They Fight to Protect Our Rights; Shouldn't We Do the Same for Them? Intramilitary Immunity in Light of United States v. Stanley

Martha J. Burns

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THEY FIGHT TO PROTECT OUR RIGHTS; SHOULDN'T WE DO THE SAME FOR THEM? INTRAMILITARY IMMUNITY IN LIGHT OF UNITED STATES v. STANLEY

INTRODUCTION

Thus the building sits beside the river.
Far away in a placid sea the island sits in the sun.
No one has ever associated the island with Death.
But Death is on the way.
And with it, the Building must somehow cope.¹

So begins Allen Drury's novel of the Pentagon, the formidable structure from which United States military decisions ultimately emanate. But, unfortunately, the careers of United States enlisted persons can also begin threatened by an impending cloud of death as a result of the Supreme Court's recent decision in United States v. Stanley² which held that no recovery should be given to a soldier who been unwittingly used in an Army drug experiment. The view of the military as a separate entity with a distinct judicial system, necessarily set apart because of its combat mission,³ has led to a tenuous relationship between the military and civilian lawmakers.⁴ But the legal com-

3. See, e.g., Burns v. Wilson, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ."). See also Barker, Military Law—A Separate System of Jurisprudence, 36 U. CIN. L. REV. 223 (1967); Hirshhorn, The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C.L. REV. 177, 253 (1984) (judiciary accepts "separate community" rationale for reasons of "efficacy and political supremacy"); Warren, The Bill of Rights and the Military, 37 N.Y.U. L. REV. 181 (1962). Chief Justice Warren explained that the "Thou Shalt Not" of the Bill of Rights, which afford constitutional protection to all individuals, must compete with the military necessity argument. Id. at 186. He believed that the Supreme Court lets the military win this competition by adhering to the "hands off" attitude established in Ex Parte Vallandigham, 68 U.S. (1 Wall) 243 (1863), which held that civilian courts do not have jurisdiction to review decisions made by military courts. Id. at 187.
4. See Middendorf v. Henry, 425 U.S. 25, 41-42 (1976) ("hands off" policy applied); Kennedy v. United States, 258 F. Supp. 967 (D. Kan. 1966), aff'd, 377 F.2d 339 (10th Cir. 1967). In Kennedy, plaintiff had requested that either a military or civilian attorney be appointed to defend him in his courts-martial hearing, and had supported this request with an affidavit attesting to his indigence. Id. The military denied his request, concluding that counsel was not readily available. Id. The district court affirmed the military's decision, holding that civilian trials are distinct from courts-martial, and as such there was no sixth amendment right to counsel. Id. at 970. See also Fratcher, Review by the Civil Courts of Judgments of Federal Military Tribunals, 10 OSBA ST. L.J. 271 (1949) (Supreme Court's appellate jurisdiction does not extend to review of judgments by military tribunals).
The recent decisions concerning the military are influenced by the doctrine set forth in *Feres v. United States,* which bars statutory recovery for enlisted persons, and by the competing doctrine set forth in *Bivens v. Six Unknown Named Agents,* which recognizes recovery for a violation of a person’s constitutional rights. The Supreme Court’s attempt to reconcile these two competing doctrines in *Chappell v. Wallace,* where *Bivens* recovery was denied, forms the basis for the *Stanley* decision. The *Stanley* decision interprets *Feres, Bivens and Chappell* and holds that “no *Bivens* remedy is available for injuries that ‘arise out of or are in the course of activity incident to service.’” *Stanley*’s expansive reading of *Chappell* bars recovery in virtually all cases, thereby extinguishing any claims for damages by enlisted persons who have suffered constitutional violations at the hands of the military.

In order to analyze the *Stanley* holding properly, this Casenote will first address the historical development of the various immunity doctrines, starting with the doctrine of sovereign immunity, moving through the doctrine of qualified immunity for governmental officials and the role of *Bivens* in any discussion of qualified immunity, and ending with an explanation of how

5. See Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military,* 49 IND. L.J. 539 (1974). Orloff v. Willoughby, 345 U.S. 83 (1953), was the first case to articulate that the military operates separately from the civilian sector, a belief that the judiciary has adhered to in subsequent cases. *Id.* at 541.

6. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969) (school could not ban wearing of black armbands to protest the United States’ involvement in Vietnam because first amendment freedom of expression rights would be violated); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (right to privacy recognized under the fifth, ninth, and fourteenth amendments and the penumbras surrounding the Bill of Rights); *Sherbert v. Verner,* 374 U.S. 398 (1963) (Seventh Day Adventists, who chose not to work on Saturday for religious reasons, were entitled to unemployment compensation).

7. See generally *Warren,* supra note 3, at 191-94 (servicemen give up some rights upon entering the military but can not be expected to surrender all constitutional protections).

8. 340 U.S. 135 (1950). The *Feres* doctrine states: “[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” *Id.* at 146.

9. 403 U.S. 388 (1971). In *Bivens,* the Court held that there was a “cause of action under the fourth amendment” for a violation of petitioner’s constitutional rights by federal agents. *Id.* at 397.

10. 462 U.S. 296 (1983). In *Chappell,* the Court held that “[e]nlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.” *Id.* at 305.

11. 107 S. Ct. at 3063.

12. The *Bivens* case created the constitutional tort cause of action by allowing an individual to recover against government officials for an illegal search and seizure. 403 U.S. 388, 397 (1971). The opinion limited its holding to only the cause of action question, but its principles have been
these doctrines apply to the military. The focus will then move away from
the immunity doctrines and address the unique nature of constitutional torts
and the regulations prohibiting human experimentation. Finally, this Casenote
will propose an alternate remedy for resolving the intramilitary tort problem.
The objective of this alternate remedy is to strike a proper balance between
the individual's interest in seeking redress against those who violate their rights
and the military's interest in autonomy from the civilian legal system.¹³

I. BACKGROUND

A. Sovereign Immunity

The question of whether or not the United States Government as an entity
and/or its officials should be liable for their actions has plagued our judicial
and legislative systems throughout history. Historically, protection for the
government was based on the common law doctrine of sovereign immunity.¹⁴
Sovereign immunity was absolute, defeating suits at their commencement for
lack of jurisdiction.¹⁵ Traditionally, governmental immunity from liability was
justified by the theory that the government itself granted rights to the people
and, therefore, could not be held liable for infringing on the rights that it
controlled.¹⁶ Today, however, the sovereign immunity doctrine is not as well
accepted as it once was and, although still supported by some courts and
commentators,¹⁷ it is highly criticized by others as obsolete and inequitable.¹⁸

¹³ See Stanley, 107 S. Ct. at 3066 (Brennan, J., dissenting).
¹⁴ Pound, The Tort Claims Act: Reason or History?, 30 NACCA L.J. 404, 406-09 (1964)
(common law doctrine of sovereign immunity was premised on belief that the King could do no
wrong).
¹⁵ See Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed
By Military Commanders After Butz v. Economou, 89 Minn. L. Rev. 25, 27 n.7 (1980) (suits
against government are blocked "at [their] inception" for lack of jurisdiction).
¹⁶ Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("[T]here can be no legal right as
against the authority that makes the law on which the right depends.").
¹⁷ See, e.g., Carter v. Colson, 447 F.2d 358, 365-66 (D.C. Cir. 1971) (governing bodies
should not be hampered by fear of damage suits), rev'd. on other grounds sub nom. District of
OF TORTS 1611-12 (1956) (satisfying privilege claims against state would be too great a drain on public
funds).
¹⁸ See, e.g., Rayonier, Inc. v. United States, 352 U.S. 318, 319-20 (1957) (Congress felt that
it was in nation's best interest to impose liability on United States under Federal Tort Claims
Act). See also Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA
Claims Act should be extended to military claims). See generally K. DAVIS, ADMINISTRATIVE LAWS
OF THE SEVENTIES, ch. 25 (1979) (legislature and judiciary are dismantling sovereign immunity).
The sovereign immunity doctrine was severely curtailed in 1946 when Congress passed the Federal Tort Claims Act ("FTCA"). The FTCA's primary purpose was to extend a remedy to those injured by the government who previously had been denied the right to seek recovery. The FTCA accomplished this purpose by allowing suits for money damages to be brought against the government for the negligent or wrongful acts of its employees in situations where private liability would occur. The FTCA created this liability by expanding the jurisdiction of the federal district courts to allow them to hear such claims, not by creating new causes of action. Claims that are not substantial enough to be recognized by law still are dismissed for lack of subject matter jurisdiction.

The FTCA did not create blanket liability for the government; indeed it listed certain exceptions where government immunity was not waived. One of these exceptions involves the military context, and is specifically tailored to combat situations. Absent any other definitive guidelines in the statutory language, the courts were left to discern whether or not the FTCA should apply to all situations arising in the military setting.


20. Feres, 340 U.S. at 140 (FTCA marked culmination of long effort to mitigate sovereign immunity's unjust consequences). Accord United States v. Yellow Cab Co., 340 U.S. 543 (1951). Since under the FTCA the United States had consented to be sued, the Yellow Cab Court required that the United States be impleaded as a third party defendant. Id. at 544. The Court concluded that the FTCA was reflective of a general trend toward increasing the scope of the United States' waiver of its sovereign immunity from suit. Id. at 550. See also United States v. Aetna Casualty & Sur. Co., 338 U.S. 366 (1949) (Court allowed insurance company to bring suit in its own name against United States upon its claim that it had become subrogated by payment to insured person who individually would have been able to bring such an action against United States); Note, FTCA Government Liability for Personal Injuries to Military Personnel, 51 J. Am. L. & Com. 1087, 1089 (1985-86) [hereinafter Note, Government Liability] (FTCA attempted to provide relief to individuals for wrongs inflicted by government).

21. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, ...." 28 U.S.C. § 2674 (1982). See also Feres, 340 U.S. at 141.

The Act grants federal courts jurisdiction over claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1982).

22. Feres, 340 U.S. at 140-41.

23. Id. at 141. ("[The FTCA] does not say that all claims must be allowed.").

24. Note, FTCA Recovery, supra note 18, at 1118 (immunity is not waived for claims arising in foreign countries, 28 U.S.C. § 2680(k); from combatant activities, 28 U.S.C. § 2680(j); and from intentional torts of government employees, 28 U.S.C. § 2680(h)).

25. "The provisions of this chapter shall not apply to—. . . (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (1982).
Shortly after the FTCA was enacted, the Supreme Court addressed the FTCA's application to the military in *Feres v. United States*. There, the Court created a judicial exception to FTCA liability by holding that the government is not liable under the FTCA for servicemen's injuries which arise out of or are in the course of activity "*incident to service*." The pivotal fact in *Feres*, and its two companion cases, was that the enlistees' injuries, inflicted by other servicemen, arose in the course of military duty. Since the Court could not discern any American law which allowed a serviceman to recover from the military for negligence, it was hesitant to create novel and unprecedented liabilities. Recovery was denied.

The *Feres* decision failed to define the term "*incident to service*," leaving the lower courts free to decide how broadly this judicial exception to FTCA liability should be interpreted, and commentators free to criticize or laud the decision. The Supreme Court attempted to remedy this confusion in *Brown v. United States*, another enlisted person's claim for recovery under the FTCA. In *Brown*, the Court followed *Feres* and denied recovery. The Court relied on two rationales: 1) the necessity of fostering a unique relationship between soldiers and superiors; and, 2) the necessity of maintaining discipline.

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27. Id. at 146 (emphasis added).
28. Id. *Feres* was granted certiorari with Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949). In each case the Court held that the government was not liable under the FTCA for injuries which arose out of or in the course of activity incident to service. 340 U.S. at 146. *But see* Brooks v. United States, 337 U.S. 49 (1949) (recovery granted because Brooks was on furlough). The *Feres* Court distinguished *Brooks* by concluding that activity while on furlough was not activity incident to service. 340 U.S. at 146.
30. Id. at 142.
31. *Compare* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) and Henninger v. United States, 473 F.2d 814 (9th Cir.) (absolutist rule applied to bar claim under FTCA when serviceman would not have been injured but for fact that he was on active duty), *cert. denied*, 414 U.S. 819 (1973); with Zoula v. United States, 217 F.2d 81 (5th Cir. 1954) ("*incident to service*" is determined by whether serviceman was on or off base at time of injury). Other courts have attempted to redefine the "*incident to service*" rule to serve the needs of justice as they see fit. See Downes v. United States, 249 F. Supp. 626, 628-29 (E.D.N.C. 1965) (court created new focus for applying *Feres* principles); Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for this Court to read exceptions into the Act beyond those provided by Congress."); (citing United States v. Aetna Casualty and Sur. Co., 328 U.S. 366, 383 (1946)).
32. Most commentators have criticized the decision. See, e.g., Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 Rutger's L. Rev. 316 (1954) (Court in effect added exception to FTCA which discriminates against certain servicemen). *But see* Burgess, *supra* note 15, at 45 n.101 (author notes reaffirmation of *Feres* doctrine in *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977)).
in the armed forces. The Court felt that subjecting the military to unprecedented liability would adversely affect both of these considerations, thus resulting in a decrease in military effectiveness.

