No. _____

In the Supreme Court of the United States

BRYAN JAMES STROTHER, SFC.,
California Army National Guard,

Petitioner,

v.

DAVID S. BALDWIN, Adjutant General,
State of California Army National Guard;
MIKE MCCORD, Pentagon Comptroller;
DEFENSE FINANCE AND ACCOUNTING SERVICES;
United States Department of Defense,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL C. WILLMAN (P55867)
P.O. 606
Pinckney, MI 48169
(248)-231-0705
Attorney for Petitioner

QUESTIONS PRESENTED

This Petition seeks to end recoupment of accrued benefits, pay and bonus monies which are honorably earned in good faith and overturn the *Feres doctrine.*

Even in cases of court-martial this Nation's Article III courts have consistently held that accrued and vested U.S. Military pay is textually committed property[1]. Yet U.S. Military personnel are routinely subjected to recoupment of accrued property, including bonus monies offered in enlistment contracts.

This Court has defined plain language on multiple occasions and the *Feres doctrine* conflicts with all of them: In regard to U.S. service personnel the Feres doctrine has single-handedly managed to undermined the plain language of the Federal Torts Claim Act (FCTA) leading to a host of absurd consequences and confusion.

I.

Regardless of the presence or absence of any statutory scheme do enlistment contracts become entitlements vested upon commitment at the decision point *United States v. Larionoff*, 431 U.S. 864, (1977) or are they unilateral gratuities non-binding upon the United States Department of Defense and its Branches.

II.

There is zero statutory authority or legislative intent to support the *Feres doctrine* notion of "incident to service" exception. It came out of thin air to usurp the plain language of the FTCA and should be invalidated in favor of new rule in line with 28 U.S.C. § 2680 (j) (k).

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[1] *U. S. v. Larionoff*, 431 U.S. 864, 869 (1977), *Bell v. U.S.* , 366 393, 401 (1961), *In re Grimley*, 137 U.S. 147, 151-152 (1890), *Costello v. U. S.* 587 F.2d 424, (9th Cir. 1978) (en banc).

QUESTIONS PRESENTED-continued

III.

Courts and litigants are not reading or following the plain language of the second sentence of F.R.C.P. 9 (b) and contrary judgments, opinions and usage in pleadings about the rule leads to error and uncertainty.

V.

Were Respondents given fair notice of Petitioner's 42 U.S.C. §1983 14th Amendment "Property Interest" Claim, which would allow nominal damages in addition to punitive damages.

IV.

This case is a classic example of a case being capable of repetition yet evading judicial review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The names of all the parties before the United States Ninth Circuit Court of Appeals are contained within the case caption.

Petitioner Bryan James Strother pursuant to S.Ct Rule 29.6, states there is no parent or subsidiary company to be listed.

The Respondents before the Ninth Circuit and This Court are David S. Baldwin, Adjutant General, State of California National Guard, Mike McCord, Pentagon Comptroller and Defense Finance and Accounting Services; United States Department of Defense.

Suit was brought against Respondents David S. Baldwin and Mike McCord in their individual and official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bryan James Strother SFC. California Army National Guard seeks a writ of certiorari to review an opinion and order of the U.S. Court of Appeals for the Ninth Circuit, which affirmed an opinion and order by the U.S. District Court for the Eastern District of California, which dismissed Petitioner's claims which included declaratory relief.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals for the Ninth Circuit dated May 28, 2019, is an unpublished Opinion reprinted in the appendix 1a.

The Opinion and Order of the U.S. District Court of the Eastern District of California dated December 4, 2017 dismissing Petitioners' Case and Complaint is reprinted at 5a.

DktEntry used throughout indicates 9th Circuit EFC numbers.

JURISDICTION

Pursuant to 28 U.S.C. § 1254 (1) jurisdiction is vested with this Court. Filing of this Petition is within 90 days from the Ninth Circuit's May 28, 2019 Order per S.Ct Rule 13 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III Sec. 1, Sec. 2, Article VI the 5th Amendment, 14th Amendment, 28 U.S.C. § 1346(b)(1) Federal Tort Claims Act (FTCA) 28 U.S.C. § 2680 42 U.S.C. §1983, Federal Rules of Civil Procedure 8, 9, 12, reproduced in pertinent part 39a.

INTRODUCTION

This Writ seeks an Opinion and Order of affirmation compelling proper application of controlling on point United States Supreme Court decisions and overturning the *Feres doctrine*.

In 2005 facing a troop shortage the U.S. Department of Defense (DoD) made an unprecedented push to retain troops offering some of the largest ever bonus incentives and student loan repayments (S.L.R.P.). Unfortunately the push to retain troops resulted in several massive recruiting fraud schemes, affecting all corners of the U.S. Army National Guard from North to South to East to West.

One of largest most egregious scandals rocked the California Army National Guard (CAARNG) DktEntry:18-2,p194. Within months of signing re-enlistment contracts over 16,000 CAARNG troops were deployed to Iraq or Afghanistan. Years after contracts were completed in good faith the CAARNG via the DoD accounting arm Defense Financing Account Service (DFAS) began heavy-handed efforts to recoup bonus monies.

The CAARNG and DFAS claimed the bonuses were given illegally, troops were unjustly enriched at the expense of the U.S. Government and such enrichment was against equity and good conscience.

Absent a showing of fraud via court martial all U.S. Military enlistment bonus contracts/pay become "fully earned upon commitment"[2] at the "decision *point"Costello v. U.S.*, 587 F.2d 424, (9th Cir. 1978)(en banc) at 427 citing *U.S. v. Larionoff*, 431 U.S. 864, 869

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[2] After pledging the required oath of enlistment, based on upholding and protecting the oldest most important contract in the history of the U.S. of America, the Constitution (DktEntry:18-2,p49).

(1977). Enlistment contracts also fall outside of the *Feres doctrine* "incident to service"exception *Feres v. U.S.*, 340 U.S. 135 (1950) *Jackson v. Tate,* 648 F.3d 729 (9th Cir. 2011).

United States Supreme Court cases *Larionoff*, and *Bell v. U.S.*, 366 U.S. 393, 401 (1961) are on point controlling opinions which Respondents, the DOJ and all lower courts must follow.

STATEMENT OF THE CASE

After the events of September 11, 2001, the U.S. Department of Defense sought to boost the ranks in all of the armed forces.[3]

CAARNG "Operation Overdrive"[4]

The Army National Guard launched the Recruiting Assistance Program in 2005 to bolster ranks, which had thinned during the wars in Iraq and Afghanistan. The CAARNG had a name for their effort[5] to boost ranks "Operation Overdrive", which offered bonuses to over 16,000 CAARNG members. The program was canceled in 2012 after audits turned up evidence of fraud at which time the CAARNG and

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[3] 2005 20% below goal, Guard leader calls ranks a "hollow force." (DktEntry:18-4,p52)

[4] Not to be confused with "Operation Overlord"

[5] ttp://www.sacbee.com/news/investigations/article2573111 "operation overdrive" 2007 memo, Brig. Gen. . . . priority: recruitment and retention. "I cannot overemphasize the importance of this effort," "I am counting on leaders at every level to commit themselves fully."

the DoD via DFAS sought to recoup those monies.

