

18-9532

No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED  
JUN - 1 2019  
OFFICE OF THE CLERK

LEMUEL CLAYTON BRAY - PETITIONER  
(Your Name)

vs.

UNITED STATES - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The 10<sup>th</sup> Circuit and the CAVC

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lemuel C Bray

(Your Name)

2833 Main St

(Address)

Torrington, WY 82240

(City, State, Zip Code)

(307) 316 8568 cell (307) 575 9249 lembray@gmail.com

(Phone Number)

## QUESTION(S) PRESENTED

1. Are U.S. War Veterans and active duty military separate and unequal citizens under the Constitution, Article I, Section 8, Paragraph 14, despite the 14<sup>th</sup>, the 14<sup>th</sup> Section 4, the 5<sup>th</sup>, the 7<sup>th</sup>, the 9<sup>th</sup> Amendments?
2. Is the Feres Doctrine Constitutional? Should it be revisited?
3. Where does the United States Government ascribe the right to “sovereign immunity” from being sued in the Constitution or Constitutional law?
4. Is the Constitution the “sovereign” of the United States?
5. Has Amendment 14, Section 4 modified Article I, Section 9, paragraph 6 of the Constitution?
6. Does Amendment 14, Section 4 preclude back pay for veterans compensation from being anything but in current dollars?
7. Is the denial of 5<sup>th</sup> Amendment due process by the United States a precipitating cause of many of the veteran suicides that have raised the rate to almost 2.5 times the National average?
8. Are veterans of United States military wars constitutionally denied protection of the 7<sup>th</sup> Amendment?
9. Does the Petitioner’s RBA before the CAVC show the DVA has retaliated against the Petitioner because of his First Amendment right of activism?
10. Does the Constitution divide the United States into sections including a section, the Executive Administration (the “government”) and a section, the People such that a claim of “due process” is against the government and not inclusive of the voting public?
11. Do the Clerks of the Appeal Courts have to follow FRAP and the Court’s Rules under 5<sup>th</sup> Amendment Due Process Rights?
12. Is the Constitution the highest precedence, even where common law applies, for all citations?
13. Are veteran compensations guaranteed from the date of demonstrated of entitlement under the 14<sup>th</sup> Section 4, not to be limited by a claim or SOL?
14. Duty of the DVA to be proactive? Can the veteran, due to TBI and/or PTSD, put off a claim without suffering property right loss of compensation from the first date of entitlement?
15. Is it due process to allow the DVA unlimited time to decide while veterans must adhere to strict SOL requirements?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioner, respondent, including the Administration of the DVA, CAVC, CAFC and the Board for Correction of Naval Records.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

is unpublished.

**JURISDICTION**

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 7, 2019

No petition for rehearing was timely filed in my case because the question of overruling a SCOTUS 1950 Decision, The Feres Doctrine.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution, Article I, Section 8, Paragraph 14,
2. Article I, Section 9, Paragraph 6
3. 14<sup>th</sup> Amendment and Section 4 of the 14<sup>th</sup>.
4. 5<sup>th</sup> Amendment
5. 7<sup>th</sup> Amendment
6. 9<sup>th</sup> Amendment
7. 1<sup>st</sup> Amendment
8. 10<sup>th</sup> Amendment
9. 11<sup>th</sup> Amendment
10. U.S.C. Title 38 re SOL
11. U.S.C. Title 38 re back pay of veterans' disability compensation.
12. 5 U.S.C. 2302(b)(8)-(9), Pub.L.101-12 as amended



## STATEMENT OF THE CASE

There is a veteran suicide crisis inadequately managed by the DVA.

Three 10<sup>th</sup> Circuit Appeals Courts decisions have recommended a revisiting of the Feres Doctrine. The 10<sup>th</sup> Circuit, in its Decision on page 4, stated:

“The Feres Doctrine is based on a Supreme Court decision, which binds us and requires us to reject Mr. Bray’s constitutional challenge. See *Labash v. U.S. Dep’t of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (“Although many courts have expressed reservations about the continuing validity of the broad Feres Doctrine, only the United States Supreme Court can overrule or modify Feres.”), *quoted with approval in Ortiz v. United States ex rel Evans Army Comm. Hospital*, 786 F.3d 817, 823 (10th Cir. 2015).”

