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United States v. Stanley: Has the Supreme Court Gone a Step Too Far

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UNITED STATES v. STANLEY: HAS THE SUPREME COURT GONE A STEP TOO FAR?

I. INTRODUCTION

During testing of the atomic bomb shortly after World War II and again during the Vietnam War, a great number of military personnel were subjected to life-threatening experiments hidden under the guise of furthering the military mission. Upon learning of their plight, many of these servicemen sued the federal government for damages sustained as a result of their treatment. Unfortunately, many of their claims for redress have been denied based on the government’s immunity from liability under the Federal Tort Claims Act (FTCA), as applied by the Supreme Court in Feres v. United States, and the Supreme Court’s ban on constitutional tort actions addressed most recently in Chappell v. Wallace. The reaction to this treatment is obvious:

The servicemen involved acted under military orders while on military maneuvers. And their own government is killing them. They cannot be expected to support its ‘larger mission.’ The Army’s desertion of its men will not gain their agreement with its institutional objectives. Servicemen have been denied relief in order to preserve a respect for authority that already has been destroyed. Cast aside by the Feres doctrine, they can only rebel.

In United States v. Stanley, the Supreme Court once again confirmed the rule of immunity from liability announced in Feres and Chappell, and took it one step further; it denied a serviceman’s claim

2. Id.
against non-military federal officials who had intentionally given him several doses of lysergic acid diethylamide (LSD) without his consent or knowledge during a secret military experiment. The Court based its decision on the need to maintain military discipline and decision-making along with congressional authorization to control the military, factors which counselled them to ignore the plaintiff's constitutional rights and deny his claim.

The effects of *Stanley* are far-reaching, for it grants federal officials absolute immunity from actions for damages by military personnel. The opinion places soldiers in the precarious position of having their constitutional guarantees superseded by the need to protect the sanctity of the "military mission," a situation which would hardly be condoned in a comparable civilian context. What is even more unsettling is that the nature of Stanley's injuries, intentional infliction of harm, call into question the validity of protecting this larger mission, especially when the rationale used to substantiate the policy rests upon unsteady grounds. Indeed, *Stanley* raises the question of whether the Supreme Court has taken a step too far in order to protect the military from exposure to claims for liability.

This note will comment on the Supreme Court's decision in *Stanley*, and will focus on whether the Court has overextended the bounds of military protection. First, it will explore the development of the law dealing with actions for damages against the government, specifically addressing how they have affected military personnel. Second, it will summarize the Supreme Court's opinion in *Stanley*, discussing both the majority and dissenting views. Third, it will look at the majority's reasons for supporting its decision, suggesting that under the circumstances of *Stanley*, the Court's rationale does not support denial of the plaintiff's claim. Finally, it will propose that a new standard of review is needed, which takes into consideration the needs of the soldier as well as protection of the military establishment.

8. *Id.* at 3068.
II. PRIOR LAW

At common law, the United States was immune from tort actions for damages brought by its citizens. However, with passage of the Federal Tort Claims Act (FTCA) in 1946, the government was exposed to liability for personal injury and property damage caused by the negligence of federal employees. Although the traditional concept of sovereign immunity was waived by the FTCA, a number of statutory and judicially created exceptions limiting this waiver have been recognized. These exceptions include claims by members of the military against the government arising out of combat activities during a time of war.

Development of the military exception to the FTCA began with Feres v. United States. Feres involved three consolidated cases dealing with the common issue of whether active military personnel were entitled to a remedy under the FTCA for negligent acts incident to their service. In a unanimous decision, the Feres Court held that the United States was not liable under the FTCA where the serviceman's injuries "arise out of or are in the course of activity incident to service." The Court cited three rationales for this rule. First, since the FTCA recognized government liability only in circumstances where liability would be imposed in a civilian context, there could be no liability in Feres, because there was no parallel circumstance in which a civilian could be liable to the same extent as an officer to his military personnel. Second, since the FTCA provides that "the law of the place" where the negligent act or omission occurred governs liability, it was irrational to base the

11. Id. at § 2680(a)-(n).
12. Id. at §§ 2671, 2680(j). 
14. Id. at 138.
15. Id. at 146.
17. Feres, 340 U.S. at 141-42.
government's liability upon the fortuity of where the injured serviceman was stationed at the time of the injury.\(^\text{19}\) Third, the Veteran's Benefit Act (VBA)\(^\text{20}\) had already established a substitute for governmental tort liability that provided benefits on a par with existing workmen's compensation programs, and it would be unfair to allow the plaintiff's further recovery.\(^\text{21}\)

The rationale for denying a soldier's FTCA claim was expanded in *United States v. Brown*,\(^\text{22}\) where the Supreme Court recognized that the disruptive effects on "military discipline" resulting from soldiers maintaining suits against their superior officers was a sufficient reason to bar the plaintiff's FTCA claim. The "military discipline" rationale gained wide acceptance with the Supreme Court, eventually being regarded as the "best" of the *Feres* rationale and was used as a primary reason to bar many FTCA claims.\(^\text{23}\)

After the Supreme Court's decision in *Brown*, the *Feres* doctrine was used as a bar in an overwhelming number of cases brought by military personnel trying to gain FTCA relief for service-connected injuries.\(^\text{24}\) During the same period, the rationale used to justify the

\(^{19}\) *Feres*, 340 U.S. at 142-43.
\(^{21}\) *Feres*, 340 U.S. at 144.
\(^{24}\) Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489, 511 nn.129 & 130 (1982) [hereinafter Zillman]. Zillman noted that upon review of cases dealing with the *Feres* doctrine between 1955 and 1981, only 8 out of 147 were decided in the plaintiff's favor. These included:

- Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (incident-to-service rule does not bar military plaintiff's action under Swine Flu statute, which made United States liable for claims against flu vaccine manufacturers);
- Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (injury on military road);
- Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974) (injury on road abutting military installation);
- Stephan v. United States, 490 F. Supp. 323 (W.D. Mich. 1980) (injury at voluntary military recreational activity away from normal duty station);
- Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978) (off-duty fatality in trying to control drunk on military installation);
- Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1966) (injury on highway included in military base);
- Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965) (accident on military installation while plaintiff on pass but in uniform);
- Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956) (on leave but driving to
doctrine came under increased criticism, raising questions regarding its continued validity. However, in *Stencel Aero Engineering Corp. v. United States*, the Supreme Court put these criticisms to rest, reinforcing the traditional *Feres* rationale. In *Stencel*, the Supreme Court barred the defendant corporation’s cross-claim against the government for indemnity arising from the claims of a serviceman injured by an ejection system malfunction in his fighter aircraft. The Court reasoned that because the pilot had already been compensated and military discipline might be affected by encouraging similar suits, there was sufficient reason to bar the defendant’s cross-claim.

Recently, the Supreme Court has again justified its denial of a serviceman’s FTCA claim using the *Feres* doctrine in *United States v. Johnson*. Johnson, the wife of a deceased military helicopter pilot, brought action under the FTCA on the grounds that a government flight controller had negligently caused her husband’s death.

Subsequent review of cases between 1981 and October 26, 1987 reveals that plaintiffs raising *Feres*-style claims have not fared better. Of the 81 cases reviewed, only 8 plaintiffs received favorable judgments. These include: Sanchez v. United States, 813 F.2d 593 (2d Cir. 1987) (action not barred by *Feres* doctrine where case unlikely to impair military discipline or second guess military decisions); Roush v. United States, 752 F.2d 1460 (9th Cir. 1985) (serviceman injured at enlisted man’s club by bouncer may go forward with claim unless state statute provides otherwise); Adams v. United States, 728 F.2d 736 (5th Cir. 1984) (serviceman’s survivors may advance claim where serviceman injured while being discharged); Boudy v. United States, 722 F.2d 566 (9th Cir. 1983) (injury result of post-service negligence); Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) (claims for injuries occurring in motor vehicle accident following after hours party at NCO club where serviceman was working as bartender); Kohn v. United States, 680 F.2d 922 (2d Cir. 1982) (claims of parents for post-service negligent acts by Army to deceased son not barred by *Feres* doctrine); Targett v. United States, 551 F. Supp. 1231 (N.D. Cal. 1982) (claim based on post-discharge conduct by government); Ordahl v. United States, 601 F. Supp. 96 (D. Mont. 1985) (serviceman struck in eye by dart thrown by other serviceman when both off-duty); Cooper v. Perkiomen Airways, Ltd., 609 F. Supp. 969 (E.D. Pa. 1985) (serviceman killed on civilian airplane).


27. The Supreme Court did not support the parallel private claim rationale which was refuted in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957).


29. *Id.*


31. *Id.*
The Supreme Court denied the plaintiff's FTCA action by affirming the *Feres* doctrine and reiterated that the *Feres* rationale cited in *Stencel* was controlling in *Johnson*. While *Johnson* renewed the Court's reliance on the *Feres* doctrine's bar to a plaintiff's FTCA claim, the opinion was also significant for its dissent, one in which Justices Marshall, Brennan and Stevens joined Justice Scalia in renewing criticism of the *Feres* rationale. In Justice Scalia's view, none of the *Feres* rationale justified the result in *Johnson*. He perceived the "law of the place" rationale as an absurd justification, since there was nothing unfair in allowing military personnel to recover varying levels of damages for their injuries just as civilian plaintiffs do in civil tort actions. In addition, he stated the "VBA compensation" rationale of *Feres* was no longer controlling, noting that cases before and after *Feres* had permitted a serviceman to bring FTCA claims even though compensated by VBA. In reaching this conclusion, he pointed out that the VBA was never intended as an exclusive remedy, placing an upper limit on the government's liability. Finally, Justice Scalia reasoned that military discipline and decision-making was an equally ineffective rationale, for neither the *Feres* Court nor Congress had ever recognized it, and contrary to its purpose, the rationale has failed to curtail judicial inquiry into military affairs in *Feres*-style actions.

32. *Id.* at 2067. Justice Powell, announcing the opinion of the Court, gave three reasons for the decision. First, he noted that since the relationship between the government and members of the armed forces was distinctively federal in character, and the serviceman's injuries occurred incident to service, it makes no sense to allow the situs of the alleged negligent act to affect the government's liability. *Id.* at 2068. Second, the existence of generous statutory disability and death benefits under the VBA, already taken advantage of by the plaintiff, also barred her claim. *Id.* at 2069. Third, *Feres* and its progeny barred FTCA claims which would otherwise involve the judiciary in sensitive military affairs at the expense of military discipline and decision-making. *Id.* at 2069.

33. *Id.* at 2070. Justice Scalia stated that he saw no reason to extend *Feres* any further, recognizing that *Feres* was "wrongly decided and heartily deserves the 'widespread almost universal criticism' it has received." *Id.* at 2074 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. at 1246).