Nationally recruiting fraud reached all corners of the U.S. National Guard, from North[6] to South from East to West. (Entry:18-4, p103).

Rampant Unprecedented fraud at CAARNG

The CAARNG corruption ranged from recruiters collecting bounties[7] for recruits they did not sign up, to handing out illegal bonuses to CAARNG top brass [8] (some receiving in excess of $100,000) including then CAARNG Adjutant General, Major General William Wade. (DktEntry:18-2,p192, DktEntry:18-

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[6] Minnesota
http://www.military.com/daily-news/2014/02/13/recruiting-scandal-hits-minnesota-national-guard.htm
http://www.startribune.com/recruiting-scandel-hits-minnesota-national-guard/245202901
Texas
http://www.justice.gov/opa/pr/army-national-guard-recruiter-admits-crimes-fraudulentrecruiting-referral-bonus-scheme
New York
https://www.fbi.gov/washingtondc/press-releases/2014/five-army-national-guard-officials-andone-civilian-charged-with-bribery
California
http://www.usatoday.com/story/news/nation/2014/02/03/army-national-guard-bogus-bonus payments-iraq-afghanistan/5182717/

[7] http://www.justice.gov/usao-edca/pr/california-army-national-guard-member-pleads-guiltycharges-recruiting-fraud-0

[8] 115 members mostly officers committed fraud acted improperly http://www.sacbee.com/news/investigations/article2580420.html

4,p104).

In 2011 General David S. Baldwin was appointed by then Gov. Jerry Brown to lead the CAARNG. In regard to the CAARNG retention scandal Gen. Baldwin described the problems as "monumental", and the solution as cultural change for an organization that had "lost its way, ethically and morally."[9] (DktEntry:18-4,p104).

Respondent Baldwin launched an audit of the bonus program, which claimed thousands of soldiers unjustly received tens of millions in bonus monies. Despite the involvement of many implausibly only one person was cited as the sole source of this systematic institutional fraud: MSGT.Toni Jaffe, who (DktEntry:18-2, p39) was forced into retirement, charged with several federal crimes, resulting in a guilty plea. Via the direct orders of Respondent Baldwin, the CAARNG began recoupment of bonus monies and S.L.R.P given between 2004-2010.

Events Surrounding Petitioner's Enlistment Contract

In March 2007 instead of attending a scheduled drill Petitioner and other CAARNG members were by Order of the Adjutant General, ordered to attend a retention seminar (DktEntry:18-4,p113). Members were put into assembly lines where they signed contracts to stay in the CAARNG. Members were given advice and counsel by superiors (Acting "Under Color of Law") to extend their time in the CAARNG ---

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9 http://www.sacbee.com/news/investigations/article2573399.html http://www.kcra.com/news/ca-national-guard-bonus-scandal-leads-to-guilty-pleas/29870728

*(AR 135-parg 5-1.41(b)(2) (DktEntry:18-4,p164-65). Based on their trust and reliance in their superiors CAARNG members acting in good faith signed contracts extending their service.

Required to Keep the Same MOS

The CAARNG contract signed by Petitioner required him to remain in the same MOS (job) 25C Radio operator for 3 (three) years. The 20 plus pages at DktEntry: 18-4,p114 clearly and unmistakably show Petitioner had been a radio operator[10] for decades.

CAARNG and DFAS Seek Recoupment

Within months of signing the retention contract Petitioner was sent to Iraq, as were other similarly situated soldiers. Orders calling Petitioner to active duty dated May 15, 2007 clearly show he was a 25C (DktEntry:18-4,p129).

In 2012 the CAARNG sent notice to Petitioner they deemed his bonus an error that must be recouped (other soldiers received similar letters). Petitioner contested the matter and forwarding the CAARNG, DoD and DFAS proper documentation several times but they refused to acknowledge (DktEntry:18-4,p152) that he had never changed his MOS.

Filing of lawsuit

On February 9, 2016, after numerous appeals and exhaustion of administrative remedies, Petitioner filed suit seeking relief from recoupment (and other relief) on behalf of all other similarly situated plaintiffs

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[10] Petitioner's DD 214 discharge from active duty (DktEntry:18-4,p73), shows he was in active service June 6, 2007-- June 6, 2008. Box 11. clearly indicates Primary Specialty. 25C30 Radio per/Maint- 21 Yrs 7 MOS.

(DktEntry:18-4,p 93).

On August 15, 2016, Petitioner received notice (out of the blue) that a great part of his bonus would not have to be repaid, the decision was based upon the fact Petitioner had always acted in good faith (DktEntry: 18-3,p105).

In the fall of 2016, Respondents filed a motion to dismiss Petitioner's Complaint (DktEntry:18-4,p73), (Petitioner filed a Motion for a Preliminary Injunction the same day,(DktEntry:18-4,p37 DktEntry:18-4,p25).

Defendants' Motion asserted an menagerie of defenses, aimed at stating the matter was moot, District Court lacked Article III jurisdiction under the *Feres doctrine* and Defendants were entitled to qualified immunity. Petitioner responded mootness doctrine did not apply, subject matter of the case was capable of repetition yet evading judicial review, that enlistment contracts are outside the scope of the *Feres doctrine* "incident to service" exception, citing *Jackson v. Tate,* 648 F.3d 729 (9th Cir. 2011) and all associated Respondents were not entitled to qualified immunity, having carried out an official policy, custom, practice, or pattern of acts that resulted in a violation of rights and privileges, fairly attributed to Respondents.

In response to the motion to dismiss, guard members came forward and submitted supporting affidavits detailing their struggles and burdens as a result of the recoupment efforts of the CAARNG. One such affidavit was submitted by SFC. Robert Richmond (DktEntry:18-3,p114).

Richmond Affidavit and L.A. Times

Several days after Robert Richmond submitted his affidavit (44a), a friend of his forwarded it to the *Los Angles Times*. A few weeks later, SFC. Richmond, Respondent and MSG. Susan Haley were all part of an October 22, 2016 *L.A. Times* article.

On October 26, 2016, amid national uproar, then U.S. Secretary of Defense, Ash Carter, announced suspension of recoupment efforts (DktEntry:18-3,p 25). On the same date 200-plus U.S. Congress members sent a signed letter (DktEntry:18-2,p50, (DktEntry: 18-3,p33) to Secretary Carter, citing service personnel who acted in good faith should not have to repay bonus funds. The letter only addressed bonuses.

