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A simple case of justice...

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(Editor's note: The following article is a cogent and thorough presentation of the complex issues in the Filipino war veterans case. In non-technical language, the author traces the history of the case, explains what the present Immigration and Naturalization Services' policy is, and concludes with a tribute to the Filipinos' persistence in carrying out the good fight. Mr. Seguritan is also the author of two previously published articles on the subject.)

On April 2, 1982, the Court of Appeals for the Ninth Circuit affirmed a California District Court decision in the case of Dr. Sergio Mendoza, a Filipino war veteran, granting him US citizenship on the basis of an expired naturalization statute. The government asked for a rehearing but this was denied July 22, 1982. On Oct. 13, 1982, the Solicitor General decided to pursue the case in the US Supreme Court.

This latest governmental move has dampened the hopes of many Filipino war veterans who have pending naturalization petitions as well as those who have intentions to file. The net effect is for them to wait until the US Supreme Court makes a final decision.

Historical background

The historical background of the Filipino war veterans' case dates back to the early 1940s when President Roosevelt, in response to the growing involvement of the United States in World War II, issued an order on July 26, 1941 calling all organized military units of the Commonwealth of the Philippines into the Armed Forces of the United States. On March 27, 1942, the Nationality Act of 1940 was amended to provide for the naturalization of non-citizens who served honorably in the US Armed Forces. Section 701 of the said Act exempted certain servicemen who served outside the continental United States from some naturalization requirements, such as a period of residence and literacy in English. Section 702 provided for the overseas naturalization of persons eligible under Section 701 who were active in the US military and were not within the jurisdiction of any court authorized to naturalize aliens. Section 705 directed the Commissioner of Immigration and Naturalization with the approval of the Attorney General to prescribe and furnish forms and make such rules and regulations as were necessary to implement the Act. Subsequent amendments specified that all naturalization petitions filed under Section 701 had to be submitted by Dec. 31, 1946.

Pursuant to the 1940 Act, immigration officers were dispatched to overseas military posts to naturalize eligible members of the military. Between 1943 and 1946, these officers went to England, Iceland, North Africa and the Pacific. In August 1945, following the liberation of the Philippines from the Japanese occupation, George H. Ennis, Vice Consul of the US at Manila was designated to naturalize members of the army of the Commonwealth of the Philippines who, according to the INS and the Attorney General, were qualified under the Act.

Death March begins for Fil-American forces at Bataan. Of the 50,000 soldiers who surrendered after a gallant stand, less than a third survived the march and prison camp at Capas, Tarlac.

Then concerns were voiced that naturalization under the 1940 Act would cause the mass emigration of Filipinos to the US, resulting in the drain of much needed manpower. This came about because of the impending grant of Philippine independence set for July 4, 1946. On Sept. 13, 1945, the INS Commissioner wrote to the Attorney General: "The Philippine Government again has expressed to the Department of State its concern because Filipino members of the armed forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands...In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

Acting upon this recommendation, the Attorney General revoked the naturalization authority of Vice Consul Ennis, and on Oct. 26, 1945 naturalizations were halted. The absence of a naturalization officer continued until August 1946 when a new naturalization representative for the Philippines was appointed. From that time until Dec. 31, 1946, when the naturalization law expired, about 4,000 Filipinos were naturalized pursuant to Section 702 of the 1940 Act.

How did the issue of the naturalization of Filipino war veterans emerge many years after the expiration of the law? Why would it become a major question for the courts and even the US Congress?

