current number of eligible Filipinos at between 60,000 to 80,000 people.\textsuperscript{16} Although few of that number are expected to apply for naturalization, as many as 1,600 Filipino war veterans are directly affected in California alone.\textsuperscript{16} In addition, each veteran who successfully naturalizes under the liberalized requirements of the Act can establish permanent residency status for immediate family members,\textsuperscript{17} thereby multiplying the potential effect of naturalization for Filipino veterans. Rather than simply providing a springboard for legal doctrine in other immigration cases, this problem is significant enough to merit serious examination in its own right.

\textbf{Naturalization through Litigation}

Though the expiration date of the Act is long past,\textsuperscript{18} many Filipino veterans still seek naturalization under its provisions. To obtain relief, the Filipinos raise several issues regarding government suspension of the naturalization program. Petitioners for naturalization have based their claims for relief on three different grounds. First, based on the principles of equitable estoppel, errant administration of the naturalization program by the government estops reliance on the statutory expiration date of the Act. Second, government management of the naturalization program violates the Filipinos' rights

\textsuperscript{14} Edward J. Shaughnessy, Special Assistant to the Commissioner of the INS (Oct. 19, 1945) \textit{reprinted in 68 Veterans}, 406 F. Supp. at 936.

\textsuperscript{15} Mendoza v. United States, 672 F.2d 1320, 1327 (9th Cir. 1982), \textit{rev'd} 104 S. Ct. 568 (9th Cir. 1984); Barretto v. United States, 694 F.2d 603, 606 (9th Cir. 1982), \textit{rev'd} \textit{sub nom}, INS v. Litonjua, 104 S. Ct. 990 (1984). Both Ninth Circuit decisions discounted the accuracy and significance of government figures, but the numbers are a reasonable estimate of the surviving Filipinos who served in the United States Armed Forces and were eligible for naturalization under the provisions of the Act. During World War II, an estimated 175,000 Filipinos served in the United States Armed Forces. L.A. Times, Oct. 22, 1983, \textsection 2, at 1, col. 2.

\textsuperscript{16} Television editorial by Bill Fox, General Manager of KCST-TV in San Diego (January 20, 1984). In the San Francisco area alone, the INS currently has 738 such naturalization applications or petitions pending. Additionally, the San Francisco INS office has "at least three and one half boxes of letter inquiries from aliens expressing an interest in or asking for information with respect to applying for naturalization as Filipino war veterans." No specific count of the inquiries has been made. Letter from Lauri S. Filppu, Deputy Director of Office of Immigration Litigation, to Ninth Circuit Court of Appeals (June 14, 1984) (regarding United States v. Mendoza).

\textsuperscript{17} 8 U.S.C. \textsection 1153(a)(1) (1982).

\textsuperscript{18} \textit{See supra} note 3.
to due process of law. Finally, the government should be collaterally estopped from the relitigation of issues settled in an adverse decision against them. This Comment examines the development of each of these issues and the effect each has on current efforts to naturalize the veterans.

Equitable Estoppel

Equitable estoppel was the first basis of relief relied upon by Filipino veterans. When an individual has induced another to act in a particular manner, the doctrine of equitable estoppel generally prevents that individual from adopting an inconsistent position or course of conduct which causes loss or injury to the other. Recently, litigants have sought to estop the government from relying on statutory requirements and procedures when government actions constitute misconduct. In INS v. Hibi, the petitioner entered the United States in 1964 on a visitor-for-business visa and subsequently filed for naturalization based on section 702. Hibi argued that the government was estopped from relying on the expiration date of the Act because the government had failed to advise him of his right to naturalization and to provide a naturalization representative in the Philippines while he was eligible for naturalization.

However, the Supreme Court refused to estop government reliance on the expiration date, finding that INS administration of the Act did not constitute the “affirmative misconduct” necessary for estoppel. The Court never directly decided whether affirmative misconduct could estop the government. Instead, the Court held that the particular facts of Hibi did not properly raise the issue of equitable estoppel.

Hibi was a landmark case in the use of equitable estoppel against the government in immigration cases. Hibi continues to influence the manner in which courts apply equitable estoppel against INS misconduct in other circumstances. Because the Court never established definitive criteria for identifying “affirmative misconduct,”

22. Id.
lower courts have been forced to compare their cases with the factual circumstances in Hibi. In Santiago v. INS,24 for example, the court held that INS activities constituted "affirmative misconduct" only if they were more blameworthy than the conduct at issue in Hibi.25 Subsequent cases have continued to rely on case-by-case comparisons to determine the application of equitable estoppel against the government.26

