GOVERNMENT IMMUNITY AND LIABILITY—ARMED FORCES—GOVERNMENT OFFICIALS CHARGED WITH VIOLATING SERVICEMEN'S FIFTH AMENDMENT RIGHTS NOT ENTITLED TO ABSOLUTE IMMUNITY—*Jaffee v. United States*, No. 79-1543 (3d Cir. Feb. 20, 1980).

Feres v. United States[1] was an action under the Federal Tort Claims Act[2] (FTCA) in which the executrix of a soldier alleged that the government had been negligent in quartering the deceased in unsafe barracks. The Supreme Court, refusing to construe the FTCA so as to permit recovery under those circumstances, held that the Act was not intended to render the government liable for injuries to servicemen sustained "in the course of activity incident to service."[3] In the thirty years since *Feres* was decided, various lower courts have interpreted it as creating a doctrine of absolute "intramilitary" immunity which protects both the government and individual officials from liability for any injuries to members of the armed forces.[4] This interpretation was recently refuted through an analysis of the history of *Feres* and an examination of subsequent Supreme Court decisions in the areas of official immunity[5] and federal common law. Accordingly, the Court of Appeals for the Third Circuit, in *Jaffee v. United*

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[1] 340 U.S. 135 (1950).

[2] The Federal Tort Claims Act is a limited waiver of sovereign immunity, *see* 28 U.S.C. §§ 1291, 1346(b)-1346(c), 1402(b), 1504, 2110, 2401(a)-2401(b), 2402, 2411(b), 2412(c), 2671-72, 2674-80 (1976), which, by its terms, applies the law of the place when the [wrongful] act or omission occurred." *Id.* § 1346(b).

[3] 340 U.S. at 146.

[4] *E.g.*, Hass v. United States, 518 F.2d 1138, 1142 (4th Cir. 1975); Misko v. United States, 453 F. Supp. 513, 514, 516 (D.D.C. 1978); Roach v. Shields, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974). *See also* Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F.L. REV. 24 (1976); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery*, 77 MICH. L. REV. 1099 (1979).

[5] Just as sovereign immunity operates as an absolute bar to an action for damages against the government, so too official immunity shields individual government officers from liability for discretionary acts within the scope of their authority. *See* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963). *See generally* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

Absolute immunity precludes an action for damages against the immunized officials. Qualified immunity is an affirmative defense whereby government officials are exonerated upon a showing of good faith. Imbler v. Pactman, 424 U.S. 409, 419 n.13 (1975). Official immunity is applicable only in the context of a suit for damages. It is not a defense to an action for injunctive relief. *See* Wood v. Strickland, 420 U.S. 308, 315 n.6 (1975); Conover v. Montemuro, 477 F.2d 1073, 1096-1104 (3d Cir. 1973) (Gibbons, J., concurring in the result).

Traditionally, absolute immunity was justified by reference to the inequities inherent in empowering federal officials with discretionary authority and then penalizing them for the exercise of that authority.

States,[6] rejected a doctrine of absolute immunity in favor of a rule of qualified immunity for federal military and civilian officials charged with conducting unlawful programs of human experimentation on American servicemen.

Stanley Jaffee was one of an estimated 250,000 soldiers who, in the years between 1946 and 1962, were forced to participate in nuclear test explosions in order to gauge the immediate effects of massive radiation exposure on combat troops.[7] In the spring of 1953, while on active duty at Camp Desert Rock, Nevada, Jaffee was ordered to stand in a field while a nuclear bomb was exploded a short distance away. He was not informed of the potential health hazards or given an opportunity to refuse to participate, nor was he provided with any protective clothing or equipment.[8] In November, 1977, Jaffee discovered that he, like many other "atomic veterans," had developed radiation-induced cancer as a result of his role in the nuclear testing program.[9] He and his wife, Sharon Blynn Jaffee, filed suit in the United States District Court for the District of New Jersey against the individual officials in the Department of Defense, the Department of the Army, and the Atomic Energy Commission who were responsible for conducting the experiment. The Jaffees sued directly under the first, fourth, fifth, eighth and ninth amendments of the Constitution, alleging that these officials had knowingly and recklessly directed the tests without legal authority or military justification.[10]

> [O]fficial immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974)(footnote omitted). The Supreme Court, however, has declared that the abrogation of absolute immunity is an important means of preventing governmental abuse and vindicating constitutional rights. Butz v. Economou, 438 U.S. 478, 480-81 (1978). *Accord*, Owen v. City of Independence, 100 S. Ct. 1398, 1415 (1980). Cognizant of the possible chilling effects of imposing liability upon federal officials and yet aware that the broad authority possessed by these officials affords a greater potential for lawless conduct, the Court has adopted a rule of qualified immunity with respect to unconstitutional activity. Butz v. Economou, 438 U.S. 478, 505-06 (1978).