Although the rationales articulated in Brown seemed defensible, the continued viability of the Feres doctrine was questioned in certain lower courts. Nevertheless, others courts applied the doctrine with a vengeance. Despite this split, the Feres doctrine is very much alive today because of the Supreme Court’s conclusions in Stencel Aero Eng’g Corp. v. United States. Although the suit was brought by a third party manufacturer seeking indemnity for damages it might be required to pay a serviceman for his injuries received after the manufacturer’s equipment malfunctioned, the Court nevertheless relied on the Feres bar to FTCA recovery. The Court stated that the Feres bar should apply to both third parties and servicemen since the effect on military discipline would be the same in either situation.

Up to this point, the question of what role the Feres doctrine would play in light of the concurrent developments of the doctrine of qualified immunity for government officials and of the doctrine of recovery for constitutional tort violations remained unanswered.

34. "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military service, led the [Feres] Court to read that Act as excluding claims of character."

Id. at 365 (quoting United States v. Brown, 348 U.S. 110, 112 (1954)).

35. See United States v. Muniz, 374 U.S. 150 (1963) (Feres doctrine does not extend to federal prisoners’ claims for negligence on the part of prison officials); Rayonier, Inc. v. United States, 352 U.S. 315 (1957) (government held liable under FTCA for negligent fire fighting by United States Forest Service); Indian Towing Co. v. United States, 350 U.S. 61 (1955) (FTCA recovery allowed for Coast Guard’s negligent operation of lighthouse).

36. See Note, Stencel Aero Engineering Corporation v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers, 29 HASTINGS L.J. 1217, 1218-19 (1973). The author cites cases where a broad interpretation of ‘‘incident to service,’’ leading to a Feres ban on recovery, included activities such as a drowning in a base pool while swimming. Id. at 1219 (citing Chambers v. United States, 357 F.2d 224 (8th Cir. 1966)).

37. 431 U.S. 666 (1977). See also United States v. Shearer, 473 U.S. 52 (1985) (recovery barred by Feres doctrine). But see Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (analysis of case facts must be done to see if they are sufficiently similar to Feres).

38. 431 U.S. at 673 (factors considered by Feres applicable to Stencel facts).

39. Id. at 673-74.

40. Id. at 673. See also Donaldson, Constitutional Torts and Military Effectiveness: Proposed Alternatives to the Feres Doctrine, 23 A.F.L. REV. 171, 185 (1982-83) (courts are genuinely reluctant to interfere with military affairs because of disciplinary concerns); Miller, Liability and Relief of Government Contractors for Injuries to Service Members, 104 MIL. L. REV. 1, 10 (1984) (allowing suits by military personnel would erode discipline).
C. Immunity For Individual Government Officials

Today, individual government officials enjoy only qualified immunity. This immunity standard is the product of a long line of cases, including Bivens, which, while not formally specifying a qualified immunity standard, is viewed as one of the more important cases in this area. As the following analysis will show, the qualified immunity doctrine reflects an attempt to develop a standard which would adequately protect individual officials while allowing these same public officials the flexibility necessary to perform their duties effectively.

Because the traditional doctrine of sovereign immunity was directed toward protecting the Crown or other government entities, government officials had to look elsewhere for protection. Initially, they were afforded little protection for their actions. Essentially, the demarcation was between errors made while acting within the scope of the official's authority, which did not subject the official to liability, and errors made while acting without official authority, which did subject the official to liability. But this distinction was essentially a facade. The courts, by manipulating certain analytical factors, repeatedly imposed liability even though the officials appeared to be acting within the scope of their authority.

By the late 1800's, a change was evident. The Supreme Court began to realize that although the maxim "no man is above the law" was an established jurisprudential tenet, the competing need for government officials to exercise

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41. In Butz v. Economou, 438 U.S. 478 (1978), the Court concluded that all government officials, state and federal, deserve only qualified immunity. Id. at 504.
42. The Butz holding resulted from a heavy emphasis on the Bivens principles. Id. at 485-86. The Court explained the Bivens case facts, its holding therein, and agreed with the Second Circuit's holding on remand. See infra notes 61-64 & 68-71 and accompanying text. See generally Euler, Personal Liability of Military Personnel for Actions Taken in the Course of Duty, 113 Misc. L. Rev. 137, 139 (1986) (qualified immunity creates legal defense for federal official if that official can prove he acted reasonably under the circumstances, and did not knowingly violate clearly established constitutional rights).
43. See supra notes 14-16 and accompanying text.
44. See Burgess, supra note 15, at 30 n.20 (nineteenth century courts offered very little protection to government officials).
45. Id. Compare Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845) (officials were not held liable for good faith errors in judgment made while acting within scope of their authority); with Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849) (circumstances were found to support cause of action and therefore liability).
46. Id.
47. See Bradley v. Fisher, 80 U.S. 335 (1871). In Bradley, the Court held that judges were entitled to absolute immunity for their judicial acts even if such acts were in excess of their jurisdiction or done out of malice. Id. at 351-52. But see Forrester v. White, 108 S. Ct 538 (1988) (judges do not have absolute immunity for administrative, legislative or executive acts, only for those acts which are within their judicial functions).
48. Butz v. Economou, 438 U.S. 478, 506 (1978) (quoting United States v. Lee, 106 U.S. 196, 220 (1882)). "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." Id.
their discretionary functions without fear of negative consequences was also an important concern. In 1896, the Supreme Court began to expand the immunity doctrine, as a means to protect government officials, in cases such as Spalding v. Vilas. In Spalding, the Court extended absolute immunity to the Postmaster General in a defamation suit, while refusing to consider the propriety of his motives. Lower courts seized the Spalding holding and extended absolute immunity to a diverse group of federal officials for a wide range of injuries.

In 1959, the Supreme Court further expanded the immunity doctrine in Barr v. Mateo. The Court held that lower echelon federal officials could receive absolute immunity when acting within the outer perimeters of their authority, regardless of whether their actions were maliciously motivated. Consequently, after Barr, federal officials enjoyed absolute immunity from suits for any common law tort provided that: 1) the official was exercising a discretionary function; and, 2) the official was acting within the boundaries of his statutory authority. The Court afforded more weight to the government officials' interests in unfettered performance than to the public's interest in obtaining redress for wrongs committed by government officials. By clothing federal officials with absolute immunity when acting within the scope of their

49. See Bradley, 80 U.S. at 347 (judicial system will not operate properly if judicial officers must live in fear of consequences of suits brought against them).
50. 161 U.S. 483 (1896).
51. Id. at 499 (motive that compelled federal official to act is wholly immaterial).
52. See, e.g., Standard Nut Margarine Co. v. Mellon, 72 F.2d 557 (D.C. Cir.) (Secretary and Assistant Secretary of Treasury are immune), cert. denied, 293 U.S. 605 (1934); Jones v. Kennedy, 121 F.2d 40 (D.C. Cir.) (SEC employees are immune), cert. denied, 314 U.S. 665 (1941); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950) (immigration officials are immune), cert. denied, 341 U.S. 92 (1951).
54. Id. at 569-76. The Barr plurality recognized that two conflicting concerns had to be addressed: individual citizen's rights had to be protected against oppressive action by the federal government, and the public interest had to be protected by shielding government officials against vindictive or ill founded suits. Id. at 565. The Court concluded that government policies must be vigorously and effectively administered. Id. at 576. Such a need was seen as a substantial enough public interest to mandate that government officials be given more protection than individuals. Id. at 572-73. See also Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949) ("In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."). cert. denied, 339 U.S. 949 (1950).
56. See Barr, 360 U.S. at 575-76. The Barr Court held that when an officer is acting within his powers, the occasion during which he is acting justifies the act. Id. at 575 (citation omitted). The Barr Court further stated that it is not the title of the office but the duties entrusted to the officer which provide guidelines for delineating the immunity which clothes the official acts of the executive officer Id. at 573-74.
official duties, the Court believed that the officials could serve the public more effectively.

Subsequent courts disagreed with this rationale, and the erosion of the absolute immunity doctrine began.\(^7\) This erosion, signaling a departure from *Spalding*, was inevitable because absolute immunity had failed to accommodate the numerous competing interests adequately. On the one hand, the courts had to be mindful of any injustices that might result from subjecting officials to liability for simply performing their required duties. Also, a very real danger existed that the constant threat of personal liability would stifle the officials’ desire to exercise their discretionary powers fully.\(^8\) On the other hand, the courts had to be mindful of any injustice wrought by not compensating the individual citizen for federal officials’ tortious conduct.\(^9\) An unlimited grant of absolute immunity ignored the individual’s interest in redress, and seriously eroded basic constitutional rights.

The absolute immunity doctrine was further curtailed in *Bivens v. Six Unknown Named Agents*.\(^{60}\) In *Bivens*, the Court held that the fourth amendment created an implied cause of action for a private citizen’s damage suit against federal officers who had engaged in an illegal search and seizure.\(^{61}\) Thus, the constitutional tort claim against individual government officials was born. The *Bivens* Court, however, did not specifically address the immunity issue, choosing instead to limit its holding to the recognition of a federal cause of action for damages.\(^{62}\) The opinion did list two situations in which a

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57. See Black v. United States, 534 F.2d 524 (2nd Cir. 1976) (agency heads no longer have absolute immunity); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (public interests sufficiently protected by according officials only qualified immunity); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974) (remanded for further fact-finding on immunity issue).

58. See supra note 49 and accompanying text.

59. See Note, Government Immunity and Liability—Armed Forces—Government Officials Charged with Violating Servicemen’s Fifth Amendment Rights Not Entitled to Absolute Immunity—Jaffe v. United States, No. 75-1474 (3d Cir. Feb. 20, 1980), 11 STONY HALL L. REV. 273, 279 (1980). There are three arguments for imposing liability: 1) absolute immunity takes away from constitutional protections; 2) federal officials have greater authority and therefore have a greater potential for lawlessness; and 3) constitutional rights must be vindicated. Id. See also supra note 48.

60. 403 U.S. 388 (1971).

61. Id. at 397. *Bivens* arose after FBI agents made a warrantless entry into petitioner’s apartment, searched the apartment and arrested him on narcotics charges. Id. at 389. Petitioner alleged that the arrest was made without probable cause. Id. The district court dismissed petitioner’s damages suit on alternative grounds: 1) the complaint failed to state a federal cause of action; and, 2) respondents were immune from suit by virtue of their official positions. Id. at 390. The Court of Appeals for the Second Circuit affirmed on the first ground alone. Id. The Supreme Court reversed and remanded on the first ground, holding that petitioner’s complaint stated a federal cause of action under the fourth amendment for which damages were recoverable. Id. at 397.

constitutional cause of action would be barred: 1) where special factors counselling hesitation in the absence of affirmative congressional action exist; and, 2) where a congressional remedy explicitly declared to be a substitute for constitutional recovery, and viewed as equally effective, exists.63 Because these situations were set forth only in dicta, it remained to be seen if they would affect subsequent cases. It also remained to be seen if the Supreme Court would follow the Second Circuit’s Bivens analysis which, on remand from the Supreme Court, specifically addressed the immunity issue and held that federal agents were entitled to qualified immunity based on a good faith, reasonable belief test.64

While the Bivens Court was creating a constitutional cause of action, other courts were narrowing the scope of immunity for state officials. In Scheuer v. Rhodes,65 state officials were granted only qualified immunity for their acts. The burden was on the officials to demonstrate that their actions were “in good faith and reasonab[e] in light of all the circumstances as they appeared at the time.”66 Scheuer created a fluid concept, granting varying degrees of qualified immunity to state officials based on the nature of the officials’ responsibilities, and the circumstances at the time.67 As a result, state officials found themselves exposed to a greater degree of liability than federal officials. The direct evaluation of the immunity principles in Scheuer, resulting in qualified immunity for state officials, complemented the constitutional cause of action created in Bivens. It was now time for the courts to reconcile the developing lines of federal and state immunity and form one workable immunity doctrine.

