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# Casenotes: Constitutional Law — Military Enlisted Personnel May Not Recover Damages from Superior Officers for Violations of Constitutional Rights. Chappell v. Wallace, 103 S. Ct. 2362 (1983)

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CONSTITUTIONAL LAW — MILITARY ENLISTED PERSONNEL MAY NOT RECOVER DAMAGES FROM SUPERIOR OFFICERS FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS. *Chappell v. Wallace,* 103 S. Ct. 2362 (1983).

Wallace was one of five black Navy enlisted men who claimed that their superior officers had violated their constitutional rights by discriminating against the men on the basis of race.[1] The enlisted men brought suit in the United States District Court for the Southern District of California seeking damages, declaratory judgment, and injunctive relief. The district court granted the officers' motion for summary judgment and dismissed the complaint.[2] The United States Court of Appeals for the Ninth Circuit reversed, finding that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[3] authorized an award of damages for the constitutional violations alleged by the enlisted men,[4] unless either the acts complained of were non-reviewable military decisions, or the officers were immune from suit.[5] On appeal the Supreme Court reversed the Ninth Circuit in a unanimous opinion written by Chief Justice Burger.[6] The Court reasoned that the presence of "special factors counselling hesitation"[7] precluded it from making the *Bivens* damages remedy available,[8] and held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[9]

The evolution of the *Bivens* cause of action, or the judicially implied "constitutional tort,"[10] is well documented.[11] In *Bivens v. Six Un-*

1. Chappell v. Wallace, 103 S. Ct. 2362 (1983). The acts alleged to be racially discriminatory included assignment to undesirable duties, imposition of unusally severe punishments, and the giving of low performance evaluations. *Id.* at 2364.
2. *Id.* at 2364. As grounds for dismissal the district court indicated that the enlisted men had failed to exhaust their administrative remedies, the alleged actions were non-reviewable military decisions, and the officers were immune from suit.
3. 403 U.S. 388 (1971).
4. Wallace v. Chappell, 661 F.2d 729, 730 n.1 (9th Cir. 1981), *rev'd,* 103 S. Ct. 2362 (1983).
5. *Id.* at 737. The court of appeals set out certain tests to determine these issues, and remanded to the district court for application of those tests. *Id.* at 734, 736.
6. The Chief Justice vigorously dissented to the majority's opinion in *Bivens,* mainly because of a concern to protect the separation of powers. *Bivens,* 403 U.S. at 411 (Burger, C.J., dissenting).
7. *Id.* at 396.
8. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983).
9. *Id.* at 2368. The *Chappell* Court remanded the case for a determination of whether the enlisted men could maintain their additional claim for damages under 42 U.S.C. § 1985(3) (Supp. IV 1980). Section 1985(3) allows recovery of damages by persons injured as a result of "two or more persons" conspiring to interfere with their civil rights, specifically, conspiring "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Id.*
10. "Constitutional tort" is a term including any actions alleging a violation of constitutional rights, including actions brought under a statute allowing damages for deprivations of constitutional rights by one acting under color of state law. Comment, Bivens *and the Creation of a Cause of Action for Money Damages Arising Directly from the Due Process Clauses,* 29 EMORY L.J. 231, 233 n.10 (1980); *see*

*known Named Agents of Federal Bureau of Narcotics,*[12] a private citizen claimed damages for violations, by federal officials, of his fourth amendment right to be free from unreasonable searches and seizures. He brought suit against the individual officials on the theory that the fourth amendment itself, even in the absence of a statute authorizing a cause of action, provided an independent basis for relief.[13] The *Bivens* Court reasoned that even though the fourth amendment does not expressly provide for a damages remedy, such a remedy could be granted because the Court had statutory jurisdiction to hear the claim, and therefore the power to use any historically available remedy to redress the injury.[14]