[6] No. 79-1543 (3d Cir. Feb. 20, 1980). *See also* Jaffee v. United States (Jaffee I), 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (earlier appeal of same case involving question of sovereign immunity). For a discussion of *Jaffee I*, see Comment, 25 N.Y.L. SCH. L. REV. 377 (1979).

[7] *See* N.Y. Times, Apr. 11, 1980, § A, at 10, col. 1.

[8] Slip op. at 3-4.

[9] *See* Jaffee v. United States, Amended Complaint at 4, 9.

[10] Slip op. at 3-4.

The district court dismissed the suit on the ground that *Feres* "exempt[ed] these defendants from liability."[11] The court of appeals reversed. Judge Gibbons, writing for the court, held that *Feres* did not create a rule of absolute immunity for military superiors against suits by members of the armed forces for willful torts.[12]

Emphasizing that the Jaffees' complaint was premised not upon negligence under the FTCA, as was the claim in *Feres*, but rather upon a constitutionally proscribed intentional tort,[13] Judge Gibbons turned his attention to *Gregoire v. Biddle*.[14] He noted that at the same time that *Feres* had been before the Court of Appeals for the Second Circuit, *Gregoire v. Biddle* was being considered by a different panel in the same circuit.[15] *Gregoire* was an action against five members of the executive branch of government for conspiring to arrest and detain the plaintiff on the pretense that he was an enemy alien. Relying upon an 1896 case in which the Supreme Court recognized official immunity for a cabinet member acting "pursuant to an act of Congress,"[16] the court of appeals dismissed the *Gregoire* complaint on the ground that federal officials were entitled to absolute immunity.[17] The Supreme Court denied certiorari.[18]

The juxtaposition of *Feres* and *Gregoire* served as the basis upon which Judge Gibbons distinguished the issue in *Feres* from that in *Jaffee*.[19] He posited that the difference between *Feres* and *Gregoire* was the difference between construing the liability of the United States under the then newly enacted FTCA and adopting a broad interpretation of a judicially created immunity doctrine. It was the development of the latter that was central to the issue in *Jaffee*.[20]

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[11] Jaffee v. United States, 468 F. Supp. 632, 633 (D.N.J. 1979), *rev'd*, No. 79-1543 (3d Cir. Feb. 20, 1980).

[12] Slip op. at 5, 18-19.

[13] *Id.* at 5-6. *See generally* 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).

[14] 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[15] Slip op. at 6.

[16] Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[17] 177 F.2d at 581.

[18] 339 U.S. 949 (1950).

[19] Slip op. at 6-7.

[20] *Id.* at 8.

> The law of individual personal immunity of federal officers has undergone an entirely separate development in a series of cases beginning in 1959 with *Barr v. Matteo*, 360 U.S. 564, and *Howard v. Lyons*, 360 U.S. 593, and culminating with the Court's most recent discussion in *Butz v. Economou*, 438 U.S. 478 (1978). It is to the personal immunity holdings and not to the interpretations of the Federal Tort Claims Act that we must look for the solution to the present quandary.

Slip op. at 8.

The focus of the court's analysis was the effect of the abrogation of absolute immunity for state officials and the expansion of the doctrine of federal common law upon the Supreme Court's subsequent rejection of a rule of absolute immunity for federal officials accused of constitutional violations. In tracing the movement from absolute to qualified official immunity, Judge Gibbons noted that when confronted with the immunity question ten years after its denial of certiorari in *Gregoire*, only four members of the Supreme Court were willing to embrace a rule of absolute immunity for federal officials.[21] He stated that by 1974, as evidenced by its decision in *Scheuer v. Rhodes*,[22] "it had become apparent to the Court that a *Gregoire* type absolute immunity . . . simply was too dangerous for general application to state officials."[23] It was a unanimous Supreme Court which held in *Scheuer* that the Governor of Ohio, as head of the National Guard, was not absolutely immune from damages under section 1983 for the intentional use of excessive force to quell the Kent State disturbances. As a result, the *Jaffee* court averred that at least with respect to state officials, qualified immunity became the rule.[24]

