In the

Supreme Court of the United States

UNITED STATES, ET AL.,

PETITIONERS,

V.

No. 76-413

NICHOLAS J. LARIONOFF, JR., ET AL,

RESPONDENTS.

Washington, D. C.
April 27, 1977

Pages 1 thru 47

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, ET AL., Petitioners,	:	
v.	:	No. 76-413
NICHOLAS J. LARIONOFF, JR., ET AL., Respondents.	:	

Washington, D. C.,

Wednesday, April 27, 1977.

The above-entitled matter came on for argument at 1:01 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Washington, D. C.; on behalf of the Petitioners.

STEPHEN DANIEL KEEFFE, ESQ., 733 - 15th Street, N.W., Washington, D. C. 20005; on behalf of the Respondents.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in 76-413, United States v. Larionoff.

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

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JONES: Mr. Chief Justice, and may it please the Court:

The issue in this case which arises under a statute that has since been repealed is whether the variable reenlistment bonus of an enlisted man who extends his enlistment in the military service is computed as of the date he signs his extension agreement or, instead, as of the later date in which he enters into service of the extension period.

This issue involves approximately $60 or $70 million in military pay, and this Court granted certiorari to resolve a conflict among the circuits.

In order to understand this case, it is necessary first to understand the considerations that led to enactment of statutory authority for payment of variable reenlistment bonuses, also to understand the manner in which the Department of Defense exercised that authority.

The statute was enacted in 1965, during the first major phase of this country's military undertaking in Vietnam. At that time, the Department of Defense was concerned that

enlisted men possessing critical military skills would reenter civilian life at the end of their original enlistment periods, leaving the Department of Defense with the essential but expensive task of training new men in those skills.

It was determined that the offer of a large bonus in addition to the existing so-called regular reenlistment bonus might induce substantial numbers of enlisted men to reenlist at the end of their original enlistment periods.

It was further determined that the size of the bonus in each case should depend upon the importance of the particular military skill to the military. Accordingly, Congress authorized the Secretary of Defense to assign to each military skill an award level, ranging from zero to four, depending upon the importance of that skill to the military at that time. These award levels were subject to annual review and modification as the military's needs changed.

The bonus, called the variable reenlistment bonus, was equal to the regular reenlistment bonus multiplied by the award level in effect for the enlisted man's skill level at the time of his reenlistment.

For present purposes, the most significant aspects of this history are that the variable reenlistment bonus statute by its terms refers only to reenlistments, not to extensions of enlistments, and that there is no indication in the legislative history that either the Department of Defense or Congress gave

consideration to how or even whether the variable reenlistment bonus program would apply to extensions of enlistment.

Now, this is important because extensions differ from reenlistments in two fundamental respects. They differ as to timing. An extension typically is entered into right at the outset of the man's military service, whereas, by contrast, a reenlistment only takes place at the end of that original enlistment period.

QUESTION: Has this been your position throughout?

MR. JONES: Has what been our position throughout, Mr. Justice White?

QUESTION: Has what you just said?

MR. JONES: Oh, yes. There is a clear difference between extensions and reenlistments.

QUESTION: And has your --

MR. JONES: Oh, I am not arguing that the statute -- that the bonus program doesn't apply to extensions. I am just explaining, if you will give me time, how it applies.

QUESTION: All right. Would you repeat what you just said?

MR. JONES: I said the extensions differ from reenlistments in two ways. I just described one way in which they differ, that is as to timing. The extension is entered into at the beginning of the period of service; the reenlistment is entered into only at the end of the original enlistment period.

The second difference is more important for this case, and that is the difference in motivation. An enlisted man extends his enlistment at the outset of his military service in order to qualify for specialized training that will lead to higher pay in the military and in some cases at least to a better career in civilian life after he leaves the military.

As a condition of eligibility for specialized training of this kind, the military requires, often requires a longer minimum service commitment than the original enlistment period, and the enlisted man extends his enlistment at the beginning in order to satisfy that condition of eligibility and to receive the specialized training.

In contrast, a reenlistment is entered into only at the end of the original enlistment period. There is no built-in incentive other than the pay, allowances and other enjoyments that the military life generally may afford.

Now, in view of these differences, we cannot know how Congress would have legislated with respect to extensions of enlistment if it had that matter, if it explicitly considered that matter. Congress might have concluded that the incentive of specialized training was sufficient alone to induce extensions and that no additional bonus need be provided.

On the other hand, in view of --

QUESTION: Extension of enlistment would be typically

what, from --

MR. JONES: From four years to six years. That is the extension in this case. It could be for a lesser or greater period of time. The original enlistment period here was four years.

In view of the differences in timing, that is that the extension is entered, the extension agreement is signed at the beginning, Congress, had it considered the matter, might have acted to clarify the question when the variable reenlistment bonus accrues in cases of extensions, but it did neither.

The statute and the legislative history are silent as to the intended application of the variable reenlistment bonus program to extensions of enlistment. Now, this is not to say that the program does not apply to extensions of enlistment, but it applies not by virtue of the language of the bonus statute itself, former 37 U.S.C. 308(g), but rather as a consequence of the general catchall provision in 37 U.S.C. 906, which provides that a man who extends his enlistment is entitled to the same pay and allowances as are made available to the man who reenlists.

This means that when Congress passed the bonus statute, the Secretary of Defense was left with the delegated responsibility of accommodating the bonus program to a group of service members who extend their enlistments, but that had not been within the explicit contemplation of Congress when it

enacted the statute.

Now, the major question confronting the Secretary in this regard was whether in cases of extensions the bonus was to be measured on the basis of the award level that was in effect when the extension agreement was signed or instead on the basis of the award level that was in effect on the later date when the extended period was entered into.

