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Allowing Free Reign in the Military Establishment: Has the Court Allowed Too Much Deference Where Constitutional Rights Are at Stake? (United States v. Stanley)

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ALLOWING FREE REIGN IN THE MILITARY ESTABLISHMENT: HAS THE COURT ALLOWED TOO MUCH DEFERENCE WHERE CONSTITUTIONAL RIGHTS ARE AT STAKE?-*United States v. Stanley*-

In the aftermath of World War II, the 1947 Nuremberg medical trials[1] laid the foundation for future restrictions on medical experimentation on human beings.[2] The Nazi atrocities revealed at Nuremberg provided the world with the impetus for implementation of international law, commentary, and discussion on experimentation upon uninformed or unconsenting human subjects.[3] The Nuremberg Code,[4] emerging from the trials and subsequently adopted by the United States Military Tribunal, established a standard to judge scientists who experimented with human subjects.[5] The United States developed the Code, which protects all citizens-soldiers as well as civilians.[6]

The twenty-three defendants in the Nuremberg Medical Case performed a number of experiments and projects upon unknowing and unconsenting human beings. These experiments included injection of virulent typhus into prisoners to ensure a ready supply of virus for typhus experiments,[7] forced ingestation of seawater to test desalinization processes,[8] experimental bone transplantation,[9] and injection of malaria to

1. The Nurnberg Trial, 6 F.R.D. 69 (International Military Tribunal 1946).

2. Bassiouni, Baffes & Evrard, *An Appraisal of Human Experimentation In International Law And Practices: The Need For International Regulation Of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1639 (1981) [hereinafter Bassiouni].

3. *Id.* at 1639.

4. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (1), U.N. Doc. A/64/Add.1, at 188 (1946).

5. The Articles of the Nuremberg Tribunal require that an experiment be performed only after obtaining the voluntary consent of a subject who has the legal capacity to consent after that subject has been informed of the possible risks of the experiment. *Id.*

6. *See, e.g.*, Mulford, *Experimentation on Human Beings*, 20 STAN. L. REV. 99, 105 n. 34 (1967) (Military personnel cannot be compelled to submit to nontherapeutic procedures) (citing Johnson, *Civil Rights of Military Personnel Regarding Medical Care and Experimental Procedures*, 117 SCIENCE 212-15 (1953)).

7. Bassiouni, *supra* note 2, at 1639.

8. *Id.*

9. *Id.*

test malaria immunity.[10] Following the trials, fifteen of the defendants were convicted of committing war crimes and crimes against humanity.[11] Of the fifteen defendants found guilty of conducting nonconsensual experimentation on human beings, seven were put to death, five were sentenced to life imprisonment, two were sentenced to twenty years imprisonment, and one was sentenced to fifteen years imprisonment.[12]

In 1958, Master Sergeant James Stanley of the United States Army, in the course of Army experimentation, was asked to drink a clear liquid which appeared to be a glass of water.[13] Stanley volunteered and was led to believe that the nature of the experiments were to test chemical warfare equipment and clothing designed to protect against chemical warfare agents.[14] Unknown to Stanley, the liquid contained lysergic acid diethylamide (LSD).[15] Stanley ingested the dangerous drug on four occasions in 1958 and as a result experienced severe reactions including hallucinations soon after ingestion, but he did not know the source of these reactions.[16] Stanley was never informed of the true nature of the testing program, nor of the risks involved.[17]

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10. *Id.* While such tests were being done in the United States at the same period of time, most were performed on animals or tested with control groups with appropriate safeguards when performed on human subjects. *Id.* at 1640.

11. *Id.* at 1640 n.221.

> Crimes against humanity include murder, extermination, enslavement, deportation, and other inhumaneacts committed against any civilian population, before or during a war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of any domestic law of the country where perpetrated.

Id.

12. J. APPELMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 139-40 (1954) [hereinafter APPELMAN].

13. Stanley v. United States, 549 F. Supp. 327, 328 (S.D. Fla. 1982).

14. Brief for Appellant, United States v. Stanley, 483 U.S. 669 (1987) (No. 86-393).

15. *Stanley*, 549 F. Supp. at 328.

16. Stanley v. United States, 574 F. Supp. 474, 476 (S.D. Fla. 1983).

17. *Id.* at 476

Stanley was discharged from the military in 1969,[18] as he was unable to perform his military duties efficiently. He soon began to beat his wife and children violently.[19] As a civilian, Stanley was never informed of the administration of LSD,[20] was never given follow-up medical care,[21] and eventually his bizarre behavioral changes resulted in a breakdown and dissolution of his family life and marriage one year after his discharge.[22] In 1975 Stanley was notified for the first time by letter that he had secretly been given LSD in 1958.[23] This was the first time Stanley realized he had been used as an unconsenting subject for the study of the long range medical and psychological effects of LSD, rather than being a volunteer in testing chemical warfare equipment and clothing as he had been led to believe.[24]

After bringing suit against several named defendants, including the United States Government, for a violation of his constitutional rights,[25] the Supreme Court, in a 5-4 decision,[26] held that the Constitution provides him with no remedy, as his injuries were inflicted in the performance of his duties in the Nation's Armed Forces.[27] The Court set precedent in holding that unconsenting, unknowing military personnel may be used for experiments, have their constitutional rights violated, and

18. *Id.*

19. *Id.* at 476 n.2.

20. *Id.*

21. *Id.* at 477.

22. *Id.* at 476 n.2.

23. Brief for Appellant, United States v. Stanley, 483 U.S. 669 (1987) (No. 86-393). "The letter solicited [Stanley's] participation in a follow-up study of the 'volunteers' who participated in the 1958 LSD experiments." *Id.*

24. *Stanley*, 574 F. Supp. at 476.

25. United States v. Stanley, 483 U.S. 669 (1987).

26. *Id.* Justice Scalia wrote the opinion of the Court and was joined by Justices Rhenquist, White, Blackmun and Powell; Justice O'Connor filed a separate opinion concurring in part and dissenting in part; Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Stevens. *Id.*

27. *Id.*

have no legal redress through the courts.[28] In describing the nature of such a line of cases, Judge Gibbons in *Jaffe v. United States*[29] stated:

> That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government.[30]

The implications of *United States v. Stanley* are not easily discernable. In light of the Military's adoption of the Nuremberg Code in the 1940's,[31] and the line of Supreme Court precedent dealing with Military immunity from liability for tortious conduct and violations of constitutional rights,[32] the decision signifies an alarming extension by the Supreme Court to clothe the United States Armed Forces with absolute immunity for decisions made concerning virtually any military conduct performed upon military personnel within "the line of duty." It is for this reason the vigorous dissenting opinion by Justice Brennan will be of particular importance to this comment in exploring the moral and legal justifications for the majority opinion.

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28. *Id.* at 686 (Brennan, J., concurring in part and dissenting in part); *Id.* at 709-10 (O'Connor, J., concurring in part and dissenting in part).

29. 663 F.2d 1226 (3rd Cir. 1981).

30. *Id.* at 1250.

31. "1. The voluntary consent of the human subject is absolutely essential. The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, and engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity." APPELMAN, *supra* note 12, 147 (quoting United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 181 (1949)).

32. *See infra* notes 42 and 43.