The reconciliation of the state and federal immunity doctrines occurred in Butz v. Economou.68 The Supreme Court held that there was no justification

63. Id. at 396. See also Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597 (1982) [hereinafter Note, Rethinking Immunity]. In regard to the second exception, the author stressed that a “cause of action will survive unless Congress has enacted an alternative remedy that the Court views as equally effective.” Id. at 641 (emphasis in original). The author went on to conclude that FTCA recovery is not an adequate replacement under the second exception criterion. Id. at 652-53. In regard to the first exception, the author identified some factors that should be evaluated to determine whether special factors counselling hesitation are present: 1) concerns about the manageability of the cause of action; 2) explicit constitutional barriers; and, 3) countervailing constitutional principles. Id. at 654. In conclusion, he stated that none of these factors are really sufficient reasons to bar damages remedies. Id. at 666.


66. Id. at 247. In Scheuer, section 1983 claims were brought against state officials after the Kent State University shooting incident. Id. at 234. Petitioners alleged that they were deprived of their federal rights under the color of state law, so they demanded personal liability for the named defendants. Id. at 238.

67. Id. at 247. See Note, The Standard of Culpability, supra note 62, at 583 (Scheuer introduced a combination of subjective—official’s good faith belief in the legality of the actions,—and objective—the reasonable grounds for that belief,—as the basis for determining which level of immunity should apply).

for distinguishing between suits brought against state officials and suits brought against federal officials. In so doing, the opinion provided extensive guidance for the lower courts. Federal and state officials were now to be judged on an equal basis, both warranting only qualified immunity against suits for damages. The Court accomplished this unification by explaining the development of the immunity doctrines, extending the Scheuer holding to federal as well as state officials, and affirming the Second Circuit's Bivens' holding that the standards against which qualified immunity is to be judged are good faith and reasonableness. With Butz, qualified immunity became the accepted standard on both the state and federal levels.

Evidence of this acceptance was found in the Davis v. Passman decision, where a congressman was held liable for damages under the fifth amendment equal protection clause after discriminating against a female employee. Federal officials could no longer hide behind a veil of absolute immunity while they infringed upon individual rights. Instead, the correct method to decide these cases now involved analyzing the situation to determine whether it fell into one of the exceptions to qualified immunity. Absolute immunity would apply only if the situation fell into one of the narrow exceptions enumerated in Bivens.

69. Id. at 500. In Butz, respondent, a commodity futures commission enterprise controller, sued petitioners, Department of Agriculture officials, for damages, alleging a violation of his constitutional rights. Id. at 480. Specifically, respondent claimed that these officials had instituted an investigation and an administrative proceeding against him because he had criticized the Department of Agriculture. Id. The district court dismissed the action, granting the federal officials absolute immunity. Id. The Court of Appeals reversed, holding that defendants were entitled to only qualified immunity, as were their state counterparts. Id. The Supreme Court granted certiorari to address the immunity doctrine question. Id. at 480-81.

70. The Supreme Court rejected the view that all federal officials are absolutely immune from damages liability. Butz, 438 U.S. at 485. The Court supported its conclusion by tracing the development of immunity since Marbury v. Madison, 1 Cranch 137, 163 (1803) ("the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws"). Id. The Court analyzed the Supreme Court's holding in Bivens, which had created a constitutional cause of action for damages, and the Second Circuit's holding on remand which had concluded that the public interest is best served when officials enjoy only qualified immunity, and found both conclusions to be sound. Id. at 486. The Court also traced the development of state officials' qualified immunity. Id. at 496-98. After this informative journey through the immunity principles, the Court concluded that, absent congressional directions to the contrary, federal and state officials should enjoy the same degree of immunity. Id. at 504.

71. 442 U.S. 228 (1979). In Davis, which involved a sex discrimination suit brought against a United States congressman, the Court concluded that petitioner had presented a valid cause of action, thereby establishing a right to seek a damages remedy under the fifth amendment. Id. at 234-44. The Court concluded that the equal protection component of the fifth amendment's due process clause conferred a federal constitutional right on petitioner. Id. The Court found that a congressman was as liable as any other person for constitutional violations. Id. at 244. See infra note 156.

72. Cf. id. at 248-49. After a thorough analysis of the facts, the Court concluded that a cause of action under the fifth amendment existed which could be redressed by a damages remedy. See also Note, Rethinking Immunity, supra note 63, at 625 (even though comprehensive employment
D. The Application Of The Immunity Doctrines To The Military

With the affirmation of Bivens in the Butz decision, it appeared that the immunity question was settled, and therefore, its application to the military would be an easy extension of an accepted principle. This was not the case. As noted earlier, the Bivens court specifically listed two situations where a constitutional cause of action would be barred: 1) where special factors exist; or, 2) where an adequate alternative remedy exists. These two situations, set forth in dicta, have proven to be a major roadblock to the direct application of the Bivens doctrine in the military context.

1. Special factors counselling hesitation

The Bivens Court’s failure to define the exceptions to the recovery that it had created resulted in confusion among the lower courts. The first exception to Bivens recovery, “special factors counseling hesitation,” was particularly troublesome in relation to intramilitary tort suits. On the one hand, some saw the military as a totally separate society with a unique mission. In this scenario, recruits were expected to surrender certain constitutional rights upon entering the military as a means to further the military’s particularized need for internal discipline. The judiciary, accepting this separate community concept, allowed the military court system to exist as an entity separate from the civilian courts. The civilian courts were generally barred from interfering with the military jurisprudential system. Military tribunals, governed by the Uniform Code of Military Justice (“UCMJ”), exercised independent control over the military through a unique set of procedures which did not necessarily mesh with the civilian judicial process.

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73. See supra note 63 and accompanying text.
74. See Zillman, Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort, 60 N.C.L. Rev. 489, 491, n.11 (1982) (“Intramilitary suit” is a term of art used to define any tort suit in which: 1) plaintiff alleges harm has occurred during his tour of duty; and, 2) suit is brought against individual military officials, the government or both).
75. See Goodrich, Denying Soldiers the Rights They Fight to Protect, 2 Calif. Law 48, 50 (Nov. 1982) (Col. John Henry Wigmore, when asked, stated, “The primary objective of the military organization is victory, not justice.”).
76. See supra note 3 and accompanying text.
77. See Barker, supra note 3, at 226-27 (federal courts generally may not interfere with established system of military jurisprudence).
78. 10 U.S.C. §§ 801-940 (1970). The UCMJ was passed by Congress in 1950 and was recognized as Congress’s effort to insure that military justice was administered in accord with due process demands.
79. See, e.g., Kennedy v. Commandant, U.S. Disciplinary Barracks, 258 F. Supp. 967 (D. Kan. 1966). The facts, which are undisputed, showed that the accused had requested that either a military or a civilian lawyer be appointed to represent him in his two courts-martial proceedings. Id. at 968. But the court, rather than follow Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon
Attempting to carry this separate system theory one step further, the theory's proponents urged that the recognized needs for military discipline and internal order were "special factors counselling hesitation." As such, they contended that military officers deserved absolute immunity for their acts or omissions performed in the course of their military duties. The military feared that suits brought by subordinates against their superiors would undermine the prompt and unquestioning obedience required in the military context. Also present was the fear that suits by members of the same unit would undermine morale and decrease the unit's fighting effectiveness. The courts, including the Supreme Court, accepted these rationales and granted considerable discretion to military judgments.

On the other hand were those who believed that the special factors counselling hesitation were just that—discrete factors occurring in a limited range of situations. These commentators, who felt that the separate system doctrine was overextended, pointed to the FTCA's language which bars government

v. Wainwright, 372 U.S. 335 (1963), which guarantee sixth amendment due process rights, specifically distinguished those cases as not applicable to the military sector. Id. at 969-70. Therefore, although the sixth amendment provides for a right to counsel, this right was not extended to the military situation, and no counsel was appointed. Id. at 970. See generally Barker, supra note 77, at 223; Howland, The Hands-Off Policy and Intramilitary Torts, 71 IOWA L. REV. 93 (1985) (separate systems is valid theory).

80. Most of the supporters of this theory are writers who are affiliated with the military. See, e.g., Donaldson, supra note 40, at 184-85 (distinctly unique relationship between soldiers and government is of primary importance).

81. See Goodrich, supra note 75, at 50 (military believes that internalized discipline is required at all times since attitudes developed in training must be such that they will be conducive to voluntary and willful obedience on battlefield). See also Parker v. Levy, 417 U.S. 733, 743-44 (1974); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (immediate compliance to orders must be reflexive in order to assure combat readiness).

82. See Goodrich, supra note 75, at 50 (argument is essentially based on a floodgates theory, whereby military believes that allowing one suit will lead to plethora of other suits). Contra Howland, supra note 79, at 115. Howland cites M. JANOWITZ, SOCIOLOGY AND THE MILITARY ESTABLISHMENT 19 (1965), which concluded that a soldier's combat effectiveness does not depend on formal discipline but rather on group dynamics. Id. In addition, Howland believes that soldiers are more motivated by the desire to prevent bodily harm than by the possibility of suits. Id. at 122.


84. See generally Zillman, supra note 74, at 30 (Chappell substantially narrowed Feres and established qualified immunity as the norm for federal officials).
liability for claims "arising out of combatant activities . . . during time of war." The absence of statutory language creating an all-inclusive bar to military liability, in the face of statutory language creating a bar to liability for certain military activities, justified their conclusion that the special factors doctrine should not be applied to every military situation. The commentators argued that qualified immunity should be the norm, with recognized distinctions between peacetime and combat situations. If the military officials could prove that they were performing functions sufficiently related to national security then absolute immunity should be given.

The Supreme Court had an opportunity to define the "special factors" exception in Chappell v. Wallace. In Chappell, enlisted military personnel were denied recovery in a damages suit against a superior officer for alleged constitutional violations. The Court's rationale in Chappell was unique because, although the claim involved a constitutional tort based on Bivens, the Court relied on Feres and the FTCA, as its guiding principles. The Supreme Court concluded that the separate systems rationale was valid because of the unique disciplinary structure of the military and because of Congress' unique role in relation to the military establishment.

Rather than decisively conclude that the separate systems rationale bars all recovery for military personnel, the Chappell Court left open the possibility that some suits against the military might still be allowed. The Court accomplished this by stating that military personnel would not be barred from all redress in civilian courts for constitutional wrongs suffered in the course of


86. See, e.g., Note, Government Liability, supra note 20, at 1087 (certain suits do not encroach on military disciplinary structure).

87. See Tigue v. Swain, 585 F.2d 909 (8th Cir. 1978) (particularized analysis done to determine whether immunity should be granted); Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977) (military necessity is not a justification for absolute immunity).


89. Id. at 305. In Chappell, five enlisted Navy seamen brought a damages claim against their superior officers. The enlisted men alleged that because they were minorities they were given poor reviews and undesirable duties and were threatened. Id. at 297. They claimed a violation of their constitutional rights against discrimination, and a violation of the 42 U.S.C. section 1985 prohibitions against conspiracy. Id. The Southern District of California dismissed the complaint, but the Ninth Circuit reversed, basing its holding on Bivens. Id. at 298. The Supreme Court granted certiorari and reversed. Id. The Court used the analysis set forth in Feres as its guide, even though this case was not concerned with statutory relief. Id. at 299. The Court concluded that the special factors within a military setting, such as the unique disciplinary structure and Congress's activity in the field, bar allowing a Bivens remedy in the military context. Id. at 304.

90. Id. at 299. It is important to note that the Court recognized Feres as a guiding principle, not as a controlling principle. Id. Therefore, there was not a totally mixing of Feres statutory FTCA claims and Bivens constitutional claims.
military service. This language created a problem because courts were unsure how broadly the Chappell holding, barring Bivens recovery for military personnel, was to be read. If the bar was narrow in scope, just how narrow was it? Did it bar only those actions in which an adverse effect on the hierarchical command structure would result, or only those actions in which Congress had exercised its plenary constitutional authority? Or had the Chappell Court envisioned a total bar, barring all actions for redress brought by enlisted military personnel? By not taking a definitive position on these issues, the Chappell Court left the lower courts free to decide claims on a case-by-case basis.