Now, the former alternative would have concededly had the advantage of relative certainty, that is at the time the agreement was signed everyone would know what award level would apply.

On the other hand, relative certainty as to the award level that will apply to a bonus that will not be received for several years might not be of major significance as compared with the basic incentive of specialized training.

In any event, several other considerations militated against measuring the bonus as of the earlier date. That form of computation would have led to a potential disparity between the treatment of reenlistments and extensions. It would have created the possibility that a man who entered into his extension period would receive a different bonus, perhaps greater, perhaps smaller, depending upon what had happened to the award level in the intervening time, from that received by a man who entered into his reenlistment period on the same day and possessing the same skill.

Now, this disparity in treatment could have been expected to have led to disputes and dissatisfaction and, more than that, it would appear to be contrary to the statutory command of equal treatment for extensions and reenlistments.

Furthermore, 37 U.S.C. 308(b) provides that a man who reenlists during basic training is not entitled to the bonus. That statute would seem to suggest, in view of the requirement of equal treatment, that the bonus could not immediately vest in the case of an extension that was entered into, an extension agreement that was signed during the period of basic training.

QUESTION: Mr. Jones, if a man dies somewhere along the line, does that make any difference at all?

MR. JONES: Well, if he dies before he enters into his extension period, our position is that he is not entitled to any bonus. The matter hasn't been fleshed out in litigation, but I assume that would be the respondent's position, too.

There is a provision in the regulations for recoupment if the extension period is not fully served, that is if for some reason the man leaves the service having finished only one of the two years of his extension period, then they could recoup one-half of his variable reenlistment bonus.

QUESTION: Has that ever been effectuated, to your knowledge, if a man dies?

MR. JONES: The record does not so show because the case is up on summary judgment, but it is my understanding that

it is common to have recoupment in situations like that.

Well, let me state further that the bonus is paid in installments, so that the future installments simply would not be paid. I think that that more than an official recoupment would be the method by which the full bonus would not be paid.

Moreover, permitting the bonus to vest at the time the extension agreement was signed would also be inconsistent with the Secretary's representation to Congress at the time the bill was being considered that there would be no express or implied obligation with respect to future payments of the bonuses.

QUESTION: I suppose there is no doubt, is there, Mr. Jones, that if I enlist in the Army as a private and the pay is, as in fact was mine, $50 a month, and I enlist for three years and two months later Congress reduces the pay to $45, I have to stay in the Army three years?

MR. JONES: Absolutely, and the enlistment agreements provide -- and I will get to this a little bit further, but they normally provide that they are entered into in consideration of the pay that will accrue, whatever accrues is what the man gets, under the contract.

With considerations of the kind that I have just recited presumably in mind, the Secretary promulgated regulations that in his view provide for computation of the variable reenlistment bonus on the basis of the award level in effect on the

day that the man enters into the extended period of service, whether he enters into that service by way of reenlistment or extension.

Now, there can be no question under the statute that the Secretary had latitude to adopt this rule. The only question in this case is whether the regulations have the effect that the Secretary intended.

Now, with this rather extensive background in mind, I will discuss the particular facts of this case. The respondents are Navy enlisted men who at the outset of their service extended their enlistments from four years to six years in order to qualify for training in the Navy's program of what was called advanced electronics field.

Their extension agreements stated that they were entered into, and I quote, "in consideration of the pay, allowances and benefits which will accrue to me during the continuances of my service." The agreements did not state that the respondents would be entitled at any point to a variable reenlistment bonus. Indeed, the agreements did not mention the variable reenlistment bonus at all.

Now, pursuant to these extension agreements, each respondent in fact did receive the advance electronics field training, and that training led to qualification in the Naval skill rating called communications technician maintenance or CTM.

Now, the problem in this case arises because at the time the respondents signed their extension agreements, the CTM award level was set at four, the highest permissible. But by four years later, when they entered into their extension periods, the award level, CTM award level had been reduced to zero.

Moreover, by the time respondent Johnson entered into service of his extension period, Congress had already repealed the statutory authority for payment of variable reenlistment bonuses. Accordingly, the Navy refused to pay the respondents the bonus.

Respondents then brought this suit, claiming that their right to the bonus had accrued within the meaning of their extension agreements at the time they signed those agreements, and they requested payment of the bonus based upon an award level of four, or in the alternative release from service.

Some of the respondents submitted affidavits in which they stated that they had been promised payment of a variable reenlistment bonus by recruiting officer, based upon the award level of four.

In response, the head of the Navy's variable reenlistment bonus program submitted an affidavit in which he stated, and I quote, "It is not the policy of the Department of the Navy to promise specific eligibility for variable reenlistment bonus, nor is any official authorized to make such a promise in

counseling with the prospective enlistee."

The government also submitted to the court regulations requiring reenlistment interviewers to inform enlistees of, and I quote, "VRB program flexibility and possibility of changes which might decrease the amount of bonus to which entitled at the time of reenlistment."

Both sides then moved for summary judgment. The District Court granted the respondents' request for payment of the bonuses and denied their requests for release from service. Both sides appealed and the Court of Appeals affirmed.

One point should be clarified in connection with these facts. Respondents in this Court state as a fact that they were promised bonuses based upon an award level of four, but that allegation was disputed in the District Court and the court made no findings with respect to that.

Moreover, by granting summary judgment for the respondents, the District Court necessarily proceeded upon the assumption that no such promise had been made. In any event, we take the position here that whether or not such a promise was made is legally immaterial.

Insofar as respondents argue a theory of promissory estoppel and they do not appear to do so in this Court, it is well established that the government is not estopped by the unauthorized representations of its agents, and respondents have abandoned --

QUESTION: These were alleged oral promises by recruiting officers?

MR. JONES: That is correct. That was the allegation. It was never found as a fact.