The *Bivens* opinion suggested, however, that the exercise of this power might be inappropriate in two situations. First, the existence of an explicit congressional directive requiring the use of some other remedy, viewed by Congress as equally effective, would militate against the federal courts' use of their power to grant a damages remedy.[15] Second, even in the absence of congressional action, special factors counseling hesitation might also preclude federal courts from using their power.[16] The Court's only amplification in *Bivens* of what it might consider such special factors was a reference to two decisions, *United States v. Standard Oil Co.*[17] and *United States v. Gilman,*[18] both of which discussed federal fiscal policy.[19]

In those opinions the Court had reasoned that creation of a new common law damages remedy required it to make policy decisions that it characterized as determinations of federal fiscal policy more appropriately left to Congress.[20] In addition, the Court found *Gilman* to im-

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*also* 42 U.S.C. § 1983 (Supp. IV 1980) (providing damages remedy for unconstitutional acts of state officials).

11. *E.g.,* Bush v. Lucas, 103 S. Ct. 2404, 2409 (1983); Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972); Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials,* 4 HASTINGS CONST. L.Q. 531 (1977); Comment, *Righting Constitutional Wrongs: The Development of a Constitutionally Implied Cause of Action for Damages,* 19 DUQ. L. REV. 107 (1980).
12. 403 U.S. 388 (1971).
13. *See Bivens,* 403 U.S. at 389. Bivens was precluded from using existing state law remedies because the government officials were protected by a federal common law immunity. Lehmann, *supra* note 11, at 532-33.
14. *Bivens,* 403 U.S. at 395-96; *see also* Bush v. Lucas, 103 S. Ct. 2404, 2411 (1983) (expanding and clarifying the *Bivens* reasoning).
15. *Bivens,* 403 U.S. at 397; *see also* Bush v. Lucas, 103 S. Ct. 2404, 2410 (1983) (clarifying this limitation on the *Bivens* remedy); Carlson v. Green, 446 U.S. 14, 18-19 (1980) (applying and interpreting the limitation). Discussion of this limitation on the *Bivens* cause of action is beyond the scope of this casenote.
16. *Bivens,* 403 U.S. at 396.
17. 332 U.S. 301 (1947).
18. 347 U.S. 507 (1954).
19. *Bivens,* 403 U.S. at 396 (citing *Gilman,* 347 U.S. 507 (1954); *Standard Oil,* 332 U.S. 301 (1947)).
20. *Gilman,* 347 U.S. at 509-13; *Standard Oil,* 332 U.S. at 314-17.

plicate policy decisions relating to government employment, including employee discipline, morale, and efficiency.[21] Congress, the Court stated, should be the branch to make these decisions and thus to formulate the policy concerning relations between federal agencies and their staffs.[22] The *Gilman* Court therefore refused to create damage remedies that would redress the government for injuries sustained as the result of common law torts.[23]

When the Supreme Court next discussed the special factors limitation in *Davis v. Passman,*[24] it did so without reference to either *Standard Oil* or *Gilman.* In *Davis,* a female administrative assistant to a United States Congressman sued him for damages, alleging that termination of her employment constituted gender discrimination in violation of her fifth amendment rights.[25] The Court found this *Bivens*-type cause of action to raise special factors counseling hesitation.[26] These special factors related to a concern that the judiciary, by fashioning a damages remedy, might inhibit the independent functioning of the legislature.[27] Similar concerns, the *Davis* Court reasoned, had motivated the Framers of the Constitution to adopt the speech or debate clause of the Constitution.[28] This clause protects federal legislators' independence from judicial inhibition by granting them an immunity from suits arising from the conduct of their official duties.[29] The Court determined that if the congressman had not acted within the scope of his legislative duties, then the Court was free to provide the *Bivens* remedy, because the danger of judicial inhibition of independent legislative processes would be absent; that is, no special factor counseling hesitation would be present.[30]

In *Bush v. Lucas,*[31] the Supreme Court returned to the *Standard Oil* and *Gilman* decisions as a means of elucidating the definition of special factors counseling hesitation.[32] The *Bush* Court determined that as illustrated by those cases, the special factors to be considered before allowing a *Bivens* remedy related not to the merits of the remedy sought, but rather "to the question of who [Congress or the courts] should decide whether such a remedy should be provided."[33] The