As courts struggled with the estoppel issue in other contexts, another case which involved Filipino veterans focused on the estoppel doctrine. In In re Naturalization of 68 Filipino War Veterans,27 equitable estoppel was viewed in a new light. The court classified all petitioners into one of three different categories, categories which continue to play a role in cases today. Category I included eligible veterans who submitted applications or pursued naturalization under section 702. Category II veterans were those who were eligible under the provisions of the Act but took no timely steps to be naturalized prior to December 31, 1946. Category III included veterans who were unable to show that they had served in the United States Armed Services. For the equitable estoppel claim, only Category I veterans were considered for relief.28

The court in 68 Veterans factually distinguished Hibi and held that, for several reasons, the Supreme Court's decision in Hibi should be narrowly interpreted and limited to its own facts. First, the court noted that the Hibi decision was a summary reversal, decided solely on the basis of a petition for certiorari without benefit of full oral argument, and from which three justices strongly dissented.29 Additionally, the court noted that Hibi had made no effort to file a naturalization petition while still in the Army. Instead, he claimed that governmental failure to publicize his right to apply for naturalization and to station an INS representative estopped reliance on the expiration date.30 In contrast, Category I veterans had actively pur-

24. 526 F.2d 488 (1975) (en banc), cert. denied, 425 U.S. 971 (1976) (alien, misled by INS agent into thinking entry was legal, later deported when failed to meet visa requirements).
25. Id. at 493.
26. See, e.g., INS v. Miranda, 459 U.S. 14 (1982) (unexplained failure by INS to act on visa petition for 18 months not "affirmative misconduct"); Oki v. INS, 598 F.2d 1160 (9th Cir. 1979) (per curiam) (INS not estopped by failure to notify student that permission was needed to work); Sun II Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976) (INS estopped by failure to follow INS regulations); Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (INS estopped for failure to warn).
28. As discussed later in this Comment, only the Category I claims involved government misconduct that was distinguishable from the actions considered in Hibi. The equitable estoppel claims by Category II and III veterans, based on circumstances nearly identical to those in Hibi, were essentially foreclosed by the Hibi decision.
29. 68 Veterans, 406 F. Supp. at 938.
30. Id.
sued their rights under the statute, and the American government had either informed them that their application for naturalization would be pointless or refused to act on the pending applications. Employing a misfeasance/nonfeasance distinction, the court found that the facts alleged against the government in *Hibi* constituted a failure to take affirmative action by the government, a type of “nonfeasance” which fell below the level of affirmative misconduct necessary for estoppel. On the other hand, in the view of the court, governmental actions against Category I veterans were affirmative conduct which directly prevented naturalization of the veterans. The court thus held that the “misfeasance” of the government rose to the level of affirmative misconduct sufficient to support the estoppel claim.\(^\text{31}\)

Because Supreme Court estoppel guidelines were subject to inconsistent interpretations, the court in *68 Veterans* also held that Category I veterans “constructively filed” their applications before the expiration of the Act. Although the government claimed that “constructive filing” was merely a variant of equitable estoppel, the court found the two doctrines sufficiently distinct. Whereas equitable estoppel was used to prevent the government from claiming that the provisions of the statute were unfulfilled, “constructive filing” alleged that the veterans fully complied with the statute. Relying on *In re Vacontios’ Petition*,\(^\text{32}\) the court held the act of filing Form N-403\(^\text{33}\) by Category I veterans, although not a formal petition for naturalization, was the constructive equivalent of filing a petition for naturalization, thereby establishing compliance with the statutory deadline.\(^\text{34}\)

Although the government initially docketed an appeal from the *68 Veterans* decision, the court in *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975), the court did not embrace the misfeasance/nonfeasance distinction used in *68 Veterans* as a basis for estoppel. Rather, the court in *Santiago* limited its analysis to a comparison with the facts in *Hibi*. In light of the *Santiago* decision, the *68 Veterans* court noted in addendum that Category I veterans were independently entitled to relief on both due process and constructive filing grounds. *68 Veterans*, 406 F. Supp. at 951. Although the estoppel claim was neither expressly overruled nor affirmed in addendum, the court in *68 Veterans* had also evaluated the relative “blameworthiness” of INS action as compared to *Hibi*. *68 Veterans*, 406 F. Supp. at 938. The “blameworthiness” distinctions with *Hibi* are consistent with the *Santiago* decision and are apparently sufficient to support the Category I estoppel claims.