On December 23, 2016, the 2017 National Defense Authorization Act (NDAA) enacted by Congress went into affect, it required the DoD to submit a report in regard to the CAARNG bonus scandal.

On July 26, 2016, the DoD submitted their report to Congress (DktEntry:18-3,p81). On August 25, 2017, (missing a July 30, 2016, deadline to review all cases) the DoD announced they would cease recoupment efforts because they had lost or could not find all necessary records (DktEntry:18-2,p194).

Relevant Findings of the Report In regard to Fraud

In regard to the bonus scandal, the DoD report (DktEntry:18-2,p81,p120) notes criminal behavior (fraudulent activity, outright fraud (DktEntry:18-2,p81,p120,p85, Section VIII, para1) all consistent with

Petitioner's Complaint.

DoD Report Issues Addressed and Not Addressed

The DoD report identified the bonus class total at 17,485 and claimed only 1,429 troops suffered actual recoupment, the remainder of the troops had allegedly only been warned they would be targeted for recoupment. (DktEntry:18-2,p100).

The report did not address soldiers who signed contacts and only received part of a bonus (DktEntry:18-3,p28), partial S.L.R.P. payments or did not have their contracts honored at all. (DktEntry:18-2,p49).

Minute Order

On September 11, 2017 the District Court issued a Minute Order (37a):

> . . .[t]he Court understands there may be factual developments relating to the reimbursement of members of the putative class. If that is the case, the Court will consider a supplemental brief from each side in connection with Defendants' motion to dismiss as it relates to Defendants' mootness arguments pursuant to Rule 12(b)(1).

Defendants asserted the same position that the matter was moot (DktEntry:18-3,p7). Petitioner countered "effective relief" could still be granted, that a retention or recoupment scandal should never happen again (DktEntry:18-2,p27). Petitioner also took great issue with repeated statements that the contracts in question were illegal; they were not.

When the 9th Circuit case of *Jackson v. Tate* came down, Respondents went into recoupment hyper-

drive. The DoD claims soldiers are now protected by a 2011 software system, Guard Incentive Management System, (GIMS,); they are not protected by GIMS (DktEntry:18-2,p196, CAARNG internal email). There already is a solution by following the on point holdings of *Larionoff,* and *Bell*.

December 5, 2017
District Court Order

Petitioner's Complaint (DktEntry:18-4,p93) set forth five causes of action. Count I Violation 42 U.S.C. §1983 Failure to Train, Count II Breach/Impairment of Contracts, Count III Intentional Misrepresentation, Count IV Deceit or Intentional Fraud and Count V Concealment Fraud.

The District Court dismissed all counts but left leave to amend[11]Counts I, III, IV and V. Count II was dismissed with prejudice. The Court held that Respondents had immunity from suit as Federal actors in their official capacities but could be held liable for damages in their individual capacities.

In regard to Count II Petitioner's contract claim the District Court noted:

> In Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements. (DktEntry:18-1,p19 and 29a.

Though the District Court could clearly identify Petitioner's argument it adopted Defendants' erroneous

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[11] The Court rejected Respondents mootness contentions.

argument that the Court lacked Article III jurisdiction.

9th Circuit Opinion

The Court adopted the position of the District Court that Petitioner did not identify a Constitutional right to satisfy a due process claim under Count I of his Complaint. As to Count II the Court erroneously held "soldiers do not have a contractual right to their reenlistment bonuses" (3a), the Court failed to distinguish the fundamental difference between an accrued entitlement as verses a statutory gratuity.

As to the fraud claims, the Court held Petitioner did not identify an applicable waiver of sovereign immunity, holding the FTCA is the only relevant waiver but "it does not apply because Petitioner has not satisfied the FTCA's administrative exhaustion requirement." The Court's exhaustion finding is not supported by the record.

As to claims against "Defendants in their personal capacities" the court held that Federal Rule of Civil Procedure (F.R.C.P.) 9(b) particularity requirement was not met and that Petitioner conceded the point during oral argument. Only Petitioner briefed the issue of personal liability, noting Respondents waived the issue (DktEntry:30,p38).

Petitioner did meet the plain language requirements of particularity required in F.R.C.P. 9(b). The fact the U.S. Attorney General did not move to offer Respondent Baldwin Westfall Act certification as evidence he was acting within the scope of employment was not addressed by the Court.

Proper subject matter jurisdiction over all claims in this matter and the grounds upon which they rest fall within Article III review.

SUMMARY OF ARGUMENT

Accrued v. Gratuity

Bonus monies and S.L.R.P. (student loan) repayments in military enlistment contracts are not statutory gratuities they are accrued vested property rights and entitlements "earned upon commitment" at the "decision point." This Court has noted this distinction: "[N]o paramount power of Congress or important national interest justifies interference with contractual entitlements" *U.S. v. Larionoff*, 431 U.S. 864, 880 (1977). *Bell v. U.S.*, 366 U.S. 393, 401-402 (1961).

There are CAARNG members who are still owed part of a bonus or S.L.R.P. or both in their entirety, these soldiers are entitled to specific performance of their enlistment contracts in addition to compensatory, consequential, or incidental damages resulting from this breach.

Feres doctrine

This case is the extremely rare intersection of contract and tort in regard to accrued vested military entitlements verus statutory gratuities and clearly demonstrates the dire need to overturn the *Feres doctrine* which has far too long single-handedly usurped the plain language of the FTCA leading to a host of absurd consequences and confusion.

Enlistment is the act of a civilian and as such outside the scope of the *Feres doctrine* "incident to service" exception. Once civilian status is established any violation of a right embedded in any enlistment contract negates the 28 U.S.C. § 1346 FTCA procedural requirement of presentment first of tort claims (in addition to the contract claim) to an administrative

agency or military board of review within the DoD.

The often quoted *Feres* "incident to service" exception is inconsistent with the plain language of the FTCA and should be disregarded completely. This Court has defined plain language on multiple occasions and the *Feres doctrine* conflicts with all of them.

Property Interest

Counts I (42 U.S.C.§ 1983 Failure to Train) and II (Breach of Contract) of Petitioner's Complaint (DktEntry:18-4,p93) go hand in hand. Count I §1983 is not in and of itself a source of rights, it identifies the Constitutional procedural abuse of a process by the DoD via DFAS that led to the thousands of substantive property interest violations.

The Court of Appeals held Petitioner's due process claim failed because it was dependent on a contract claim rendered non-viable because such matters are controlled strictly by statutory scheme. The District Court held Petitioner did not plead a due process violation though it did understand Petitioner's Count I argument:

> "plaintiff did argue" he and his fellow CAARNG members have been deprived of a "property interest" without due process in violation of the Fourteenth Amendment." In Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements. (29a).

Petitioner pled sufficient facts to satisfy F.R.C.P. 8, fair notice was given of Petitioners claim and the grounds upon which it rests. There is not a

"heightened" pleading standard for §1983 claims *Leatherman v. Tarrant County,* 507 U.S. 163, 168-69 (1993). On the face of the pleadings recovery may appear unlikely or remote but that is not the test. [F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims. *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007).