I. BACKGROUND OF THE CASE

In the 1950's, military intelligence and the Central Intelligence Agency (CIA) began testing chemical and biological materials, including LSD. These programs were purportedly designed to "determine the potential effects of chemical or biological agents when used operationally against individuals unaware that they had received the drug," including drug testing on "unwitting, nonvolunteer Americans."[33] In 1959 a Staff Study of the United States Army Intelligence Corps recognized the moral and legal implication of its conduct as it discussed its covert administration of LSD to soldiers:

> It was always a tenet of Army Intelligence that the basic principle of dignity and welfare of the individual will not be violated . . . . In intelligence, the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-ethical values, but not legal limits, through necessity . . . . Any claim against the U.S. government for alleged injury due to EA 1729 [LSD] must be legally shown to have been due to the material. Proper security and appropriate operational techniques can protect the fact of employment of EA 1729.[34]

James Stanley brought suit in the Southern District of Florida after filing claims with the United States Army and the CIA, both of which were denied.[35] Stanley's complaint

33. S. REP. NO. 755, 94th Cong., 2d Sess. Book I, 385 (1976).

34. *Id.* at 416-17.

35. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1149 n.5 (5th Cir. 1981). On November 16, 1977, Stanley received a letter from the U.S. Army Claims Service informing him that his claims under the FTCA were not payable since "[i]njuries to individuals incurred while on duty with the United States Army are considered to be incident to the individual's service, Feres v. United States." The letter further advised him that he could file a suit in the appropriate United States District Court if he was

alleged that several defendants were negligent in various respects in their administration of the experimentation program. The complaint specifically alleged that:

> (1) Defendants knew or should have known that LSD is a consciousness and behavior altering drug capable of producing irreparably harmful results, including death, and that the drug would affect different persons in different unpredictable ways; (2) Defendants breached their duty to warn plaintiff; (3) Defendants failed to take adequate precautions; (4) Defendants negligently failed to debrief plaintiff after administering the drug to advise of the potentially hazardous physiological and psychological effects; (5) Defendants negligently failed to continue to monitor the plaintiff following the experiment; (6) Defendants negligently failed to obtain plaintiff's informed consent.[36]

Stanley claimed that, as a result of this negligence, he suffered severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage.[37] As a result of the LSD exposure, Stanley's inexplicable behavioral changes eventually resulted in the breakdown and dissolution of his marriage and family life.[38] Stanley was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency.[39] At times he would be absent without leave,

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dissatisfied with the action taken on his claim.

Id. (citing Feres v. United States, 340 U.S. 135, 146 (1950)).

36. *Stanley*, 639 F.2d at 1149 n.3.

37. *Id.* at 1149.

38. Brief for Petitioner Appellant, United States v. Stanley, 483 U.S. 669 (1987) (No. 86-393).

39. Stanley v. United States, 574 F. Supp. 474, 476 n.2 (S.D. Fla. 1983) (citing plantiff's amended complaint 5, *Stanley*, 574 F. Supp. 474 (No. 78-8141-CIV-Jag)).

and could not recall his whereabouts when questioned.[40] Before being administered the LSD, Stanley maintained an unblemished record; he earned various military honors and intended to pursue a promising military career.[41]

Stanley initially filed a Federal Tort Claims Act ("FTCA") suit in the district court.[42] The district court granted the Government summary judgment on the ground that the suit was barred under the doctrine of *Feres v. United States*,[43] which precludes governmental FTCA liability for injuries to servicemen resulting from activity "incident to service."[44] The Court of Appeals for the Fifth Circuit remanded the case, concluding that Stanley had a colorable constitutional claim

40. Brief for Respondent, United States v. Stanley, 483 U.S. 669 (1987) (No. 86-393).

41. *Id.*

42. Stanley v. Central Intelligence Agency, No. 78-8141, (S.D. Fla., May 14, 1979).

43. *Id.* (citing Feres v. United States, 340 U.S.135 (1950)). This comments' focus will be primarily on Stanley's *Bivens* claim against the federal officials who allegedly violated Stanley's constitutional rights. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Court in *Bivens* held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against the offending federal officials even in the absence of a statute authorizing such relief. *Id.* at 396. This holding led the way to the general principle that where constitutional rights have been violated, an action for damages brought directly under the Constitution for the violation of constitutional rights by federal officials could be maintained. *Id.* at 395. The thrust of the majority opinion is concerned with the interpretation of *Bivens* in relation to Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), and how one case establishes the outcome of the other.

44. Feres v. United States, 340 U.S. 135, 146 (1950). The importance of the "incident to service" finding is essential to the majority opinion in the case. Stanley argued that his participation in the chemical warfare testing program should not be considered "activity incident to service" because he was a volunteer and had been given a release from his regular duties in order to participate in the program. Stanley v. CIA, 639 F.2d 1146, 1150 (5th Cir. 1981). Additionally, Stanley contended that the Government's activity in such a testing program was illegal and thus should not be covered by the *Feres* doctrine. *Id.* The court of appeals held that such a contention was unwarranted. *Id.* at 1154-55. "Appellant has no sound authority for his assertion that the voluntary status of his participation in the program necessitates the conclusion that *Feres* should not control." *Id.* at 1150. *Feres* has been applied in cases involving a wide range of voluntary activity. *See, e.g.*, Charland v. United States, 615 F.2d 508 (9th Cir. 1980) (serviceman killed while voluntarily participating in a Navy Seal Training exercise); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980) (serviceman injured while participating voluntarily in Naval experiment designed to test the effectiveness of certain protective clothing when exposed to sulphur mustard gas); Loeh v. United States, No. 77-2065-B and 77-2023-B, *slip op.* (S.D. Ill. Apr. 23, 1979) (serviceman injured when administered LSD while participating voluntarily in Army drug experimentation program).

pursuant to the Court's ruling in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[45] whereby a violation of constitutional rights can give rise to a damages action against offending federal officials even in the absence of a specific statute authorizing appropriate relief for such violations. The Court narrowed this holding by providing that a *Bivens* claim may be defeated if there are special factors counselling a court to hesitate in granting the requested damages, or where there is an explicit congressional declaration that there is another exclusive remedial scheme to address and remedy the violations complained of.[46] The government, in response to the court of appeals remand, contended that a remand would be futile because *Feres* would bar *any* claims that Stanley could raise either under the FTCA or directly under the constitution against individual officers under *Bivens*.[47] The case was remanded[48] and Stanley amended his complaint to add claims against unknown individual federal officers for violations of his constitutional rights.[49] Additionally, Stanley specifically alleged that the United States' failure to warn, monitor, or treat him after he was discharged constituted a separate tort, which was not incident to service because it occurred subsequent to his discharge, within the *Feres* exception to the FTCA.[50]

On remand, the district court dismissed Stanley's FTCA claim because the alleged negligence occurring after his

45. *Bivens*, 403 U.S. at 388 (1971).

46. *Id.* at 396.