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Veterans decision, it later withdrew the appeal.\textsuperscript{35} The INS Commissioner decided not to appeal the decision in furtherance of a policy of "compassion and amnesty."\textsuperscript{36} Apparently, that policy was shortlived. Reevaluating its position, the INS subsequently revived its challenges to the naturalization of the Filipino veterans.\textsuperscript{37} However, these challenges have been limited to Category II veterans. Presently, the INS recommends naturalization of all Category I veterans, as well as all Category II veterans who have filed for naturalization prior to government withdrawal of its petition in 68 Veterans. Thus, Category I veterans have been successful in asserting their claims of equitable estoppel and constructive filing through a favorable court decision and administrative concessions by the government.\textsuperscript{38}

\textbf{Due Process and Equal Protection Claims}

As American nationals at the time the Act was in force, the Filipino veterans were entitled to due process protections under the United States Constitution. Unlike other aliens naturalized under the Act, the Filipinos were American nationals, residing in American territory and subject to the law of the United States, until the Philippines became an independent nation on July 4, 1946.\textsuperscript{39} As nationals, Filipinos had rights analogous to those of non-citizen residents of the United States.\textsuperscript{40} Thus, the constitutional protections of the due process clause of the fifth amendment and the equal protection rights derived from that provision were available to the Filipinos during the administration of the naturalization program.\textsuperscript{41} Although courts uniformly held that the Filipino veterans were entitled to such protections, they disagreed when defining the constitutional interest at stake, selecting the proper standard to apply in evaluating governmental administration of the Act, and characterizing the nature of governmental conduct.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{35} United States v. Mendoza, 104 S. Ct. 568, 573 (1984).
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 571 n.2.
\item \textsuperscript{38} Classification as a Category I veteran is generally based on the petitioner's own testimony. Three of the seven Category I veterans in 68 Veterans relied solely on their own testimony to show they pursued naturalization while eligible under the Act. The court found their testimony sufficiently plausible and persuasive, and thus granted them Category I status. 68 Veterans, 406 F. Supp. at 938 n.12. Because the INS has agreed to naturalize Category I veterans in compliance with the 68 Veterans decision, the INS currently has the initial authority to determine whether the petitioner is a Category I veteran. Any adverse finding by an INS representative may then be directly challenged in court. See infra text accompanying notes 45-46.
\item \textsuperscript{39} 68 Veterans, 406 F. Supp. at 940-42; Olegario v. United States, 629 F.2d 204, 222 (2d Cir. 1980).
\item \textsuperscript{40} See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954); Balzac v. Puerto Rico, 258 U.S. 298, 312-13 (1922).
\item \textsuperscript{41} 68 Veterans, 406 F. Supp. at 941-42.
\item \textsuperscript{42} It is important to note that the \textit{Hibi} decision did not foreclose consideration
\end{itemize}
Due process protections in naturalization cases are guided by several unique considerations. Generally, immigration and naturalization laws draw distinctions based on alienage, race, and ethnic origin and permit the executive branch to admit or exclude aliens as it deems proper. However, the authority of the government is significantly more restricted by due process considerations regarding American nationals and non-citizen residents. In addition, a significant distinction exists between the immigration and naturalization functions of the government. While the executive branch normally has broad discretion to formulate policy and procedure for the enforcement of immigration laws, Congress maintains exclusive constitutional authority in matters of naturalization.

The authority of the INS in naturalization matters is limited to an investigatory role before the court which has ultimate authority to rule on petitions for naturalization.

The principal cases which have addressed the due process claims of the Filipino veterans are 68 Veterans and Olegario v. INS. In both cases, the courts held that the veterans could pursue due process claims against the government. However, the courts fundamentally disagreed on the effect of government action on the veterans' due process rights.

68 Veterans

The due process issue was initially raised by the Filipino veterans in the Ninth Circuit in 68 Veterans. Category II veterans claimed that their fifth amendment rights to due process were violated by the failure of the United States government to station a naturalization representative in the Philippines. Particularly, the veterans claimed that their due process claims subsequently raised in other cases. The constitutional issues addressed in later cases were neither presented nor considered in Hibi. See 68 Veterans, 406 F. Supp. at 942-43; Olegario, 629 F. Supp. at 221-22.

45. 5 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 14.7a (1984).
48. 629 F.2d 204 (1980).
49. 68 Veterans, 406 F. Supp. at 931.
50. Although the due process claims are the primary bases for relief by Category II veterans, the due process claims are also applicable to Category I veterans. 68 Veterans, 406 F. Supp. at 951. Since the government is presently challenging the applications of Category II veterans, the due process claims are currently relevant only for that category.
that governmental actions discriminated against the Filipinos as a class.51 During the statutory life of section 702, the Philippines were the only region where authorization for the naturalization representative was revoked. Because the discrimination was based on alienage and national origin, the Filipino veterans claimed that government administration of the Act should be subject to strict judicial scrutiny.52

Noting the general trend toward greater constitutional protections for foreign nationals who reside in the United States,53 the court in 68 Veterans examined the scope of constitutional guarantees available to American nationals. Although the status of American nationals residing in American territories is not completely analogous to that of non-citizen residents of the United States, the 68 Veterans court held that Filipinos were protected by the same due process guarantees accorded non-citizen residents.54 Because classifications based on alienage, nationality, or race are inherently suspect,55 the court held that any state or federal action which discriminates against the Filipinos on the basis of alienage or national origin is subject to strict judicial scrutiny and can only be justified by a compelling state interest.56