Petitioner's due process claim may only offer declaratory relief and recovery of nominal damages but unlike a claim in contract punitive damages are allowable, *Smith v. Wade, 461 U.S. 30 (1983) and in this case warranted.*

Fraud

As cited consistently throughout all stages of his pleadings Petitioner was ordered to a retention seminar in 2007, by direct Order of the CAARNG Adjutant General (DktEntry:18-4,p113, p102 para #61-62, 65-66). The Order and the circumstances of how it was carried out meet the plain language pleading requirements of F.R.C.P. 9 (b) containing sufficient particularity constituting fraud, the who, when, where, time, how and what was said and the harm it caused. *Cafasso v. General Dynamics,* 637 F.3d 1047, 1054, 1055 (9th Cir. 2011).

Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally, this was done throughout Petitioners Complaint. Allowing contrary judgments and opinions would created uncertainty and misapplication of the second sentence of the rule.

Additionally Respondents themselves satisfied the pleading requirements of F.R.C.P. 9(b) by admitting mass fraud "known wrongs" in a DoD report

both Petitioner and Respondents attached to pleadings. The report (DktEntry:18-2,p81,95,104) was requested by Congress, submitted to Congress and in essence was a declaration against interest.

Fraud was also admitted in public hearings before Congress, and many public statements, such admissions more then meet particularity requirements.

Capable of Repetition

Ending recoupment of vested entitlements is the only real definitive solution to a repetitive problem (91% error rate in bonus program in 2011). The practice poses a real mental health issue for all past, current and future U.S. service members (and their families) who are entitled to this measure of peace of mind, especially while deployed. Meaningful effective declaratory relief can still be granted.

This matter is Capable of Repetition yet Evading Judicial Review. If service personnel fulfill the terms of their contracts or their service ends due to injury they should never endure recoupment.

Service members are entitled to specific performance of their enlistment contracts, honorably signed in good faith, "fully earned upon commitment" at the "decision point"after each solider took the oath of enlistment to "support and defend" the most important contract in the history of the United States: The U.S. Constitution." An actual case and controversy exists.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. ARE ENLISTMENT CONTRACTS ACCRUED VESTED PROPERTY RIGHTS "FULLY EARNED UPON COMMITMENT," AT THE DECISION POINT OR ARE THEY STATUTORY GRATUITIES AND ARE THEY SUBJECT TO ARTICLE III JURISDICTION.

In essentially a few paragraphs the District Court [12] and the 9th Court of Appeals rested their findings on incorrect views of *Bell v. U.S.*, 366 U.S. 393 (1961) and *U.S. v. Larionoff*, 431 U.S. 864 (1977)[13]. The Court of Appeals held Federal Courts lack Article III jurisdiction over Petitioner's contract claim

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[12] The Court did note "In Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements" 29a. Respondents also understood "Petitioner's main contention appears to be his claim for breach of contract" (DktEntry:18-1 p19) DktEntry:18-4, p73).

[13] The Court did not address the holding of *Costello v. U.S.*, F.2d 424, 427 (9th Cir. 1978)(en banc) (with which their unpublished Opinion directly conflicts as it does with *Larionoff)* which held the enlistment contracts in *Larionoff* were "fully earned upon commitment" and distinguishable from retirement benefits which are statutory gratuities subject to alteration or even complete withdrawal. The Court also did not address the holding of *Jackson v. Tate,* 648 F.3d 729 (9th Cir. 2011) infra.

and as a result Petitioner's §1983 claim must also fail because it needed a constitutional right to which it could attach 3a (Essentially a F.R.C.P.12(b)(1) finding on the contract claim and a 12(b)(6) on the §1983 claim). The correct view Petitioner asserts is that once an enlistment contact is signed bonus monies and incentives within the contract which exists for the sole purposes of troop retention are vested, accrued, earned upon commitment at the decision point, which is the signing of the contract and the soldier's oath of affirmation. Furthermore the decision to sign a re-enlistment contract is the act of a civilian just as it is when a civilian first voluntarily joins a U.S. service branch *Jackson v. Tate, 648* F.3d 729 (9th Cir. 2011).

In *Bell* it was noted that "A soldier's entitlement to pay is dependent upon statutory right" at 401. However that right to pay noted in *Bell* is for regular pay as in a salary paid monthly or bi-weekly.

Bell involved three U.S. Soldiers captured during the Korean War. While in captivity all three men participated in propaganda against the U.S. Once back in the U.S. all three soldiers sought back pay for their time spent in captivity (37 U.S.C. § 242 and the Missing Persons Act). The *Bell* Court ultimately found for the former soldiers holding:

> punishment may include the forfeiture of future, but not of accrued, pay. But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be. 401-2.

The holding of *Bell* was and is not novel, it has

deep roots within United States jurisprudence. In *In re Grimley*, 137 U.S. 147, 151-152, (1890) Major Herod, was arrested, tried by court-martial, convicted for murder and sentenced to death by hanging but was never dismissed from the Military. Though the Comptroller wanted to deny Major Herod his accrued back pay Attorney General Ebenezer Rockwood Hoar held Major Herod was entitled to back pay "whether he has actually performed military service or not." The Bell noted several other examples where it was found U.S. service members entitled to fixed pay "whether they actually performed service or not" 13 Op.Atty.Gen. 103, 104. (1884-85), *Straughan v. U.S.*, 1 Ct.Cl. 324 (captured by British troops at sea in 1807) *Jones v. U.S.*, 4 Ct.Cl. 197, 203 (captured 1863 by Confederate guerrillas). *Bell* at 406.

In *Larionoff*, the DoD sought to retain certain soldiers in regard to critical MOS needs. Soldiers were offered enlistment bonuses (VRB award) that they would receive after their current enlistment ended and their new enlistment began, in essence a deferred bonus. Before several soldiers were to begin their new enlistments Congress enacted a new plan. The DoD denied to honor the soldiers' prior enlistment contracts. The Court in *Larionoff*, held the soldiers were entitled to their contracted bonus monies, even though a new statute was enacted.

Accrued Entitlement vs. Statutory Gratuities

The *Larionoff* Court distinguished a bonus from regular pay:

> . . . Assistant Secretary of Defense, Norman S. Paul, also distinguished the

> VRB from ordinary pay, stating that, with the VRB, the military hoped "to cure a separate specific problem by specific means, rather than overall pay." . . . the VRB could only be effective as a selective incentive to extension of service if at the time he made his decision the service member could count on receiving it if he elected to remain in the service. 875-76.[14]

The Court further noted:

> The clear intention of Congress . . . could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. . . . Congress intended to provide at the reenlistment decision point a promise of a reasonably certain and specific bonus for extending service in the Armed Forces, Larionoff and the members of his class are entitled, ...to the award levels in effect at the time they agreed to extend their enlistments. At 877-878.