47. United States v. Stanley, 483 U.S. 669, 672 (1987).

48. Stanley v. United States, 549 F. Supp. 327 (S.D. Fla. 1982).

49. *Id.* The Supreme Court has recognized that there is a constitutional right to be free to decide for oneself whether to submit to drug therapy. Mills v. Rogers, 102 S. Ct. 2442 (1982). Courts have recognized this constitutional protection as a liberty or privacy interest associated with the penumbral right to privacy, bodily integrity, or personal integrity. *Id.* at n.3. "This right to be free from unwanted administration of drugs has also been associated with First Amendment rights because the power to produce ideas is fundamental to our cherished right to communicate . . . . " *Id.*

50. *See* United States v. Brown, 348 U.S. 110 (1954). *See also infra* notes 136-68 and accompanying text.

discharge was not "separate and distinct from any acts occurring before discharge, so as to give rise to a separate actionable tort not barred by the *Feres* doctrine."[51] The court refused, however, to dismiss the *Bivens* claims against the individual defendants, rejecting the Government's argument that the considerations giving rise to the *Feres* exception in relation to an FTCA claim, constitute special factors as alluded to in *Bivens* which would defeat a *Bivens* claim.[52]

Stanley filed his second amended complaint and named as defendants nine individuals and the Board of Regents of the University of Maryland where the drug testing took place.[53] He asserted civil rights claims under 42 U.S.C. §§ 1983 and 1985.[54] Before the Government's motion to dismiss was ruled upon, the United States Supreme Court issued its decision in *Chappell v. Wallace*,[55] which held that "[e]nlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[56] The district court reaffirmed its prior decision.[57] It concluded that despite the broadly stated holding of the case, *Chappell* did not totally bar *Bivens* actions when a "[m]ember of the military brings suit against a superior officer for wrongs which

51. *Stanley*, 549 F. Supp. at 329. The court reached its conclusion by examining the reasoning of the fifth circuit and its reliance on Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980). The court found that Stanley failed to allege a distinct tort arising entirely post-discharge, as established in Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (*Feres* doctrine does not bar claims arising from conduct occurring entirely post-discharge). *See infra* notes 135-68 and accompanying text.

52. *Stanley*, 549 F. Supp. at 330. The Court in *Bivens* held that such an action inferred directly from the Constitution might not be appropriate when there are "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), or where there is an "[e]xplicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens*, 403 U.S. at 396-97.

53. United States v. Stanley, 483 U.S. 669, 674 (1987).

54. *Id.*

55. 462 U.S. 296 (1983).

56. *Id.* at 305.

57. Stanley v. United States, 574 F. Supp. 474 (S.D. Fla. 1983).

involve direct orders in the performance of military duty and the discipline and order necessary thereto,"[58] factors that in its view were not connected to Stanley's claims. Nor could the court find congressionally proscribed remedies[59] of such an exclusivity that *Bivens* contemplated would preclude recovery.[60] The court of appeals affirmed the district court decision relying on the same reasoning.[61]

II. THE SUPREME COURT DECISION

A. Majority Opinion

The Supreme Court's opinion, written by Justice Scalia, begins by summarizing the court of appeal's ruling on Stanley's *Bivens* claim.[62] "In our view the court took an unduly narrow view of the . . . circumstances in which courts should decline to permit non-statutory damages actions for injuries arising out of military service."[63]

The opinion traced the development of the theory stated in *Bivens* which identified "special factors counselling

58. *Id.* at 479.

59. *See* Veterans Benefits Act, Pub. L. No. 85-857, 72 Stat. 1105 (codified as amended at 38 U.S.C. § 301 (1976)).

60. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971).

61. The Court did not think that Congress' activity in the military justice field was a special factor precluding Stanley's claim, as "[t]hose intramilitary administrative procedures which the court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here." Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986) (quoting Chappell v. Wallace, 462 U.S. 296, 303 (1983)).

62. The Court's opinion primarily focuses on the *Bivens* claim in light of *Chappell*. The majority felt that the Court of Appeals took an "[u]nduly narrow view of the circumstances in which courts should decline to permit nonstatutory damages actions for injuries arising out of military service." United States v. Stanley, 483 U.S. 669, 678 (1987).

63. *Id.* The Court at the outset of the opinion made it clear that it granted certiorari "[b]ecause the Circuit courts have not been uniform in their interpretation of the holding in *Chappell*." *Stanley*, 483 U.S. at 676. *See, e.g.*, Jordan v. National Guard Bureau, 799 F.2d 99, 107-08 (3d Cir. 1986); Trerica v. Summons, 755 F.2d 1081, 1082-84 (4th Cir. 1985); Mollnow v. Carlton, 716 F.2d 627, 629-30 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Gaspard v. United States, 713 F.2d 1097, 1103 (5th Cir. 1983), *cert. denied sub nom.* Sheehan v. United States, 466 U.S. 975 (1984).

hesitation, in the absence of affirmative action by Congress."[64] In *Bivens*, the Court held that a search and seizure that violates the fourth amendment can give rise to an action for damages against the offending federal officials, even in the absence of statute authorizing such relief.[65] The Court had qualified the holding by stating that if there are "special factors counselling hesitation," or if there was an "explicit congressional declaration that injured parties have an alternative remedy equally effective" such an action could not be maintained.[66] This cautionary language remained only as guiding dictum until the Court decided *Chappell v. Wallace*, where the dictum became legal precedent.[67]

In *Chappell*, the Court found "factors counselling hesitation" in "the need for special regulation in relation to military discipline,[68] and the consequent need and justification for a special and exclusive system of military justice . . . ."[69] The plaintiffs in *Chappell* brought suit alleging that, because of their race, their superior officers had "[f]ailed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity."[70] The Court concluded that factors such as the "unique disciplinary structure of the Military Establishment"

64. *Stanley*, 483 U.S. at 679.

65. *Bivens*, 403 U.S. at 397.

66. *Id.* Subsequently, the Court held that a *Bivens* action could be brought under the due process clause of the fifth amendment, Davis v. Passman, 442 U.S. 228 (1979), and under the eighth amendment's proscription against cruel and unusual punishment, Carlson v. Green, 446 U.S. 14 (1980). In each case, in dictum, it was emphasized that "special factors counselling hesitation" or an "explicit congressional declaration" that another remedy is exclusive would bar such an action. *Davis*, 442 U.S. at 246-47; *Carlson*, 446 U.S. at 18-19.

67. Chappell v. Wallace, 462 U.S. 296 (1983). On the same day, the Court also decided Bush v. Lucas, 462 U.S. 367 (1983), which also made the *Bivens* dictum binding precedent.

68. *See infra* notes 127-31 and accompanying text.

69. *Chappell*, 462 U.S. at 300.

70. *Id.* at 297. *Chappell* reversed the lower court's tests for determining whether a constitutional damage remedy applied on behalf of minority servicemen who alleged that because of their race their superior officers "[f]ailed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Id.* at 297-98.

and Congress' activity in the field of the Military[71] should be a bar to the plaintiffs in *Chappell*, and that therefore, a *Bivens* action against the plaintiffs' superior officers[72] would be inappropriate.[73]

The Court next addressed Stanley's two arguments at distinguishing *Chappell*. First, Stanley argued that the defendants in this case were not his superior military officers, and indeed may have been civilian personnel.[74] Accordingly, Stanley argued, the chain of command or superior-subordinate concerns at the heart of the *Chappell* decision would not be compromised by allowing Stanley remedies against the named

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71. The Court held that under the U.S. CONST. art. I, § 8, cl. 14, Congress has the power "[T]o make Rules for the Government and Regulation of the land and naval Forces." *Id.* at 301. Thus, it was contemplated that the Legislative Branch has plenary control over the rights, duties, and responsibilities of the Military Establishment. *Id.*

72. The Court's conclusion was based on the judiciary's interest in protecting the constitutional rights of service personnel which was fully considered and adequately safeguarded through the congressionally imposed system of military administrative procedures. United States v. Stanley, 483 U.S. 669, 683 (1987). In response, the dissenting opinion points out that the Veterans Benefits Act is irrelevant

> [w]here, as here, the injuries alleged stem . . . from pain and suffering in forms not covered by the Act.The U[niform] C[ode] [of] M[ilitary] J[ustice] assists only when the soldier is on active duty and the tortfeasor is another military member. Here, incontrast to the situation in *Chappell*, no intramilitary system 'provides for the . . . remedy' of Stanley's complaint.