Applying the strict scrutiny standard to administration of naturalization laws, the court in 68 Veterans found no compelling state interest sufficient to justify government discriminatory actions against the Filipinos. Relying on cases which involved the restriction of persons of Japanese ancestry during World War II,57 the court held that governmental concerns about the maintenance of amicable relations between the United States and the Philippines failed to justify the actions of the INS Commissioner and Attorney General. Although the court agreed that the government was justifiably concerned about the effects of the naturalization program on relations with the new Philippine government, the problems anticipated by the

51. The veterans, of course, did not base their constitutional argument on the equal protection clause of the fourteenth amendment, since no state action was present. Rather, their equal protection claim was founded on the principle that the unequal application of law among those entitled to be treated alike is violative of the due process clause of the fifth amendment. 68 Veterans, 406 F. Supp. at 948 n.26. While "equal protection of the laws" and "due process of law" are not always interchangeable phrases, "discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

52. 68 Veterans, 406 F. Supp. at 948.


54. 68 Veterans, 406 F. Supp. at 950.


government were neither "exceptional" nor of the "greatest imminent danger." Therefore, the court held that the diplomatic concerns of the government did not justify suspension of the naturalization program in the Philippines.

Olegario v. United States

In Olegario v. United States, the Second Circuit, disagreeing with the findings in 68 Veterans, held that the government had much greater discretion in administration of naturalization affairs. In accord with 68 Veterans, the Olegario court agreed that Filipino veterans were entitled to assert a claim based on the due process clause of the fifth amendment and the equal protection rights derived from that provision. However, Olegario rejected strict judicial scrutiny as the proper standard for determining whether government administration of the Act violated the equal protection guarantees of the veteran. Although Congress is vested with exclusive authority over naturalization, Olegario held that the wide discretion of the executive in foreign affairs justified discretionary enforcement of naturalization statutes.

The Olegario court distinguished equal protection rights accorded aliens in federal government enforcement of immigration and residency regulations from traditional equal protection cases, making the "strict judicial scrutiny" standard inappropriate for review of governmental administration of the Act. In Mathews v. Diaz, the Supreme Court upheld provisions of a statute which denied Medicare benefits to aliens who had never been admitted to permanent residence or who had not resided in the United States for at least five years. Because Congress was under no obligation to provide these benefits to aliens, a party who challenged the regulation was required to show convincing reasons why the line for denial of benefits should be drawn elsewhere. Relying on Diaz and Hampton v. Mow Sun Wong, the Olegario court noted that some "national interests are sufficiently weighty to support discriminatory treatment

58. 68 Veterans, 406 F. Supp. at 950-51.
59. Id. at 951.
60. 629 F.2d 204 (1980).
61. Id. at 222.
62. See supra text accompanying note 44.
63. Olegario, 629 F.2d at 226-27.
64. 426 U.S. 67, 84 (1976).
65. Id. at 82.
of aliens."67 Olegario summarily concluded that governmental concerns regarding amicable relations with the new Philippine government reasonably justified the discriminatory administration of the naturalization program.68

The court in Olegario also addressed the due process issue of whether the petitioner was unconstitutionally deprived of a "liberty interest" by governmental administration of the naturalization program. The fifth amendment prohibits the government from depriving an individual of "life, liberty, or property, without due process of law."69 To invoke the due process protections of the fifth amendment, a litigant must establish that the interest sought to be protected is within the rights encompassed by the fifth amendment.70 In the Filipino veteran cases, petitioners for naturalization claim that the withdrawal of the naturalization program from the Philippines arbitrarily deprived them of a "liberty right," created by statute, to apply for naturalization.71

In Olegario, petitioners argued that the Act created a constitutionally protected "legitimate claim to entitlement."72 The court, however, found that the provisions of the Act established no vested right of naturalization, but simply an administrative procedure by which aliens were given the opportunity to apply for naturalization under liberalized requirements.73

Finding no deprivation of a vested "liberty interest," the Olegario court next considered whether the actions of the executive branch clearly contravened the congressional mandate contained within sections 701 through 705. No provision of the Act expressly authorized the INS Commissioner or Attorney General to withdraw naturalization representatives. The executive branch has some discretion in enforcing these provisions, but section 705 directs the Commissioner, with the approval of the Attorney General, to implement such administrative procedures "as may be necessary to carry into effect the provisions of this Act." Whether or not Congress would have granted the executive branch the authority to halt implementation of the Act upon foreign policy considerations, the provisions of the act did not expressly confer such authority on the INS Commissioner and Attorney General.