Respondents' whole contention below has been that the bonuses were regular pay controlled by Statute. The 9th Circuit went out of its way to state that Petitioner "does not claim that his bonus was authorized by statute" 4a. Whether the funds for "Operation Overdrive" that came to the CAARNG were statutorily authorized from Congress misses the point. In this case just as in *Larionoff* at 880:

> "No paramount power of the Congress or

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[14] Hearings: Senate Committee on Armed Services, 89th Cong., 1st Sess., 41 (1965)

> important national interest justifying interference with contractual entitlements is invoked."

Respondents never invoked statutory language nor did they invoke the repeal of any statute. As Petitioner's noted there was a push to retain troops, Instead of drilling Petitioner was sent to a retention seminar by order of the Adjutant General (DktEntry:18-4,p113). At the seminar Petitioner and other similarly situated soldiers acting in good faith "were advised and counseled to accept the retention bonus" they then were put into assembly lines to sign contracts and to give their Oath and Affirmation of allegiance to the United States Constitution. At this decision point ("earned upon commitment" *Costello* at 427) the contract rights became vested and accrued.

There are CAARNG soldiers that went through the recoupment process and despite contentions to the contrary, were never paid interest or received any other consequential or incidental damages (DktEntry: 18-3,p114) they are rightfully deserving of just compensation as are those soldiers who were threatened with recoupment, spent hours and days filing appeals to avoid recoupment. Lastly there are soldiers who served in good faith and yet their contracts bonuses and S.L.R.P. were only partially honored or never honored at all and they are entitled to specific performance of their enlistment contracts.

This matter is well within Article III subject matter jurisdiction. *Maine v. Thiboutot*, 448 U. S.1, 4 (1980), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) Article VI, Sec 2.. Affected service members are entitled to "effective relief," damages and the protection and full enforcement of the document they are sworn to uphold and defend.

II. THIS CASE DEMONSTRATES THE NEED TO OVERTURN THE *FERES DOCTRINE* WHICH HAS SINGLE-HANDEDLY USURPED THE PLAIN LANGUAGE OF THE FEDERAL TORT CLAIMS ACT (FTCA).

Every few decades a case makes its way through this Nation's Courts in regard to the infringement or denial of a military benefit. Such matters generally concern an accrued, vested entitlement or a statutory gratuity and parties seeking to challenge or uphold the flawed holding of *Feres v. U.S.*, 340 U.S. 135 (1950). These cases sound either in tort or contract, this case is the extremely rare intersection of both and makes the case to overturn the *Feres doctrine* and bring it in line with the plain language of the FTCA.

The act of enlistment is the act of a civilian and once civilian status is established any violation of a right embedded in any enlistment contract negates the procedural requirement of presentment first of tort claims to an administrative agency or military board of review within the DoD. 28 U.S.C. § 1346 Federal Tort Claims Act (FTCA)

Civilian status in regard to an enlistment contract was addressed in *Jackson v. Tate,* 648 F.3d 729 (9thCir. 2011). Jackson was honorably discharged from the Washington Army National Guard in May 2006. Jackson's discharge notice from the Guard stated he had been assigned to: "[U.S. Army Reserve] Control Group (Reinforcement) . . . to complete [his] remaining service obligation" at 731.

In June 2006, full time Army recruiters positioned within the National Guard's Recruiting and Retention Command forged Jackson's name to a re-

enlistment contract. Jackson filed suit in district court where defendants argued via the *Feres Doctrine* they were immune from suit, and the district court agreed.

The 9th Circuit Court of Appeals reversed noting the act of signing an enlistment contract is solely the province of a soldier:

> Indeed, a service member's re-enlistment, as opposed to being recalled or otherwise ordered to duty, falls outside the scope of *Feres'* "incident to service" standard because that decision is solely the province of the enlistee [who] . . . voluntarily submit[s] himself to military authority by virtue of his enlistment. At 735.

Though the *Jackson* Court reached the correct decision a major portion of its reasoning is fundamentally flawed. The Jackson court held:

> Courts have applied the *Feres doctrine* in cases where "two common factors" have been present: "One. The injured person was a member of the armed forces of the United States at the time the injury was sustained. Two. The injury must arise out of or occur in the course of activity incident to military service" at 733.

The often quoted "incident to service" exception is inconsistent with the plain language of the FTCA which plainly notes the only two exceptions for service members not being able to sue the U.S. military.

Per 28 U.S.C. § 2680 (j) (k):

> (j) Any claim arising out of the combatant activities of the military . . . or naval forces, or

the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

There is zero statutory authority or intent to support the "incident to service" exception which seemingly came out of thin air to usurp the plain language of the FTCA leading to a host of absurd consequences and confusion clearly demonstrating the dire need to overturn *Feres* (citations omitted). As this court has noted in dissent multiple times, "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.". . . At a bare minimum, it should be reconsidered" (J.Thomas, dissent denial of Petition Writ of Certiorari, *Lanus v. U.S.,* (2013) (DktEntry:18-3,p20).

Plain Language

In *U.S. v. Johnson*, 481 U.S. 681, 684 (1987) the dissent, Justices Scalia, Brennan, Marshall and Stevens would have overruled the *Feres doctrine* because the clear language of the FTCA had been corrupted by extending protections to the military that were never included nor intended in the FTCA and there is "no other reason why the Court should hesitate to bring its interpretation of the FTCA in line with the plain meaning of the statute." J. Thomas dissenting *Lanus v. U.S.,* (2013) (DktEntry:18-3,p20-21).

This Court has defined plain language on multiple occasions and the *Feres doctrine* conflicts with all of them:

> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise", *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917).

[W]here the language of an enactment is

> clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning *intended; U.S. v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929).
>
> "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, (1992).
>
> Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last:`judicial inquiry is complete.'"Id."Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner,* 928 F.2d 901, 904 (9th Cir. 1991).
>
> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that '[absent] a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' *Escondido v. La Jolla,* 466 U.S. 765, 772 (1984).

The Court of Appeals asserted Petitioner had "not satisfied the FTCA's administrative exhaustion

requirement" (4a) when he in fact did so, yet based on all of the above it is clear enlistment contracts fall outside the scope of the FTCA and the *Feres doctrine* and any breach of an enlistment contract is subject to specific performance and recovery of compensatory, consequential, incidental or any other damages sounding in contract[15] and any ancillary tort claims infra.

For all of the above the *Feres doctrine* serves no legitimate purpose and should be overturned in favor of a brightline rule consistent with the Plain Language of the FTCA.

III. UNDER F.R.C.P. 9(b) ONLY THE CIRCUMSTANCES CONSTITUTING FRAUD HAVE TO BE PLED WITH PARTICULARITY, THIS WAS DONE. CONTRARY JUDGMENTS AND OPINIONS CREATE UNCERTAINTY.