Stanley, 483 U.S. at 706 (Brennan, J., dissenting). *See also* Bush v. Lucas, 462 U.S. 367, 386, 388 (1983) (special factors counselling hesitation found because claims were fully cognizable within an elaborate remedial system, providing comprehensive, meaningful, and constitutionally adequate remedies). Moreover, the military compensation system is not designed to redress many of the intentional tort injuries. Zillman, *Intramilitary Tort Law: Incidence To Service Meets Constitutional Tort*, 60 N.C.L. REV. 489 (1982) [hereinafter Zillman].

> A seriously injured battery victim may benefit to the extent of receiving free medical care and recompense for disability. However, a military determination that the injury was due to plaintiff's willful misconduct . . . would bar any eligibility under the compensation system. Victims of false imprisonment or defamation seek damages not compensable under the administrative benefits scheme. Individual redress in the military intentional torts cases includes more than monetary damages.

Id.

73. *Stanley*, 483 U.S. at 706.

74. *Id.*

individuals.[75]

Stanley's second contention was that there was no evidence that his injuries were incident to service, as there were not enough facts yet disclosed to determine the character of the drug testing program, the titles and roles of the various individual defendants, or Stanley's duty status when he was at the Maryland testing ground.[76] The Court disposed of this contention by reasoning that "[t]o give controlling weight to those facts, . . . is to ignore our plain statement in *Chappell* that [t]he 'special factors' that bear on the propriety of respondent's *Bivens* action also formed the basis of this Court's decision in *Feres* v. United States."[77]

The Court next analyzed factors involved in establishing a rule which would apply the special factors to suits similar to Stanley's.[78] The two major considerations which the Court contemplated in establishing its test was premised on the amount of intrusion into Military affairs that the Court was willing to undertake,[79] and the depth of such intrusion.[80] That

75. *Id.* at 680. The Court has often noted "the peculiar and special relationship of the soldiers to his superiors," United States v. Brown, 348 U.S. 110, 112 (1954), and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . . " Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion). The overriding justification in the majority opinion is based on what the Court has explained by "[t]he peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline . . . ." *Brown*, 348 U.S. at 112. *But see Stanley*, 483 U.S. at 702 n.25 (Brennan, J., dissenting). Stanley was administered LSD without his knowledge so he could not have disobeyed any order given to him. *Id.* This fact alone simply removes the case one step further from the concern for obedience to orders that the Court chose to protect in *Chappell*. *Id.*

76. *Stanley*, 483 U.S. at 680.

77. *Id.* (citing Chappell v. Wallace, 462 U.S. 296, 298 (1982)).

78. In trying to establish a clear line for determining when such cases should be heard, the Court stated that "[t]his is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer." *Stanley*, 483 U.S. at 681.

79. *Stanley*, 483 U.S. at 681 (emphasis in original text)

> [T]here are varying levels of generality at which one may apply "special factors" analysis. Most narrowly, one might require reason to believe that in the particular case the disciplinary structure of the military would be affected-thus not even excluding *all* officer-subordinate suits, but allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties. Somewhat more broadly, one might disallow *Bivens* actions whenever the officer-subordinate relationship underlay the suit. More broadly still, one

determination "depends upon how prophylactic one thinks the prohibition should be," that is, how much disruption of military discipline and how much intrusion into Military affairs should the judiciary permit.[81] The Court squared its ruling on policy grounds stating:

> Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits . . . In fact, if anything we might have felt more free to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for *Congress* "[t]o make Rules for the Government and Regulation of the land and naval Forces",[82] and rely upon inference for our own authority to allow money damages.[83]

One of the overriding concerns expressed in the majority opinion was the degree of disruption within the Military which would follow by the rule proposed by Stanley. The majority was primarily concerned with creating a test for liability which would call into question military discipline and

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> might disallow them in the officer-subordinate situation and also beyond that situation when it affirmatively appears that military discipline would be affected . . . . Fourth, as we think appropriate, one might disallow *Bivens* actions whenever the injury arises out of activity "incident to service." And finally, one might conceivably disallow them by servicemen entirely.

Id.

80. *Id.*

81. *Id.*

82. U.S. CONST. art. I, § 8, cl. 14.

83. *Stanley*, 483 U.S. at 682.

decision-making, and the judiciary's role as an intruder into military matters.[84] Based on these concerns, the Court reasoned that the incident to service test, as set forth in *Feres*, "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters."[85]

The Court next considered two factors established in the court of appeals decision which, as the Court explained, were inapplicable to the case at bar. First, the Court found it irrelevant to a special factors analysis whether Stanley, or any other serviceman, is afforded an adequate federal remedy for his injury.[86] The Court stated that the inquiry is not the fact that Congress has or has not established another form of relief that guides a special factors inquiry, but the degree of uninvited judiciary intrusion into military concerns.[87] Second, the court of appeals erroneously relied on the statement in *Chappell* which stated that the Court "[n]ever held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."[88] The Court distinguished this statement in *Chappell* by pointing out that it was made in relation to cases which sought to halt or prevent continuing constitutional violations, rather than seeking an award for money damages for past constitutional violations.[89]

Based on the preceding analysis, the Court held that no *Bivens* remedy was available for injuries which amounted to violations of Stanley's constitutional rights.[90] Military personnel's injuries and violations of constitutional rights are barred from judicial remedy when such injuries "'arise out of,

84. *Id.* at 682. Such intrusion would occur through compelled depositions, trial testimony by military officers concerning details of military commands and decisions, and intrusive litigation discovery. *Id.*

85. *Id.* at 683.

86. Stanley v. United States, 786 F.2d 1490, 1496 (11th Cir. 1986).

87. *Stanley*, 483 U.S. at 682.

88. *Id.* (citing Chappell v. Wallace, 462 U.S. 296, 304 (1983)).

89. *See id.* at 682-83.

90. *Id.* at 683-84.

or are [inflicted] in the course of activity incident to [military] service."[91]

B. Dissenting Opinions

1. Justice O'Connor

Justice O'Connor, concurring in part and dissenting in part,[92] agreed with the Court's analysis as applied to Stanley's cause of action under the Federal Tort Claims Act,[93] and with the Court's analysis of *Chappell v. Wallace,*[94] that there is generally no *Bivens* remedy available for injuries that arise out of the course of activity incident to military service.[95] In O'Connor's view, however, the conduct of the Military as alleged by Stanley, "[i]s so far beyond human decency that as a matter of law it simply cannot be considered a part of the Military mission."[96] Further, the extension of *Chappell* by the majority should not "[i]nsulate [Military] defendants from liability for deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent, outside of any combat, combat training . . . and for no other reason than to gather information on the effect of [LSD] on human beings."[97] Finally, after referring to the United States Military's role in the criminal prosecution of Nazi officials who experimented on human beings, Justice O'Connor concluded by stating that the victims of such egregious conduct should at least be compensated for the injuries which they sustained; as "[o]ur Constitution's promise

91. *Id.* at 684 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).
92. *Id.* at 708-10.
93. 28 U.S.C. § 2671 (1949).
94. 462 U.S. 296 (1983).
95. *Stanley*, 483 U.S. at 701.
96. *Id.* at 709.
97. *Id.*

of due process of law guarantees this much."[98]