Respondents have abandoned their request for release from service, which presumably was based upon some theory of misrepresentation or mutual mistake by failing to file a cross petition from that portion of the judgment below that was adverse to them.

Accordingly, respondents' claim for entitlement to the bonus turns upon the test of the applicable military regulations. Now, the Department of Defense Instruction 1304.15, paragraph VI.A., which we discuss in our brief, provides that members will receive the award level effective on the date of their extension of enlistment. The term "extension of enlistment" is not defined in the regulation.

We show in some detail, however, at pages 28 to 30 of our brief, that both the Navy regulations and the extension agreements themselves provide that an extension does not become effective until the day following the expiration of the original enlistment period. And as a corollary -- and this is the military's construction of its own regulations -- the extension of enlistment occurs only when service of the extension period begins. Now, this is a fair reading of the regulation, and we submit that it should be sustained.

But moreover, as we point out in our reply brief, at page 2, if extension of enlistment were read as the respondents suggest, as referring to the signing of the extension agreement, then respondents would never have become even potentially eligible to receive a variable reenlistment bonus. Paragraph V.B.1.b. of the regulation, which is set forth at page 59 of the appendix, requires that to be eligible for a bonus, a service members must have completed at least 21 months of continuous active service prior to extension of enlistment, and respondents had not completed any substantial active service before they signed their extension agreements.

In short, under the regulations respondents were entitled at most to the award level that was in effect on the days that they entered into service of their extension periods. Since the CTM award level on those dates was zero, the Navy properly refused payment of the variable reenlistment bonuses.

Now, respondents claim, however, that paragraph V.B.1.f. of the regulation, which is at page 61 of the appendix, implies -- it doesn't state but implies -- that they are entitled to a bonus. But that paragraph has no application to respondents at all. It is designed solely to deal with the fact that an award level -- excuse me, that a 90-day advance notice is given before an award level is reduced or terminated.

There are service members so situated that upon hearing that their award level was to be reduced or terminated,

they would be able to obtain an early discharge under the regulations and reenlist, or possibly to sign an extension agreement toward the end of their period of service and then enter into service of the extended period.

Paragraph V.B.1.f. is simply designed to prevent such service members from obtaining a variable reenlistment bonus based upon the older outgoing award level. As to such service members, the purpose of this provision is to make the reduction or termination of award level effective immediately upon the issuance of the notice. That is the only purpose and effect of this provision.

It does not apply to respondents and it would not assist them even if it did. Now, I would concede that these regulations could have been written in a manner better calculated to reveal their objectives to the non-military mind. They are not plain on their face. But they are interpreted and applied in a manner that I have described.

This Court's statement in a similar context, Immigration & Naturalization Service v. Stanisic, pertains here as well, and I will quote from that opinion: "Granting that this regulation is not free from ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation as interpreted it to apply."

The Navy's interpretation here is not plainly erroneous, it is not inconsistent with the language of the regulation

and should therefore be given controlling weight in this litigation.

I have one final point. Respondents argue that if they are right and the military is wrong about the meaning of the military's own regulations, then Congress acted unconstitutionally in repealing the variable reenlistment bonus in a manner that deprived payment of the bonus or denied payment of the bonus to respondent Johnson.

QUESTION: If that is correct, then the illustration, the hypothetical that Mr. Justice Rehnquist gave of a reduction in pay would be equally unconstitutional?

MR. JONES: Well, it would proceed along the same lines. The respondents' theory is that as of the time they signed the agreement they had a vested right to a certain amount, and insofar as they made --

QUESTION: Well, if he joined the service at $50 a month, isn't that almost what is vested?

MR. JONES: Yes, Mr. Chief Justice, the same line of analysis could equally well be applied there, however we would strongly resist such an interpretation just as we do here. Indeed, our point with regard to their argument of constitutionality is that that is simply one more argument in favor of the military's interpretation. The military's construction avoids any constitutional question and therefore should be preferred, even if the respondents' competing construction were otherwise

equally plausible, which we submit they have not shown it to be. For these reasons, we ask that the judgment below be reversed.

QUESTION: Mr. Jones, did I understand you earlier to indicate that the rescission issue had been decided adversely to them in the Court of Appeals?

MR. JONES: That's correct, Mr. Justice White.

QUESTION: Well, I don't understand, was that the main opinion by Judge McGowan?

MR. JONES: Yes, it was.

QUESTION: On page 32a of the petition for certiorari, the question is whether the rescission falls within that narrow exception --

MR. JONES: Pages 31a to 33a, that's correct.

QUESTION: Yes, and then normally -- "that courts exercising Tucker Act jurisdiction generally do not jurisdiction over suits for equitable" matters, but there are some exceptions, and the court says, "We have serious doubts as to whether the case falls within that exception," but then says, "We find it unnecessary to resolve these doubts one way or the other." It says, "On the basis of the record before us, we find it impossible to sustain a judicial decree of rescission," but only because they order the VRB to be paid.

MR. JONES: Well --

QUESTION: Let's assume -- they certainly don't say

what their view is if the VRB was to be paid.

MR. JONES: All they do, Mr. Justice White, is to affirm the denial of that relief. They say we therefore conclude that the District Court properly limited the relief in this case to the award of the bonus.

QUESTION: Exactly, but they just say that since they are awarding VRBs they don't need to decide the rescission issue.

MR. JONES: Well, the District Court may have said very much the same. The respondents felt it necessary --

QUESTION: Well, let's assume we reversed and said they are not going to get the VRBs, do you mean the rescission -- shouldn't the case go back and have the Court of Appeals decide then to resolve the doubts that they found it unnecessary to resolve?

MR. JONES: Well, I would not think so, Mr. Justice White, but the questionis whether the respondents had an obligation to protect their rights to rescission by filing a cross petition.