21. *Gilman,* 347 U.S. at 509-10.
22. *Id.* at 511-13.
23. *Id.*; *see Standard Oil,* 332 U.S. at 314-17.
24. 442 U.S. 228 (1979).
25. *Id.* at 230-31.
26. *Id.* at 246.
27. *See id.* at 235 n.11, 246.
28. U.S. CONST. art. I, § 6, cl. 1.
29. *See Davis,* 442 U.S. at 235 n.11.
30. *See id.* at 246.
31. 103 S. Ct. 2404 (1983). *Bush*, which was decided the same day as Chappell v. Wallace, 103 S. Ct. 2362 (1983), was relied upon by the *Chappell* Court. *Id.* at 2364, 2367.
32. *Bush,* 103 S. Ct. at 2411-12.
33. *Id.* at 2412.

Court therefore refused to create a damages remedy for Bush, a federal civil service employee who alleged violations of his first amendment rights by his superior because, as in *Standard Oil* and *Gilman,* it found reason for Congress, and not the Court, to prescribe the scope of relief.[34]

In reaching its decision, the *Bush* Court noted that Congress had created an elaborate remedial system to provide redress for civil service employees injured by their superiors' improper action.[35] This system included meaningful, though less than complete, remedies for civil servants injured by violation of their first amendment rights.[36] Congress had carefully constructed this remedial system in a step-by-step fashion with particular attention to conflicting interests.[37] These interests included concerns with providing job security, protecting free speech, and maintainng discipline and efficiency in the federal workforce.[38]

The Court was concerned that the addition of a judicial remedy to this existing system might disrupt discipline and therefore reduce the efficiency of the civil service.[39] The Court reasoned that Congress, because of its expertise gained in creating the existing remedial system, could best determine whether an additional damages remedy would, in fact, disrupt discipline and reduce efficiency. If Congress determined that this additional remedy would indeed cause reduced efficiency, it would then be in a better position than the Court to balance the interest in efficiency against the interest in protecting civil servants' constitutional rights, and thus finally to decide whether it would be good policy to provide a damages remedy. In these circumstances, the Court declined to decide whether it would be good policy to augment the existing remedial system by providing a *Bivens* remedy, and therefore refused to provide that remedy, finding that Congress's superior ability to make this policy decision was a special factor counseling hesitation.[40]

*Chappell v. Wallace,*[41] like *Davis* and *Bush,* involved a civil suit brought by federal employees who alleged a violation of their constitutional rights by superiors.[42] A *Bivens* special factor analysis was therefore appropriate to determine if the Court could provide a damages remedy. *Chappell,* however, arose in a military context, a distinction of critical significance, because the law of intramilitary civil liability is pervasively affected by the Supreme Court's 1950 landmark opinion in

34. *Id.* at 2416-17.
35. *Id.* at 2415-16.
36. *Id.* at 2408, 2415.
37. *Id.* at 2414-16.
38. *Id.* at 2414-15.
39. *See id.* at 2417.
40. *See id.*
41. 103 S. Ct. 2362 (1983).
42. *Id.* at 2364.

*Feres v. United States.*[43] *Feres* involved lawsuits brought under the Federal Tort Claims Act (FTCA)[44] seeking recovery from the federal government for injuries to soldiers sustained as the result of negligent acts committed by superior officers in the course of military duty.[45] The Court found the government not liable to the soldiers, holding that Congress, in enacting the FTCA, had not intended the selective waiver of sovereign immunity under the FTCA to extend to liability for injuries sustained incident to military service.[46] In a subsequent decision,[47] the Court observed that the *Feres* rule was best explained by recognizing that a special relationship exists between soldiers and their superiors, and by understanding that lawsuits brought by soldiers against the United States, based upon individual intramilitary negligence, would affect the discipline upon which this relationship depends.[48]

This concern with protecting military discipline led the *Chappell* Court to begin its consideration of special factors counseling hesitation with an analysis of the effects on military discipline and efficiency that would result from the addition of a new damages remedy to the existing system of military justice.[49] The likely impairment of military efficiency, measured by the certain disruption of the " 'peculiar and