2. The alternate means of recovery

The second exception to recovery noted in Bivens was the existence of an equally effective alternate compensation scheme specifically designated by Congress as a replacement. Earlier, the Feres Court had noted that such an alternate scheme could exist in the Veterans Benefits Act ("VBA"). The VBA was enacted as a no-fault compensation scheme for injuries incurred by soldiers in the course of their military duties, duties recognized as dangerous

91. Id. at 304. Some commentators thus believe that Chappell was a narrow decision, applicable only to situations whose fact patterns are the same as that in Chappell. See generally Zillman, supra note 74, at 33 (case did not end all possibilities of military commander being sued because, even though dicta was sweeping, opinion itself was narrow). But see Trerice v. Summons, 755 F.2d 1081, 1084 (4th Cir. 1985) (Bivens recovery barred by intramilitary immunity); Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (Chappell created per se ban on Bivens actions by military).

92. Chappell, 462 U.S. at 300.

93. Id. at 301. Often times the problem lies in determining what exactly constitutes congressional activity in the field. Compare Chappell, 462 U.S. 296 (1983) (this activity is evident in the Constitution's grant of power over rights, duties and responsibilities of military to Congress); with Jaffe, 663 F.2d 1226, 1227-28 (3rd Cir. 1981) (this activity requires some sort of financial commitment, such as is evident in the VBA alternative remedies of free medical care and no-fault limited compensation). Contra Donaldson, supra note 40, at 197 (VBA is inadequate replacement).

94. See Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985). The Johnson court set forth a thorough analysis of Feres, Bivens and Chappell. The court's primary focus during its special factors analysis was on the unique need for discipline in a military setting, the existence of military alternatives, and Congress's authority over the military. Id. at 1535. But see Gaspard v. United States, 713 F.2d 1097, 1103 (1983), cert. denied, 466 U.S. 975 (1984) (courts can not impose, or even inquire into, monetary damages for servicemen's injuries).

95. Bivens, 403 U.S. at 396-97.

96. 38 U.S.C. §§ 301-62 (1976). See Feres, 340 U.S. at 145 (Court concluded that congressional enactments, providing military with compensation for injuries or death, must be evaluated fully before deciding whether damages remedy is warranted). The courts of appeal in the companion cases on certiorari with Feres had addressed the alternative means of recovery issue. Id. at 145 (citing Jefferson v. United States, 178 F.2d 518 (4th Cir. 1950) and United States v. Griggs, Ex’x, 178 F.2d 1 (10th Cir. 1950)). In both of those cases, the enlistee had already recovered under the Veterans' Administration programs. The Feres Court thus concluded that recovery under the FTCA would be a double recovery and should not be allowed. Id.
but necessary. Its purposes, as articulated in the Stencel Aero Eng'g Corp. v. United States opinion, were to provide swift, efficient compensation to servicemen, and to place an upper limit on government liability. Thus, since some courts and commentators believed that the VBA provided a viable alternative to FTCA recovery, they also believed that the VBA would satisfy the second Bivens exception. But, as other commentators noted, VBA recovery is limited recovery, and thus does not fall within the second Bivens exception to recovery granted by the FTCA. These commentators believe that the existence of the VBA in conjunction with the second exception no more created a per se ban on recovery than does the first exception did. Again, questions remained.

E. The Unique Nature Of Constitutional Tort Actions

As shown above, the Supreme Court's approach to suits against the military evolved into a pattern of analysis which utilized portions of prior—albeit very different—cases, such as Feres, Bivens, and Chappell, to justify its holdings. Some commentators believed that the Court's method of combining a Feres statutory action for a tortious violation, with a Bivens constitutional claim, was invalid. Citing the Supreme Court's extensive recognition of the Bill of

99. Id. at 673.
100. See Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980) (per curiam) (in dicta, Court said that proper reading of Stencel led to conclusion that veterans' benefits were the exclusive remedy for injuries incurred by military). But see Schwartz, Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine, 95 Yale L.J. 992 (1986). The author called the Hatzlachh dicta into question by referring to Brooks v. United States, 337 U.S. 49 (1949), and United States v. Brown, 348 U.S. 110 (1954). Id. at 998, n.29. In Brooks the enlistees received FTCA recovery because they were on furlough. The Court held that events which occurred while on furlough were not "incident to service." Brooks, 337 U.S. at 50-51. In Brown, recovery for post-discharge negligence was allowed, again under the not "incident to service" rationale. Brown, 348 U.S. at 112. The author concluded that if veterans' benefits were held to be an exclusive remedy for injured servicemen, then Brown and Brooks would have to be overruled. Schwartz, at 998 n.29.
101. See Note, FTCA Recovery, supra note 18, at 1105 ("the compensation system is often inadequate"). Cf. Schwartz, supra note 100, at 991-1000 (pressures inherent in the military system cause relief programs to break down when they are most needed).
102. See Note, FTCA Recovery, supra note 18, at 1108 ("there is no substitute for congressionally mandated tort recovery").
103. E.g., Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985). The Eighth Circuit admitted that the case presented a unique factual situation, not directly controlled by any of its previous decisions. Id. at 367. However, the court applied parts of the Feres, Bivens and Chappell decisions as a way to reach its holding that recovery should be allowed for injuries suffered when an enlistee was subject to a mock lynching by other members of the military. Id. at 362.
104. Cf. Note, Intramilitary Immunity, supra note 55, at 350 (greater recognition for constitutional rights will serve to promote respect for authority within military and will serve to ease recruitment problems).
Rights in many other contexts, such as the fourth amendment's protection against unreasonable search and seizure, the fourteenth amendment's guarantee of equal protection, and the first amendment's guarantee of freedom of speech, they believed that the weight given to constitutional claims brought by military personnel should be greater than the weight given to common law tort claims brought by the same group.

In response, other commentators opined that granting an extra degree of protection to constitutional tort claims under Bivens, but barring FTCA claims under Feres created problems. They suggested that a little "creative complaint writing" could eventually lead to all claims being framed as constitutional actions for which recovery would be allowed. For example, common law false imprisonment claims could be restructured as eighth amendment cruel and unusual punishment claims. To prevent this restructuring, they contended that all claims should be treated equally under a uniform standard. The Court accepted this logic, as evidenced by its use of a Feres-Bivens combination in the Chappell decision. The Court continues to use a similar analysis in most claims arising from military service.

F. The Prohibitions On Human Experimentation

Because the Army experiments involved the use of humans as experimental guinea pigs, these experiments should have been subjected to the constraints of the principles developed at Nuremberg and elsewhere. The historical development of these principles reflected a recognition of the need for human subjects in scientific research. However, the potential for gross abuse was also recognized. That potential for abuse was graphically illustrated at the 1947 Nuremberg medical trials, where the heinous deeds of German doctors, allegedly committed to promote the development of science, were brought to center stage. The medical trials resulted in the promulgation of stringent

110. Jaffe, 663 F.2d at 1235.
standards to govern human experimentation and research procedures. Significantly, those standards ("The Nuremberg Code") were established by the United States military, as overseer of the Nuremberg trials. Although the Nuremberg Code did not carry the weight of an American statute, most commentators viewed it as the primary control mechanism over human experimentation. The Nuremberg Code's first principle stressed that voluntary informed consent by the human subject is absolutely essential. But determining the scope of "informed consent" created problems in practical application. Volunteers did not necessarily have the sophistication or the academic training to evaluate the procedures fully, or to become completely informed. Additionally, volunteers did not necessarily have the status to consent unequivocally because a large percentage of "voluntary" research was done on captive volunteers, such as prisoners or mental hospital patients. Most research groups, recognizing these difficulties, tried to provide additional safeguards as a means to minimize the potential for abuse. Some of these safeguards included the use of prior review and clearance, the use of a monitor throughout the project concerned solely with the subject's welfare, or the use of professional sanctions or civil liability for researchers who strayed outside accepted boundaries. The considerations underlying the rules and guidelines recognized that although research on human subjects was necessary, the sanctity of the subject's life was of primary importance. Strict standards were created to ensure that these interests were properly guarded in all situations.

II. UNITED STATES V. STANLEY

A. Facts And Procedure

In February, 1958, James B. Stanley, a Master Sergeant in the United States Army, volunteered for an Army chemical warfare testing program ostensibly

114. See generally Ladimer, Ethical and Legal Aspects of Medical Research on Human Beings, 3 J. P.U. L. 467 (1954).
115. See Mulford, Experimentation on Human Beings, 20 STAN. L. REV. 99, 102 (1967) (tribunal was composed of American judges and used American procedural rules).
116. Id. at 102-03.
117. See generally Ladimer, supra note 114, at 467-68; Bassiouni, Baffes and Evrard, An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1601-02 (1981) [hereinafter Bassiouni, Human Experimentation]. Further, the Nuremberg principles have been used as the basis for a number of other regulations, such as Air Force Regulation No. 169-8 (Use of Volunteers in Aerospace Research); The International Code of Medical Ethics promulgated by the General Association of the World Medical Association; and the Declaration of Helsinki, Art. II, § I. Id. at 1609-21.
118. Bassiouni, Human Experimentation, supra note 117, at 1611 (emphasis added).
119. Mulford, supra note 115, at 106.
120. Id. See Ladimer, supra note 114, at 493. One state, New York, has addressed the issue and has Specifically prohibited experiments on mental patients, stating that the only purposes for psychiatric hospitalization are care and treatment. Id.
121. Id.
intended to test and to develop the effectiveness of protective clothing and equipment. During the course of the program, Stanley was secretly given lysergic acid diethylamide ("LSD"). Stanley contended that as a direct result of his exposure to LSD he suffered severe physical and mental injuries which impaired his military service and culminated in the dissolution of his marriage in 1970.

In 1975, the Army sent Stanley a letter soliciting his participation in a follow-up study, aimed at examining the long term effects of LSD on the 1958 program volunteers. This letter was the first time Stanley learned of his LSD exposure and the true nature of the 1958 program. Rather than participate in the follow-up study, Stanley filed an administrative claim with the army which was denied. Subsequently, Stanley filed suit in the district court for the Southern District of Florida, which granted the government's motion for summary judgment. On appeal, the Fifth Circuit affirmed the

122. United States v. Stanley, 107 S. Ct. 3054, 3055 (1987). The Court of Appeals' opinion stated that the statutory basis for the program Stanley participated in was "the Organization of the Army Act of 1950 (64 Stat. 322, 5 U.S.C. § 235a)", which authorized the Secretary of the Army to conduct research and development programs related to Army activities. Stanley v. Central Intelligence Agency, 639 F.2d 1147, 1148-49 n.2 (5th Cir. Unit B 1981). The genesis of the research program at issue in this case was a February 26, 1953 memo from the Secretary of Defense to the service secretaries concerning the use of human volunteers in research programs. Id. The Secretary of the Army acted on this memo on November 3, 1955 when he gave the Army's Director of Research and Development complete authority over research matters. Id. On May 17, 1956, the Director approved a psycho-chemical research program in which volunteers were to be used in chemical warfare defense tests. Id. Of the substances approved for testing was LSD. Id.

123. Id. at 3057. It is an accepted fact that Stanley received LSD four times over a one month period. Id.

124. Id. Stanley alleges hallucinations, periods of incoherence and memory loss, impaired military performance resulting in a reduction in rank, and periods of violent behavior during which he would beat his wife and children but then be unable to remember the incidents. Id.

125. Id. These allegations, presented in Stanley's second amended complaint, were accepted as true for the purpose of this decision. Id. at 3057. Therefore, the fact that Stanley remained in the Army for an additional 11 years, and then was honorably discharged in 1969, has no bearing on the sufficiency of his complaint. See id.

126. Id.

127. Id.

128. Id. The United States Army Claims Division had concluded that Stanley's FTCA claims were not payable because "injuries to individuals incurred while on duty with the United States Army are considered to be incident to the individual's service." Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1149 n.5 (5th Cir. Unit B 1981). The Army had not closed all doors to Stanley, though, since it had suggested that he could file suit in district court if he was dissatisfied with the disposition of the case. Id.

Stanley also had filed a claim against the Central Intelligence Agency ("CIA"), which was dismissed when both the CIA and the Judge Advocate General's offices found nothing in their records to establish CIA involvement. Id. at 1149 n.4.