2. *Justice Brennan*

Justice Brennan summed up his dissenting opinion stating that "[t]he principles of accountability embodied in *Bivens*-that no official is above the law, and that no right should be without a remedy-apply."[99] The heart of Justice Brennan's dissent lies in an analysis of governmental sovereign immunity afforded to Military officials. By interpreting *Bivens*, *Chappell*, and *Feres* as the majority did, Justice Brennan argues that the result grants absolute immunity from liability for money damages to all federal officials who intentionally violate the constitutional rights of those serving in the military.[100] Justice Brennan's dissent focuses on two areas: first, the governing precedent, showing that the majority confers absolute immunity on federal officials without considering longstanding case law which establishes the general rule that such officials *are* liable for damages caused by their intentional violations of well-established constitutional rights;[101] second, the majority's "unwarranted extension of the narrow exception" to the immunity rule created in *Chappell*, stating that "[t]he Court's reading of *Chappell* tears it from its analytical moorings, ignores the considerations decisive to our immunity cases, and leads to an unjust and illogical result."[102]

Justice Brennan began by arguing that a special factors analysis, as dictated by *Bivens*, demands a determination of the propriety of a damages award against, in this context, military officials.[103] But the inquiry also extends into whether the federal officials charged are entitled to absolute immunity

98. *Id.* at 710.
99. *Id.* at 706 (Brennan, J., dissenting).
100. *Id.* at 690.
101. *Id.* at 691.
102. *Id.*
103. *Id.*

from money damages, which the majority opinion did not consider at all.[104] Therefore, the issue of immunity "[and] the 'special factors' inquiry are the same; the policy considerations that inform them are identical, and a court can examine these considerations only once."[105] Once both the special factors and immunity issues are decided, they should not and do not produce different outcomes. If the Court establishes there are special factors prohibiting Stanley's *Bivens* claim, then defendants maintain absolute immunity. This results in an outcome that creates a conflict between a typical special factors analysis and case law governing governmental immunity. "The practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those flowing from a conclusion that the official has absolute immunity."[106] This, Justice Brennan maintains, is at odds with case law concerning governmental immunity.[107]

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104. *Id.*

105. *Id.* at 692. *See* Butz v. Economou, 438 U.S. 478 (1978).

> If, as the government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs . . . . The 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.

106. *Stanley*, 483 U.S. at 693 (quoting Mitchell v. Forsyth, 472 U.S. 511 (1985) (Stevens, J., concurring)). *See also* Davis v. Passman, 442 U.S. 228 (1979), where the Court explicitly acknowledged that the immunity question and the "special factors" question are intertwined. *Id.* at 246. The Court recognized that "[a] suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitations" under *Bivens* but held that "[t]hese concerns are coextensive with the protections afforded by the Speech or Debate clause, . . . which shields federal legislators with absolute immunity." *Id.* Absent immunity, the Court said, legislators ought to be liable in damages as are ordinary persons. *Id.* Justice Brennan argues that the same analysis should apply to military personnel who make decisions in military matters. "Absent immunity, they are liable for damages, as are all citizens." *Stanley*, 483 U.S. at 692.

107. *See infra* notes 90-116 and accompanying text.

Addressing the majority's opinion, and in response to the special factors/immunity analysis,[108] Justice Brennan points out that he cannot produce "'any reason for creating' an equivalency between . . . ." an immunity and special factors analysis because, neither he nor the Court can decide the separate immunity analysis without more facts indicating the functions and roles performed by the defendant officials.[109]

Historically, the Court has conferred qualified immunity to most public servants.[110] In *Butz v. Economou,*[111] the Court balanced "[t]he need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority,"[112] against the crucial importance of a damages remedy in deterring "federal officials from committing constitutional wrongs."[113] The Court in *Butz* also acknowledged that where federal officials receive absolute immunity, the burden is on the federal official to demonstrate that an "exceptional situatio[n] exists, in which absolute immunity is essential for the conduct of the public business."[114]

Applied to a situation where there is an invocation of

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108. In response to Justice Brennan's dissent concerning federal immunity, the majority argued that "*Chappell* made no reference to immunity principles, and *Bivens* itself explicitly distinguished the question of immunity from the question of whether the Constitution directly provides the basis for a damages action against individual officers." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). The analytic answer is that the availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*." *Stanley*, 483 U.S. at 684 (emphasis in original text).

109. *Stanley*, 483 U.S. at 693 n.10 (responding to majority's argument at 685).

110. That is, immunity for acts that an official did not know, or could not have known, violated clearly established constitutional law. *See* Procunier v. Navarette, 434 U.S. 555 (1978) (Prison Officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (State Hospital Administrators); Scheuer v. Rhodes, 416 U.S. 232 (1974) (State Executive Officers).

111. Butz v. Economou, 438 U.S. 478 (1978).

112. *Id.* at 506.

113. *Id.* at 506.

114. *Id.* at 506-07. To meet the burden of proof, an executive, claiming absolute immunity, must first show that the nature of his duties in the particular executive position was so sensitive as to require a total shield from liability. Harlow et al. v. Fitzgerald, 457 U.S. 800, 813 (1982). "He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." *Id.* at 813.

a national security justification/defense,[115] federal officials still bear the burden of demonstrating that the usual protection of qualified immunity should be heightened.[116] In the context of national security, the Court in *Schauer v. Rhodes*[117] demonstrated that executive officials may receive only qualified immunity even when the function they perform is military decision-making.[118] Justice Brennan argued[119] that the concerns the Court expressed in *Chappell*, the extent of intrusion by the judiciary into military command functions, and the effects of such, are not present in Stanley's case.[120] He argued that the Court could not examine Stanley's *Bivens* claim in conjunction with an immunity analysis where the officials who administered the drug to Stanley were

115. *See* United States v. Stanley, 483 U.S. 669, 695-96 n.14 (1987). The government claimed that the purpose of the LSD experimentation which Stanley participated in without his consent was "[f]or the purpose of ascertain[ing] the effects of the drug on [soldiers'] ability to function as soldiers, and to evaluate the validity of traditional security training . . . in the face of unconventional, drug enhance interrogations." Brief for the United States at 3 n.1, United States v. Stanley 483 U.S. 669 (1987) (No. 86-393) (quoting S. REP. No. 755, 94th Cong., 2d Sess., Book 1 at 411-12 (1976)). "Fears that counties hostile to the United States would use chemical and biological agents against Americans or America's allies led to the development of a defensive program designed to discover techniques for American intelligence agencies to detect and counteract chemical and biological agents." S. REP No. 755 94th Cong., 2d Sess., Book 1 at 385 (1976). *See Generally* Brief for the United States at 8, United States v. Stanley, 483 U.S. 669 (1987) (No. 86-393) (a history of the development of Governmental Military drug testing).

116. "The practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those flowing from a conclusion that the official has absolute immunity." Mitchell v. Forsyth, 472 U.S. 511, 538 (1985) (Stevens, J., concurring).

> Petitioner is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions. Petitioner points to no historical or common law basis for absolute immunity for officers carrying out tasks essential to national security And the danger that high federal officials will disregard constitutional rights in their zeal to protect the national security, is sufficiently real to counsel against affording such officials an absolute immunity.

Id. at 520-24.

117. 416 U.S. 232 (1974).

118. *Id.* at 238-49.

119. *Stanley*, 483 U.S. at 697 n.17.