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43. 340 U.S. 135 (1950). This area of the law is affected by the lower courts' expansion of the *Feres* rule into a broad doctrine of intramilitary immunity. *See* Note, *Torts-Military Service Immunity—There Is No Cause of Action Under the Constitution Against Government Officials for Intentional Constitutional Torts Occurring Incident to Military Service,* 27 VILL. L. REV. 858, 869-72 (1981-1982) (discussing broad application of *Feres* doctrine) [hereinafter cited as Note, *Torts-Military Service*]. *See generally* Note, *Intramilitary Immunity and Constitutional Torts,* 80 MICH. L. REV. 312 (1981) (pre-*Chappell* exploration of relationship of *Feres* doctrine to intramilitary constitutional torts) [hereinafter cited as Note, *Intramilitary Immunity*]; Note, *Denial of Atomic Veterans' Tort Claims: The Enduring Fallout from* Feres v. United States, 24 WM. & MARY L. REV. 259 (1983) (examining harsh results of expansion of *Feres* doctrine) [hereinafter cited as Note, *Atomic Veterans'*].

Intramilitary immunity bars suit not only against the government for negligent torts committed incident to service (the *Feres* rule), *see, e.g.,* Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053 (1969), but also against individual officials for negligent torts, *see, e.g.,* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Roach v. Shields, 371 F. Supp. 1392 (E.D. Pa. 1974), intentional torts, *see, e.g.,* Citizens Nat'l Bank of Waukegan v. United States, 594 F.2d 1154 (7th Cir. 1979); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), *aff'd mem. on other grounds,* 593 F.2d 1371 (D.C. Cir. 1979), and judicially implied constitutional torts, *see, e.g.,* Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979).

44. 28 U.S.C. §§ 2671-2680 (1976 & Supp. V 1981). For a discussion of the FTCA, see Note, *Torts-Military Service, supra* note 43, at 860-61.
45. *Feres,* 340 U.S. at 136-38.
46. *Id.* at 146.
47. United States v. Muniz, 374 U.S. 150 (1963).
48. *Id.* at 162 (quoting United States v. Brown, 348 U.S. 110, 112 (1954)); *see also* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) (quoting the same language and following *Feres*).
49. Chappell v. Wallace, 103 S. Ct. 2362, 2365 (1983).

special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court" was of primary concern to the Court.[50] The Court reasoned that an effective military requires a strict discipline and regulation that would be unacceptable in a civilian setting.[51] This strict discipline assures the unhesitating obedience to command necessary to the success of a military organization.[52] It is acceptable, therefore, to limit the rights of military personnel to a degree not permitted in civilian life to maintain military discipline and thus effective military function.[53] The Court concluded that a judicially created damages remedy that exposed officers to personal liability for violations of enlisted men's constitutional rights would undermine military discipline.[54] The *Chappell* Court found this potential disruption to effective military function as a special factor counseling hesitation to provide a *Bivens* remedy to the enlisted men.[55]

Turning from this analysis to reasoning analogous to that employed in *Bush v. Lucas,*[56] the *Chappell* Court then discussed the reasons why Congress, and not the courts, should prescribe the scope of available relief. The Court believed that the Framers had anticipated the possibility that the judicial branch might tamper with the military system of discipline, and had guarded against such an event by explicitly granting Congress plenary authority over internal military affairs.[57] Furthermore, Congress had exercised its authority by establishing a comprehensive internal system of military justice that included means to redress the constitutional wrongs alleged by the enlisted men.[58] The Court noted that out of respect for Congress's authority, and in recog-