129. No. 78-8141-Cir.-CF (S.D. Fla. May 14, 1979). Since Stanley was "at all times on active duty and participating in a bona fide Army program," the district court concluded that his claim was barred by the Feres doctrine which preempts FTCA recovery when the injuries are "in the course of activity incident to service." 107 S. Ct. at 3057.
dismissal of the FTCA claim, but also remanded, concluding that Stanley "has at least a colorable constitutional claim based on Bivens." 130

In response, Stanley amended his complaint by adding a Bivens claim against unknown individual officers, and a claim for a separate tort occurring subsequent to his discharge. 131 Once again, the Southern District of Florida dismissed the tort claim. 132 However, it refused to dismiss Stanley's Bivens claim, and voluntarily certified an order for an interlocutory appeal under 28 U.S.C. section 1292 (b). 133

Upon the government's request for, and the district court's grant of, summary judgment, 134 Stanley again amended his complaint, naming nine individuals as defendants. 135 In response, the district court recertified its order for an interlocutory appeal, which the Court of Appeals for the Eleventh

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130. 639 F.2d 1146 (1981). The Fifth Circuit affirmed the district court's conclusion that Stanley's Feres claim should be denied, but not by means of summary judgment. Id. at 1148. Instead, the Fifth Circuit believed that the proper disposition was dismissal for lack of subject matter jurisdiction, since a suit defeated under the FTCA should be defeated at its inception without the merits being reached. Id. at 1148 & 1157. The court also stated that although it did not have a position on the merits, Stanley might have presented a constitutional Bivens claim. Id. at 1159.

131. Stanley v. United States, 549 F. Supp. 327 (S.D. Fla. 1982). These amendments were necessary for two reasons. First, an action under Bivens is directed at individual federal officers, so Stanley's original claim against the government did not present the proper adverse party. Id. at 330 (citing Jaffe v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979)) (Jaffe sued government itself so his reliance on Bivens and Butz, which were suits against individual federal officers, was incorrect). Second, although the Feres doctrine bars FTCA recovery for claims incident to service, claims for separate torts occurring subsequent to discharge are not barred. Id. at 329 (citing Schurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980)) [no causal connection between injury and post-discharge negligence so no recovery given]; Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) [claims for post-discharge conduct not barred by Feres doctrine]).

132. 549 F. Supp. 327 (S.D. Fla. 1982). The district court concluded that Stanley's FTCA claim was still barred by the Feres doctrine since the amended complaint failed to persuade the court that there were separate and distinct acts occurring after discharge. Id. at 329.

133. Id. at 332. The district court cited the Ninth Circuit's decision in Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), as its authority for not barring the Bivens action. Id. at 331. In Wallace, the Ninth Circuit held that even if a FTCA claim is barred by the Feres principles, a Bivens claim based on the same set of facts is not necessarily barred. Id. Accord Davis v. Passman, 442 U.S. 228 (1979). The Supreme Court's reversal of the Fifth Circuit in Davis, which had denied recovery, was an important decision for Stanley's Bivens claim. 549 F. Supp. at 331. Up until this reversal the future of the Bivens cause of action was questionable. See id. Davis unequivocally recognized the Bivens constitutional cause of action. Id.

134. Stanley v. Central Intelligence Agency, 552 F. Supp. 619 (S.D. Fla. 1982). The government's summary judgment motion was based on its contention that it and three federal agencies had been improperly named as FTCA defendants. 107 S. Ct. at 3058. Also, since no individual defendants had been named, the government believed that there was no one to seek interlocutory review of the court's refusal to dismiss the Bivens action. Id.

135. 107 S. Ct. at 3058 n.2. The named defendants included two employees of the University of Maryland—Gerald Klee, M.D. and Walter Weintraub, M.D.—and seven federal agents or employees—Joseph R. Bertino, M.D., H.D. Collier, Albert Dreisbach, Bernard G. Elfert, Sidney Gottlieb, M.D., Richard Helms, and Van Sim, M.D. Id.
Circuit granted. On appeal, the court affirmed that Stanley's *Bivens* claim was not barred.\textsuperscript{136} In addition, the Eleventh Circuit stepped outside the bounds of the order appealed from and remanded the case so the district court could reevaluate whether Stanley had a viable FTCA claim.\textsuperscript{137} The Supreme Court granted certiorari to address the reinstatement of the FTCA claim and to attempt to resolve the intercircuit conflicts in the *Bivens* and *Feres* areas.\textsuperscript{138}

B. The Opinions In Stanley

1. Justice Scalia's majority opinion

Justice Scalia's majority opinion\textsuperscript{139} addressed Stanley's FTCA and *Bivens* claims separately. The opinion quickly vacated the reinstated FTCA claim on jurisdictional grounds. Because interlocutory appeal is restricted to the particular order appealed from,\textsuperscript{140} the Supreme Court believed that the Eleventh Circuit had to address what, if any, effect the Supreme Court's reversal of the Ninth Circuit in Chappell v. Wallace, 462 U.S. 296 (1983), during the course of the *Stanley* proceedings, had on this case. \textit{Id.} at 1493. See supra note 133. The *Stanley* district court opinion had held that *Chappell* did not affect the *Bivens* disposition here. \textit{Id.} (citing 574 F. Supp. 474 (S.D. Fla. 1983), mod. 587 F. Supp. 1071 (S.D. Fla. 1984)). The Eleventh Circuit affirmed that holding and concluded that Stanley's *Bivens* action was not precluded by *Chappell* because neither of the special factors deemed dispositive in *Chappell*—the unique disciplinary structure of the military establishment and Congress's plenary authority and extensive activity in the military field—were present here. \textit{Id.} at 1496. Nor was Stanley's *Bivens* action precluded under the adequate alternative remedies exception, since the court did not view the VBA's limited liability provisions as a sufficient alternative. \textit{Id.} at 1497.

136. Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986). The Eleventh Circuit had to address what, if any, effect the Supreme Court's reversal of the Ninth Circuit in *Chappell* v. Wallace, 462 U.S. 296 (1983), during the course of the *Stanley* proceedings, had on this case. \textit{Id.} at 1493. See supra note 133. The *Stanley* district court opinion had held that *Chappell* did not affect the *Bivens* disposition here. \textit{Id.} (citing 574 F. Supp. 474 (S.D. Fla. 1983), mod. 587 F. Supp. 1071 (S.D. Fla. 1984)). The Eleventh Circuit affirmed that holding and concluded that Stanley's *Bivens* action was not precluded by *Chappell* because neither of the special factors deemed dispositive in *Chappell*—the unique disciplinary structure of the military establishment and Congress's plenary authority and extensive activity in the military field—were present here. \textit{Id.} at 1496. Nor was Stanley's *Bivens* action precluded under the adequate alternative remedies exception, since the court did not view the VBA's limited liability provisions as a sufficient alternative. \textit{Id.} at 1497.

137. Although the Eleventh Circuit admitted that *Stanley I*, 639 F.2d 1146, 1150 (5th Cir. Unit B 1981), had established the “law of the case” on Stanley's pre-discharge FTCA claim against the government, the court found an exception to the law of the case doctrine. \textit{Id.} at 1497. This doctrine dictates that an appellate court's findings of fact and conclusions of law generally are binding in all subsequent proceedings in the same case. \textit{Id.} at 1497 (citing Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984)). But this doctrine is only a general rule. There are three recognized exceptions in which the federal courts have power to reopen issues previously decided: 1) where substantially different evidence is presented on subsequent trial; 2) where a contrary decision of law applicable to the issues is made by a controlling authority; and, 3) where a previous decision is clearly erroneous and manifestly unjust. \textit{Id.} at 1498 (citing Westbrook v. Zant, 743 F.2d 764, 768-69 (11th Cir. 1984) (citing White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967))). The Eleventh Circuit believed that the second exception applied to *Stanley* because of the decisions rendered in United States v. Shearer, 473 U.S. 52 (1985); Cole v. United States, 755 F.2d 873, \textit{reh. denied}, 765 F.2d 1123 (11th Cir. 1985); and, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1984), during the course of the *Stanley* proceedings. \textit{Id.} These three cases mandated that the courts conduct a case-by-case analysis to evaluate whether precluding a FTCA claim brought by someone in the military would serve the purpose of the *Feres* doctrine. \textit{Id.} at 1499.

138. 107 S. Ct. at 3059.


140. \textit{Id.} at 3060. The Supreme Court concluded that the Court of Appeals had jurisdiction pursuant to 28 U.S.C. section 1292(b). \textit{Id.} 28 U.S.C. section 1292(b) governs interlocutory appeals, which are appeals based on decisions other than final decisions, and restricts these appeals to an order made by a district judge. \textit{Id.}
Circuit had overstepped the restrictions on it by addressing something outside the scope of that order.

The Eleventh Circuit's conclusion that Stanley could proceed with his Bivens claim notwithstanding the Chappell decision also did not fare well in the Supreme Court. Stanley claimed that because his injury was not incident to service, and, because the situation invoked no chain of command concerns, which were of primary importance in Chappell, Chappell should not be strictly controlling. The Court refused to accept Stanley's argument because it believed the incident to service issue had already been decided against him. Also, the Court refused to accept Stanley's construction of Chappell, concluding instead that since Ferres had guided the Court's analysis of the Bivens claim in Chappell, the Ferres level of protection for the military should be extended to all Bivens claims, including the claim currently before the Court. In so doing, Scalia's opinion noted that the special factors found in the unique disciplinary structure of the military, and Congress' activity in relation to the military, both required that the incident to service rule articulated in Ferres apply to both FTCA and constitutional claims. Consequently, Stanley's recovery was denied on both counts.

2. Justice O'Connor's concurrence in part, dissent in part

Justice O'Connor concurred with the majority that Stanley's cause of action under the FTCA should not be reinstated. O'Connor also concurred with the majority's holding that as a general rule there is no Bivens remedy for injuries arising "incident to service." However, her analysis of Stanley's claim led her to dissent from the majority's denial of Stanley's Bivens claim. O'Connor concluded that the military's conduct here was so heinous and so far beyond the bounds of human decency that it could never be considered within the bounds of military activity. Hence, O'Connor did not view this as a military liability case, but instead saw it as a case of involuntary human

141. Id. at 3061.
142. Id. See supra notes 88-94 and accompanying text. See also Zillman, Tort Liability of Military Officers: Initial Examination of Chappell, 27-50-128 ARMY LAW. 29, 31 (1983) (special emphasis of decision was on superior-subordinate relationship); Schwartz, supra note 100, at 996 (rights of soldiers must be tempered to meet "overriding demands of discipline and duty . . . .").
143. 107 S. Ct. at 3066.
144. Id. at 3061-63.
145. Id. at 3063. See Zillman, supra note 142, at 36 (if concern is with disrupting the military by filing lawsuit, why differentiate between two types of claims?). But see Chappell, 462 U.S. at 299 ("the Court's analysis in Ferres guides our analysis in this case"); Donaldson, supra note 40, at 191 (Chappell undermined Ferres because it concluded that, if a constitutional cause of action is established, then qualified immunity applies).
146. 107 S. Ct. at 3065.
147. Id. at 3065. Her conclusion stemmed from the belief that Chappell and Ferres must be read together as preventing suits in civilian courts to determine military liability. Id.
148. Id.
experimentation, condemned by the Nuremberg trials and by constitutional due process guarantees. O'Connor would have allowed Stanley's *Bivens* action to proceed.

3. Justice Brennan's dissenting opinion

Justice Brennan's dissent also joined part I of the majority opinion, and concluded that Stanley's FTCA claim should not have been reinstated by the Eleventh Circuit. But Brennan's agreement with the majority opinion stopped there, as his dissent proceeded to castigate the majority for "disregard[ing] the commands of our Constitution" by denying Stanley a *Bivens* remedy. Brennan concluded that the Army's use and abuse of Stanley, treating him as if he were a laboratory animal and surreptitiously dosing him with dangerous drugs, violated all standards of what is legally and morally acceptable. Brennan concluded that such blatant overreaching by the military demonstrated that the military decision making process must not be left unsupervised. Instead, he opined that soldiers must be afforded the opportunity to find relief in a *Bivens* action just as their civilian counterparts are afforded this opportunity.

Brennan predicted that the inevitable result of this decision would be absolute immunity from liability for money damages for all federal officials—military and civilian alike. Brennan believed that such a result would be impermissible in light of longstanding caselaw which had established that officials are liable for damages caused by their intentional violations of constitutional rights.