The 9<sup>th</sup> Circuit has also, *Daniel v. United States*, 889 F.3d 978 (9th

Cir., 2018) *Daniel v. United States*, 889 F.3d 978 (9th Cir., 2018):

*“CONCLUSION: Lieutenant Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If ever there were a case to carve out an exception to the Feres doctrine, this is it. But only the Supreme Court has the tools to do so. Daniel v. United States, 889 F.3d 978 (9th Cir., 2018)”*

*Atkinson v. U.S.*, 825 F.2d 202 (9th Cir., 1987) “Four Justices now believe that Feres was wrongly decided. Johnson, 107 S.Ct. at 2074 (Scalia, J., dissenting) (“Feres was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.”) (quoting *In re “Agent Orange” Prod. Liability Litig.*, 580 F.Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir.1984)). We recognize that Atkinson’s case is distinguishable on its facts from Johnson. The helicopter rescue mission in the latter case more obviously falls within the key phrase “activity incident to service” than does the medical treatment of a pregnant servicewoman in a non-field hospital. We also note that Atkinson’s case differs in some respects from the malpractice situation in Feres itself. 5 We are nonetheless reluctant to carve out an exception to the Feres doctrine after five members of the Court appear to have emphatically endorsed Feres and all three of its rationales. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress. *Atkinson v. U.S.*, 825 F.2d 202 (9th Cir., 1987)”

Eleventh Circuit Court averting the Feres Doctrine in Johnson v. U.S., 779 F.2d 1492 (11th Cir., 1986) Johnson v. U.S., 779 F.2d 1492 (11th Cir., 1986):

“Id. Following this command, we find that the panel opinion has given proper consideration to the Feres factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the Feres preclusion. Johnson v. U.S., 779 F.2d 1492 (11th Cir., 1986)”

Additional Appeals Court decisions citing discomfort with the Feres Doctrine:

Ritchie v. United States, 733 F.3d 871 (9th Cir., 2013); Costo v. USA., 248 F.3d 863 (9th Cir., 2001) Costo v. USA., 248 F.3d 863 (9th Cir., 2001); Van Sickel v. United States, 285 F.2d 87 (9th Cir., 1960); Elliott By and Through Elliott v. U.S., 13 F.3d 1555 (11th Cir., 1994); United States v. Lee, 400 F.2d 558 (9th Cir., 1969); Laswell v. Brown, 683 F.2d 261 (8th Cir., 1982); United States v. Johnson, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987); Martin v. U.S., 856 F.2d 195 (6th Cir., 1988); Jones v. United States (9th Cir., 2018); Irvin v. U.S., 845 F.2d 126 (6th Cir., 1988); Romero by Romero v. U.S., 954 F.2d 223 (4th Cir., 1992); West v. U.S., 729 F.2d 1120 (7th Cir., 1984); Loughney v. U.S., 839 F.2d 186 (3rd Cir., 1988); Persons v. U.S., 925 F.2d 292 (9th Cir., 1991).

The Feres Doctrine is an abuse of veteran’s constitutional rights involving: 1st Amendment retaliation for activism; 5<sup>th</sup> Amendment Due Process; 7<sup>th</sup> Amendment Trial of fact Jury; 9<sup>th</sup> Amendment unlisted rights; 10<sup>th</sup> Amendment supremacy of the Constitution. This case arises, related to the Amendments stated above in the following specifics:

1. The specific exceptions in the 5<sup>th</sup> Amendment are not met in the Feres Doctrine: "...except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;" "Time of War or in public danger" are the operative words here. The meaning is clear that it refers to the disability of the Courts to function, not the exemption of the individuals right to protections granted in the Constitution as Amended.
2. Because of the veteran's activism on behalf of veterans with organic brain syndromes since 1985 and continuing through the RBA dispute with the last action of March 8, 2019 above. Petitioner alleges that respondents destroyed and or denied the Petitioner's access to evidence; acted arbitrarily, capriciously and knowingly to damage the Petitioner's efforts for himself and others in scheduling hearings at a time the Petitioner couldn't attend; forcing the Petitioner to leave DC and go to Japan for a C&P examination that couldn't be done in Japan, arbitrarily and capriciously ignored portions of the CAVC Clerk's Order to resolve the RBA dispute; ordering an unqualified, because of language barrier, C&P examination; failure to obtain clear etiology statements on C&P examinations; failure to return audiograms for a definitive statement as to whether tinnitus had resolved or the audiologist had omitted filling in that section of the report or failed to report a negative in the case of a history of tinnitus; ignored Petitioner's claim of anosognosia; denied a claim of PTSD in a clear and unmistakable error and refused to certify issues on appeal, mistreated the Petitioner with Tegretol, a drug known to make the Petitioner's diagnosed seizures worse because of the type of seizures diagnosed and the Petitioner's sensitivity to amitriptyline (making him less functional for activism, 1990 Ed. PDR pg 983). 5 U.S.C. 2302(b)(8)-(9), Pub.L.101-12 as amended
3. Back payments of veterans' compensation is based upon the year being paid not on current dollars depriving the veteran of an equal purchasing power of the amount owed. Section 4 of the 14<sup>th</sup> was ratified when the U S was on the gold standard making this adversity less likely.
4. Denial by the 10<sup>th</sup> Circuit of the Petitioner's right to a 7<sup>th</sup> Amendment right to a trier of fact jury to prove definitively the allegations in 1 above.
5. Denial by the DVA DRO of Due Process in certifying issues to the BVA

## REASONS FOR GRANTING THE PETITION

Veterans are being deprived of their constitutional rights under the Bill of Rights and additional Amendments to the Constitution because of the inability to obtain discovery in the face of obstruction, inability to challenge adverse witnesses with medical textbooks they studied, inability to challenge adverse professionally witnessed documents, etc. because of the “Feres Doctrine.”