QUESTION: Not if the Court of Appeals had never decided the issue. Let's assume they had expressly reserved the question.

MR. JONES: Well, then I suppose --

QUESTION: Which I think they did.

MR. JONES: Well, that is a permissible interpretation.

Let me point out, Mr. Justice White, that this is more or less an academic discussion because each of the --

QUESTION: For the Navy?

MR. JONES: Well, not only for the reason that I would hope but also because each of these named respondents has already completed all of his extended period so there would be no basis for release from service if indeed they are still in the service. If they are in the service now, it is because they reenlisted or further extended their agreements of their extensions and not because of the agreement they entered into in this case.

QUESTION: So the issue isn't here or never will be anywhere but not because they failed to file a cross petition?

MR. CHIEF JUSTICE BURGER: Mr. Keeffe.

ORAL ARGUMENT OF STEPHEN DANIEL KEEFFE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KEEFFE: Mr. Chief Justice, and may it please the Court:

We are dealing with an act of Congress that was passed during the war, and the bonuses before this Court were passed to induce these plaintiffs to extend their enlistments.

To understand what happened here, you have to look at the legislative history of section 308(g) and you have to listen as you read to the words of Secretary McNamara when he asked for these bonuses. He was faced with the situation where

first-termers, that is men in our service, men and women in our service who were under four-year contracts, were enlisting at the rate of 25 percent, and all other enlistments in our services fell in the rate of 85 percent. There was an astounding attrition rate in that first term, and it was this finding by the Secretary that drew him to the conclusion that something else was needed to induce military personnel to extend their enlistments; this, coupled with the fact that the training required for these men and women is very expensive.

The testimony in the Congress is that it was over $10,000 a person, therefore, of course, if you lost a person in a critically undermanned skill you would have to retrain them at a substantial cost.

So in addition to training which was offered these men and women, they were also offered bonuses, substantial bonuses to induce them to extend their enlistments in critically undermanned skills. And it is this background that these plaintiffs arrived in our services. They enlisted for four years, in basic training they were told not, Justice Rehnquist and Mr. Chief Justice, that their pay wouldn't be changed, they were told that if they extended their enlistments they would receive bonuses, and the bonuses were computed off their regular reenlistment bonuses.

QUESTION: What is the difference between those two? You obviously think there is one.

MR. KEEFFE: Yes, sir, I do, and I think it is a fundamental difference between us, that is to say between the petitioners and respondents. That difference is this, it is that we do not say that the Congress could not change basic pay, in your case, your illustration from $50 to $45, we concede that. We also say that Congress has the power to provide specific bonuses to induce people to extend -- something else. Basic pay, one thing; these bonuses are something else.

The Congress said -- and you read the testimony that moves the Congress to spend this kind of money, and it says we want to concentrate retention dollars at the decision-making point.

QUESTION: Pay, too, is an inducement to enlist. I mean the pay that a person gets in the armed services at whatever level. If there were no pay, he probably wouldn't enlist.

MR. KEEFFE: That is probably true. That's true. However, the question is were the bonuses an inducement, a specific promise to pay by the Congress to these persons to extend their enlistments for an additional two years. That is something else and we say it is something else.

QUESTION: How is it different from an undertaking at the outset, if it is different, on the part of the military that if you extend we will give you a raise in salary?

MR. KEEFFE: I suppose the difference is that if you -- there wouldn't be any difference, Mr. Chief Justice, I don't

if you said exactly how much you were going to give them and when they were going to get it. Other than that, I don't think there would be that much of a difference.

What we had here, however, sir, was a finding by the court below based upon an extensive review of the legislative history that it was the intent of Congress to do something very specific, at a very specific point in time and one that could be calculated. And I may say that when you look at the record, you are going to find that there will never be another VRB case here, I don't believe, because we are only dealing with a peculiarity of the manner in which this was administered by the Navy.

When you look at, for instance, Deschler v. United States, 204 in the Court of Claims, you will see set out there exactly what happened in the other services. One of the problems here, as you know, is that they repealed or rather part of the class lost the bonuses because the Navy said that their skill was no longer critically undermanned and as a result they no longer got the bonuses, and so they said if we don't get the bonuses does that mean we have to serve the two years, and the answer was categorically yes, yes, you have to serve the two years.

QUESTION: Well, that was the answer the court gave in Orloff v. Willowby, too, wasn't it? The plaintiff there said he was entitled to a commission because he was a doctor

and he had been drafted as a doctor, and the government refused to commission him and he said, well at least let me out, and this Court said, you know, we will not let you out and you will not get a commission.

MR. KEEFFE: I appreciate that that was the finding, sir. The only thing I can say is that when you look at the legislative history, it would appear that the men were entitled to their bonuses through act of Congress. And I would also say to you, sir, that the bonuses that they were entitled to I believe they were entitled to under the Navy regulations themselves.

It is only when you get into this slippery intepretation that the Secretary of the Navy used, which was to say in the first three months of your four-year extension or four-year contract, you extend for two years, making it a four-year obligation, but we don't pay you the bonuses until you start the first day of the fifth year. We don't pay you the bonuses. So these men and women all enlist or extend their enlistments induced by these bonuses a whole two years, and then as they approach the fifth year, the Navy says these skills are no longer critically undermanned and therefore we don't give any bonuses out. And this has the peculiar effect, if properly administered in a computerized world, of never having to pay the bonuses because you always can induce enough people presumably through your recruitments to fill the necessary need,

then declare it no longer critical and you don't get your bonus. And a majority of the plaintiffs before this Court had that happen to them.