34. See *Johnson*, 107 S.Ct. at 2074.
35. See *Id.* at 2071. Justice Scalia stated that "nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Id.* (citing *Muniz*, 374 U.S. at 162).
36. *Johnson*, 107 S. Ct. at 2072-73; see *Shearer*, 473 U.S. at 52.
37. 107 S. Ct. at 2073.
38. See *id.* at 2073-74.
While the *Feres* doctrine continued to bar military personnel from claims for damages against the government, it appeared that soldiers would have an alternate remedy with development of the "constitutional tort" action established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. In *Bivens* the Supreme Court recognized that the fourth amendment itself authorized suit for damages against federal police officers involved in an unlawful search and seizure. Writing for the majority, Justice Brennan stated that a person whose fourth amendment rights had been violated could recover money damages so long as the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress," or where there was an "explicit congressional declaration that persons injured . . . must instead be remitted to another remedy, equally effective in the view of Congress." Either

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40. See generally Zillman, *supra* note 24, at 489 passim.


42. *Id.* at 397.
factor would caution the Court to rule otherwise. Additional justification was noted in Justice Harlan’s concurring opinion. He reasoned that because injunctive relief was unavailable to persons whose fourth amendment rights had already been violated, their remedy was limited to “damages or nothing.”

The *Bivens* constitutional tort action was expanded in three subsequent Supreme Court decisions, each of which promised to extend protection to military personnel. In *Butz v. Economou,* the Court discussed the relationship between government immunity and *Bivens*-style actions. In *Butz,* the plaintiff sued the government for violation of his first and fifth amendment rights after his subjection to disciplinary action by the Department of Agriculture. In opposition, the government argued that the Department’s agents were entitled to absolute immunity from liability because they had acted within the scope of their official duties. Rejecting the government’s position, the Court held that the plaintiff’s action for damages was a valid means of vindicating his constitutional rights, inferring there were no “special factors” present to prevent granting his claim. In addressing the government’s defense, the Court noted that federal officials were entitled only to a grant of qualified immunity in their dealings with civilians; hence, their acts were protected only when they acted reasonably and in good faith within the scope of their official duties.

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43. Id. at 396-97.
44. Id. at 410. As a result of *Bivens,* Congress amended the FTCA in 1974, allowing individuals the right to sue the government for certain intentional torts committed by federal law enforcement officers. 28 U.S.C. § 2680(h) (1982 & Supp. III 1985).
46. Id. at 481-82.
49. Id. at 486.
50. See id. at 503-04.
51. Id. at 507. Justice White, writing for the majority, noted that an “extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.” Id. at 505; see Schuerer v. Rhodes, 416 U.S. 232, 247-48 (1974).
The Supreme Court again considered the government's liability under the fifth amendment in *Davis v. Passman*.52 Davis, a woman, brought action against the government for violations of her fifth amendment rights, alleging sex discrimination resulted in her discharge from employment by a federal congressman.53 The defendant countered that his actions in dismissing the plaintiff were protected by his immunity under the speech and debate clause of the Constitution.54 In the opinion of the Court, Justice Brennan stated that the plaintiff was entitled to advance her claim for monetary relief, because she had asserted a valid claim of violation of her constitutionally protected rights.55 Justice Brennan noted that although the defendant's alleged unconstitutional actions raised "special factors," which must be considered in the court's analysis, those factors were coextensive with protection afforded under the Speech and Debate clause.56 Therefore, as the congressman was not shielded from liability under that clause, he ought to be liable for damages the same as any ordinary person.57

In the third case decided after *Bivens*, the Court extended constitutional tort protection to violations of the eighth amendment's proscription of cruel and unusual punishment, and also faced for the first time the interrelationship between FTCA and *Bivens*-style claims. In *Carlson v. Green*,58 the plaintiffs sued federal prison officials for the death of their incarcerated son, in violation of the fifth and eighth amendments.59 In granting the plaintiff's claim, Justice Brennan, again writing for the majority, held that neither "special factors" nor an alternate remedy should counsel the Court to bar the plaintiff's claim.60 More importantly, the Court reasoned that nothing in the FTCA preempted a plaintiff from securing a *Bivens* and FTCA remedy for the same cause of action. In response

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53. *Id.* at 230-31.
54. *Id.* at 232 referring to U.S. Const. art. I, § 6, cl. 1.
55. *Davis*, 442 U.S. at 248-49.
56. *Id.* at 246.
57. *Id.*
59. *Id.* at 16.
60. *See id.* at 18-19.
to the argument that allowing both claims would permit a plaintiff double recovery, the Court noted that the legislative history of the FTCA reflected a desire by Congress to offer victims both remedies. Therefore, the Court concluded that Congress could not have intended a plaintiff to be bound solely to an FTCA claim.

After Bivens, it appeared that military personnel would be able to advance their claims of intentional wrongdoing against the government under the constitutional tort theory. However, both the Supreme Court and lower courts continued to deny soldiers’ claims against the government, relying primarily on the Court’s rationale in Feres to justify their decisions. For instance, in Jaffee v. United States, the Court of Appeals for the Third Circuit barred a serviceman’s action alleging violation of his constitutional rights due to his forced exposure to a nuclear explosion while in the military. The Court noted the fact that the plaintiff had alternative relief through the VBA and the possible threat to military discipline by allowing similar claims as grounds for denying him recovery.