50. *Id.* at 2367 (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)).
51. Chappell v. Wallace, 103 S. Ct. 2362, 2365 (1983).
52. *See id.*
53. *See id.* (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)); *see also* Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots.").
54. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983). It is unclear why a legislatively created damages remedy would not have the same effect. The same considerations guiding the Court would presumably also be of concern to Congress should it decide to create a statutory damages remedy for military personnel injured by the unconstitutional acts of their superiors.
55. *Id.*
56. 103 S. Ct. 2404 (1983).
57. Chappell v. Wallace, 103 S. Ct. 2362, 2365-66 (1983); *see* U.S. CONST. art. I, § 8, cls. 12-14.
58. Chappell v. Wallace, 103 S. Ct. 2362, 2366 (1983); *see* The Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940 (1982). For a discussion of the provisions within the UCMJ that protect the constitutional rights of military personnel, see Note, *Intramilitary Immunity, supra* note 43, at 329-30.

nition of the Court's own lack of competence in the area of internal military affairs, it had habitually declined to review or reverse congressional decisions concerning matters of military justice and personnel management.[59] Therefore, the *Chappell* Court concluded that adding a judicially created damages remedy to the existing legislatively created system of military justice would encroach upon Congress's authority in the area.[60] Thus, Congress's authority and activity in the field of intramilitary affairs, taken together with "the unique disciplinary structure of the military establishment," constituted special factors counseling against providing a *Bivens* remedy to the enlisted men.[61]

In all of the cases in which the Supreme Court has found the existence of special factors counseling hesitation, the factors related to a possible judicial intrusion into areas the Court considered reserved to Congress.[62] *Bush* and *Chappell* concerned potential intrusions into matters of federal personnel policy.[63] In both cases, the plaintiffs demanded relief that, if granted, would have resulted in judicial enlargements of existing legislatively created remedial systems designed to redress employees' grievances.[64] Underlying the Court's decision in these cases is a concern that litigation arising from these additional remedies would deleteriously affect employee discipline and morale, hence reducing efficient operation of the federal service, whether civil or military.[65]

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59. Chappell v. Wallace, 103 S. Ct. 2362, 2366-67 (1983); *see also* Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981) (Court deferred to congressional authority over the military, and declined to invalidate statute excluding women from draft registration); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (Court refused to find statute mandating different requirements for promotion of female officers than for male officers unconstitutional because courts defer to Congress in military affairs); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (civilian courts lack competence in military affairs and therefore will not examine patterns of weaponry, training, and orders of state's national guard); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (Court refused to review specific duty assignments of an army doctor because judiciary must be scrupulous not to interfere with legitimate army matters).
60. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983).
61. *Id.*
62. *See id.* at 2367 ("Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field."); Bush v. Lucas, 103 S. Ct. 2404, 2417 (1983) ("[W]e are convinced that Congress is in a better position to decide. . . ."); Davis v. Passman, 442 U.S. 228, 235 n.11 (1979) ("The Clause is therefore a paradigm example of '[a] textually demonstrable constitutional commitment of [an] issue to a coordinate political department.' ") (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); United States v. Gilman, 347 U.S. 507, 513 (1954) ("That function is more appropriately for those who write the laws, rather than for those who interpret them."); United States v. Standard Oil Co., 332 U.S. 301, 316 (1947) ("[E]xercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress' control. . . .").
63. Bush v. Lucas, 103 S. Ct. 2404, 2412 (1983); *see* Chappell v. Wallace, 103 S. Ct. 2362, 2365 (1983).
64. *See supra* notes 33-39 & 56-59 and accompanying text.
65. *See* Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983); Bush v. Lucas, 103 S. Ct.

In *Bush* and *Gilman* the Court reasoned that it had adequate power to decide whether it would be good policy to provide an additional damages remedy.[66] Congress, however, was more experienced with civil service personnel issues, and therefore was better prepared and more competent to determine the effects of an additional remedy on employee discipline and morale, and hence on service efficiency.[67] Congress's ability to better evaluate the discipline, morale, and efficiency issues thus placed it in a better position than the Court to decide whether it would be good policy to provide a damages remedy. As a result, the Court declined to provide this remedy by judical action.[68]