Absent express mandate or prohibition, statutes may implicitly confer discretionary authority on the executive branch. Normally,

67. Olegario, 629 F.2d at 230.
68. Id. at 232-33.
69. U.S. Const. amend. V.
71. Olegario, 629 F.2d at 223.
72. Roth, 408 U.S. at 564.
73. Olegario, 629 F.2d at 223.
such implicit legislative intent is derived from the traditional separation of powers among the various branches of government. However, the interests of naturalization and foreign affairs are normally the domain of the legislative and executive branches, respectively. Thus, petitioners in Olegario claimed that the ultimate authority of Congress over naturalization matters precludes implying discretionary authority by the executive branch in enforcing the Act. The government, on the other hand, claimed that traditional discretion of the executive branch over foreign affairs extends to the administration of naturalization laws, and that the opposition of the Philippine government to the program was a valid foreign policy justification for suspending enforcement of the program.

The Olegario court held that the INS Commissioner and the Attorney General acted within their discretion when they suspended the naturalization program at the behest of the Philippine government. Noting that the executive is traditionally given broad latitude in foreign policy areas, and that the intent of Congress was not patently contrary to actions of the executive branch, the court in Olegario found that the Attorney General had properly exercised his discretion under the Act for the purpose of averting a "potential diplomatic conflict," thereby outweighing the equal protection interests of the Filipino veterans.

Conflict Between the Circuits

The decisions in 68 Veterans and Olegario represent substantial differences in approach to the issue of due process. In 68 Veterans, the court held that the concern of the government for amicable relations with the new Philippine government failed to justify the discriminatory administration of the veteran naturalization program. In contrast, the Olegario court found that the government exercised reasonable discretion in the administration of the program. Although

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75. Olegario, 629 F.2d at 225-26.
77. Although Congress was never informed of, nor ratified, the Attorney General's suspension of the naturalization program, the court in Olegario looked to the legislative history of the Armed Forces Voluntary Recruitment Act of 1945, Pub. L. No. 79-190, § 14, 59 Stat. 543 (1945). Although the statute provided for the recruitment of 50,000 Filipinos to serve with American occupation forces in Japan, the court considered provisions which made the program contingent upon "the approval of the Philippine government" relevant to determining the legislative intent of §§ 701-05. Olegario, 629 F.2d at 227-28.
78. 629 F.2d at 228-33.
the government admittedly discriminated against the interests of the Filipinos, government conduct was justified by overriding national interests, was consistent with congressional intent, and did not deprive the veterans of a protected “liberty interest.”

However, the two decisions also share some similarities. Both opinions recognized that the Filipinos were entitled to due process under the fifth amendment. Moreover, both courts found that government conduct actively discriminated against the Filipinos. Finally, both courts held that the decision of the Supreme Court in Hibi did not address the constitutional issues raised by these cases. Although the Olegario decision has effectively foreclosed further litigation in the Second Circuit, the district court opinion in 68 Veterans soon led to a third basis for legal redress.

Collateral Estoppel

The third basis relied upon by the Filipino veterans was the application of offensive collateral estoppel79 against the government. Petitioners for naturalization sought to estop the government from relitigating the constitutional issues decided in 68 Veterans. The collateral estoppel claim was initially endorsed in In re Colmenar.80 The Colmenar court found present all of the elements81 necessary to collaterally estop the government from challenging the constitutional issues decided in 68 Veterans. The INS was a party to 68 Veterans, which involved issues identical to those addressed in Colmenar. Additionally, the issues were resolved by final merit judgment. Thus, the Colmenar court found that the INS could not challenge the due process issues previously addressed in 68 Veterans.

The Colmenar decision was endorsed by the central district of California in In re Nisperos82 but rejected by the southern district of California in In re Litonjua.83 The collateral estoppel issue later reached the Ninth Circuit Court of Appeals in Mendoza v. United States84 and Barretto v. United States.85 Although both decisions

79. Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue that the defendant has previously litigated unsuccessfully to a merit judgment in another action against the same or a different party. By contrast, defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue that the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Parklane Hosiery v. Shore, 439 U.S. 322, 329 (1979).
81. See supra note 79.
84. 672 F.2d 1320 (9th Cir. 1982).
85. 694 F.2d 603 (9th Cir. 1982).
were subsequently reversed by the Supreme Court, a review of the
decisions is essential to an understanding of the present status of the
Filipino veteran cases.