Judge Gibbons recognized that a major obstacle to imposing liability on federal officials was the fear of subjecting them to the vagaries of state law, but he reasoned that by the time the Court had perceived the improvidence of a rule of absolute immunity for state officials, it had dispensed of the problem of non-uniformity[25] through its decision in *Bivens v. Six Unknown Named Federal Agents*.[26] The Court in *Bivens* acknowledged the existence of a federal common law through its pronouncement that a complaint against federal agents seeking damages directly under the fourth amendment stated a cause of action in the federal courts. The majority, however, declined to address the immunity question inasmuch as the lower court had not ruled on the issue.[27] Nonetheless, as Judge Gibbons observed, the *Bivens* Court did proffer "the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police misconduct."[28] Thus, Judge Gibbons noted that two years after its decision in *Bivens*, the Court rejected a rule of

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[21] Slip op. at 9.
[22] 416 U.S. 232 (1974).
[23] Slip op. at 11.
[24] *Id.*
[25] *Id.*
[26] 403 U.S. 388 (1971).
[27] *Id.* at 397-98.
[28] Slip op. at 10 (quoting Bivens v. Six Unknown Named Federal Agents, 403 U.S. at 411 (Harlan, J., concurring)).

absolute immunity for lower level federal officials,[29] and in *Butz v. Economou*,[30] "finally and unequivocally" rejected a rule of absolute immunity with respect to upper level federal officials charged with committing intentional torts.[31]

Quoting Justice White's opinion in *Butz*, Judge Gibbons set forth the major arguments in support of imposing liability. Absolute immunity seriously erodes constitutional protection. The broad authority possessed by federal officials increases the potential for lawless conduct. Most importantly, the availability of an action against individual officials is an essential means of vindicating constitutional rights.[32] The court of appeals therefore determined that the rule in *Butz* would not afford the officials in *Jaffee* absolute immunity.[33]

After examining the history of official immunity, the court disposed of the notion that there is a separate category of intramilitary immunity which is independent of the concepts of official and sovereign immunity. The court attributed the misunderstanding regarding the existence of a per se intramilitary immunity to Justice Jackson's statement in *Feres* that the Court knew "of no American law which ever has permitted a soldier to recover *for negligence* either against his superior officers or the Government he is serving."[34] Judge Gibbons noted that this holding pertains only to an action grounded in negligence and that it did not purport to make a member of the armed services absolutely immune from suit by another member for a willful tort. He referred to the footnote accompanying the *Feres* text in which Justice Jackson compared the rule he

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[29] *See* Doe v. McMillan, 412 U.S. 306 (1973).

[30] 438 U.S. 478 (1978).

[31] Slip op. at 12.

[32] *Id.* at 12-13 (quoting Butz, 438 U.S. at 505-06).

[33] Slip op. at 14.

[34] *Id.* at 15-16 (quoting Feres, 340 U.S. at 141)(footnote omitted). Judge Gibbons, in discussing Justice Jackson's opinion in *Feres*, noted that the suggestion that there is an absolute intramilitary immunity would be anomalous "coming from a Justice recently returned from acting as prosecutor in the *Nuremberg Trials*." Slip op. at 16. That tribunal's most important pronouncement was that individuals, not merely governments, should be held legally accountable for military wrongs. F. BIDDLE, IN BRIEF AUTHORITY 482 (1962). This was the crux of the issue in *Jaffee*. Military discipline is a somewhat nebulous concept which encompasses both the fear of a multiplicity of suits and potential draconian liability. Reliance on military discipline amounts to "a gloss of form over substance . . . . [I]t can perhaps be best explained with reference to unmentioned political and economic interests at stake in the controversy." Comment, *supra* note 6, at 393 (footnote omitted).

Commentators have argued that the application of *Feres* should be limited to cases where it is demonstrated that the maintenance of a suit would "undermine traditional concepts or military discipline." *See* Rhodes, *supra* note 4, at 32, 44; Note, *supra* note 4, at 1124-26. The courts have not heeded the suggestion.

was announcing in *Feres* with regard to negligence to that which had been established in *Dinsman v. Wilkes*[35] for intentional torts.[36] *Dinsman* involved a suit by a marine against his commanding officer for injuries incurred while on an expedition in the South Seas during the 1830's. When Dinsman sought to be released from service at the end of his term of enlistment, Captain Wilkes, the commander of the ship, ordered him flogged and imprisoned.[37] In considering the immunity issue the *Dinsman* Court ruled, in Judge Gibbons words, "that while there was a presumption of regularity with respect to the imposition of military discipline, there was no absolute immunity from liability for intentional torts."[38]