149. *Id.* at 3065-66.
150. Marshall, J. joined in the dissent. Stevens, J. joined in part III. *Id.* at 3066.
151. *Id.* at 3066. Brennan concluded that the Constitution demands that everyone be provided either injunctive relief or damages when a constitutional tort is suffered.
152. *Id.* at 3066-67. See *supra* notes 112-21 and accompanying text.
153. *Id.* at 3067. Interestingly, Brennan believed that the Army recognized the "moral and legal implications" of the testing program but went ahead with the program anyway. *Id.* His evidence for this belief was a 1959 Army Intelligence Corps Staff Study, which discussed the need to keep the LSD program secret. *Id.* See also S. REP. No. 755, Book I, p. 392 (1976) (keep knowledge away from public of these "unethical and illicit activities"). *Id.* Brennan concluded that government officials should not be granted absolute immunity. *Id.* In light of this gross abuse by the military, Brennan concluded that government officials should not be granted absolute immunity. *Id.* As an example of what can happen when the military is left unchecked, Brennan cited cases such as *Jaffe*, 663 F.2d 1226 (3rd Cir. 1981); where enlistees were forced to stand unprotected while an atomic bomb was dropped nearby; and Barrett v. United States, No. 76 Civ. 381 (S.D.N.Y. 1987), where an unconsenting mental hospital patient was used in Army mescaline tests.
154. *Id.* at 3068. ("An injunction, however, comes too late for those already injured; for these victims, it is damages or nothing.") (quoting *Bivens*, 403 U.S. at 410 (Harlan, J. concurring)).
155. *Id.*
156. See *id.* at 3068-69 (citing *Davis v. Passman*, 442 U.S. 228 (1979)). The *Davis* Court had concluded that "legislators ought . . . generally to be bound by [the law] as are ordinary persons." *Davis*, 442 U.S. at 246 (quoting *Gravel v. United States*, 408 U.S. 606, 615 (1972)). The need to vindicate citizens' rights was also recognized in *Butz*, 438 U.S. at 504-05. *Butz* clearly established that constitutional limits must be maintained. *Id.* at 506-07.
Absent immunity, legislators, members of the military, and ordinary persons should be liable for damages.

According to the dissent, the correct analysis here would entail reviewing the *Bivens* special factors doctrine along with the immunity doctrine since both doctrines are based on identical concerns. After recognizing that the immunity doctrine should apply to this case, Brennan recommended remanding the case to consider whether there were exceptional circumstances present which justified a grant of absolute immunity. Absent such circumstances, the generally accepted principles of qualified immunity should apply. Second, Brennan recommended restricting the *Chappell* exception to *Bivens* recovery to a narrow reading. This revised *Chappell-Bivens* doctrine should then be utilized to provide a basis for the constitutional claims. Rather than using a broad inflexible ruling barring recovery, Brennan opined that recovery under *Bivens* would result in an analysis which would accommodate both the interest in maintaining military discipline and the need for protecting essential human dignity, two competing concerns that Brennan believed the courts should not ignore.

III. Analysis

A. Strengths And Weaknesses Of The Stanley Decision—A Short Summary

The Supreme Court's decision in *Stanley*, vacating the Eleventh Circuit's ruling that Stanley could reinstate his FTCA claim and reversing the Eleventh Circuit's ruling that Stanley could proceed with his *Bivens* claim notwithstanding *Chappell*, left Stanley with virtually no recourse for the wrongs inflicted upon him. His administrative remedies had been exhausted, and now his judicial remedies were exhausted as well. The Supreme Court reached its decision to refuse to grant Stanley relief by analyzing the *Feres*, *Bivens* and *Chappell* doctrines. But as this Casenote will show, the Court's conclusion...
on how these doctrines apply to Stanley's situation, and other similar ones, is inconsistent with history and precedent.

The Stanley Court attempted to set forth guidelines for suits arising from tortious behavior by a superior toward a subordinate enlistee. The Court stated that it would clarify the Chappell decision for the appellate courts which, to the date of this decision, were applying Chappell inconsistently. Theoretically, solving this conflict between the circuits would serve an important function because it would establish a consistent standard for the lower courts to follow.

However, rather than analyze the Feres doctrine fully, the Supreme Court simply vacated the FTCA claim on procedural grounds. Such a quick dismissal did not provide the guidelines needed by the lower courts. Instead the lower courts will remain at odds on their definitions of "incident to service" and on the application of these definitions to the military context.

The Court's analysis of the Bivens constitutional cause of action muddled the issues by attempting to create blanket immunity for the military without fully analyzing the particular fact situation. The Court seemed eager to preclude Bivens remedies at any cost. As a result, the Court read the Chappell case expansively, a case which was not entirely applicable to Stanley. The majority also ignored the well-settled immunity principles, which generally grant qualified immunity, except in those limited situations where special circumstances create the need for absolute immunity. The Court equated Feres FTCA recovery with Bivens constitutional recovery under their broad interpretation of Chappell.

In sum, the Court seized Chappell, a decision which created a limited exception to Bivens recovery, stretched it beyond recognition, and justified its actions by phrases such as "incident to military service" and "the unique disciplinary structure of the military." If the Court had focused on phrases such as "morally unacceptable acts" and "government officials remaining free to violate constitutional rights," its decision would have focused on the real issues of the case. But as the case stands, the glaring weaknesses are ripe for criticism.

163. 107 S. Ct. at 3059. Cases such as Jordan v. National Guard Bureau, 799 F.2d 99 (3rd Cir. 1986); Trrice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), and Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984), failed to uniformly interpret the Chappell doctrine. Id. at 3059 n.3.
164. Id. The Court sought to create such a precedent here.
166. Id. at 3073 (Brennan, J. dissenting). The Court admitted that some of Chappell's language would not be applicable to the case at bar, but then proceeded to rely on Chappell for its special factors analysis. Id. at 3061.
167. Id. at 3059.
B. Governmental Immunity And The FTCA In Stanley

The Supreme Court vacated Stanley's statutory FTCA claim on strictly procedural grounds. Admittedly, the Court's reasoning would be upheld under Title 28 alone. Jurisdiction, pursuant to Title 28, section 1292(b), is limited to the particular order from which the party appeals. Limited judicial review is consistent with established principles concerned with fairness in the judicial process. By concluding that some decisions are final and not subject to review, stability is imparted into the system. This interest in stability is also evident in the "law of the case" doctrine, which establishes that conclusions of law, determined by an appellate court, are not subject to review by subsequent trial and appellate courts. Hence, the provisions in section 1292(b) and the "law of the case" doctrine focus on the same purposes of fairness and stability.

Nevertheless, the "law of the case doctrine" is more flexible than the principles set forth in section 1292(b). This flexibility is provided by three exceptions which allow federal courts to reopen issues that have been previously decided on appeal. The Eleventh Circuit believed that the second exception, "where controlling authority has made a contrary decision of law," was applicable to Stanley's claim in light of its recent decision in Johnson v. United States. Johnson demands a case-by-case analysis when the facts presented are sufficiently different from those presented in Feres. Only by conducting such a particularized analysis did the Eleventh Circuit believe that the courts could properly determine whether or not the purposes behind the Feres doctrine would be furthered by precluding FTCA recovery in individual cases. Had the Supreme Court managed to find some validity in the Eleventh

168. See supra note 140 and accompanying text.
169. Id. Since the case came to the Court under section 1292(b), it was not a section 1291 final decision. Id. The Court believed that it should only look to the order appealed from to determine the scope of the issues open for discussion. Id. (citing 16 C. WRIGHT, A. MILLER, E. COOPER & E. GREEN, FEDERAL PRACTICE AND PROCEDURE, § 3929, p 143 (1977)). In addition, the Court felt that it was doubly improper to rule on the FTCA claim since the United States government had been dismissed as a party to the Bivens claim sometime earlier. Id.
170. See Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984), cert. dism'd., 786 F.2d at 1498. The three exceptions in which federal courts have the power to reopen issues are: 1) where substantially different evidence appears at a later trial; 2) where a contrary decision of law has been made by a controlling authority; or, 3) where a previous decision is clearly erroneous.
171. 749 F.2d at 1537. The stated purpose, to provide a remedy where none had been provided before, must be examined before recovery is granted or denied. See Johnson, 749 F.2d at 1537.
UNITED STATES v. STANLEY  153

Circuit's "law of the case" analysis, it might have been able to decide the proper role for the Feres doctrine in intramilitary tort suits.

The Feres doctrine, although the subject of critical commentary,176 is "beyond question . . . the law."177 The straightforward application of that doctrine in cases where the facts closely mirror the facts in Feres—i.e., an FTCA suit for injuries or death allegedly caused by a serviceman's or an armed forces employee's negligence—does not create problems. The dispositive issue to be decided in such cases is whether or not the plaintiff is precluded by the "incident to service" exception to recovery announced in Feres.178 If the facts do not fit neatly under the Feres doctrine, such as in Chappell, Johnson, and the case at bar, the courts should then engage in a case-by-case analysis, evaluating the underlying Feres rationales to determine whether or not denying recovery comports with the policies which underlie the FTCA.179 The Stanley opinion could have provided substantial guidance to the lower courts on how to apply the Feres doctrine in those and other instances.

Originally, the Feres doctrine was justified by four considerations, however, today there are three.180 These justifications are: 1) the distinctly federal nature of the soldier-sovereign relationship; 2) the existence of a no-fault statutory compensation scheme as a substitute for governmental tort liability; and, 3) the adverse effect of these claims on the military disciplinary structure.181 Where these justifications would not be undermined, the plaintiff's FTCA claim should not be barred182 by the Feres doctrine.183

Assuming that the Eleventh Circuit's "law of the case" exception was correct and the reinstated FTCA claim should have been evaluated, the next step for the Stanley court would have been to examine whether the above three justifications would have been undermined by allowing recovery. In short, they would not have been. First, the FTCA claim presented by Stanley was distinctly federal. Stanley did not ask for relief under state procedures,

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176. See generally Hale v. United States, 416 F.2d 355 (6th Cir. 1969) (court openly criticized Feres doctrine as too vague); Schwager v. United States, 279 F. Supp. 262 (E.D. Pa. 1968) (further analysis of facts in each separate case is necessary to decide whether or not Feres recovery should be precluded). See also note 34 and accompanying text.
178. E.g., Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (issue presented is then limited to whether injury arose out of or during course of activity "incident to service").
179. See also Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (court did not automatically extend Feres doctrine to factual situation not similar to that presented in Feres).
180. The fourth rationale, the parallel personal liability provision, is no longer utilized. See Stencel Aero Eng's Corp. v. United States, 431 U.S. 666, 671-72 (1977) (Court only elaborated on three underlying rationales); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) (private liability defense is misinterpretation of purposes behind FTCA); Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955) (no parallel private liability is necessary for FTCA claim to stand). See also Note, FTCA Recovery, supra note 18, at 1103 (courts first undermined, then abolished, parallel private liability requirement).
181. Johnson, 749 F.2d at 1532-34.
182. Id. at 1531 & 1540.
which would upset the balance of the soldier-sovereign relationship. Instead, by instituting a claim under the FTCA, Stanley proceeded under a federal recovery system. Second, an adequate substitute compensation scheme set up as an alternative for FTCA recovery did not exist. VBA recovery is limited recovery. Any recovery that might have been awarded under the VBA could not have begun to compensate Stanley for the injuries he suffered at the hands of the military. Third, the FTCA claim would have neither disrupted the military nor exerted an adverse influence on military discipline. There is a significant difference between military discipline concerns on the battlefield and discipline concerns during peacetime. Combat situations call for strict discipline as a means to assure that responses will be immediate and unwavering. But here Stanley was a voluntary participant in an Army research program, presenting no threat to discipline. As a result, had the Supreme Court reached the issue, the government’s contention that the FTCA claim should have been barred because of the Feres doctrine would not have stood up to a full analysis of the justifications behind Feres.

The Court’s hesitance to address the interests which impact on the Feres doctrine parallels the civilian courts’ reluctance to enter the military forum. Military and civilian systems are viewed as two unique entities, each concerned with its own mission and purpose. As a result, civilian courts are somewhat ignorant about the internal structure of the military system. For example, the Feres Court relied heavily on the term “incident to service” but failed to define it, leaving lower courts free to apply differing interpretations. If the Supreme Court had established a definition for “incident to service” in this case, it would have negated the problems that result from the inconsistent definitions and applications of the term. Instead, without such a definition, the Feres principle has been, and will continue to be, applied haphazardly by lower courts and the Supreme Court.