In *Chappell,* however, the Court did not find Congress better prepared or more competent to determine the effect on military efficiency that would result from augmenting the existing system of military justice with a damages remedy. The Court found ample judicial precedent upon which to base its own conclusions that intramilitary litigation resulting from the addition of a *Bivens* remedy to the existing grievance system would disrupt discipline, that this disruption would reduce service efficiency, and that the interest in an efficient military service outweighs the enlisted men's interest in individual constitutional rights. Thus, the Court effectively concluded that it would be unwise military personnel policy to provide a damages remedy.[69] Yet, even as it reached this policy conclusion the Court also acknowledged its historical deference to Congress's competence in, constitutional authority over, and extensive experience with issues of military personnel management policy.[70] Therefore, by the Court's own reasoning, Congress has the competence and constitutional authority to undertake the same analysis as has the Court. If Congress does so, and reaches a policy conclusion different than the Court's, it may choose to provide a statutory damages remedy for enlisted personnel injured as a result of their superiors' unconstitutional acts.[71]

An approach more consistent with the *Bush-Gilman-Standard Oil* definition of special factors counseling hesitiation to create a *Bivens*

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2404, 2417 (1983). Similar concerns motivated the Court in United States v. Gilman, 347 U.S. 507 (1954). *Gilman* involved a suit by the government against its employee, rather than between federal employees, and involved common law rather than constitutional rights. *Id.* at 507-08.

66. *See* Bush v. Lucas, 103 S. Ct. 2404, 2410-17 (1983); United States v. Gilman, 347 U.S. 507, 509-13 (1954).

67. Bush v. Lucas, 103 S. Ct. 2404, 2417 (1983); *see* United States v. Gilman, 347 U.S. 507, 509-13 (1954).

68. Bush v. Lucas, 103 S. Ct. 2404, 2417 (1983); *see* United States v. Gilman, 347 U.S. 507, 509-13 (1954).

69. *See supra* notes 48-54 and accompanying text.

70. *See supra* notes 56-59 and accompanying text.

71. See Note, *Intramilitary Immunity, supra* note 43, at 330, suggesting that the UCMJ rejects the notion that all intramilitary litigation will interfere with the effectiveness of the armed forces. *See also* 10 U.S.C. § 939 (1982) (allowing "any person" redress for property damage caused by military personnel).

remedy would have been for the Court simply to leave the issues of discipline, service efficiency, and personnel policy to Congress while still declining to create the remedy. Instead, the *Chappell* Court decided these policy issues, placing its primary emphasis on the threat to military discipline as a special factor. This emphasis, combined with the Court's concluding caution that *Chappell* is not to be read as barring military personnel from all redress for constitutional wrongs suffered incident to military service,[72] may result in lower courts interpreting *Chappell* as limited to its facts. Thus, unless an enlisted person's *Bivens* cause of action involves facts clearly implicating matters of discipline arising from a superior officer's personnel management decision, that superior may be held personally liable for damages caused by his unconstitutional acts.[73]

A better view, however, is to interpret *Chappell* together with *Bush,* and to recognize that regardless of the Court's conclusions concerning military discipline, military efficiency, and the individual rights of military personnel,[74] Congress remains the appropriate branch to make policy decisions concerning military justice, and that respect for Congress's expertise and constitutional authority is the controlling special factor counseling hesitation. *Chappell* reinforces the growing dichotomy between the separate systems of civil and military justice,[75] and leaves squarely upon Congress the responsibility for defining, protecting, and enforcing the rights of this nation's military personnel.[76]

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72. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983).
73. Stanley v. United States, 574 F. Supp. 474 (S.D. Fla. 1983) (a *Bivens* remedy could be provided to a soldier because there would be no resulting disruption of military discipline; *Chappell* limited to its facts). *But see* Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (*Chappell* a per se bar of damages suit), *cert. denied,* 104 S. Ct. 1595 (1984).
74. As the *Chappell* Court stated, " 'Courts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.' " Chappell v. Wallace, 103 S. Ct. 2362, 2368 (1983) (quoting Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 187 (1962)).
75. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983).
76. *See generally* Burgess, *Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After* Butz v. Economou, 89 MIL. L. REV. 25, 58 (1980); Note, *Atomic Veterans', supra* note 43.