The 9th Circuit held (5a) Petitioner "conceded" he did not plead with particularity in regard to suing Respondents for fraud in their individual capacities F.R.C.P 9 (b). Petitioner asserts he was only required to plead with particularity the circumstances constituting fraud to meet the pleading requirements

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15 See *Grulke v. U.S.*, 228 Ct.Cl. 720, 721-722 (1981); *DeCrane v. U.S.*, 231 Ct. Cl. 951 (1982): enlistment contract enforceable . . . distinguish[ed] . . . rather than seeking pay afforded by statute but withheld, Grulke was actually claiming a right "for 'actual, compensatory, special and punitive damage,' for breach of contract."

of F.R.C.P. 9 (b)[16] and this was done throughout Petitioners Complaint[17] (DktEntry:18-4,p93) yet courts and litigants are not reading the second sentence of the rule leading to contrary judgments, opinions misapplication and uncertainly. The Court also stated Petitioner failed to exhaust his administrative remedies or "identify an applicable waiver of sovereign immunity" under the FTCA (which is not applicable, supra). 4a-5a.

In 2007 Petitioner was ordered to an "Operation Overdrive" retention seminar, by Order of the CAARNG Adjutant General (DktEntry:18-4,p113, p102 para #61-62, 65-66). The Order and the circumstances of how it was carried out contained sufficient particularity constituting fraud, the who, when, where, time how and what was said and the harm it caused. *Cafasso v. General Dynamics*, 637 F.3d 1047, 1054, 1055 (9th Cir. 2011).

The Order which was noted by the District Court (35a-36a) contained the:

Who? By Order of the Adjutant General (only

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[16] F.R.C.P. 9(b) Pleading Special Matters:
(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

[17] As to, intent, knowledge, state of mind those issue were generally alleged. Furthermore under F.R.C.P. 9 (c) the conditions that gave rise to the allegations only needed to be alleged in general terms, only a denial would have to be pled with particularity yet never once in a pleading did Respondents deny any allegations of fraud.

one person holds this title)

When? March 1, 2007.

Where? Fairfield Armory, Fairfield California.

Time? 0600 hrs.

How? CAARNG members were given advice and counsel by superiors to extend their service then placed in assembly lines (DktEntry:18-4,p93,para, 35-36a) to sign contracts. CAARNG service members in attendance acted in good faith based on the reliance, encouragement and guidance they received from their superiors in attendance. (DktEntry:18-4,p104).

What were they told?

CAARNG members were all told they were entitled to enlistment bonuses and S.L.R.P. payments. Petitioner's Complaint stated officials knew they were lying and would recoup bonus monies, troops were conned, a classic bait and switch (DktEntry:18-4,p107 para #81-82) "one of the most egregious mass frauds in U.S. Military history" (DktEntry:18-4,p105).

What is false about the statements?

Later contentions Petitioner was not eligible for a bonus or S.L.R.P. that he switched his MOS are false (DktEntry:18-2,p23, DktEntry:20,p17). That over 16,000 soldiers (for similar reasons) were also suddenly deemed not be eligible for their bonuses and S.L.R.P they earned

> upon commitment are false, and that one person only was cited as the sole source of this massive fraud, MSGT.Toni Jaffe, is also false.

Why were the statements false?

> Petitioner did not give the bonus to himself. Petitioner repeatedly gave Respondents supporting documents that he did not change his MOS but Respondents repeatedly refused to acknowledge the evidence (DktEntry:18-4,p101,para57, p106-7, para 77-82, p113-122, MOS history).

Petitioner's Complaint asserted Respondents knew they would recoup from the inception of "Operation Overdrive" and that the commonality of operative acts were repeated (numerously) over 16,000 times even earning General Wade a self-congratulatory Master Recruiter Badge/Award (DktEntry:18-4,p107). Petitioner further asserted: The Secretary of Defense's office and the heads of the military and DFAS (only one person heads DFAS) have for years knowingly signed off on false entries. (DktEntry:18-4, p96,para #25. DFAS has a long history of using fake numbers, "Plugging" (plugs) to justify accounting actions).

Petitioner also noted that in 2011 then Secretary of Defense Robert Gates described the Pentagon's business operations as "an amalgam of fiefdoms without centralized mechanisms to allocate resources, track expenditures, and measure results"(DktEntry:18-4,p98,Para #30).

Former CAARNG Adjutant General (Wade) was the "Moving Force" behind (DktEntry:18-4, p105), "Operation Overdrive" (DktEntry:18-2,p11). Current Adjutant General Respondent Baldwin was

the "Moving Force" that started the recoupment aspect of the bonus scandal, Baldwin even declared: "I have the authority to put people in jail"[18] and "said he already knows enough to identify the genesis of the problems: Incredible pressure that came from above to increase Guard membership,"[19] confirming Petitioner's "Moving Force" assertions were based in fact and more then 'fairly attributable" to Respondents, *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). In the beginning of this action Respondents contended Petitioner's Complaint and Motion for Class action status (DktEntry:18-4,p37) was based on raw unfounded allegations that could never be proven, that the class could not be 16,000 etc... yet as Petitioner noted below:

> As fanciful as Plaintiff's Complaint may have initially seemed to Defendants, everything noted in plaintiff's complaint has come to light (DktEntry:18-3,p29).

Matters Outside of the Pleadings Not Excluded

Respondents themselves satisfied the pleading requirements of F.R.C.P. 9 (b) by admitting mass fraud "known wrongs" in this matter in a DoD report (an official document F.R.C.P. 9 (d)[20] both Petitioner and

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18 California Guard Likely Faces a Battle to Recover Incentive Funds https://www.sacbee.com/news/investigations/article2573395.html

19 New leader implements big changes in California National https://www.sacbee.com/news/investigations/article2573396.html

20 F.R.C.P. 9(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was

Respondents attached to pleadings. The report (DktEntry:18-2,p81,95,104) was requested by Congress and submitted to Congress. Fraud was also admitted in public hearings before Congress, and many public statements[21] supra, such admissions more then meet the requirements of F.R.C.P. 9 (b). The report was in essence a declaration against interest.

Additionally Petitioner's Complaint and pleadings in total offered twenty-nine (29) EFC attachments over 200 pgs (DktEntry:18-2,p14-28,49-170, 189-200, DktEntry18-3,p80-138), none of which were excluded by the Court even though Respondents sought exclusion (DktEntry:18-3,p3-4). Respondents on the other hand via the DoD report implausibly blamed one person as the sole source of fraud: MSGT.Toni Jaffe (DktEntry:18-2, p39) who was forced into retirement, charged with several federal crimes, resulting in a guilty plea.