In a recent decision, the Supreme Court provided a further link between FTCA and Bivens-style claims. In Chappell v. Wallace, the Court held that enlisted military personnel may not maintain suit to recover damages from a superior officer for alleged constitutional violations, closing the door on soldiers advancing certain types of Bivens claims. In Chappell, five enlisted men, all members of minorities, alleged their superior officer discriminated in assigning duties, conducting performance evaluations and administering disciplinary action. In a unanimous decision, the Court reasoned that while the plaintiffs’ claims were brought under the nonstatutory damages remedy recognized in Bivens and were thus governed by the “special factors” test, that test must necessarily be “guided”

61. Id. at 19-20.
62. Id. at 23.
64. Id. at 1240.
65. See generally id. at 1231-35.
67. Id. at 297.
by the *Feres* rationales for determining whether a plaintiff may bring action against the government under the FTCA.\(^6\) In doing so, the Court raised three barriers against other military personnel bringing similar claims. First, it equated the FTCA and *Bivens* causes of action in the military context, inferring that where one cause of action failed to exist, so did the other. Second, the Court implied that in order for a military plaintiff to bring a successful action under *Bivens*, he or she must first satisfy the *Feres* rationale.\(^6\)\(^9\) Third, the case established the "special factors" test in military constitutional tort cases, a fact not explicitly recognized in earlier decisions.\(^7\)\(^0\) In applying the "special factors" analysis, the Court saw "[t]he need for special regulations in relation to military discipline, and the consequent need . . . for a special and exclusive system of military justice, . . ." as well as Congress' powers to regulate the military, as reasons for denying the plaintiff's claims.\(^7\)\(^1\) Although the Court did not specifically bar all types of actions brought by military personnel,\(^7\)\(^2\) it seriously limited their chances for being successful.

After *Chappell*, it was apparent that military personnel bringing action against superior officers for violation of their constitutional rights must necessarily distinguish the *Feres* rationale in order to recover monetary damages. However, the prospects for successful recovery looked dim based on the Court's grant of immunity to superior military officers in *Chappell*. Although *Chappell* closed the door on most claims arising out of the soldier/superior officer relationship, one question remained unanswered; would the Supreme Court extend immunity to federal officials not in the soldier's chain of command, but still within the military establishment? The answer to this question became apparent in *Stanley*.

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\(^6\) Id. at 298-99.

\(^9\) See id. at 299.

\(^7\) See *Stanley*, 107 S. Ct. at 3061.

\(^1\) *Chappell*, 462 U.S. at 300-01. Chief Justice Burger reasoned that the legislative branch was to have plenary control over the military and that the comprehensive system of justice used to regulate military life fulfilled this purpose.

\(^2\) Id. at 304. Chief Justice Burger stated, "[t]his 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." *Id.*
III. STATEMENT OF THE CASE

A. Procedural History

In February of 1958, James B. Stanley, a master sergeant in the United States Army, volunteered to participate in a program testing protective clothing and equipment at the Army's chemical Warfare Laboratories in Maryland.\(^{73}\) While enrolled in the program, Stanley was administered several doses of lysergic acid diethylamide (LSD), pursuant to an Army plan to test the effects of drugs on human subjects.\(^{74}\) As a result of the LSD exposure, Stanley allegedly suffered from hallucinations and memory loss which eventually led to his discharge from the Army and dissolution of his marriage.\(^{75}\) In 1975, the Army contacted Stanley requesting his cooperation in a follow-up study on the long-term effects of LSD on volunteers of the 1958 study.\(^{76}\) This was Stanley's first notification that he had been given LSD at the testing program in Maryland.\(^{77}\)

After his administrative claim for compensation was denied, Stanley brought action under the FTCA alleging negligence in the administration, supervision and monitoring of the drug testing program.\(^{78}\) However, the district court found that Stanley's claim was barred by the *Feres* "incidence to service" test.\(^{79}\) The Fifth Circuit agreed, but held that Stanley had at least a colorable constitutional claim based on *Bivens*.\(^{80}\) Stanley amended his complaint to add the constitutional claim against unknown government officials. The District Court again dismissed his FTCA claim but refused to dismiss his *Bivens* claim, and certified its order for interlocutory appeal to the Fifth Circuit.\(^{81}\)

\(^{73}\) Stanley, 107 S. Ct. at 3057.
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Id.
\(^{79}\) Id.
\(^{80}\) Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981).
Stanley amended his complaint a second time to name nine individual defendants, but before any action had been taken on the interlocutory appeal, the district court reaffirmed its decision to allow Stanley's Bivens claim in light of the Supreme Court's then recent decision in Chappell v. Wallace. The district court reasoned that Chappell did not totally bar Bivens-style actions by military personnel. The Fifth Circuit affirmed the district court's conclusion, and also reasoned that based on the Eleventh Circuit's decision in Johnson v. United States, Stanley might also have a viable FTCA claim formerly barred by Feres. The Supreme Court granted certiorari because of the tension between the circuit court's opinion and Chappell and to address the reinstatement of Stanley's FTCA claim.

B. Opinion of the Supreme Court

After vacating that portion of the circuit court's decision dealing with Stanley's long-dismissed FTCA claim, Justice Scalia's majority opinion focused on the issue of whether Stanley could proceed with his Bivens claim notwithstanding the Supreme Court's decision in Chappell. He stated that Stanley tried to distance himself from Chappell by advancing two arguments: first, that the defendants in this action were not military officers and as a result the chain-of-command concerns at the heart of Chappell were not important; and second, that his injury was not "incident to service," an element barring recovery under Feres. Justice Scalia found these arguments unpersuasive, holding that the reasoning of Chappell extended beyond the officer-subordinate relationship, and barred

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86. Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986).
88. Justice Scalia was joined by Justices White, Blackmun, Powell and Chief Justice Rehnquist. Justice Brennan dissented, joined by Justices Marshall and Stevens and in part by Justice O'Connor. Justice O'Connor also filed a separate dissent. Id. at 3057.
89. Id. at 3060.
90. Id. at 3061.
91. Id. at 3061-62.
recovery under *Bivens* for injuries to military personnel which arise out of or are in the course of activity incident to service.\(^9^2\)