Finally, the *Jaffee* court noted that no post-*Feres* Supreme Court opinion had been found which supported the existence of a separate category of intramilitary immunity. The court therefore concluded that the immunity of military superiors was no more or no less than that afforded other officials of the executive branch of government.[39]

Essential to an understanding of the propriety of the *Jaffee* court's enunciation of a rule of qualified immunity for military officials is a familiarity with the nature of the immunity. Absolute official immunity originated as a means of protecting federal officials in the performance of their statutory duties from either civil or criminal liability under state law.[40] As indicated by the Court in *Butz*, however, and reiterated by the court of appeals in *Jaffee*, since *Bivens* "the myth of non-uniformity," insofar as the danger of imposing state standards of liability on uniquely federal personages, has been "removed from the discussion" due to the availability of a cause of action under federal law.[41] Moreover, the immunity was never intended to insulate federal officials from liability for egregious wrongs or for activities palpa-

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[35] 53 U.S. (12 How.) 390 (1851). *See also* Wilkes v. Dinsman, 48 U.S. (7 How.) 93 (1849)(earlier appeal of same case). The Court in *Dinsman* focused upon the fact that while it is essential to the efficient operation of the military that the authority of military superiors when properly exercised be firmly supported in courts of law it is equally important for the preservation of civil liberty that those individuals serving our country who are the victims of improperly exercised authority be given the opportunity to seek redress in the courts. 53 U.S. (12 How.) at 403.

[36] Slip op. at 16. *See generally* James v. United States, 358 F. Supp. 1381 (D.R.I.), *vacated*, 502 F.2d 1159 (1st Cir. 1973).

[37] 53 U.S. (12 How.) at 402-03.

[38] Slip op. at 17.

[39] *Id.* at 19. "[W]e conclude that at best the immunity of the individual defendants is qualified." *Id.* at 6.

[40] Butz, 438 U.S. at 489. *See also* Scheuer, 416 U.S. at 238-42 (discussion of origins of immunity doctrines).

[41] Slip op. at 12.

bly beyond the limits of their authority. Justice White, writing for the majority in *Butz*, discussed "the general rule, which long prevailed, . . . that a federal official may not with impunity, ignore the limitations which the controlling law has placed on his powers."[42]

The precise limits of the qualified immunity defense were set forth in the Supreme Court's opinion in *Butz*.[43] The extent of the immunity varies depending upon the scope of discretion with which an official is empowered.[44] It is comprised of a subjective and an objective element.[45] Consequently, the official is immune where he or she has acted in good faith and where reasonable grounds for a good faith belief existed under the circumstances.[46] In addition, the *Butz* Court's adoption of a qualified immunity was limited to constitutional claims.[47] Thus, upper level federal officials, including military officials, cannot be held accountable in damages for other than constitutional transgressions. Also, damages are appropriate under this standard only where the official has acted with such an impermissible motivation or with such blatant disregard of a serviceman's constitutional rights that his action cannot reasonably be characterized as being in good faith.

The Supreme Court has in recent years expressed repeated concern over the need to assure a remedy to the victims of governmental abuses of power.[48] In *Butz*, the Court recognized that to immunize the responsible civilian officials was to render nugatory the constitutional cause of action created in *Bivens*.[49] The "frequently impenetrable" barrier of sovereign immunity requires a rule of qualified official immunity[50] inasmuch as "a vital component of any scheme for vindicating cherished . . . constitutional guarantees" is a remedy for damages.[51] Absolute immunity requires the immediate dismissal of any suit against the immunized party. The abrogation of absolute immunity acts as a check on governmental abuse by permitting judicial

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[42] 438 U.S. at 489-91.

[43] *Id. passim*.

[44] Scheuer, 416 U.S. at 247.

[45] Wood v. Strickland, 420 U.S. 308, 321 (1974).

[46] 416 U.S. at 247-48.

[47] 438 U.S. at 495 n.22.

[48] *E.g.*, Gomez v. Toledo, 100 S. Ct. 1920, 1923 (1980); Owen v. City of Independence, 100 S. Ct. 1398, 1415-16 (1980). This is, of course, a recurring theme in many of the qualified immunity and federal common law cases.

[49] 438 U.S. at 504-05.

[50] *Id.* at 504.