The Ninth Circuit in Mendoza reconciled the findings of the lower
courts with the Supreme Court decision in Parklane Hosiery Co. v.
Shore and the Second Circuit decision in Olegario. In Parklane
Hosiery, trial courts were given broad discretion to apply collateral
estoppel offensively to avoid needless litigation. Such discretion was
to be guided by the general rule that, where a plaintiff could easily
have joined in the earlier action or where the application of offensive
collateral estoppel is unfair to a defendant, the defendant should be
allowed to relitigate issues from a previous adverse decision. In
Mendoza, the government claimed that the application of collateral
estoppel would be grossly unfair for three reasons. First, the govern-
ment argued that the Solicitor General’s decision to withdraw the
appeal in 68 Veterans was made without a “complete understand-
ing” of the consequences of the 68 Veterans decision. Moreover, it
contended that the decision in Olegario, refusing to apply coll.teral
estoppel and ruling in favor of the government on the constitutional
issues, made application of collateral estoppel unfair. Finally, it
claimed that the analysis of Parklane Hosiery should be limited to
private litigants because of the geographic breadth of government
litigation and the nature of the issues the government litigates.

The Mendoza court discounted each of the claims of the govern-
ment, finding no circumstances which would make application of of-
fensive collateral estoppel unfair to the government. Although the
government claimed that original estimates of eligible Filipinos were
understated, the court found little support for revised figures of the
government. According to the government, 60,000 to 80,000 Filipi-
nos are eligible for naturalization as a result of the 68 Veterans deci-
sion. However, less than 100 veterans had applied for naturalization
as of 1978. The court therefore found that the potential impact on
future applications did not unfairly prejudice the interests of the
government.

86. Mendoza v. United States, 104 S. Ct. 568 (1984); Barretto v. United States
88. Parklane, 439 U.S. at 331.
89. Mendoza, 672 F.2d at 1326-29.
90. Hearings Before the Subcomm. on Immigration, Citizenship and Interna-
(statement of Leonel Castillo, Commissioner of INS).
Recognizing that Olegario was inconsistent with the result in 68 Veterans, the court in Mendoza found that Olegario did not preclude application of collateral estoppel against the government. First, the court reasoned that, although inconsistent decisions are relevant to a finding of unfairness, the Olegario decision did not give rise to such unfairness. According to the Mendoza court, Olegario was the only inconsistent decision on the constitutional issues raised in 68 Veterans, and the difference in outcome resulted from substantive disagreement between the circuits rather than an intervening change of law. Moreover, the Mendoza court found the collateral estoppel analysis in Olegario unpersuasive. The court concluded that although government litigation may often involve issues of great public concern, the issues in 68 Veterans presented no need for redetermination.

Finally, the Mendoza court recognized that the government has unique litigational interests to protect. Because of the potential scope and impact of government litigation, the government is subject to constraints not present in private civil litigation. However, the court found that the issues involved in Filipino veterans cases were not of such great scope or significance as to create a crucial need to relitigate the issues.

The Supreme Court quickly addressed the collateral estoppel issues in Mendoza and reversed the findings in the Ninth Circuit decision. The Court held that offensive collateral estoppel, asserted against the government by a litigant who was not a party in the first suit, was impermissible. Recognizing the substantial differences between litigation by private parties and litigation involving the government, the Court determined that the objectives delineated in Parklane Hosiery would not be served by application of nonmutual collateral estoppel against the government. According to the Court, "judicial economy" interests which result from application of the doctrine to private litigants are inapplicable to government litigation because the government would then be more hesitant to abandon appeals of unfavorable decisions. In addition, res judicata and mutual defensive collateral estoppel are sufficient to promote judicial economy and protect the interests of private litigants against the government.

91. Mendoza, 672 F.2d at 1329.
92. Id.
93. Id. at 1329-30.
95. Both Mendoza and Barretto were reversed and remanded in accordance with the decision.
PRESENT STATUS AND FUTURE DIRECTIONS

Since Mendoza, Category II veterans have relied on constitutional issues as the sole basis for claiming a right to naturalization under the Act. As previously noted, the equitable estoppel claim related only to Category I veterans, and the INS no longer challenges the naturalization of those veterans. In addition, the failure of the collateral estoppel claim in Mendoza forced all Category II veterans to litigate their own individual claims. The constitutional issues originally addressed in 68 Veterans are therefore subject to government challenge. Several important issues are likely to be addressed in these cases in the future.96

Government Conduct as Error

In Olegario, the court held that the Attorney General acted within his discretion in revoking the naturalization of the INS representative in the Philippines. However, subsequent decisions have described the government conduct in question in more unfavorable terms. In INS v. Miranda,97 the Supreme Court again addressed the equitable estoppel question, employing a case-by-case comparison similar to that used in Santiago v. INS.98 In distinguishing Hibi from the facts of Miranda, the Court stated, “unlike . . . Hibi, where the Government’s error was clear, the evidence that the Government failed its duty in this case is at best questionable.”99

Although a finding of “clear error” is insufficient to support an equitable estoppel claim,100 the statement of the Court undermines the contention of the Olegario court that the Attorney General acted within his authority by suspending the Philippine naturalization effort.101 Redress of a due process violation does not require a showing of “affirmative misconduct” or “bad faith”; government action which exceeds executive authority is sufficient to constitute a violation of