After dismissing Stanley’s “incident to service” argument,\(^9^3\) Justice Scalia stated four reasons why he believed the Court’s decision in *Chappell* was controlling. First, Stanley’s chain-of-command argument ignored the plain statement of *Chappell*; that the “special factors” which bear on the propriety of Stanley’s *Bivens* claim were guided by the rationale of *Feres*.\(^9^4\) He reasoned that since *Feres* had not considered the chain-of-command argument crucial, but rather established an incident to service test, the same held true in the present situation.\(^9^5\) He suggested that the appropriateness of the incidence to service test, or for that matter any other test regarding *Bivens*-style actions, was essentially a policy question based on the amount of judicial intrusion into military discipline one was willing to accept.\(^9^6\) Seeing no more reason to decrease protection of the military establishment now than when *Chappell* was decided, he emphasized that the same “special factors” which guided the Court’s analysis in that case, Congress’ control over the military and the need to maintain military discipline and decision-making, also barred Stanley’s claim.\(^9^7\) Second, he found the fact that Stanley had no “adequate” federal remedy for his injuries irrelevant to the “special factors” analysis, reasoning that within the military context the “special factors” which counsel hesitation are limited to a single concern; uninvited intrusion into military affairs.\(^9^8\) Third, he also found it irrelevant in Stanley’s case that the Court had never barred military personnel from redress in civilian courts for constitutional violations suffered during military service.\(^9^9\) In distinguishing Stanley’s action for money damages from the cases supporting that con-

\(^{92}\) Id. at 3063, citing *Feres*, 340 U.S. at 146.

\(^{93}\) *Stanley*, 107 S. Ct. at 3061. Justice Scalia cited Allen v. McCurry, 449 U.S. 90, 94 (1984), inferring Stanley’s claim was barred by the doctrines of res judicata and collateral estoppel.

\(^{94}\) *Stanley*, 107 S. Ct. at 3062 (citing *Chappell*, 462 U.S. at 299).

\(^{95}\) *Stanley*, 107 S. Ct. at 3062.

\(^{96}\) Id.

\(^{97}\) See id.

\(^{98}\) Id. at 3063.

\(^{99}\) Id.; see supra note 72.
tention,\textsuperscript{100} he suggested they were intended to provide proscriptive rather than monetary relief.\textsuperscript{101} Finally, he dismissed the dissent's argument that the Court's decision had the effect of granting federal officials absolute immunity. He based his conclusion on the fact that \textit{Chappell} made no mention of immunity principles, and \textit{Bivens} had distinguished the question of immunity from that of whether the Constitution provided a basis for damages actions against individual officers.\textsuperscript{102} He also noted the dissent's failure to provide any justification for its position.\textsuperscript{103}

In his dissent, Justice Brennan saw the issues presented in this case in a different light, chiding the majority for placing emphasis on protection of military discipline and decision-making at the expense of protecting individual rights under the Constitution.\textsuperscript{104} In contrast, he believed Stanley's claim was warranted regardless of \textit{Chappell}, stating that serious violations of a soldier's constitutional rights must be exposed and punished.\textsuperscript{105} He based his conclusion on three premises. First, he saw the practical result of the denial of money damages to Stanley as a grant of absolute immunity for any federal official who intentionally violates the constitutional rights of those in the military, a policy which he believed was contrary to longstanding precedent.\textsuperscript{106} Relying on \textit{Davis}, he stated that absent absolute immunity, federal officials should be liable for damages the same as are all citizens.\textsuperscript{107} Based on development of immunity principles for government officials as well as common law, he concluded that qualified rather than absolute immunity was the norm for federal officials allegedly committing intentional torts, and that there was no reason to expand that rule in this situation.\textsuperscript{108}

\begin{thebibliography}{10}
\bibitem{101} \textit{Stanley}, 107 S. Ct. at 3063.
\bibitem{102} \textit{Id.} at 3064 (citing \textit{Bivens}, 403 U.S. at 397).
\bibitem{103} \textit{Stanley}, 107 S. Ct. at 3064.
\bibitem{104} \textit{Id.} at 3067.
\bibitem{105} \textit{Id.} at 3068.
\bibitem{106} See \textit{id.} at 3069. Relying on the reasoning in \textit{Butz} and \textit{Davis}, Justice Brennan emphasized that the \textit{Bivens} special factors analysis and immunity analysis are based on identical judicial concerns which should not produce different outcomes.
\bibitem{107} \textit{Id.} at 3069.
\bibitem{108} See \textit{id.} at 3073.
\end{thebibliography}
Second, Justice Brennan believed that Chappell was not controlling in the present situation, stating it created only a "narrow exception" to the general rule of qualified immunity for federal officials. He emphasized that under Chappell, constitutional tort actions were intended to be "guided" not "governed" by the Feres rationale, inferring that those considerations were not applicable under all circumstances. Thus, he reasoned that the Feres rationale were most important in a situation such as Chappell which dealt with the soldier/superior relationship, while in the present case their importance was diminished because the relationship between Stanley and his tortfeasors was unknown. Reasoning that of the three Feres rationale only military discipline could be used to substantiate the Feres doctrine in Stanley's case, he concluded that that rationale was unpersuasive because Stanley's injuries were intentionally caused by civilian officials.

Third, Justice Brennan argued that congressional activity providing review of grievances by injured soldiers was lacking in Stanley's case. He noted that neither VBA nor military regulations offered Stanley any relief, contrary to the relief offered to the plaintiff's in Chappell. He also noted that the authority granted to Congress to make rules governing the military did not adequately address the concern of whether civilian officials should be immune from liability for damages arising from service related injuries, and that military officials should present no exception to the rule permitting Bivens-style actions against officials in other types of administrative agencies.