Respondent McCord was the head of DFAS and Respondent Baldwin is still the head of the CAARNG, in regard to immunity the origins of all acts by them or any associates can be traced directly to their offices. In regard to immunity in an Official capacity being applied to state actor Respondent Baldwin[22] it is the

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legally issued or the act legally done.

[21] January 3, 2017- DoD Briefing –"unique to California was fraud." https://www.c-span.org/video/?421024-1/secretary-defense-peter-levine-update-recoupment-efforts

[22] No Addendum, Westfall Act 28 U.S.C. § 2679(d) protection not offered to Respondent Baldwin a state not federal actor. Also see *Perpich v. U.S.* , 880 F.2d 11 (8th Cir.1989)(en *banc)Watson v.*

office being sued, *Will v. Michigan Department of State Police,* 491 U.S. 58, 71 (1989):

> "[A] suit against a state official in his or her official capacity is not a suit against an official but rather is a suit against the official's office.

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise", *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). The Court of Appeals application of F.R.C.P. 9 (b) goes against the *Plain Language doctrine*. Petitioner pled sufficient particularity, the standard of F.R.C.P. 9 (b) was met.

IV. A "HEIGHTENED" PLEADING STANDARD IS NOT REQUIRED FOR §1983 CLAIMS. ALL THAT WAS REQUIRED OF PETITIONER WAS A SHORT AND PLAIN STATEMENT. THIS WAS DONE.

Counts I (42 U.S.C. § 1983 Failure to Train) and II (Breach of Contract) of Petitioner's Complaint (DktEntry:18-4,p93) go hand in hand. Count I 42 U.S.C. § 1983 is not in and of itself a source of rights, but it identifies the Constitutional procedural abuse of a process by the DoD via DFAS associates that led to the thousands of substantive property interest violations of the 5th and 14th Amendments to the U.S. Constitution. *Daniels v. Williams,* 474 U.S. 327, (1986). *Cleveland Bd. of Educ, v. Loudermill,* 470 U.S. 532, (1985). Substantive due process applies to the right a

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Ark. Nat'l Guard, 886 F.2d 1004, 1007 (8th Cir. 1989). If granted Certiorari immunity would be briefed in more detail.

plaintiff has been denied, life, liberty or property. *County of Sacramento v. Lewis,* 523 U.S. 833 (1998).

Count II concerns the accrued vested rights in contract that textually established the property interest and became finalized upon the required oath of enlistment, "support and defend" . . . The Constitution of the United States (DktEntry:18-2,p49)

District Court Findings
14th Amendment Property Interest

In dismissing Count I of Petitioner's Complaint, the District Court held the Complaint did not identify the specific constitutional right infringed yet noted:

> "plaintiff did argue" he and his fellow CAARNG members have been deprived of a "property interest" without due process in violation of the Fourteenth Amendment." . . . Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements. (29a).

Even though the District Court was clearly on notice and understood Petitioner's claim it erroneously concluded that "bonus monies" are regular pay governed by statute and not subject to Article III review. The Court of appeals adopted a similar position 3a.

There is not a "heightened"pleading standard for §1983 claims *Leatherman v. Tarrant County*, 507 U.S. 163, 168-69 (1993). Pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests . . . federal courts and litigants must rely on summary

judgment and control of discovery to weed out unmeritorious claims. *Bell Atlantic v. Twombly,* 550 U.S. 544, 555 (2007). "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions, none of which apply to section 1983 actions."*Swierkiewicz v. Sorema,* 534 U.S. 506, 512 (2002).

Moving Force

Under 42 U.S.C. § 1983, a plaintiff needs to show a state actor engaged in an official policy, custom, practice, or pattern of acts that resulted in a violation of rights, privileges, or immunities and that the acts were either intentional or the result of deliberate gross indifference. The acts complained of must be of such character that any reasonable official or associates would have understood that what they are doing violates that right and are "fairly attributable" to the government *Rendell-Baker v. Kohn,* 457 U.S. 830, 838, (1982). *Golden State Transit. v. City of Los Angeles,* 493 U.S. 101, 106 (1989).

The "moving force" behind the actions that started the bonus scandal were direct orders from the very top of the CAARNG, and the actions of the DoD via DFAS supra, *Bryan County v. Brown*, 520 U.S. 397 (1997), *McMillan v. Monroe*, 520 U.S. 781 (1997). Indeed DFAS and the DoD have a decades-long history of failed accounting customs, practices and polices which was at the heart of Petitioner's due process claim against Respondents. In the matter at hand the actions complained of were not isolated but were repeated thousands of times.

Declaratory Relief,
Nominal and Punitive Damages

When filing his complaint Petitioner was well aware that a 1983 action may only result in nominal damages[23] but Petitioner's main goal was permanent declaratory relief to stop current and future illegal recoupment of accrued vested entitlements in enlistment/re-enlistment retention contracts "fully earned upon commitment" at the " decision point" citations omitted. All Respondents are subject to claims seeking declaratory relief *Ex Parte Young*, 209 U.S. 123, 124 (1908).

Proper jurisdiction in these types of matters does not belong to the internal workings of DFAS, all U.S. Military personnel have a right in contract, outside the internal administrative processes of the DoD, DFAS and the CAARNG. Furthermore the availability of administrative mechanisms to protect plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. *Rosado v. Wyman,* 397 U.S. 420 (1970). As Justice Rutledge noted while concurring in *Marino v. Ragen*, 332 U.S. 561, (1947):

> It would be nothing less than abdication of our constitutional duty and function to rebuff petitioners with this mechanical formula whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief. At 564.

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[23] "[a] live claim for nominal damages will prevent dismissal [of a cause of action] for mootness." *Bernhardt v. City. of Los Angeles,* 279 F.3d 862, 872 (9th Cir. 2002).

Claims in contract can cover specific performance, consequential, incidentals and other related relief for losses/costs but it cannot compensate for a constitutional violation which may only offer nominal damages yet would allow punitive damages, which are warranted in this case.

> "As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Smith v. Wade*, 461 U.S. 30, 48-49. (1983).

It was likewise generally established that individual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants. *Scott v. Donald*, 165 U.S. 58, 77-89 (1897) (punitive damages for constitutional tort).

Proper jurisdiction over this claim rests in this Nation's Article III Courts. The 14th Amendment "guarante[e] more than fair process," *Washington v. Glucksberg*, 521 U. S. 702, 719 (1997).

Here in the case at hand U.S. Service Members via their contracts have a textually protected property interest, all that was required of Petitioner was a short and plain statement: This has been done.

V. RECOUPMENT OF ACCRUED ENTITLEMENTS EARNED BY U.S. SERVICE PERSONNEL IS AN UNCONSTITUTIONAL PRACTICE CAPABLE OF REPETITION YET EVADING JUDICIAL REVIEW. ALL SERVICE MEMBERS ARE ENTITLED TO THE DECLARATORY RELIEF REQUESTED.