Had the Supreme Court defined “incident to service,” its application in this case might have resulted in a different conclusion concerning Stanley’s FTCA claim. Such a conclusion would have turned on whether the Court found that the purposes behind the Feres doctrine were met. But more importantly, the time for framing a concrete definition for “incident to service” had arrived. The Supreme Court should have seized the opportunity

183. See Howland, supra note 79, at 136. Veteran’s benefits under the VBA can not justify foreclosing intramilitary tort suits because, rather than being a definite remedy, they are not a matter of right. Id. They are contingent on getting the appropriate discharge, and are much smaller than tort remedies. Id. The benefits do not provide damages for pain, suffering, or loss of consortium, and are not punitive. Id. at 137. See also Note FTCA Recovery, supra note 18, at 1107 (veteran benefits are merely a conditional gift, not an adequate replacement for tort remedies). But see Miller, supra note 40, at 10 (Stencel court showed that VBA recovery could be adequate and at the same time preserve military discipline).


185. See supra notes 34-39 and accompanying text.
to address this issue, thus clearing the path for civilian involvement in the
military realm, an area where civilian courts fear to tread.

The Court's reluctance to get involved in military matters is out of step
with the modern day relationship between the military and the civilian sectors.
With the advent of the all volunteer armed services, the same disciplinary
concerns are no longer implicated. Instead, the modern military is viewed
as a career option for some people. The term "servicemen" no longer means
combat-ready males; instead, both sexes are represented and non-combat
employees far outnumber combat employees. The belief that servicemen
should be expected to give up their rights upon entering the service is no
longer valid. Instead servicemen, just like their civilian counterparts, should
be given ready relief against the government for tort violations. If the Court
had found some way to accept the reinstated FTCA claim, it could have
analyzed whether such relief was warranted in this instance.

C. Individual Immunity and the Bivens Claim in Stanley—The Majority
   Opinion

The Supreme Court reversed the Eleventh Circuit's holding which had
allowed Stanley to proceed with his Bivens claim because it believed that the
Court of Appeals had taken too narrow a view of the circumstances in which
courts could deny damages recovery for injuries incurred during military
service. Essentially, the Court's decision was based on its reading of the
"special factors counselling hesitation" exception and the "explicit congress-
ional declaration" exception set forth in the Bivens dicta.

The Bivens decision was a significant departure from the absolute immunity
which was being extended to a diverse group of federal officials under the
 guise of protecting both federal authority and the unimpeded practice of
official discretion. However, this absolute immunity concept had been abused
through overextension and used to protect officials even where malicious
conduct, intentional wrongfulness, or negligent action was at issue. Provided
the situation could be viewed as within the outer perimeters of the person's
official authority immunity was granted. Bivens established that a cause of

186. See Howland, supra note 79, at 107, 115 (author recognizes that there has been a dramatic
increase in the number of permanent military personnel and in the number of technical non-
combatant roles); Sherman, supra note 5, at 542 (there has been convergence of military and
civilian life).
187. See Howland, supra note 79, at 107-09 (boundaries between military and civilian sectors
has been blurred, and military is now civilian-like bureaucracy).
188. Id. at 114 (reflex obedience to orders is no longer considered to be ideal behavior). See
generally Goodrich, supra note 75, at 50.
189. 107 S. Ct. at 3060.
190. Id. at 3063.
191. See supra notes 50-56 and accompanying text (lower cabinet officials, immigration officers,
SEC employees, and the U.S. marshall are some examples).
192. See supra notes 52-56 and accompanying text.
action for a constitutional violation may give rise to a claim for money damages, even against governmental officials who until this point had been enjoying expansive immunity.193

The Stanley majority opinion interpreted the Bivens decision as holding that the question of the availability of a constitutional damages action for particular injuries is distinct from the question of the availability of immunity for a particular defendant.194 However, the Supreme Court's reliance on Bivens as a means to circumvent the immunity doctrine ignores its earlier analysis in Butz v. Economou,195 which had reconciled the developing lines of immunity for state and federal officials. Butz accordingly established both a cause of action and a right of recovery.196

A cause of action and a right of recovery should have been granted in Stanley. First, Stanley's Bivens claim was valid, based on constitutional tort concerns. The heinous conduct was inflicted upon him by individuals acting as governmental officials, who were properly named in Stanley's amended complaint.197 After legitimately establishing a cause of action against the government officials, Stanley should have been awarded recovery. Had the majority applied Butz and Davis correctly, the result would have been different.

Furthermore, had the majority read Chappell narrowly, Stanley's Bivens claim would not have been dismissed. The majority's reading coincided with the cases that interpreted Chappell as creating a per se ban on suits against the military.198 This interpretation, however, contradicts the very language of the Chappell opinion which specifically declared that not all redress for military personnel was to be barred.199 The Chappell decision created a narrow bar to Bivens recovery, in situations where the military disciplinary structure would be compromised or where Congress has regulatory control.200 Stanley's Bivens claim was valid because it did not fall into that narrow area. Because Stanley was a voluntary participant in the research program, granting relief would not have posed a threat to the military's disciplinary system. Additionally, no

194. 107 S. Ct. at 3064.
196. See supra notes 68-70. See also Butz, 438 U.S. at 504 (recognizing a Bivens action and allowing for damages is vital means of redress); Burgess, supra note 15, at 39 (Butz decision cleared up any lingering confusion about which type of immunity should be given to federal officials when it held that federal officials are entitled to qualified immunity just like their state counterparts); and at 57 (if person alleges a constitutional violation compensable in damages, official has high burden of proof when trying to establish absolute immunity defense).
197. 107 S. Ct. at 3058.
199. Chappell, 462 U.S. at 304 ("this Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service").
200. See id. at 304-05.
battlefield situation existed, no group morale was threatened, and no national defense interests were compromised. Nor was there any congressional activity in the field which would have preempted Stanley’s claim, since the existence of the VBA could not have been viewed as an adequate replacement. Since neither Chappell exception applied, Stanley’s Bivens claim should have been allowed.

D. Individual Immunity and the Bivens Claim in Stanley—The Dissenting Opinion

Brennan’s dissent emphasized the incongruity which would result by using only the exceptions set forth in the Bivens case as the basis for intramilitary tort claims. If the courts proceed on the assumption that because the military establishment has such unique demands for discipline there should always be a “special factor counselling hesitation,” Brennan believes that the practical effect will be a reinstatement of the absolute immunity doctrine for military commanders.201 Such absolute immunity disregards the fact that only a narrow exception to liability was created in Chappell, with all other situations requiring qualified immunity.

Brennan concluded that the “special factors” analysis and the immunity analysis are based on parallel concerns and, as such, would not produce different outcomes.202 Brennan pointed out that qualified immunity for government officials, with limited absolute immunity exceptions, is the norm.203 Special factors counselling hesitation are just that—discrete factors. These factors should be applied sparingly. Brennan equated “special factors” with absolute immunity only when the situation demands it.204

Meshing the two concepts, as Brennan advised, is consistent with already accepted principles. The issue of whether sufficient grounds exist to establish a cause of action would be addressed initially. After answering this question affirmatively the courts could then decide whether recovery should be allowed. Absent a showing that absolute immunity is necessary, qualified immunity would attach and recovery would be allowed or disallowed in light of the facts of the particular suit. The need for officials to perform their governmental duties effectively would then be properly balanced against constitutional concerns. Brennan’s balancing approach would have resulted in a recognition of Stanley’s constitutional concerns for what they are, grave violations of his rights for which relief should have been granted.

201. 107 S. Ct. at 3068 (Brennan, J. dissenting).
202. Id. at 3068-69. Both Davis, 442 U.S. 228 (1979), and Butz, 438 U.S. 478 (1978), recognized that these two concerns were intertwined and as such analyzed them together. Id. at 3069.
203. Id. at 3069.
204. Id. Contra Jordan v. National Guard Bureau, 799 F.2d 99, 107 (1986) (interpreting special factors to mean qualified immunity in some instances and absolute immunity in others is incorrect because such an interpretation would require difficult and hair-splitting distinctions).
E. An Application of the Immunity Principles to the Military and to Stanley

The Bivens and Butz cases did not address the effect of their holdings on cases involving the military.205 Both cases recognized the constitutional tort claim, but both cases were brought against federal officials, not military officials.206 The Butz opinion listed which federal officials qualify for the absolute immunity exception, but said nothing about the military.207 Those cases’ failure to address the military context left the individual courts faced with the problem of determining the military’s position on the immunity spectrum.208

The Stanley Court’s pronouncement on the immunity question concluded that the “special factor” of military discipline precluded recovery for service-men.209 Although this conclusion finds some support,210 its foundation can be easily undermined. The holding is based, in part, on the floodgates of litigation theory.211 Under this theory, to allow a claim such as Stanley’s would lead to a plethora of claims by others similarly situated. Consequently, in order for the “special factors” doctrine to achieve its desired prophylactic effect,212 judicial intrusion into the military must be foreclosed. But floodgates arguments are uncertain at best.213 They do not fully evaluate the situation, but rather base their conclusions on unwarranted generalizations often set forth in an illogical manner. A particularized inquiry into the specific facts of each case could control the floodgates while providing those with valid claims the opportunity to seek redress for the egregious acts committed against them.

The other basis for the Court’s expansive conclusion was closely related to plaintiff’s status.214 The Court believed that plaintiff’s status as a serviceman justified a denial of recovery.215 But the Supreme Court has held that statutes that create liability based on status are unconstitutionally vague and must be struck down.216 The mere fact that plaintiff is a member of a certain group, such as the military, should not be enough to establish liability or preclude

205. See supra notes 60-64, 68-70 and accompanying text.
206. Id.
207. See Butz, 438 U.S. at 508-11.
209. 107 S. Ct. at 3063.
210. Bivens, 403 U.S. at 397; Butz, 438 U.S. at 500-01.
211. See supra note 82 and accompanying text.
212. 107 S. Ct. at 3073-74 (Brennan, J. dissenting).
213. See Burgess, supra note 15, at 42 (author admits that success of this argument is “uncertain at best”).
214. 107 S. Ct. at 3064.
215. Id. at 3064-65.
216. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (law prohibiting vagrancy was unconstitutionally vague); MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962) (redrafted note on loitering to cure vagueness problem).
recovery. Instead, the courts should utilize a particularized analysis, and evaluate the conduct and circumstances involved in relation to plaintiff’s position to satisfy the constitutional considerations.217

A particularized analysis can be applied successfully in the military context. A number of courts already have held that blanket absolute immunity should not apply in peacetime military situations.218 Rather, the courts in those cases found it necessary to conduct a particularized inquiry into the officers’ functions and duties. By so doing, the courts properly applied the balancing approach set forth in Butz, weighing the harm to the individual if recovery is denied against the potential disruption to the military if the officer is held liable.219 The resulting principle is that during peacetime military officials are afforded immunity only in situations where national security interests demand complete insulation from liability. In those situations, the individual’s recovery interests are outweighed by national concerns.

By conducting a particularized inquiry in the Stanley case, the Supreme Court would have realized that the facts before it did not implicate “special factors counselling hesitation.” The majority would have recognized that its extension of absolute immunity to the entire military was erroneous. First, the government did not present enough facts to the Court to determine whether or not the officials were in a chain of command relationship with Stanley.220 As Brennan pointed out, nowhere in the records were the respondents’ offices, titles or functions enumerated, nor was it conclusively established that they

217. 107 S. Ct. at 3077 (Brennan, J. dissenting).
218. See Tigue v. Swain, 585 F.2d 909 (8th Cir. 1978). In Tigue, an Air Force captain sued the Little Rock Air Force Base hospital commander, an Air Force colonel, for libel and false imprisonment after the captain had been confined for a psychiatric evaluation on a questionable fact scenario. Id. Specifically, Tigue had refused to contribute money to a coffee mugs fund and his troubles began. Id. at 910-12. The Eighth Circuit viewed the claim as a constitutional deprivation of liberty without due process which should be evaluated under Butz. Id. at 913. The court concluded that during peacetime military officers are not clothed in absolute immunity. Id. at 913-14. Instead, a particularized inquiry into the functions performed and the circumstances surrounding that performance must be conducted before absolute immunity is granted. Id. See also Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).
220. 107 S. Ct. at 3073 (Brennan, J. dissenting).
all were military personnel.221 The concern over the officer-subordinate relationship and its effects on the military disciplinary structure were of paramount importance in the Chappell decision.222 If the claim here was premised on an enlisted person bringing a suit against his immediate superior, then the Chappell bar to Bivens recovery should have applied. If not, then Chappell should not have been relied on. Brennan recognized this and suggested that Chappell should not have been strictly controlling;223 rather it should have been recognized for what it is—a narrow exception to the rule of qualified immunity. The Chappell court indicated that it did not intend to foreclose all suits for service-connected injuries.224 The burden here should have been on respondents to prove that the suit should have been foreclosed because effective performance of their official functions demanded nothing less. The Stanley majority's interpretation of Chappell ran contrary to this principle and thus resulted in a violation of Stanley's constitutional rights.