96. In addition to the issues discussed herein, the government is also relitigating other issues consistently rejected by courts in previous decisions. Currently, the government claims that the Filipinos’ claims are barred by laches, the government action is a non-justifiable issue under the political question doctrine, and naturalization under the Nationality Act of 1940 is precluded by section 310 of the 1952 Nationality Act (8 U.S.C. § 1421(e)). For a discussion of these issues, see 68 Veterans, 406 F. Supp. at 943-48; Olegario, 629 F.2d at 216-22.
98. 526 F.2d 488 (9th Cir. 1975). See supra text accompanying notes 3-4.
100. See supra text and accompanying notes 20-22.
101. See supra text and accompanying notes 74-78.
Whether the courts will employ the Supreme Court statement to determine that the government exceeded its authority in the administration of the naturalization program has yet to be seen. However, other facts presented in earlier cases indicate that the executive branch did exceed its authority in suspending the program. The Attorney General acted on advice of the INS Commissioner who, in turn, recommended suspension of the program on the basis of unofficial and unwritten concerns raised by the future Philippine government to unidentified U.S. officials. No record of these concerns by either the Philippine government, the State Department, or any other department of the executive branch entrusted with foreign policy matters exists. Moreover, neither the Attorney General nor the INS is a foreign policy-making agency of the executive branch. Interestingly, no State Department memoranda to either the Attorney General or the INS Commissioner requesting suspension or voicing the concerns of the Philippine government have been introduced in these cases. While the failure of the Philippine government to document its objections is justified by their confidential nature, such confidentiality was not required in communications between the State Department and the INS.

Official memoranda demonstrate that the government was genuinely concerned about admitting many newly naturalized citizens into the country and feared the resulting drain on federal benefits. The degree to which this concern motivated the suspension of the naturalization program is unknown, but the ulterior motive would logically undermine the foreign policy justification offered for the suspension. Moreover, the government reassigned another naturalization agent to the Philippines in August 1946, apparently satisfied that the Philippine government would no longer object to the program. No evidence indicates that the reassignment was made after the Philippine government withdrew its objections or upon reassessment of the effect of the program on relations with the Philippine government.

All of these factors indicate that government rationale for sus-

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102. See, e.g., Youngstown Sheet & Tube, Inc. v. Sawyer, 343 U.S. 579 (1952) (President Truman’s seizure of the steel mills during Korean War invalidated).
103. 68 Veterans, 406 F. Supp. at 935 n. 4, 936; Olegario, 629 F.2d at 232.
104. Id.
105. The INS Commissioner’s memorandum requesting suspension of the naturalization program referred to concerns raised by the Philippine government to the Department of State, but no memoranda from the Department of State has been produced. Olegario, 629 F.2d at 231-32.
106. Id. at 232.
107. Id. at 231.
108. However, the court in Olegario held that it did not. Id.
pending the naturalization program was suspect, and that its actions constituted the clear error referred to in Miranda. Admittedly, foreign policy considerations may have weighed heavily in the decision of the government to suspend the naturalization program. Additionally, the nature of foreign policy limits the ability of the courts to re-examine the basis of government decisions. Nevertheless, blind adherence to government foreign policy justification, in the face of inadequate and contradictory evidence, would unjustly deprive the Filipinos of their hard-fought opportunity to become American citizens.

**Implied Authority Conferred by Congress**

In Olegario, government actions were found to be impliedly authorized by statute and subsequent actions of Congress. Relying on Zemel v. Rusk, the court noted that the government was traditionally given broad discretion in foreign affairs and such discretion was included within the scope of section 705. In Zemel, however, implicit intent to grant discretionary authority was based on factors significantly different from those involved in the Filipino veteran cases. First, Zemel involved restrictions on travel of Americans to Cuba, an issue strictly limited to foreign affairs. In these cases, however, the foreign affairs implications of the Act are tied to the enforcement of naturalization law, which is under the exclusive authority of Congress. Additionally, the grounds for the implicit authority granted in Zemel stemmed from a long-standing acquiescence by Congress in giving the Secretary of State authority over travel restrictions. No such period of congressional acquiescence is involved in the Filipino veteran cases. Congress has traditionally maintained control of naturalization, as provided by the Constitution. Finally, the legislative history examined in Olegario does not indicate congressional consent to suspension of the Philippine naturalization program. The court in Olegario observed that Congress did not wish to expand naturalization opportunities for Filipinos in subsequent legislation. However, the failure to expand opportunities is irrelevant to the question of whether Congress authorized the executive branch

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109. 68 Veterans, 406 F. Supp. at 944 n.22.
111. 381 U.S. 1 (1965) (Secretary of State authorized to restrict travel by Americans to Cuba).
113. See supra text accompanying notes 44-46.
114. 629 F.2d at 227-28.
to restrict the naturalization opportunities already available. Failure to provide greater opportunities for naturalization does not evidence a long-standing policy of congressional acquiescence, such as that identified in Zemel.