IV. Analysis

As Justice Brennan pointed out, Stanley granted absolute immunity from money damages to military officials who violate the

109. Id.
110. Id.
111. Id. at 3074.
112. See id.
113. Id. at 3076. Justice Brennan stated that the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940 (1982 & Supp. III 1985), protected soldiers only when they were on active duty and the tortfeasor was another military member.
constitutional rights of soldiers. The opinion not only reinforces the Court's decision in Chappell but goes one step further; it extends the prohibition against military personnel suing their superior officers to civilian federal officials as well. However, unlike Chappell where the special relationship between soldiers and their superior officers was central to the denial of the plaintiff's claim, Stanley's tortfeasors were unknown civilians, hardly expected to contribute to military morale and support. In this light, the Court's decision seems unjustified for it fails to protect military personnel such as Stanley from obviously heinous, if not criminal, conduct, the type which would not be condoned by society if inflicted upon a civilian. In applying the Feres rationale to the facts in Stanley, the Court has continued a trend of using that decision for purposes quite different than its original protection of the government for accidental injuries to soldiers already compensated by military benefits.

What it has evolved to, is an absolute power by the military of life and death over its personnel, with no redress under the Constitution or as a statutory tort claim.

In contrast to the unanimous decision in Chappell, Stanley has prompted at least four members of the Court to question the majority's rationale for extending the prohibition against soldiers suing the government. Led by Justice Brennan, author of the Court's opinions in Bivens, Davis and Carlson, the dissent appears willing to develop a new standard for analyzing military tort claims. And well they should, for Stanley rests on grounds which hardly justify its conclusion. Each of the reasons which Justice Scalia used to rationalize Stanley have been highly criticized either in prior Supreme Court decisions, by commentators, or both. In each instance, the arguments made against these factors appear to be compelling, calling into question the validity of continuing the prohibition against

115. See id. at 3068.
116. Many lower courts have already established this prohibition. In Johnson, 107 S. Ct. at 2067 n.8, the Court noted an overwhelming number of decisions where civilian tortfeasors were protected under the doctrine. See supra note 39.
118. Id.
119. See supra note 25.
military personnel raising *Bivens*-style claims. The following analysis focuses on each of the reasons why this author feels *Stanley* was wrongly decided, supplying support for the conclusion that it is time for the Supreme Court to adopt more equitable standards.

A. Immunity

As Justice Brennan pointed out in his dissenting opinion, *Stanley* granted absolute immunity to federal officials who violate a soldier’s constitutional rights. However, Justice Scalia refuted this contention, stating that the question of immunity was logically distinct from that of availability of an action for damages. In his rationale, neither *Bivens* nor *Chappell* established the similarity between immunity and actions for damages, and the dissent’s reliance on *Davis* failed to produce a reason for creating such equivalency. Justice Scalia’s reasoning is unpersuasive, however, for he fails to distinguish the important link between immunity principles and *Bivens*-style actions. Contrary to his conclusion, the question of whether federal officials are entitled to a grant of absolute immunity was central to the decisions in *Butz* and *Davis*, both cases originating out of constitutional tort claims. As Justice Brennan inferred in *Davis*, these cases show that the “special factors” analysis of a Bivens claim is coextensive with the protection provided to government officers by acts of Congress. In *Stanley*’s case, Congress’ power to regulate the armed services provides such a coextensive

120. *Stanley*, 107 S. Ct. at 3069.
121. *Id.* at 3064.
122. *Id.*
125. *Davis*, 442 U.S. at 246; see *Butz*, 438 U.S. at 483-84. In *Butz*, the government’s defense was based on the fact that its agents were acting within the scope of their administrative duties.
factor, one which defines when a federal official is outside his or her immunity bounds. Thus, contrary to Justice Scalia’s opinion, it would seem logical that when a federal official violates a rule established by Congress for the regulation of the military, his or her immunity from actions for damages would disappear, just as it disappeared for the defendant in *Davis.* In fact, Congress has enacted legislation which would regulate military conduct in a fashion that would deny federal officials absolute immunity, imposing criminal sanctions for many actions which give rise to constitutional tort claims.

What this reasoning points out is that contrary to *Stanley,* a grant of qualified immunity would better serve both the military and its personnel because it would protect the constitutional rights of the soldier while still providing adequate protection to the military establishment. Granting federal officials qualified immunity would correspond to the Court’s decision to do so in *Butz* and *Davis,* cases which squarely equated the concept of qualified immunity with *Bivens*-style claims. Thus, federal officials would be immune from action for damages only if they were acting reasonably, in good faith and within the scope of their official duties. However, in situations where the federal official exceeds his or her authority, qualified immunity would not bar a plaintiff’s recovery under *Bivens.* Although qualified immunity will not open the government to liability in every case like Stanley’s, it will make it possible for some military personnel to voice legitimate claims.

B. Incidence to Service

Justice Scalia dismissed Stanley’s chain-of-command argument by reasoning that the incident to service test of *Chappell* more ad-

127. *Davis,* 442 U.S. at 246.
128. Note, *Intramilitary Immunity,* supra note 47, at 329. The UCMJ, 10 U.S.C. §§ 801-940 (1982 & Supp. III 1985), imposes criminal sanctions for the following offenses: cruelty or maltreatment (§ 893), unlawful detention (§ 897), murder (§ 918) and assault (§ 928). In addition, § 939 allows a subordinate to recover damages from a superior officer who wilfully takes or injures property.
129. *Stanley,* 107 S. Ct. at 3072. Justice Brennan suggested this was the norm for *Bivens*-style actions.
132. See *Schwartz,* supra note 117, at 1015 n.96, defining the parameters involved in developing such a standard.
equately protected the military establishment. In doing so, he side-stepped the reciprocal issue of whether that test provided adequate constitutional protection to members of the military. Scalia’s conclusion is unwarranted, for it tends to justify the extremes of conduct that a soldier may be subjected to in the name of “duty.” Indeed, the dissenting opinions of both Justice Brennan and O’Connor focus on whether administering LSD to Stanley was within the bounds of military service. Justice O’Connor found exposure of healthy military personnel to medical experiments without their consent “so far beyond the bounds of human decency that as a matter of law it simply cannot be considered as a part of the military mission.” Similarly, Justice Brennan likened Stanley’s treatment to the actions of German scientist’s conducting experiments on human subjects during World War II, reporting that when the drug testing experiments were discovered, the Senate condemned them as lacking relevant military application. He also pointed out that the military does not view intentional violations of a soldier’s constitutional rights as essential to its mission, a factor which implied that the defendant’s alleged misconduct could not be incident to military service.