120. *Id.*

unknown.[121] The record in the case did not reveal what offices the individual respondents held, what their functions were, and the extent to which they participated in the LSD experiments.[122]

> Yet the Court grants them absolute immunity, so long as they intentionally inflict only service-connected injuries, doing violence to the principle that the extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by the basis constitutional guarantees.[123]

Justice Brennan suggested remanding the case to allow these defendants to demonstrate that absolute immunity was necessary to the effective performance of their functions.[124] Relying on precedent,[125] Justice Brennan concluded that qualified immunity should not apply, and not absolute immunity.[126] At common law, military superiors received no exemption from the general rule that officials may be held accountable for their actions in damages in a civil court of law.[127] Subsequently, via the holding in *Wilkes v. Dinsman*,[128]

121. *Id.*

122. *Id.* at 697.

123. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 505 (1950)).

124. *Stanley*, 483 U.S at 698.

125. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); Butz v. Economou, 438 U.S. 478, 508 (1978).

126. *Stanley*, 483 U.S. at 698. *But see supra* note 90.

127. Beginning with Wilson v. McKenzie, 7 Hill 95 (N.Y. Sup. Ct. 1844) (Naval officer sued for beating and imprisoning an enlisted seaman), the New York Supreme Court dismissed defendant officer's demurrer, noting that the English courts had allowed suits for acts done in the exercise of military discipline. *See* Zillman, *supra* note 72, at 499. In 1849, the Supreme Court decided Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849), where Captain John Wilkes, fearing a mutiny, arrested and flogged Private Dinsman, placed him in irons and confined him to prison. *Id.* Dinsman prevaled in civil court on charges of assault, battery, and false imprisonment. *Id.* The Court, although it later reversed and remanded on faulty jury instructions, emphasized that Captain Wilkes could not claim immunity "[f]or acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling." *Id.* at 130 (citing Warden v. Bailey, 128 Eng. Rep.

the Court in cases dealing with immunity of federal officials afforded only qualified immunity to such officials.[129] Justice Brennan in distinguishing *Wilkes*[130] from *Chappell*, pointed out that the Court did not hold that soldiers could never sue for service-connected injuries inflicted by an intentional tort.[131]

Justice Brennan next focused on the Court's ruling and interpretation of *Chappell*, specifically on the "narrow exception to the usual rule of qualified immunity for federal officials."[132] The language and reasoning in *Chappell* focused consistently and emphatically on the "peculiar and special relationship of the *soldier to his superiors*,"[133] and the need for discipline between the *subordinate and the commander*, which supported a holding that "[e]nlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[134] Justice Brennan argued that the majority gave short shrift to the obvious and important factual distinction between Stanley's situation and that in *Chappell*; that the defendants in *Stanley* did not allege to be his superior officers.[135]

2513 (1811)). On the second appeal to the Supreme Court, after the lower court reversed and held for Captain Wilkes, the Court still did not provide an absolute immunity defense for Wilkes. Dinsman v. Wilkes, 53 U.S. 3 (12 How.) 390 (1852). Chief Justice Tanney, while recognizing the danger to military discipline from civil suits, felt that harm to the nation would occur if servicemen could be oppressed and injured by their commanding officers, out of malice, ill-will, or the wantonness of power. *Wilkes*, 53 U.S. (12 How.) at 403.

128. 53 U.S. (12 How.) 400 (1849).

129. *See* Butz v. Economou, 438 U.S. 478 (1978); Mitchell v. Forsyth, 472 U.S. 511 (1985).

130. Chappell v. Wallace, 462 U.S. 296, 305 n.2 (1983). "*Wilkes*, however, is inapposite because it involved a well recognized common law cause of action by a marine against his commanding officer for damages suffered as a result of punishment and did not ask the Court to imply a new kind of cause of action." *Id.*

131. United States v. Stanley, 483 U.S. 699, 699 (1987).

132. *Id.* at 700.

133. *Chappell*, 462 U.S. at 300 (emphasis added) (quoting United States v. Brown, 348 U.S. 110, 112 (1954)).

134. *See id.* at 305.

135. *See infra* notes 66-69 and accompanying text.

> "Instead the Court seizes upon the statement in *Chappell* that our analysis in that case was guided by the concerns underlying the *Feres* doctrine, and dramatically expands the carefully limited holding in *Chappell*, extending

In attacking the Court's reasoning that *Bivens* actions may be precluded when service-connected injuries are concerned, Justice Brennan addressed several problems in such an extension of *Feres* into the realm of *Bivens* claims. First, the *Bivens*-type context differs significantly from a *Feres*-FTCA context in that the latter is meant to address negligent acts, and the former with intentional constitutional violations.[136] *Feres* and FTCA claims invoke a more precise conflict with the judiciary interfering directly with the commander-subordinate relationship.[137] In Stanley's case however, this conflict is not implicated. Second, two of the three rationales underlying the *Feres* doctrine are entirely inapplicable to Stanley's *Bivens* action.[138] Thus, the heart of the majority's analysis focused on the special nature of military discipline. Specifically, with the need for instinctive obedience,[139] the disruption of military affairs by factual inquiries necessitated by a *Bivens* action, and the fear that "[t]he vigor of military decisionmaking will be sapped if damages can be awarded for an incorrect (albeit intentionally incorrect) choice."[140]

In addressing the majority's concern regarding the intrusion into military discipline, essential to military functioning, Justice Brennan first addressed the need for instinctive obedience.[141] Justice Brennan pointed out that such

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its reasoning beyond logic and its meaning beyond recognition." *Stanley*, 483 U.S. at 701.

136. *Stanley*, 483 U.S. at 701.

137. *Id.*

138. First, in *Feres* the Court feared that allowing FTCA recovery, which varies from state to state, would impinge on the military's need for uniformity. Feres v. United States, 340 U.S. 135, 143 (1950). In contrast, a *Bivens* claim is governed by uniform federal constitutional law. Bivens v. Six Unkown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 393 (1971). Secondly, the Court relied on the alternative statutory remedial scheme provided by the Veterans Benefits Act. Veterans Benefits Act, Pub. L. No. 85-857, 72 Stat. 1105 (codified as amended at 38 U.S.C. § 301 (1982 & Supp. 1987)). But, the Veterans Benefits Act relates only to negligence and was not enacted to deal with violations of constitutional rights. *See* Donaldson, *Constitutional Torts & Military Effectiveness: A Proposed Alternative To The Feres Doctrine*, 23 A.F. L. REV. 171, 198-99 (1982-83).

139. *Stanley*, 483 U.S. at 704.

140. *Id.*

141. *Id.*

instinctiveness is not at all implicated where, as here, a soldier sues civilian officials.[142] Second, the fear "[t]hat military affairs might be disrupted by factual inquiries necessitated by [a] *Bivens* action"[143] is not, as the majority fears, in the *Bivens* context. Justice Brennan pointed out that "the judiciary is already involved . . . in cases that implicate military judgments and decisions,"[145] and while it might be justified in the FTCA context to limit suits arising from negligence, "[u]nless the command relationship . . . is involved, these violations [intentional violations of constitutional rights] should receive moral condemnation and legal redress without limitation to that accorded negligent acts."[146] Finally, in regard to interference with military decisionmaking by allowing damage awards, Justice Brennan argues that the significant difference between *Feres* and *Bivens*

> [i]s that, in the latter, the vigorous-decision making concern has already been taken into account in our determination that qualified immunity is the general rule for federal officials, who *should* be required on occasion . . . to pause and to consider whether a proposed cause of action can be squared with the Constitution.[147]

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142. *See* Note, *Intramilitary Immunity And Constitutional Torts*, 80 MICH. L. REV. 312 (1981).

> The policy argument for absolute immunity . . . rests on the dubious proposition that a serviceman is more likely to respect authority when he has no recourse for the intentional or malicious depravation of his constitutional rights. The contrary idea--that safeguarding rights compatible with military needs will engender respect for authority and promote discipline--is more appealing.