One plaintiff in particular was denied his bonus for another reason. That reason was Congress in 1974 did away with the variable reenlistment bonuses, and when they did that the question was raised whether or not the statute prohibited the Navy from paying that person's bonus. That is what we refer to as the Johnson class.

QUESTION: Mr. Keeffe, suppose on the first day of the fifth year they said we don't need these services at all, goodby?

MR. KEEFFE: These plaintiffs would have left.

QUESTION: But would they have had any claim?

MR. KEEFFE: No, sir, I don't believe so, because Congress --

QUESTION: Well, why do they have a claim now?

MR. KEEFFE: They have a claim now because Congress said we want you to serve --

QUESTION: I thought you said Congress says you shall get a bonus --

MR. KEEFFE: Yes, sir.

QUESTION: -- on the first day of the fifth year? Now, in my hypothetical, on the first day of the fifth year they said there are two things we don't do, one is give you a

bonus, and let you stay. You admit that you wouldn't have any case at all?

MR. KEEFFE: I don't believe we would, Your Honor, because I believe the legislative history here demonstrates that Congress intended to pay these bonuses for people to serve in a critically undermanned skill.

QUESTION: But Congress changed its mind, didn't it?

MR. KEEFFE: Yes, sir, it did but there is no evidence that it changed it as to VRB for these persons who had previously enlisted, extended their enlistments. They are a different class of persons.

QUESTION: But why wouldn't they be entitled to the bonus?

MR. KEEFFE: On the first day?

QUESTION: Yes.

MR. KEEFFE: Becuase I believe it is clear -- as a matter of fact, it is because the recruitment provisions, by the way, that were mentioned by the petitioners. Congress --

QUESTION: If the serviceman died on the first day, would his heirs have a right of action for the bonus money?

MR. KEEFFE: I believe they would for only that which would be due and owing them. That is to say -- they were spread, you see.

QUESTION: Well, then you don't agree that when if they let him go the first day, you say he wouldn't be entitled

to the bonus.

MR. KEEFFE: I don't think he would have --

QUESTION: If he died the first day, his heirs would?

MR. KEEFFE: I don't think -- I think that the intent of the Congress, Justice Marshall, was to have these persons extend their enlistments, fill a need and serve, and the Congress was quite critical about the services that allowed people to extend and then let them do something else. So --

QUESTION: There is nothing in the record that shows that the government made any contract, deal or anything with him to pay him a bonus. Am I right?

MR. KEEFFE: Nothing --

QUESTION: When he signed for this extended period, there is nothing in there that said you get a bonus, is there?

MR. KEEFFE: Yes, there is, as a matter of fact.

QUESTION: Where is it?

MR. KEEFFE: It is in his contract.

QUESTION: Where is it?

MR. KEEFFE: The contract says that in consideration of pay benefit and allowances to be received, and --

QUESTION: Does that say bonus?

MR. KEEFFE: No, sir, it doesn't. The government stipulates however, as they did in the court below, that pay includes the variable reenlistment bonus.

QUESTION: I thought I understood Mr. Jones to say

there was nothing in there that promised him a bonus.

MR. KEEFFE: Well, that is incorrect then. We have a --

QUESTION: You said he agreed to it. Did he agree to it then? Has he changed his position?

MR. KEEFFE: Yes, I believe he has.

QUESTION: The government has changed its position?

MR. KEEFFE: Yes, it has, and it points itself up in the Carini case in the Fourth Circuit, where Judge Haynesworth says, in the early part of the opinion Judge Haynesworth says that "I find that that statement, pay benefit and allowances, doesn't include VRB," which I believe is the point that you are making, Justice Marshall. And the --

QUESTION: If you agree, as I understand you have, in the stipulation that VRB is pay, is --

MR. KEEFFE: Yes, the government conceded that.

QUESTION: And you assert it?

MR. KEEFFE: Yes, I do.

QUESTION: Did I understand you to say before, agreeing again with Justice Rehnquist, that the Army can reduce your pay during your term of enlistment?

MR. KEEFFE: Yes, I believe it can.

QUESTION: Well, if this is pay haven't you stipulated yourself into a precarious position, to put it mildly?

MR. KEEFFE: It would appear that way perhaps on the

surface and I appreciate your calling it to my attention. But I think that the answer is that this is a special kind of incentive pay, inducement pay. It is a different kind of pay than what we refer to as general pay.

QUESTION: Well, you must depend on the contract, mustn't you, or not?

MR. KEEFFE: On the contract?

QUESTION: Yes.

MR. KEEFFE: Yes.

QUESTION: At least if you are supporting the judgment of the Court of Appeals, you must because the Court of Appeals apparently went on the basis that this was part of the consideration, namely pay.

MR. KEEFFE: Yes, but let me --

QUESTION: Isn't that right?

MR. KEEFFE: Yes, sir, but --

QUESTION: Would you be here if the contract had said but excluding VRBs?

MR. KEEFFE: Excluding VRB? No, I don't think I would.

QUESTION: So you need the contract?

MR. KEEFFE: I need that agreement between the serviceman and the Navy.

QUESTION: Well, what if the Navy reg, what if the contract said this, that the Navy regulations were very clear

that the VRBs that he would be entitled to was part of his pay, would be the VRBs that were then in effect? What if it were perfectly clear that -- what if it were perfectly clear against you, would you say the regulation would be invalid?

MR. KEEFFE: When you say perfectly clear against me, you mean it would not give us the VRB?

QUESTION: That's right.

MR. KEEFFE: And also the contract would exclude the language --

QUESTION: Well, the contract says exactly what it does now, in consideration of pay, allowances and benefits, and then there was a regulation which made it perfectly clear that you would not get the VRB.

MR. KEEFFE: If the regulation said that, we wouldn't be here.

QUESTION: You wouldn't?

MR. KEEFFE: No, sir.