Justice Scalia’s failure to address this issue raises a serious question; can the courts adequately protect the constitutional rights of soldiers without placing some upper limit on the harm they can be subjected to in the name of duty? In Stanley, Justice Scalia seems to think so. He rationalized his conclusion by stating that on the continuum between individual rights and military discipline, public policy favored an incident to service test which maximized protection of the military establishment. However, it is clear that any standard which balances between these factors must necessarily take into consideration whether the government’s activity is outside the scope of its authority to control its personnel in a soldier/superior rela-

133. See Note, In Support of the Feres Doctrine and a Better Definition of “Incidence to Service”, 56 St. John’s L. Rev. 485, 512 (1982) [hereinafter Note, Support of Feres], inferring there is a need to protect the rights of the individual soldier as well as the military establishment.
134. See generally Bennett, supra note 6.
136. Id. at 3067.
137. See id. at 3074-75 n.26.
138. Id. at 3062.
tionship." The purpose of such a standard is obvious; without a check on its activities, the government could conceivably subject its military personnel to criminal behavior with no fear of retribution. Frightening results could occur. Thus, a judicial test for balancing these interests must rely not only on the location and consent of the victim, but also on whether the alleged wrong-doing has some valid military purpose, a factor which provides more protection for the individual rights of military personnel. Although such a test would certainly open the military to more frequent intrusions by the judiciary, it would better expose unlawful behavior among military officials, conduct which should not be permitted in any context. Therefore in cases such as Stanley, the government should be forced to show compelling reasons for its actions in order to overcome liability.

C. Proscriptive Relief

Justice Scalia found Stanley’s reliance on dicta from Chappell, that the Court had never barred military personnel from redress in civilian courts for constitutional wrongs, irrelevant to the Court’s “special factors” analysis. In doing so, he inferred only actions requesting proscriptive relief from constitutional violations should be considered in civil court. However, his reasoning essentially prohibits a plaintiff from bringing action merely because of the remedy he or she chooses. This conclusion is spurious; it seems illogical to suggest that a plaintiff such as Stanley should be barred from relief merely because he or she sought damages rather than some other form of remedy. Justice Scalia’s argument fails to point out

139. Id. at 3067, Justice Brennan stated that “[w]hat this case and others like it demonstrate, however, is that government officials (military or civilian) must not be left with such freedom.”


141. Id. at 513.

142. See Schwartz, supra note 117, at 996.

143. See generally id. at 1004-06. The public has a right to know the results of military decisions with the amount of disclosure based on the sensitivity of the issue at hand. Recently, this premise has been manifested in the public concern over the role of the Executive Branch in sales of weapons to Iran. See Panels End Public Iran Hearings, The Washington Post, Aug. 4, 1987, § C, at 1.

144. Stanley, 107 S. Ct. 3063 (citing Chappell, 462 U.S. at 304).

that in many Bivens situations, the plaintiff does not learn of his or her injury until it is too late for proscriptive relief. This was certainly the situation in Stanley. In these cases, monetary damages may be the only form of recovery available, a fact noted by Justice Brennan and heretofore implicit in Bivens-style actions.\textsuperscript{146} In addition, monetary relief is a focus of FTCA and Bivens claims, both of which were created to compensate plaintiffs for personal injuries.\textsuperscript{147} Contrary to Justice Scalia's opinion, it seems unlikely that either Congress or the Court would create such rights only to have them limited to proscriptive remedies, for without a possibility for monetary relief, actions such as Stanley's would be meaningless.

D. Military Discipline and Decision-Making

Justice Scalia's reliance on protecting respect for military discipline and decision-making in Stanley seems particularly unfounded. As Justice Brennan pointed out, these concerns were not implicated in Stanley, nor did the majority offer any reason for advancing them.\textsuperscript{148} In Stanley, the need for protecting the instructive obedience of soldiers was not a consideration, for Stanley did not even know he was given the drugs by federal officials.\textsuperscript{149} In addition, the lack of a command relationship between Stanley and his tortfeasors raises questions regarding the importance of limiting judicial inquiry into military affairs.\textsuperscript{150} What seems most puzzling, however, is that only a month prior to Stanley, Justice Scalia had taken the opportunity to criticize this rationale in Johnson, stating "I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding that Congress did not mean what it plainly said in the [FTCA]", referring to Congress' exclusion of only combat injuries from FTCA consideration.\textsuperscript{151} In Johnson, Justice Scalia inferred that the Court's reliance on protecting the military should be limited to particular situations.