Id. at 328. *See also* Uniform Code of Military Justice, 10 U.S.C. §§ 938, 939 (1956).

143. *Stanley*, 483 U.S. at 705.

145. *Id.* at 705 n.27. Such instances include when a soldier sues for non-service connected injuries, a civilian is injured, where there is a court review of court-martial proceedings, and when soldiers bring claims for injunctive and declaratory relief arising from statutory and constitutional violations. *Id.*

146. *Id.* at 704.

147. *Id.* (quoting Mitchell v. Forsyth, 472 U.S. 511, 524 (1985) (emphasis in original text)).

In response to the majority's insistence that the case and the extension of *Bivens* needed to be based solely on a policy judgement,[148] Justice Brennan argued that the immunity line of cases establish a clear framework for guidance in *Biven*-type cases.

> Were I to concede that military discipline is somehow implicated by the award of damages for intentional torts against civilian officials . . . I would nonetheless conclude, in accord with our usual immunity analysis, that the decision-making of federal officials deliberately choosing to violate the constitutional rights of soldiers *should be impaired.*[149]

The final part of Justice Brennan's dissent focused on the majority's second special factor found in *Chappell*: "[c]ongressional activity providing for the review and remedy of complaints and grievances such as those presented by the injured soldier."[150] Focusing on the Veterans Benefits Act ("VBA"),[151] Justice Brennan argued that the VBA is not relevant to the case at bar because the injuries alleged stem from pain and suffering in forms not covered or contemplated by the VBA.[152] Here, in contrast to the injuries alleged in *Chappell*, there is no remedy available to Stanley.[153]

As with Congress' constitutional authorization "to make Rules for the Government and Regulation of the land and

148. *Id.* at 705-06. "[T]his is essentially a policy judgment, which depends upon how much occasional, unintended impairment of military discipline one is willing to tolerate." *Id.* at 705.

149. *Id.* at 706 (emphasis in original text).

150. *Id.* (quoting Chappell v. Wallace, 462 U.S. 296, 302 (1983)).

151. Various provisions of statutes provide for the serviceman harmed in the line of duty. *See* 31 U.S.C. § 372 (1976).

152. *See infra* note 57.

153. The military court dismissed his claims under the "incident to service" test. *See infra* note 25.

naval Forces,"[154] Justice Brennan advanced two arguments. First, such constitutional authorization does not address "whether *civilian* federal officials are immune from damages in actions arising from service-connected injuries."[155] Second, since any time Congress acts it does so pursuant to constitutional authorization, to preclude *Bivens* claims every time Congress has acted in a given area would effectively preclude all *Bivens* claims.[156] In sum, Justice Brennan reiterated that

> [i]n *Chappell* the Court found that both the imperatives of military discipline and the congressional creation of constitutionally adequate remedies for the alleged violations constituted 'special factors counselling hesitation', and refused to infer a *Bivens* action. In this case, the invocation of 'military discipline' is hollow and Congressional activity nonexistent; a *Bivens* action must lie.[157]

III. ANALYSIS

The message for plaintiff's counsel is blunt: unless your military plaintiff was not performing military duties, not on a military installation, not subject to any immediate military command relationship, and not taking advantage of any special military privileges at the time of the

154. U.S. CONST. art. I, § 8, cl. 14.

155. United States v. Stanley, 483 U.S. 669, 707 (1987) (emphasis in original).

156. *Id.* at 707. Justice Brennan pointed out that even when considering matters most clearly within Congress' constitutional authority, the Court has allowed *Bivens* claims. *Id.* In Davis v. Passman, 442 U.S. 228, 245-49 (1979), the Court allowed damage remedies under *Bivens* to lie against respondent United States Congressman on the basis that respondent sexually discriminated against petitioner. *Id.* The Court rejected respondent's argument that he was shielded by the Speech and Debate Clause, "the principle that legislators ought generally to be bound by [the law] as are ordinary persons," applies. *Id.* at 246 (quoting Gravel v. United States, 408 U.S. 606, 615 (1972)).

157. *Stanley*, 483 U.S. at 707.

> negligent or wrongful government act, don't take the case![158]

The Court's holding in *Stanley* dealt a great blow to the Nation's established Constitutional policies that no State shall deny any person "equal protection of the laws."[159] By circumventing their own analysis of whether Stanley's injuries were inflicted in the course of military duty,[160] the Court accepts a frightening definition to the "incident to service" standard and applies the standard to a cause of action aimed at redressing flagrant violations of constitutional rights. While taking an unduly broad reading of the "incident to service" test as applied to Stanley in this case, the Court did not consider the injuries Stanley received once a civilian. While the court of appeals did address Stanley's separate tort theory,[161] upon further analysis the reasoning behind the claim was somewhat ambiguous, and under traditional theories of tort law was wrong. Further, the court of appeals, and the Supreme Court, fail to recognize what has been described as an inroad to the court-created *Feres* doctrine, and thereby fails to "reach a morally just and compelling result."[162]

Otherwise termed the "failure to warn" theory, this type of tort claim is a hybrid of a continuing and separate tort analysis.[163] The theory permits a plaintiff to recover on the

158. Zillman, *supra* note 72, at 512.

159. U.S. CONST. amend. XIV, § 1.

160. The Court stated that "[t]he issue of service incidence, as that term is used in *Feres*, was decided adversely to him by the Court of Appeals in 1981, 639 F.2d, at 1150-53, and there is no warrant for re-examining that ruling here." *Stanley*, 483 U.S. at 680.

161. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1153 (5th Cir. 1981).

162. Szykowny, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 OHIO. ST. L. J. 267, 279 (1982) [hereinafter Szykowny].

163. The continuing tort analysis is typically not recognized by the courts. Szykowny, *supra* note 162, at 272. Injuries which can be traced and characterized as incident to service under *Feres* are not compensable even if the injury does not physically or psychologically manifest itself until after service in the Military. *Id.* at 272 n.40. The separate negligent act theory has its origins in United States v. Brown, 348 U.S. 110 (1954), and is based on an entirely separate tort committed upon the former military personnel where there is virtually no connection between the incident to service harm and the subsequent harm. *Id.* at 272-73.

ground that the military owes a certain duty of care to veterans if it intentionally and harmfully exposed them to dangerous substances while they were in the service.[164] Under such a theory, the liability attaches to the military when its failure to warn a veteran aggravates the original wrong by increasing the danger over time, or by causing the veteran to believe that the danger has been removed.[165] To be successful, a plaintiff must show that there were two separate torts; one occurring while in service, and the other after discharge.[166]

The primary case in which this theory was used, and was successful, was *Thornwell v. United States*.[167] In *Thornwell*, a servicemen brought suit against the United States and 29 individuals for alleged covert administration of drugs (LSD), interrogation, and imprisonment during his active military service.[168] Additionally, Mr. Thornwell alleged that the defendants were liable for the concealment of the administration of the drug, and failure to provide follow-up treatment and examination after his discharge.[169] The court held that the *Feres* doctrine did not preclude Thornwell from pursuing claims based on injuries due to conduct occurring after his discharge.[170] The court concluded that *Feres* should not apply to the post-discharge claims because Thornwell

> [d]oes not allege a mere continuing negligent omission. He claims that he was intentionally harmed while he was on active duty and he further claims that, after he became a civilian, the defendants failed to exercise their duty of

164. *Id.* at 273.
165. *Id.*
166. *Id.*
167. 471 F. Supp. 344 (D.D.C. 1979).
168. *Id.* at 344.
169. *Id.* at 349.
170. *Id.* at 352.