Hibi: First major test

It was Hibi who raised the question in the first major case concerning the citizenship rights of Filipino war veterans. Hibi, a member of the Philippine Scouts during World War II, entered the United States on a visitor-for-business visa on April 25, 1964. When his visa expired, he filed for naturalization on the basis of sections 701-705 of the 1940 Act. Although the statutory time period within which non-citizens could have claimed this option had already passed, Hibi claimed that the Government was estopped from claiming a statutory time limit. This, Hibi attributed to its failure to advice, when he was eligible, of his right under the statute and the government's failure to station a representative in the Philippines to process naturalization petitions under the statute. What Hibi in effect was claiming was that the government had been guilty of "affirmative misconduct" and was therefore estopped from relying on the statutory time period. Hibi's contention was upheld by the District Court and affirmed by the Court of Appeals. This was reversed in a **per curiam** decision by the US Supreme Court, holding that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." In enforcing the statutory time period established by Congress, the Immigration and Naturalization Service was enforcing a public policy. Finally, there was no affirmative misconduct by the Government when it failed to publicize the statutory rights available and by failing to station an authorized person to process naturalization petitions when that right would have been available. Justice Douglas and two other justices dissented. His (Douglas) main dissent hinged on the fact that the kind of failures that the government was trying to excuse could only be made "excusable" by the "exigencies of war as long as good faith efforts to carry out the provisions of the Act have been made." In this case, however, the government deliberately withheld the authorization of the Consul in the Philippines to process naturalization petitions. "...(T)he Court's opinion ignores the deliberate and successful effort on the part of the agents of the Executive Branch to frustrate the Congressional purpose and to deny substantive rights to Filipinos such as (Hibi) by administrative fiat, indicating instead that there was no affirmative misconduct involved in this case."

68 Filipinos: Due process claim upheld

Filipino war veterans were not discouraged, however, by the unfavorable holding in **Hibi**. In 1975, 68 Filipino war veterans filed separate petitions for naturalization in California under the expired statute. When the Immigration and Naturalization Service denied their petition, they went to the District Court claiming that their petitions should be granted because of the failure of the US Government to station in the Philippines from October 1945 to August 1946 an INS examiner authorized to naturalize members of the American armed forces pursuant to Section 702 of the 1940 Act.

Judge Renfrew divided the petitioners into three categories: **Category I** referred to those veterans who had taken action to become naturalized prior to Dec. 31, 1946 but had not been processed by the INS. **Category II** consisted of those veterans who were eligible for citizenship under the 1940 Act but did not file petitions before the Act expired. **Category III** veterans were those petitioners who were unable to prove eligibility for naturalization under the 1940 Act.

Judge Renfrew granted the petitions of the Category I veterans as they had been the victims of "affirmative misconduct" by the INS. Two of the Category I vererans had actually filed application forms for naturalization during their service with the American armed forces. A third petitioner had inquired about naturalization in the form of a letter to the Attorney General six months before his discharge from the

service. Each of these petitioners had received a letter from the INS stating that "no purpose would be served by the submission of such an application to this office." Four other petitioners testified that they submitted their naturalization forms but no action was ever taken. These were evidence of affirmative misconduct according to the Court and therefore the government was estopped from relying upon the expiration date of the 1940 Act as ground for denial of their petitions for naturalization. In addition, Judge Renfrew stated that they should be deemed to have "constructively filed" everything necessary pursuant to Section 702 as there was nothing further that they could do to avail themselves of their rights. "When one takes all necessary affirmative steps to comply with the literal requirements of a statute and is prevented from complying fully by the failure of an administrative agency to take steps necessary to permit INS and the Attorney General in describing the appropriate "level of government" to make a decision depriving aliens of an important interest. The Commissioner and the Attorney General were statutorily authorized to implement the legislation involved in this case. While neither executive officer specializes in foreign affairs, both are concerned with foreign policy and diplomatic matters touching on immigration and naturalization. In this capacity, each serves as the President's agent and is an integral member of the executive branch. Accordingly, the Court concludes that the decision made by the Commissioner and the Attorney General to revoke the Vice Consul's naturalization authority was justified in the light of the express federal interest in responding to the concerns voiced by the Philippine government."

Was the Court of Appeals correct in holding that the collateral estoppel doctrine was not applicable and that the constitutional claim of due process violation was not warranted? The US Supreme Court refused to hear the case on certiorari but another Court of Appeals (Ninth Circuit) disputed the inapplicability of the collateral estoppel doctrine.

Mendoza: New victory for veterans

In the **Mendoza** case, the District Court granted citizenship to Dr. Mendoza, a Category II veteran, and held that the government was collaterally estopped from relitigating the issues decided in **68 Filipinos**. The government appealed and in its brief, it explained its decision to withdraw the appeal in **68 Filipinos**. There was a gross underestimation of the number who would be eligible under the **68 Filipinos** decision, the government claimed, and the withdrawal of the appeal was therefore based on a misunderstanding of its implications. It turned out that about 60,000-80,000 Filipino veterans may yet seek naturalization instead of about 25,000 plus derivatively eligible relatives that the government initially estimated. Under such circumstances, it argued, collateral estoppel against the government was grossly unfair and an abuse of discretion.