Since the late 1970's it has been held that enlistment contracts are accrued vested entitlements "fully earned upon commitment." *Costello v. U.S.*, 587 F.2d 424, 427 (9th Cir. 1978) citing *U.S. v. Larionoff*, 431 U.S. 864, 869 (1977). Over 40 years later Respondents falsely asserted that "thousands of soldiers in the CAARNG, and in other States" received improper bonuses (DktEntry:24,p10), to justify recoupment subjecting U.S. Service members who challenge such actions to essentially years of attrition through litigation by employing a endless circular pattern of internal appeals.

On December 7, 2016 testifying before Congress about the CAARNG bonus scandal then Under-Secretary of Defense Peter Levine commented:[24]

> "First of all, recoupment is an ordinary fact of life in the military . . . We're recouping against as many as 100,000

[24] https://www.c-span.org/video/?419532-1/defense-officials-testify-california-national-guard-bonuses at 01:17:41.
1/3/17- DoD Briefing California was fraud.
Https://www.c-span.org/video/?421024-1/secretary-defense-peter-levine-update-recoupment-efforts

> soldiers, sailors, airmen and Marines at any given time, civilians as well." at 01:17:41.

Recoupment of accrued entitlements should not be an ordinary fact of life. It is in fact an arbitrary, capricious policy and practice which violates the procedural and substantive due process rights of service personnel.

The still unexplained perfect example of this arbitrary, capricious practice are the facts and circumstances surround the recoupment of former CAARNG Adjutant General Wade (DktEntry:18-4,p104).

In 2011 General Wade who led the CAARNG 2005-2011 was forced to retire from the CAARNG due to intentional personal active involvement in illegally taking (double-dipping) $155,000 in CAARNG funds. General Wade was not criminally charged as others were and was only ordered to pay back $80,000 for his last 22 months of service, in fact he was held to a three year statute of limitations for recoupment while ordinary soldiers were held to a ten year[25] statue of limitations (DktEntry:18-2,p102,), seven years longer then General Wade. General Wade's punishment was being sent to Italy to work for NATO. (DktEntry:18-2,p69-72 DktEntry:18-4,p51-52, 104). It is still unknown if General Wade has paid back one cent.

Congress knew about the scandal for years yet did not voice outrage until this matter became national news (DktEntry17, p27-29). Following the holdings of

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[25] 42a (DktEntry:24, 39, A1, Pub.L.No. 114-328 § 671. Recovery of Amounts Owed to the United States by Members of the Uniformed Services (C)(ii)).

Larionoff and *Bell* and ending recoupment of vested entitlements is the only real definitive solution to a repetitive problem. Many CAARNG soldiers had only a part of their contract honored or not honored at all. This happened to Petitioner, Respondents did not honor their agreement to his S.L.R.P. (DktEntry:18-3, p27).[26]

The recoupment efforts of Respondents pushed many being recouped to a mental breaking [27] point. They felt abandoned, betrayed by the CAARNG and their country (DktEntry:18-3, p111, 114, 118, 123, DktEntry:18-2, p14,20, 24).

It was out of concern for fellow service members that Petitioner requested declaratory relief in the first place, indeed while some form of monetary relief is more then warranted, Petitioner made it clear from the start he was seeking declaratory relief not just for himself but for the peace of mind[28]of all past, current

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[26] In addition to a bonus Petitioner was promised $12,000, in S.L.R.P. to be paid in installments over 6 years. S.L.R.P. payments stopped after two (2) years and then DFAS started recoupment."

[27] https://www.washingtonpost.com/news/checkpoint/wp/2016/06/28/in-pentagon-bomb-squad-an-investigation-and-a-fight-to-stave-off-financial-ruin/?utm_term=.ebc0e04a9502. An already stressful job became unbearable when DoD/DFAS recoupment of bonuses pushed a Pentagon Bomb Squad member to commit suicide. . . speaking on the condition of anonymity because of fear of retaliation. "But when they tell you 'We want it back,' It's like 'What?!" I think that's what upset so many people. If I knew I was going to be in this mess … I never would have joined." Dan Lamothe June 28, 2016.

[28] When being recouped Petitioner and Robert Richmond were informed by the CAARNG they could speak to an attorney or

and future U.S. Military personnel (DktEntry:18-4, p37).

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' *Friends of The Earth, v. Laidlaw Envtl. Servs,* 528 U.S. 167, 189 (2000).

This case is a classic example of a matter being Capable of Repetition yet Evading Judicial Review, *U.S. v. Nixon,* 418 U.S. 683 (1974), *Globe Newspaper v. Superior Court County of Norfolk,* 457 U.S. 596 (1982). *Gerstein v. Pugh,* 420 U.S. 103, (1975).

Since 1990 the DoD cannot account for trillions of tax dollars (DktEntry:18-4,p98, para30) yet the one thing they always claim to account for with heavy-handed certainty is alleged overpayments to service personnel.

If service personnel fulfill the terms of their contracts or their service ends due to injury they should never endure recoupment. Service members are entitled to specific performance of their enlistment contracts, honorably signed in good faith, "fully earned upon commitment" after each solider made the oath of enlistment to "support and defend" the most important contract in the history of the United States: The U.S. Constitution. An actual case and controversy exists U.S. Const. art. III, § 2, cl. 1,.

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chaplain. DktEntry:18-2,p191, 200. Everyone recouped got this letter, the chaplain info is not a throwaway comment it is offered for only one reason, (mental health) fear of suicide. They knew recoupment could push people over the edge.

CONCLUSION
REQUEST FOR DECLARATORY AND OTHER RELIEF

Proper subject matter jurisdiction over all claims in this matter and the grounds upon which they rest fall within Article III review.

Petitioner seeks to overturn the *Feres doctrine* and enforce the holding of *Larionoff*. Enlistment contacts become accrued vested property interest at the decision point and cannot be recouped, there has to be a clear unambiguous brightline rule:

1. Signing any enlistment/re-enlistment contract is a civilian act, entitled to complete specific performance that mandates the enlistee and contract are not subject to the military administrative process (regardless of branch of service).
2. Absent fraud proven via court martial, enlistment/ re-enlistment retention bonuses and S.L.R.P. cannot be recouped.
3. Any soldier who is offered and signs a re-enlistment/enlistment, retention or any other bonus and does so in good faith has an absolute vested right to receive in full and retain said monies, and is immune from recoupment from not only that service member's branch of the U.S. Armed Forces but any other governmental entity in the United States.
4. Any error should come out of DoD monies or its branches, it is their duty to properly train and oversee recruiters, DFAS and their superiors.

5. The Government must bear the burden to refute good faith by a reasonable doubt consistent with Due Process.

6. If certiorari is granted other relief would be requested in more detail including attorney fees, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Dated: August _____, 2019

Respectfully submitted,

s/Daniel C. Willman
Daniel C. Willman
Attorney for Petitioner