> care by neglecting to rescue him from the position of danger which they had created. Although the precise nature of the duty of care upon which the plaintiff relies is not clear, Mr. Thornwell's claims for in-service and out-of-service injuries certainly involve two distinctly separate patterns of conduct, one intentional and one negligent. Thus, he has alleged two entirely different torts, and even though the first tort occurred in the course of his military service, the second did not.[171]

Therefore, the court held that Thornwell could recover to the extent that the defendants' post-discharge negligence aggravated or prolonged his condition.[172]

In addressing Stanley's separate tort theory claim, the Supreme Court initially stated that Stanley had failed to allege an intentional tort committed while he was in the service.[173] The court stated that "[t]he clearest way to fall within the theory of *Thornwell* would be to allege an intentional or wilful tort injuring an active duty serviceman and a negligent or intentional failure to provide proper follow-up care which begins after the plaintiff's discharge from the service."[174] Even if Stanley could allege negligence on the part of the government,[175] the court found that he failed to allege a separate negligent act occurring "entirely after his discharge."[176] The court stated that Stanley's

> [s]ole contention was that he had been injured

171. *Id.* at 351.

172. *Id.* at 353 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52 (4th ed. 1971)).

173. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1154 (5th Cir. 1981).

174. *Id.*

175. The court in Thornwell indicated that a negligent act will in some circumstances suffice as the original tort. Thornwell v. United States, 471 F. Supp. 344, 352 (D.D.C. 1979).

176. *Stanley*, 639 F.2d at 1154.

> by a series of negligently performed medical tests during the twelve year period after his discharge, which resulted in his injuries. There was no such active negligence alleged to have occurred after Stanley's discharge. Stanley has alleged merely an act of negligence which occurred while he was on active duty, the effects of which remained uncorrected after discharge.[177]

The court made an attempt to distinguish *Thornwell* by indicating that even if the reasoning in *Thornwell* was correct in its conclusion that a mere failure to provide information is a separate actionable tort, the failure to warn Stanley did not occur "entirely after discharge."[178] The court reasons that unlike the plaintiff in *Thornwell*, Stanley remained in the service for eleven years after the administration of LSD. The court reasoned that although the failure to warn actually occurred, because Stanley remained active in service when the the Government failed to warn him, such was "incident to service", and was thus barred under *Feres*.[179] Therefore, the court found that Stanley had failed to allege a negligent act occurring entirely after his discharge thus, denying him the separate tort theory of *Thornwell*. This same reasoning was considered in *Broudy v. United States*,[180] where the court permitted a veteran to prove post-discharge negligence but cautioned that had the government learned of the problems with radiation exposure while the veteran was still in the hospital, and still in the service, the failure to warn would have been incident to service and therefore barred by *Feres*. This leads to an absolute absurdity: "[t]he government would have to argue that the military knew that the radiation was dangerous and decided not to warn. By thus showing more

177. *Id.*
178. *Id.*
179. *Id.*
180. 661 F.2d 125 (9th Cir. 1981).

reprehensible conduct, the government can avail itself of the *Feres* umbrella."[181]

One of the prime concerns of this theory is that "[a]rtful pleading may be employed to elevate one continuing act of negligence into separate wrongs."[182] Yet, the court of appeals in *Stanley* reverses this danger by basing its determination on the procedural fact that Stanley did not *allege* an active negligent act occurring after his discharge.[183]

Dean Prosser has pointed out that under recognized moral and social standards there must be a developing duty of action when one knows of the potential serious harm to another.[184] Similarly, section 322 of the Restatment Second of Torts provides that

> [i]f the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.[185]

The question remains: was the failure to warn Stanley a second distinct tort? Another way to examine this question is to understand whether Stanley's condition, as a result of taking the LSD, was compounded from the government's failure to warn him for a period of thirteen years?[186] It has

181. Szykowny, *supra* note 162, at 273 n.55.

182. Thornwell v. United States, 471 F. Supp. 344, 352 (D.D.C. 1979).

183. *Stanley*, 639 F. Supp. at 1154. "Stanley has alleged merely an act of negligence which occurred while he was on active duty, the effects of which remained uncorrected after discharge." *Id.*

184. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 343 (4th ed. 1971).

185. RESTATEMENT (SECOND) OF TORTS § 322 (1965).

186. Use of LSD sometimes results in a syndrome "[c]haracterized by apathy, depression, loss of primary orientation, a low anxiety threshold, increased irritability, and a significant impairment of memory and other intellectual functions." TOXICOLOGY: THE BASIC SCIENCE OF POISONS 634 (L. Casarett & J. Doull ed. 1975). These are precisely the effects which the LSD had on Stanley. *See infra* notes 18-22 and accompanying text.

been established that after ingesting LSD, "[e]xtensive therapy often results in significant improvement, but there never seems to be a complete recovery of intellectual functions."[187] It appears that the susbsequent dissolution of Stanley's marriage, his inability to function properly in the military, and the periods of radical behavioral changes were a direct result of the administration of LSD.[188] Such changes occur typically in one who takes LSD.[189] But the primary difference in Stanley's case is that he never knew he was administered the drug. Therefore, it can be assumed that the effects of this mind-altering drug had a heightened effect on Stanley as he did not know what was causing his severe behavioral changes. One can postulate that if Stanley was treated and told about the ingestion of the drug, his condition would have significantly improved, and the beating of his wife and children which eventually led to the dissolution of his marriage might have been avoided. Under both a moral and social standard, and further under principles of tort law, Stanley at the least should have succeeded on the continuing tort theory. Prior to administering LSD to Stanley, the government had definite knowledge that future harm to him via the drug was inevitable.[190] The inevitable occured, and Stanley's life, after originally consenting to a supposedly harmless experiment, was forever changed.

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187. TOXICOLOGY, *supra* note 186, at 634.

188. *Id.* at 633-34.

> Mood alterations also occur . . . LSD also disrupts logical intentional thought processes without causing loss of consciousness . . . Interpersonal relationships are intensified under the influence of LSD . . . Acute anxiety reactions also occur. This state is characterized by panic resulting from an individual's rigid refusal to tolerate the alterations that have occurred in his self-perception and his feeling of gross helplessness and loss of control."

Id.

189. *Id.*

190. *See infra* note 32 and accompanying text.

IV. CONCLUSION

The extension of the *Feres* doctrine to include violations of constitutional rights is alarming. The broad application of the doctrine not only effectively penalizes the servicemen whose constitutional rights have been egregiously violated, but has been expanded to preclude recovery where there is an intentional tort, and a failure to warn of the dangers of the original tort.[191] There have been inroads into the doctrine[192] primarily due to its apparent harshness. As Justice O'Connor points out, and in light of the specific facts in *Stanley*, "[n]o judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case."[193]

The standards that the Nuremberg Military Tribunals developed to judge the behavior of the Nazi medical doctors stated that the "[v]oluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical, and legal concepts."[194] This vital principle has been violated in the case of *Stanley*, and the broad application of a military defense, narrowly established, has grown in the face of flagrant violations of the most sacred individual rights.

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191. *See* Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979).

192. *See* United States v. Brown, 348 U.S. 110 (1954); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964), *aff'd*, 381 F.2d 627 (3rd Cir. 1967); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980).

193. United States v. Stanley, 483 U.S. 669, 709-10 (1987).

194. United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 181 (1949).