The Court responded by saying that the error in the estimate was inconsequential and did not bar the preclusion of a relitigation. But what the government failed to state was the fact that these veterans served in the Philippine Army some 40 years ago. Citing former INS Commissioner Leonel Castillo's testimony, before the US Congress in 1978, "Our independent research indicates that if all of the veterans followed the same mortality rates and so on, that demographically there shouldn't be more than 60,000-80,000 assuming that they all wanted to come...(A)nd yet our experience in the aftermath of the **68 Filipino** war veterans' case is that we've had fewer than 100 applicants..." The government had every incentive to pursue an appeal in **68 Filipinos** as it should have anticipated the filing of citizenship applications by all similarly situated Filipino veterans. "We thus conclude that the government had a full and fair opportunity to litigate the issues in **68 Filipinos** and that the government's decision to withdraw its appeal does not make it unfair to estop the government from relitigating the identical issues in an effort to defeat Dr. Mendoza's naturalization petition."

How did the **Mendoza** Circuit Court view the conflicting decision on the **Olegario** case? "Unpersuasive," was its characterization of the Second Circuit's reasoning. Moreover, the Ninth Circuit said that the existence of an inconsistent Second Circuit decision was outweighted by factors favoring collateral estoppel. Finally, the Ninth Circuit took note of the heroic sacrifices of the Filipino war veterans: "...(E)ven if the number of Filipino veterans petitioning for naturalization on the basis of **68 Filipinos** were larger than the record would indicate, we can discern no compelling public interest in opposing the naturalization of those veterans. The persons who may take advantage of **68 Filipinos** are World War II veterans who are likely to be well over 60 years of age; they fought side-by-side with United States troops in the Pacific, and many, like Dr. Mendoza, suffered imprisonment by the Japanese and survived the notorious Bataan Death March. In appreciation for their sacrifices, Congress voted to admit those veterans to United States citizenship over 30 years ago. As former INS Commissioner Castillo observed in his testimony to Congress concerning the Attorney General's decision to withdraw the appeal in **68 Filipinos**: '(I)t seem(s)...that just as a matter of simple justice that we should honor our commitment to people that we agreed to naturalize thirty years ago.'"

INS policy to accept only category I veterans

Are all Filipino war veterans affected by the latest government action in Mendoza? No. The present policy of the Immigration and Naturalization service is not to oppose petitions filed by Category I veterans. These are the Filipino servicemen who can prove that they filed or attempted to file for naturalization before December 31, 1946. To prove said fact, a letter from former Assistant Commissioner for Naturalization, Andrew J. Carmichael, Jr. addressed to the author in 1978 is instructive: "What evidence will be acceptable to prove that an applicant had previously applied must be determined on a case-by-case basis and may differ somewhat in different courts. Of course, the best evidence is a copy of the application itself and the letter rejecting it. It is conceded that over so many years few such documents remain. Therefore, there may be no alternative to the taking of sworn testimony before an officer of this Service. The more specific and detailed the testimony, the more likely it will be accepted as evidence by this Service in making its recommendation and by the court in making its decision." It should also be noted that applications may be entertained even if the applicants are in the Philippines. They just have to comply with the applicable instructions.

Conclusion

The foregoing discussion illustrates the long and unsteady course that the Filipino war veterans case has travelled. Forty years have passed since the naturalization law was enacted yet these servicemen wanting to become American citizens have no clear way to go. The war which gave rise to the law and in which they fought so valiantly is long past and the ideals for which many of their comrades died have long been achieved. For their loyalty, courage and valor, they were promised American citizenship and for a time this promise was a distinct reality. Soon it would be lost, and now it becomes as elusive as ever as the Immigration and Naturalization Service has adopted a wavering and, at times, confusing policy. To the Filipino war veterans the pursuit of that promised reward has endured and from all indications it will continue to endure. This is a case of "simple justice" and fighting has become ingrained in their hearts.