The Stanley case should have been decided by evaluating the unique facts presented. In so doing, the Court would have given due deference to the Bivens-Chappell interplay and to the established rule of qualified individual immunity. Such an approach would have resulted in a proper balance between military and civilian jurisdictions. Such an approach also would have assured that the immunity principles are applied correctly, and that military officials are treated like all other government officials.

F. Human Experimentation—The Nuremberg Principles And The Right To Privacy

The majority, focusing on military immunity, the "incident to service" rule and like concerns, ignored the fact that Stanley was not engaged in a battlefield training exercise. Nor was he engaged in training camp reviews designed to keep the troops at combat-ready status at all times. Stanley was not even engaged in non-combat administrative tasks. Stanley was an unknowing volunteer in a program in which he was handled like a laboratory specimen to

221. Id. at 3070 (burden is on official to prove exceptional situation which demands absolute necessity for official) (citing Butz, 438 U.S. at 507; Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982)).

222. The primary concern in Chappell surrounded the chain of command question. Chappell, 462 U.S. at 304. There the Court specifically addressed the special nature of military life and the military command structure, finding those to be dispositive factors. Id. But compare the majority opinion, 107 S. Ct. at 3062 (Chappell was decided on factors other than officer-subordinate relationship), with the dissenting opinion, 107 S. Ct. at 3073 (officer-subordinate relationship is at heart of Chappell opinion).

223. Id. Brennan concluded that since the facts did not conclusively prove that the experimenters stood in a direct officer-subordinate relationship with Stanley, the Chappell doctrine's primary focus on that relationship was not matched in this case. Id. at 3072. Further, Brennan concluded that there was no congressional activity to speak of in this case, as the Court found in Chappell. Id. at 3071. Absent these two requirements, Brennan believed that Chappell should not have controlled the decision. Id.

224. 462 U.S. at 304.
be studied under a microscope, with total disregard for his human welfare. Save for the cursory explanation in its first paragraph, the majority’s analysis curiously lacked any discussion of the injustices wrought upon Stanley. The Court, by totally disregarding humane considerations, abdicated its responsibility to abide by and develop the moral and legal code of human experimentation. The Court ignored the experiment’s similarity to the atrocities the Nuremberg Code was designed to prohibit.225 The Code is meant to apply to all citizens, military and civilian alike. But the same United States military which created the Code also acted in covert defiance of it in its 1950’s drug testing programs. The military sensed that its actions were not acceptable, and made a conscious effort to keep all knowledge of the program from the volunteers and the public.226 But rather than stop a program that the military felt compelled to hide, the program instead was allowed to continue in full force, unimpeded by the fact that the experiments were wreaking havoc upon unwitting “volunteers.”

The government justified its drug testing program as necessary to further a vague national security interest.227 The furtherance of national security interests often requires strict military discipline and when the scenarios which implicate these interests are given a specific context, such as the battlefield situation228 or the nation’s decision to station troops in a hostile conflict,229 they are often justifiable. Suits involving claims which allegedly impact on national security concerns should be evaluated on a case-by-case basis and, when warranted by such concerns, courts should extend absolute immunity to those involved.

If the Court fails to conduct a case-by-case analysis to evaluate suits such as these, society might once again be faced with uncontrolled human experimentation. The experimenters, cloaked with absolute protection because they are members of the military, would have the freedom to perform the most gruesome of experiments. The Court’s current analysis ignored the need to maintain strict standards with regard to human experimentation, a need recognized in the Nuremberg Code. If Stanley is viewed as creating new

225. See supra notes 112-21 and accompanying text.
226. 107 S. Ct. at 3067 n.3-5.
227. Id. at 3067. See R. SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 211 (1970) (military’s age-old argument is based on the need to wage war successfully).
228. Early common law recognized that officers in command during wartime are not personally liable for injuries resulting from their official acts. See Lamar v. Browne, 92 U.S. 187 (1876); Ford v. Surgent, 97 U.S. 594 (1878); Dow v. Johnson, 100 U.S. 158 (1879). This exception to liability has continued. See, e.g., Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff’d, 455 F.2d 992 (2d Cir. 1972) (parents of soldier killed in Vietnam denied recovery).
229. See Mora v. McNamara, 387 F.2d 862 (D.C. Cir.) (per curiam), cert. denied, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967) (suits challenging legality of Vietnam conflict, brought by servicemen, were refused consideration by Supreme Court). See also Sherman, supra note 5, at 546 (Supreme Court has denied certiorari to wide variety of claims brought against constitutionality of Vietnam War and consequently has furthered the war power granted to Congress, and enunciated in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring), as “nothing in the Constitution is plainer than that the declaration of war is entrusted to Congress”).
precedent with regard to military liability, society may be catapulted down a frightening path where heinous experiments could be conducted and justified under the guise of military necessity.

In addition to the humanitarian concerns generated by the Stanley case, there are important constitutional considerations. Stanley's right to privacy, and his interest in his physical and mental integrity, were maliciously infringed upon by the military.230 By focusing on absolute military immunity rather than on the suggested factual analysis, the Court disregarded Stanley's interest in this fundamental right. The Court's failure to recognize Stanley's right to privacy in this egregious situation suggests that there are very few situations involving the military in which the Court will recognize this right. The introduction of a mind-altering drug into Stanley's system, without his knowledge or consent, substantially infringed upon Stanley's physical and mental integrity. If the Court could so nonchalantly dismiss this right in a situation this extreme, it seems easy to imagine that the Court will have no difficulty with dismissing the right to privacy in other areas. This presents as chilling an outlook as does uncontrolled human experimentation.

Suits such as the one presented involve neither national security nor military defense. Analyzing the facts of this case leads to the conclusion that the Court should have placed its primary concern on the nature and effect of the violation committed, not on Stanley's status as a serviceman. If evaluated in this way and the violation is found to be of a heinous nature, a remedy attaches. If the violation is not found to be heinous, no remedy attaches. In other words, a resolution could be reached without any reference to the separate systems theory when no national security interests are implicated. Individual relief would be evaluated on an equal basis. Utilizing this alternative method would result in a more equitable consideration of plaintiffs' claims. Plaintiffs who were once productive, functioning members of society, and, as a result of inhumane military activity, are now physically or mentally crippled would be, at least, compensated monetarily.

IV. IMPACT

A. Denial Of The FTCA Claim

The Court's denial of Stanley's FTCA claim, although based on strict procedural rules, seems to create an avenue for ignoring the purpose behind the FTCA. The FTCA was designed to create a vehicle for suits against the government. However, the Stanley decision could compel a court to conclude that a finding of military status automatically precludes recovery. Surely this undermines the remedy that the FTCA created. A governmental waiver of immunity is meaningless if the exceptions to this waiver are expanded to such an extent as to render the waiver nonexistent. The FTCA was not set up as

230. 749 F.2d 1530 (11th Cir. 1985). See also supra note 144.
a blanket liability statute, nor should it now be negated by blanket immunity.\textsuperscript{231} The section 2680(j) exceptions enumerated by the legislature serve as a protective mechanism for the government.\textsuperscript{232} Likewise, the Feres exception created by the judiciary serves as a protective mechanism for the government.\textsuperscript{233} But construing either the legislative or judicial exceptions too broadly undermines the delicate balance of interests that must be evaluated before deciding whether or not to impose liability.

The judicial exception should be narrowly construed and then automatically applied only to those factual paradigms that are identical to the situation in Feres. Automatic application to cases that are dissimilar to Feres only serves to sabotage the remedial purpose behind the FTCA. Such a development would return us to the abandoned and indefensible doctrine of absolute sovereign immunity. Instead, an automatic bar to FTCA recovery should be limited to claims arising in the course of combat duty, as section 2680(j) states. All other claims should be analyzed separately to determine whether the nature of the claim mandates or precludes recovery.

\textbf{B. Denial Of The Bivens Claim}

Just as the Court's denial of Stanley's FTCA claim foreshadows a return to the rejected sovereign immunity doctrine, the Court's denial of Stanley's Bivens claim seems to signal a return to absolute immunity for a wide range of government officials. Prior to Stanley, certain government officials were entitled to qualified immunity, and, where certain facts demanded, the potential for absolute immunity existed.\textsuperscript{234} Thus, immunity was being applied only after a careful analysis of the different functions and duties of the different officials. The Stanley decision undermined this carefully developed scheme. Absolute immunity will now be granted to the military at the beginning of the case, precluding any examination of the facts whatsoever. It appears that all military officials will now be exempt from all prosecution based on Bivens claims.

The Court's broad definition of the "incident to service" term, coupled with its expansive reading of the Chappell "special factors" exception, provides military officers with an inordinate amount of freedom. Granted, some freedom from fear of reprisals is necessary for proper military effectiveness because troops must be ready and willing to respond to orders instantly. But this need should not extract so high a cost as to force servicemen to relinquish their constitutional rights upon entering the military. Prior cases have shown that

\textsuperscript{231} See supra notes 19-24 and accompanying text. Cf. Note, Government Immunity, supra note 20, at 1089-90 (liability created should be balanced with immunity created by exceptions).

\textsuperscript{232} See supra notes 23-24.

\textsuperscript{233} See supra note 19 and accompanying text. See also Stauber v. Cline, No. 86-4233 (9th Cir. Jan. 20, 1988) (claim barred because activity viewed as incident to service under Feres); Major v. United States, No. 86-6226 (6th Cir. Dec. 16, 1987) (suit dismissed for lack of subject matter jurisdiction because of Feres principles).

\textsuperscript{234} See supra notes 41-72 and accompanying text.
an unchecked military is a fertile field for intentional, negligent, and constitutional torts. To stem the growth of these abuses, the Court must maintain a supervisory role over the military. The Court must balance the military's interest in autonomy against the individual's interest in constitutional protection. Only after performing such a balancing test can the courts equitably determine whether the specific factual situation warrants qualified immunity or absolute immunity.

Applying a balancing test would assure that the military sector would be judged by the same standards as other sectors of society. Should the courts ignore this balancing approach and apply Stanley's absolute immunity doctrine, the separate systems theory will flourish once again. The military will then be free to make decisions unencumbered by the checks and balances which regulate all other sectors. Upon entering the military, an enlisted person would lose the protections afforded to civilians, and thus surrender the rights he is fighting to protect.

V. Conclusion

The Supreme Court's decision in United States v. Stanley addressed two distinct claims, both of which it denied. First, by barring reinstatement of Stanley's FTCA claim, the Court prevented Stanley from recovering from the government. The Court's denial, based on strict procedural grounds created more problems than it solved because it undermined the express purpose of the FTCA. Second, by barring Stanley's Bivens claim, the Court prevented him from recovering from individual government officials. The Supreme Court, consequently, chipped away at the qualified immunity concept and increased the distance between the civilian and military courts. The Court's holding is not supported by legal precedent, history or the needs of modern society. The lower courts will determine the breadth of Stanley's impact, however, and one can only hope that its impact will not be too widespread.

Martha J. Burns

235. See generally supra notes 74 & 83 and accompanying text. See also Sherrill, supra note 227, at 192 (there is no shortage of places to look for condoned brutality in the military).

236. See Hirchhorn, supra note 3, at 254. "What does remain, it must be admitted, is alien to our basic concepts of humanity and law an aggregation, now numbering two million people, whom Congress, in accordance with the political process, may treat as if they exist only to be used."

Id.

237. It appears as if other parties have come to the same conclusion as this Casenote and have recognized the Stanley decision for what it is—an error in justice. For example, in October, 1988, the CIA was close to settling a lawsuit with nine Canadians who had been the unwitting participants in mind control experiments sponsored by the CIA. See CIA Near Settlement of Lawsuit By Subjects of Mind-Control Tests, N.Y. Times, Oct. 6, 1988, at 6, col. 5-6. The Times article reported that the two parties were close to concluding a $750,000 settlement agreement. While the CIA steadfastly clung to its belief that the settlement in no way represented that it or the government were liable, the opposing counsel described the settlement as proof that "no part of our Government is above the law."