\begin{itemize}
\item \textsuperscript{146} Id. at 3068; see Bivens, 403 U.S. at 410.
\item \textsuperscript{147} See supra notes 10 & 42 and accompanying text.
\item \textsuperscript{148} Stanley, 107 S. Ct. at 3075.
\item \textsuperscript{149} Id. at 3074-75 n.n.25-26.
\item \textsuperscript{150} See id. at 3075.
\item \textsuperscript{151} Johnson, 107 S. Ct. at 2073.
\end{itemize}
Protection of the military discipline and decision-making process should be limited, for few cases such as Stanley involve peculiarly military decisions. Therefore, courts should not use protection of military discipline and decision-making as an absolute bar against a soldier's constitutional tort claims. There are several factors which suggest this conclusion. First, military operations are not so sacred as to be above public scrutiny. While the military may have a strong interest to limit factual inquiries into its operation, there is also a public interest in having a military establishment which is not "closed, monolithic and secretive." Second, it appears irrational to bar a soldier's claim against the government when a civilian plaintiff suffering the same injury would not be barred. Third, military discipline and obedience is not enhanced by denying a soldier's constitutional claims. Even as Justice Scalia points out in Johnson, a serviceman's morale can hardly be boosted by a denial of his claims for damages against the government. In fact, while military discipline has been viewed as a prime rationale for denying Feres type actions by soldiers, it has not acted as a deterrent to military personnel bringing these claims. To the contrary, it would appear that safeguarding the constitutional rights of military personnel would do more to engender their respect for authority and discipline than simply denying their rights altogether.

In reality, a court may not have the competence to deal with the complex nature of the military discipline and decision-making, especially in wartime activities. However, judicial review is important whenever an injured party's constitutional rights have been violated. Thus, in cases such as Stanley, alleging intentional misconduct by federal officials outside the scope of truly military concerns, the courts should step in to review that process rather than simply barring the claim.

152. Bennett, supra note 6, at 403; Zillman, supra note 24, at 512 (implying many claims arise outside the context of strict military procedure).
154. See Johnson, 107 S. Ct. at 2074; see also Schwartz, supra note 117, at 1005 n.n.51-52.
155. See id.
156. Bennett, supra note 6, at 406-07.
E. Remedial System

Perhaps the least substantial reason advanced by Justice Scalia for denying Stanley’s claim is his argument that the lack of an adequate federal remedy has no bearing on the “special factors” analysis. To the contrary, the importance of a compensation system under the VBA was one of the three principal rationales of the Feres doctrine, and as Justice Brennan pointed out, congressional activity providing review and remedy of complaints and grievances such as those presented by an injured soldier constituted the second “special factor” of importance in Chappell. In pointing out that the system was not available to Stanley, Justice Brennan revealed a serious flaw in the majority’s analysis; that an intentionally injured serviceman acting outside of any combat situation could be left without any relief for his injuries. This result seems incongruous with a fair system of compensation for military injuries, especially when considering that Stanley’s tortfeasors were civilian. In addition, this decision seems in conflict with the Feres rationale cited in Chappell, and underscores the Court’s concern in Carlson, that plaintiffs such as Stanley should be free to pursue more than one remedy. By denying Stanley’s claim, the Court effectively eliminated his only chance for gaining any such relief.

V. Conclusion

The Supreme Court’s denial of Stanley’s claim against the federal government affirmed the Court’s earlier holding in Chappell, effectively granting federal officials absolute immunity from actions for damages by enlisted military personnel. The opinion continues the Court’s trend in denying military personnel any relief outside

159. Feres, 340 U.S. at 144-45.
160. Stanley, 107 S. Ct. at 3076 (citing Chappell, 462 U.S. at 307 n.29); see also Schwartz, supra note 117 at 999.
161. See generally Schwartz, supra note 117 at 992-93 (implying that intramilitary remedies are insufficient to deter or adequately compensate for egregious military misconduct).
163. See Carlson, 446 U.S. at 19-20; see also Johnson, 107 S. Ct. at 2073. (Justice Scalia remarked that the VBA was never intended as an exclusive remedy putting a limit on the government’s liability).
of statutory benefits for both negligent and intentionally caused harm. The Court seems convinced that any alleged wrongdoing inflicted on a soldier is a subject for military review only, and that any subsequent civil claims are barred due to the unique nature of the military/soldier relationship.

In contrast to the Court’s unanimous decision in Chappell, the five to four decision in Stanley shows that at least some of the Court’s members believe the opinion went too far, suggesting there is a limit to the extent the military may impinge upon its personnel. Indeed, the Court’s rationale does not support its conclusion. Valid arguments can be advanced for limiting the government’s authority over its military personnel without any subsequent drop in military effectiveness. Further, it seems ironic that a decision that purports to advance military discipline and morale could do so by limiting the remedies available to military personnel suffering constitutional wrongs.

Because of the inequities created under Stanley, this author believes it is time for the Court to reassess its position towards granting federal officials immunity from suits arising out of injuries to military personnel. In substitution for the incident to service test, the Court should heed Justice Brennan’s advice and adopt a test which provides absolute immunity only when it is essential to maintaining military discipline.164 Thus, if a court finds that an alleged tortfeasor’s acts did not fall within the scope of conduct specifically aimed at protecting or advancing military discipline or decision-making, it may hold the government liable for damages suffered by the injured soldier. Brennan’s test would eliminate many of the problems inherent under the Court’s Stanley analysis. First, it is obvious this test would do a better job of balancing the needs of the military as well as protecting individual soldiers’ constitutional rights.165 Second, it would serve as a deterrent to negligent or reckless behavior falling outside the scope of military rule. Third, it would provide for better obedience and discipline among soldiers if they know that their injuries will be compensated. Finally, this rule would place

164. Stanley, 107 S. Ct. at 3077.
military cases such as *Stanley* more in line with the Court's treatment of civilian plaintiffs in *Bivens* and its progeny. Whatever test is eventually employed, it is imperative that it be more equitable, granting military personnel better consideration in comparison with protection of the military establishment. Until the time comes for this type of test to be used, military personnel may be forced to continue to function as second class citizens.

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