QUESTION: So you say then that --

MR. KEEFFE: No, sir.

QUESTION: You say then that that regulation would be a reasonable construction of the statute?

MR. KEEFFE: Yes, it would, because it left -- because the statute, 308(g) left to the Secretary of Defense who in turn allowed the service secretaries to regulate to put --

QUESTION: Well, I don't understand then how you can

go much farther because the Secretary, in interpreting his own regulation, has said that under the regulations you don't get the VRBs.

MR. KEEFFE: You have to --

QUESTION: And if that is a reasonable construction of the statute, what have you got left?

MR. KEEFFE: Obviously we say it is not. First of all, obviously we say it is not and we so find -- we so found in the court below. They looked at the statute -- understand me, you have first of all the contract and the contract says pay, benefits and allowances, and the government says in the D.C. Circuit, not in the Fourth Circuit, but in the D.C. Circuit it says that includes VRB. And then we look to the question of the regulations as to the eligibility of these people under the regulations, and we find that a reasonable interpretation of the regulations is that they are entitled under the Navy regulations to the bonuses.

Now, if -- and that is our position -- if you say that the regulations do not vest a right or do not confer an entitlement on these plaintiffs, then you have got to match the regulations against the intent of Congress.

QUESTION: And then you say such a regulation would not violate the statute?

MR. KEEFFE: Only --

QUESTION: Just a minute ago you said that anyway.

Perhaps you would like to reconsider that.

MR. KEEFFE: I only reconsider it to the extent that I would presume when you say in your hypothetical on the regulations that these persons would not have extended in a critically undermanned skill and had been promised their variable reenlistment bonuses.

QUESTION: But do you still say that if a regulation were perfectly clear that they would not get the VRB, that that would be consistent with the statute?

MR. KEEFFE: I presume you are saying at the time they extend, Mr. Justice White. You obviously --

QUESTION: No, I am saying at the time they signed the -- at the time they agree to extend --

MR. KEEFFE: Right.

QUESTION: -- at the time they agree to extend here, it is perfectly clear from the regulations that they will get only the VRBs that are in effect during their period of reenlistment or extension. The regulation is perfectly clear on that, and they go ahead and nevertheless sign it up because they want the special training.

MR. KEEFFE: Then they wouldn't be entitled, it seems to me, to the --

QUESTION: You would say then that such a regulation would be consistent with the statute?

MR. KEEFFE: I believe it would, because here you

would have a situation where they wouldn't be paying any of the bonuses to these men, they wouldn't be asking them to extend, and I presume they wouldn't be told that they were entitled to those bonuses. But it seems to me that you have a different -- having posed that problem, you have a different case here, because we find two things. We find that they are eligible under the statute for the bonuses and we also find that under the regulations as found by the court below that they were entitled to the bonuses. So in this instance I think you do have a different case.

QUESTION: Mr. Keeffe, may I ask you a question with the concrete example. As I understand it, the question is whether the right attaches to the date, he signs an extension agreement -- or at the time the period begins. Now, at the time he signs the extension agreement, there are two variables that may affect the amount payable to him. One, the amount of the regular bonus; and, secondly, the multiple.

MR. KEEFFE: Yes.

QUESTION: All right. You say the multiple -- now is the bonus itself fixed as of that time or is that subject to change?

MR. KEEFFE: No, the multiple is not varied, Justice Stevens. You have -- the only thing that you can't compute to a dollar-cents figure is the exact amount of the bonus in dollars and cents because the bonus is a variable of your

regular reenlistment bonus, and your reenlistment bonus works off how much you are paid. For example, these were petty officers and they might be different rates. There was nothing unclear in this case about what the multiple was going to be. They were promised a multiple of four, the highest possible multiple available to them.

QUESTION: But it is true that as of the date they signed the agrement, the extension agreement, they could not then have computed the dollars that would have been payable to them under their theory of -- under your interpretation of the regulations because they didn't know what they would be earning four years hence?

MR. KEEFFE: No, but they did know that whatever their reenlistment bonus was, it was going to be a multiple of four of that. They knew that. They knew it was going to be four, because the way the services operated was they said this is the most critically undermanned skill.

You are looking at the plaintiffs here who were persons such as the men who were in the Pueblo in a different period of time, highly technically trained people, very competent people, very expensively trained.

QUESTION: Do you think there is anything in the statute or regulations that would have prevented the military from changing during the four-year period the basic reenlistment bonus by cutting it in half, say, saying it would be a

half a month's pay instead of a four month's pay?

MR. KEEFFE: No, I do not. I don't think so, although I have to say that as you read the legislative history of 308(g) there was a very definite effort to fix a certain amount of money at a decision point, and that obviously would reduce it, of course, because your multiple would be going off half of what it was.

QUESTION: The problem I see is that you are claiming a fixed right -- the bonus would be four times X.

MR. KEEFFE: Yes.

QUESTION: And you are saying there is a fixed right to four, but the government could change the X, and as soon as you admit that it seems to me you may be admitting they could make X zero.

MR. KEEFFE: It would appear that we would go that far, it would appear that you could do that, because obviously the reenlistment bonus, the regular reenlistment bonus was a multiple off your regular pay, and the logic of it would appear to go that far. The only thing I can say in answer to that is that the Congress of the United States had in mind, as we view it and as I have stated here this morning, an intent to give a specific amount of money to induce people to extend. Now, that certainly would frustrate that and we then would be back in the position of having to decide when the extensions went into effect. And if you follow the opinion below, and as we suggest,

the time that you have decided what these men are going to get and the multiple thereof is at the time that they extend, and it would seem to me that you would have to compute the bonuses at that time off of what their basic pay was then, in order to effectuate a congressional purpose.