Since Olegario, the Supreme Court has further supported the analysis contained in Zemel, requiring a pattern of congressional acquiescence to confer implicit authority on executive actions. In Haig v. Agee, the Court held that the Secretary of State had implied authority to revoke Agee's passport on grounds of endangering national security and interfering with national foreign relations. Such authority was based on a pattern of congressional acquiescence which spanned more than forty years. Likewise, in Dames & Moore v. Regan, implicit executive authority was based on a long-standing practice of the executive to settle claims between American citizens and foreign governments. In the Filipino veteran cases, no pattern of congressional acquiescence has been alleged to indicate implicit executive authority to revoke naturalization procedures delineated in the Act as to selected classes of aliens. Governmental action in 1945 was contrary to the intent of sections 701 through 705, and no express or implied authority was delegated by Congress to the executive branch to withhold naturalization opportunities from the Filipinos.

**Denial of "Liberty Interest"**

In Olegario, the court held that no "liberty interests" of the Filipino veterans were violated by government administration of the Act. Recent decisions may support the claims of the veterans, however. In Haitian Refugee Center v. Smith, the court held that government failure to allow Haitians to apply for political asylum violated due process. The court recognized that while aliens have no constitutionally protected right to political asylum in the United States, they do have a due process right to file applications for asylum and to have them considered in accordance with regulatory procedures. The Haitian Refugee court declared that, "the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible."

Although no due process interest is created when the dispensation of a statutory benefit is clearly within the discretion of a governmen-

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118. Olegario, 629 F.2d at 223-24.
119. 676 F.2d 1023 (5th Cir. 1982).
120. Id. at 1039.
1190
tal agency,\textsuperscript{121} the INS had no discretion to deny citizenship to eligible veterans.\textsuperscript{122} As noted above, such discretion was clearly beyond the power of the executive branch. As with the Haitian refugees, Congress created a right and an opportunity to petition for naturalization for Filipino servicemen which was purposefully, intentionally, and effectively frustrated by government actions. Although the court in \textit{Olegario} found that the Act merely provided guidelines for administrative procedures, this conclusion appears to be unsupported by relevant case law and the language of the Act.

CONCLUSION

The quest of Filipino veterans for citizenship affects the lives of relatively few people, yet the government has tenaciously resisted the efforts of the veterans toward naturalization. The reasons for the opposition of the government are unclear. Although several thousand Filipinos may be directly affected by sections 701 through 705 of the Nationality Act of 1940, the number of Filipinos seeking naturalization is likely to be small. Most eligible veterans are quite elderly, and their numbers are steadily decreasing. Additionally, the Filipinos have earned citizenship opportunities through their heroic deeds in defense of American interests during World War II. It is difficult to conceive how the public interest is served by denying the opportunity for citizenship to these veterans.

Moreover, these cases involve circumstances which the government is unlikely to confront again in the future. The events giving rise to the claims of the Filipinos occurred approximately forty years ago in the unusual context of a war-related naturalization statute and the impending independence of the Philippines. It is highly improbable that the government will ever face an analogous situation.\textsuperscript{123} Any decision adverse to the government would have limited precedential value, and no present interests of the government are likely to be impaired.

While the government has little to gain by litigating these cases,

\begin{itemize}
  \item \textsuperscript{121} Hewitt v. Helms, 103 S. Ct. 864, 871 (1983).
  \item \textsuperscript{122} See supra notes 4-5. The benefits conferred by the Act were not subject to the discretion of the INS. The government had no authority to determine whether the petitioner was naturalized nor did it have the power to grant citizenship. Rather, the INS was delegated the duty of creating the appropriate procedures necessary to receive naturalization petitions and carry into effect the provisions of the Act. Thus, the holding of \textit{Haitian Refugee Center} appears to be compelling authority for the contention that government actions led to a denial of the due process rights of the Filipino veterans.
  \item \textsuperscript{123} Barretto, 694 F.2d at 607.
\end{itemize}
the Filipinos, as well as the general public, have much to lose. Both 68 Veterans and Olegario recognized that the Filipino veterans suffered discriminatory treatment as a result of government administration of the naturalization program. The controversy is whether such action was justified by overriding “national interests.” A decision against the veterans would allow administrative agencies greater freedom to ignore due process considerations in the formulation of policy and procedure. Whether such administrative discretion is eventually endorsed awaits further determination by the courts.

The problems of Filipino veterans involve difficult issues which affect conflicting, yet important interests. The balancing of due process rights against effective foreign policy-making is inevitably subject to the value orientation and policy preferences of the courts. However, existing case law, factual circumstances, and public interests weigh heavily in support of Filipino veteran due process claims.

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