The 10<sup>th</sup> Circuit, in its Decision on page 4, stated:

“The Feres Doctrine is based on a Supreme Court decision, which binds us and requires us to reject Mr. Bray’s constitutional challenge. *See Labash v. U.S. Dep’t of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (“Although many courts have expressed reservations about the continuing validity of the broad Feres Doctrine, only the United States Supreme Court can overrule or modify Feres.”), *quoted with approval in Ortiz v. United States ex rel Evans Army Comm. Hospital*, 786 F.3d 817, 823 (10th Cir. 2015).”

The Feres Doctrine should be upheld for remedies only. Remedies through the VA Compensation and through Military Boards for Corrections of Records is adequate to address any cause.

The idea of maintaining “morale” is ridiculous a justification for maintaining the Feres Doctrine status quo. Vets suffer PTSD more from war crimes that are not prosecuted than ones that are. The same is true of diminished morale over a superior causing sadistic harm or reckless endangerment of any troupes. Fair and equal protection under the law is what the troupes swear to uphold upon entry. When that

goes awry morale goes down. Protection of an offender is not a morale lifter, it deprecates morale.

The intent of Congress's non adversarial adjudication by the DVA is great in theory and when it works. But it doesn't work in the face of cheating even for medical care as was shown by the 2012 Phoenix VAMC and the Cheyenne VAMC crisis. And there is no due process for overcoming the cheating in the adjudication process. The CAVC cannot examine evidence for validity nor can the BVA take an issue that has not been certified by the Agency of Original Jurisdiction, VARO. VARO Directors can implement policy without retribution that is contrary to the non-adversarial intent of Congress with subtlety including whistleblower retaliation.

The CAVC failed to obtain the complete benefits administrative record and a complete medical record from the DVA Medical Division, Appendix C, D, E & F.

In the Petitioner's case the Navy and DVA delayed more than 47 years in appropriate treatment, more than 32 years on a claim for TDIU, while veterans must adhere to strict Title 38 statutes of limitations despite Section 4 of the 14<sup>th</sup>.

Combat veterans are committing suicide at a rate of 2.5 times that of the National average. (not counting accidental deaths that may have been purposeful.)

What if Bray's petition to the Supreme Court #93-7327 had been heard? The issues we raised of traumatic brain injury in 1993 wouldn't have taken another 15 years to be recognized by Congress and then the DVA. The function of subtle anosognosia and wrongly focused behavioral treatment in suicide would possibly have been discovered. Suicide victims wouldn't have been pushed to the edge by poverty. Bray knows this from experience and study at the NIH Library.

Bray has been an activist for veterans with organic brain syndromes, to the best of his residual abilities, since 1987, filing and appealing, with other veterans 8/2/1988 Bray V Brown 09cae Docket 88-6276 and its subsequent names and Case Numbers.

Bray has been proven right on his 1987 assessment of mild, moderate and moderately severe traumatic brain injury (TBI), walking, talking veteran victims having mild to severe diminished capacity, partially achieved in 2008 with recognition by Congress and the DVA and the higher rate of suicide among combat veterans.

Bray has been proven right by an NIH study published in December of 2016 of the pathology of brain damage from p. falciparum Malaria being determined.

Bray has been proven right about the brain damaging effects of proximity blasts, including incoming and outgoing artillery, mortar bombs, and booby traps (now known as IUD) in recent NIH studies published. (2017-2018.) Discovery in Bray v Shinseki would have shed much transparency.

Title 38 §1710C, §1710D and §1710E: 2010-Subsecs. (b) to (d). Pub. L. 111-163 added sub-secs. (b) and (d) and re-designated former sub-sec. (b) as (c) addresses the Traumatic Brain Injury organic brain syndromes but fails

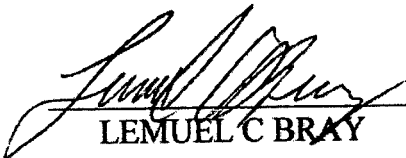
to address other organic brain syndromes acquired because of military service such as from *p. falciparum* malaria (cerebral malaria), still relying upon the “bogus” Kastl, et al study of 1966 to deny service connection cerebral malaria residuals.

With treatment since January of 2016, Bray has become much more functional and will, perhaps, be able to see this through if granted the petition for a writ of certiorari.

#### CONCLUSION

If the Court desires to assist in reducing veteran suicides the petition for a writ of certiorari should be granted and heard expeditiously.

Respectfully submitted,

  
LEMUEL C BRAY

Date: May 31, 2019