QUESTION: Does the record tell us what -- during the period that they were actually paid, I take it they were four times whatever the pay was at the time they entered into the fifth year?

MR. KEEFFE: Yes. Of course, none of these plaintiffs were --

QUESTION: I know, these people didn't get it, but there was a practice of paying the bonus --

MR. KEEFFE: Yes, there was a practike of paying the multiple of four, yes.

QUESTION: Four times the salary at the time --

MR. KEEFFE: Yes, although we don't know how many of them for sure, because, as I say, the way the logic of the matter now stands, with sophisticated computers you might not have been able to pay anybody anything. You see, if you fill a critical man skill and then go on -- now, I may dwell on two other points.

There are two opposing cases here, the one in the Fourth Circuit and the other in the Ninth Circuit. And as I started to say, on the Fourth Circuit case, in Carini, Judge

Haynesworth says, in a way that I do not understand, he said that the pay benefit and allowances didn't include the variable reenlistment bonus and he couldn't see it there and therefore that was evidence of the fact that they weren't promised the variable reenlistment bonus.

And in the D.C. Circuit the government had certified in the brief, it conceded that pay included the variable reenlistment bonus. So either that was in error or else they changed their position there, I don't know which.

In the other case that is -- the other circuit case, is Judge Sneed's opinion in the Ninth Circuit, and that has to do with only one group of the plaintiffs, it has to do with Mr. Johnson, who was denied his bonus because of a change in the statute, that is to say that the VRB was eliminated. And there Judge Sneed says that there is no evidence in the statute itself that would indicate that there was any basis for preserving VRB for Mr. Johnson. So in addition to losing his bonus under the regulations, the change in the regulations, it also is alleged that he loses it under a repeal of the 308(g), where the put in a new bonus provision.

Now, we have looked at the legislative history and here again we say we don't see any support for that. Judge Sneed states it, but if you review it as we have, I don't see any support for that position.

Secondly, if that is so, we still look to an operation

of the bonus, we give you an example in the brief itself where we say we think they would be eligible, Johnson would be eligible under the current statute because although VRB was eliminated, we don't see any basis for denying it to Johnson and we think that the way the statute operates the multiple affects Johnson in a way where he can get his bonuses. In particular, we cited an illustration there to cover that.

In addition to that, we also say that if there was that intent, then we are thrust into the question that the Court of Appeals below saw, and that is United States v. Lynch, where it appears clearly the reason for repealing the variable reenlistment bonuses, which were only in effect from '65 to '74, right in that period of the war, that if that was the case, Congress was exercising its fiscal responsibility and to that extent they are impairing the men's contract. But I don't think we have to get to that position. I think Johnson is qualified because of his extension agreement and the agreement of Congress to pay him at the time he made that decision. If not, I think that he still is eligible under the statute as it is amended. And, lastly, if that isn't the case, then it appears we have to look to the question of the conflict of the statute and Lynch v. United States.

In the few moments I have left, I would like to dwell on -- I haven't touched really on the equities here, which I am sure the Court appreciates, as all the courts below have, are

very much on our side. Our people are people who were induced to extend and did serve, and they deserve a just consideration.

I also think it was intended that they should do so and that Congress intended to pay them. It is a large group, but I do think that the equities are very much on their side.

I would also say that I think that we concede -- we do concede that basic pay could be changed. We think that the legislative history of 308(g) indicates that Congress intended a specific amount of money be paid to these men, and for that the men and women served.

Are there any other questions?

QUESTION: I have one other question. Is there anything in the history of this statute to indicate that the multiples were ever increased?

MR. KEEFFE: Increased?

QUESTION: In other words, say a man signs an extension agreement when the level was two and a couple of years later it went to four, as I understand the government's verion, he would then be entitled to four at the time of -- at the time he signed up he was only offered two.

MR. KEEFFE: Yes, that's right and, of course, that would frustrate the intent of Congress the way the operated because, of course, Congress did not want them to spread the bonus all over. They wanted them to fix what was necessary to fill a critical need, and that is the logic that the government

proceeds on.

QUESTION: My question is do you know if that ever happened, do we have any history of whether the government in fact administered it that way?

MR. KEEFFE: We don't in this case, Your Honor, because we moved quickly through summary judgment, so I can't say that it is here, but it may be in the related cases, particularly in Sailors v. United States, which is a consolidated case in the Ninth Circuit. I presume there were -- I am only guessing, because --

QUESTION: I don't want you to do that.

MR. KEEFFE: No.

QUESTION: Mr. Keeffe, to go back to Brother Rehnquist's point, assuming that Congress authroized and the Navy specifically said that in this electronic outfit we are building up, we need trained men, et cetera, and in order to get them and keep them we will pay them twice the basic salary and they take them in and as soon as they get in they cut it back? I understand from you that that is all right.

MR. KEEFFE: Well, in your example they say they are going to pay them twice their basic pay, then they take them in and --

QUESTION: And the next day they cut it back.

MR. KEEFFE: No, I don't agree that that would be proper.

QUESTION: Well, what is the difference?

MR. KEEFFE: The difference --

QUESTION: The answer, you said because they cut his basic pay they couldn't do anything about it. I thought that is what you said.

MR. KEEFFE: I believe that is correct. Try the facts here, and I presume in your hypothetical what happens is that I am doing one job and I am fully qualified to do it, and you say to me, "I will pay you twice your basic pay to do this other job the next day," and you immediately proceed in. I believe that there the government would be required to pay you the double pay.

QUESTION: On what basis?

MR. KEEFFE: On the -- presumably on the basis of the congressional intent to --

QUESTION: Congress didn't offer it, Congress is the one that changed it. Congress authorized double pay and then changed it.

MR. KEEFFE: Then we have the problem of United States v. Lynch, because if they do it, exercising the war power or paramount power, obviously they have the authority to do it. But if they are doing it simply for the purposes of fiscal administration, we have a separate problem and there --

QUESTION: Well, what about the period back forty-odd years ago during the Depression when the pay of everyone in the

government except those protected by the Constitution was reduced 10 or 20 percent.

MR. KEEFFE: Yes.

QUESTION: Is there any barrier to that?

MR. KEEFFE: No, sir, I don't see --

QUESTION: That was an act of Congress, they simply said we are going broke, we've got a depression on, and a 20 percent reduction.

MR. KEEFFE: I presume that we -- that the Court would have to sustain that kind of reduction. I don't see -- I would think you would have to find a way to do it, but that --

QUESTION: Do they need to have a good reason for it or may they just do it in the exercise of naked power?

MR. KEEFFE: I would hope that they would have to have a good reason for it, Mr. Chief Justice, but I don't think --

QUESTION: It was done, you know, in 1934.

MR. KEEFFE: Yes, I do know. Thank you, Mr. Justice Blackmun. I knew that was the case. In concluding that question, what I thought was that in looking at what Congress promised here and then what they did, it seemed to me that you are looking at a situation where if there is merely to reduce expenditures here was the -- to eliminate these promises to these men and women, then you are thrust into that question, but only as to part, Mr. Chief Justice, only as to part of the persons before the Court. The largest number were not denied

the bonuses by act of Congress, they were denied it by a change in the regulations.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Jones?

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. JONES: Yes. Thank you, Mr. Chief Justice.

Mr. Justice Marshall asked about the government's position as to whether pay includes bonuses, and then there was a colloquy which suggested that the government had changed its position. The government has not changed its position. All we ever stipulated was that the term "pay" includes bonuses, but what the agreement states is that it is in consideration of the pay that will accrue. Now, our position has been that the bonuses were a form of pay that simply never accrued as to these enlisted men.

QUESTION: I just want to make clear. If we disagreed with you and held or thought that the government really did promise these VRBs, contrary to your position, you are not relying on any -- you would lose then, I take it -- you are not relying on any power of Congress to reduce whatever it was they promised?

MR. JONES: No, we have not done so, Mr. Justice White. Most of the respondents entered into their extension periods

before Congress acted.

Mr. Justice White, I have given a little further thought, perhaps not enough, to your question about the appropriate disposition if the Court agrees with our basic position as to what the regulations provide. I would concede that the better view probably is that the petitioners did not have to protect their position by cross-petitioning.

I would submit that, as a matter of law, if they are not entitled to a money judgment, they are not entitled to any form of equitable relief under --

QUESTION: I would have thought -- that in essence is what the Court of Appeals seems to have said.

MR. JONES: The Court of Appeals said that since there is a money judgment, they don't need anything else. Our submission would be in the absence of a money judgment under the Tucker Act, there is no relief available. It is outside the jurisdiction.

QUESTION: There is no basis for rescission.

MR. JONES: That is correct, yes.

QUESTION: I have two questions, if I may ask you. First, is there anything in the history of the other case that we could properly know about with respect to an increase in the award level which the government did in fabt pay which would tend to confirm your viewpoint?

MR. JONES: My answer to that, Mr. Justice Stevens, is

yes and no. At page 105 of the appendix there is a schedule of award levels which indicates that some award levels decreased, some increased, some stayed the same over a period of several years. However, there is nothing in this record that establishes what the Navy's treatment was, but it is my understanding that the Navy has consistently administered the regulation so that when the award level went up the man was entitled to the larger bonus; when it went down, he was entitled to the smaller bonus. This case --

QUESTION: Excuse me. What do you understand, the Court of Appeals to have disagreed with the Secretary's interpretation of his regulations?

MR. JONES: Well, I think it was a very --

QUESTION: Was it based at all on the legislative history?

MR. JONES: That is not -- I think the court's allusions to the legislative history were based upon statements that were made with respect to reenlistments and not with respect to extensions of enlistments. There was language in the legislative history which indicated that the bonus would become available at the decision point. That was the decision point of reenlistment, which was at the end of the original enlistment period. There is no indication in the legislative history that these Congressmen ever considered the application of the program to extensions of enlistment, which presented a very different kind of problem.

QUESTION: Mr. Jones, to add a second question I wanted to ask you, would you agree that if your opponent is correct and if the right vested at the time the extension agreement is signed, it would be more or less analogous to say earned compensation for a month of service, on that hypothesis the example that Mr. Justice Rehnquist gave of changing the level of pay would really not be appropriate because that would be -- you wouldn't say that the government could change the level of pay for October sometime in November?

MR. JONES: Again, Mr. Justice Stevens, yes and no. Mr. Chief Justice asked me a similar question during my opening argument, and I said that the same line of analysis could be argued to suggest that the level of pay upon original enlistment was fixed in the same way that the respondents argue that their bonus was fixed. Now, if the Court accepted that argument, then the same consequences would flow, that is there might be a constitutional barrier to reduction. Now, that is the first half of the answer.

The second half is that they are talking about vesting in a peculiar sense. They are not saying that they would be entitled to the bonus if they never served their extension periods, that is they are not really talking about the vesting of pay for services already done. What they are saying is that they had a vested contract right for a quid pro quo once they performed the service, so it is a little different from pay for service that

has already been done, but it is analogous.

QUESTION: And you would not rely on the analogy of the military cutting of pay?

MR. JONES: Well, Mr. Justice Stevens, we would argue that just as the Congress can reduce pay, the Congress or the Navy under delegated responsibility can reduce the award level.

QUESTION: Yes, if that is a fair reading of the regulations?

MR. JONES: That's correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:04 o'clock p.m., the case in the above-entitled matter was submitted.]

- - -