[51] Owen v. City of Independence, 100 S. Ct. 1398, 1415 (1980).

review of intentional misconduct.[52] Under *Butz*, there is no doubt that civilian government employees, as well as the Nevada residents living in the areas surrounding the nuclear test site, would be able to withstand defendant's motion to dismiss on grounds of official immunity.[53] The military status of the plaintiff should not be dispositive of the immunity question.[54]

Moreover, the rationale in *Feres* is not controlling with regard to intentional torts. Three factors have been advanced as necessitating the Court's denial of recovery for negligence in *Feres*: the distinctly federal relationship between members of the armed forces and military superiors, the existence of a no-fault compensation scheme for veterans, and the need for maintaining military discipline.[55] The law has progressed to a point where the first rationale, the peculiarly federal character of the armed forces, is no longer a viable reason for immunizing military officials.[56] In *Davis v. Passman*[57] the Supreme Court sustained a federal common law cause of action directly under the fifth amendment. Two months after the court of appeals filed its opinion in *Jaffee*, the Court, in *Carlson v. Green*[58] once again extended its decision in *Bivens* by ruling that a remedy was available under the eighth amendment against federal officials who deliberately ignored the medical needs of a prison inmate. *Davis* and *Carlson* dispelled any doubts about the Court's willingness to expand upon its acknowledgment of federal common law in *Bivens*. In fact, the Court in *Carlson* termed it "obvious" that the conduct of federal officials should be governed by uniform standards.[59] Furthermore, the Court declared that persons who have no other effective means of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."[60]

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[52] "Judicial review may sometimes be specifically precluded by law, thus immunizing policies that might shrivel if a search-light were turned upon them." W. GELLHORN, WHEN AMERICANS COMPLAIN 27 (1966)(footnote omitted). The problem with dismissal at the pleading stage is the inability to discover who made decisions and at what level they were made.

[53] *See generally* N.Y. Times, May 13, 1979, at 23 col. 6. *See also* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

[54] *Cf.* slip op. at 10 (military status of defendant not determinative of liability).

[55] *See* Feres, 340 U.S. at 135; Jaffee, 468 F. Supp. at 633 (discussion of *Feres* holding).

[56] *See* notes 25-27 & 41 *supra* and accompanying text. *Compare* United States v. Standard Oil Co., 332 U.S. 301 (1946) *with* Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388 (1971).

[57] 442 U.S. 228 (1979).

[58] 100 S. Ct. 1468 (1980). Justice Brennan, writing for the Court in *Carlson*, recognized that federal officials are accorded adequate protection under the qualified immunity enunciated in *Butz*. *Id.* at 1472.

[59] *Id.* at 1474.

[60] Davis, 442 U.S. at 242. The intentional deprivation of a liberty or property interest provides the strongest case for implying a federal common law cause of action. The standard of care

The second justification for disallowing recovery for intramilitary negligence under the FTCA in *Feres* was the existence of a "comprehensive system of relief" in the form of veterans' benefits. The Court analogized veterans' benefits to workers' compensation payments and suggested that both were statutory schemes which provided a no-fault system of recovery in lieu of tort liability.[61] Workers' compensation statutes, however, do not generally preclude common law actions for damages against employers or third parties for intentional injuries.[62] Similarly, veterans' benefits should not be construed so as to prohibit suits against individual military tortfeasors for wanton misconduct. Although the analogy may have mandated a dismissal in *Feres*, it did not militate against exposing the individual defendants in *Jaffee* to liability.

The final reason cited by the Supreme Court for disallowing recovery for intramilitary negligence was the deleterious impact of such suits upon military discipline.[63] The Court has most recently expressed its concern for military discipline in terms of the danger of "second-guessing military orders."[64] Although the effect of litigation upon military discipline is a valid concern, the need for deterrence in the context of intentional unconstitutional activity is of greater importance. Imposing the threat of liability upon military officials charged with intentional wrongdoing will deter future intramilitary misconduct. The Court, in *Carlson*, emphasized the necessity of imposing liability as a means of deterrence and indicated that a remedy recoverable against individual officials is a more effective deterrent than a remedy against the government.[65] By confining its abrogation

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for military personnel *vis-a-vis* other military personnel must be uniform. Unless the courts are willing to supplant the entire body of common law, the case for federalizing negligence is a weak one.

[61] Feres, 340 U.S. at 144-45. This is the least persuasive of the reasons set forth in justification of the *Feres* doctrine. First, a no-fault compensation scheme does not adequately serve the need for deterrence. Slip op. at 25 n.36. Second, the Court in *Carlson* refused to pronounce an election of remedies where Congress had not done so. 100 S. Ct. at 1472. Third, the veterans' administration has denied death and disability benefits to 98 percent of the atomic veterans who have filed claims. N.Y. Times, Apr. 11, 1980, § A, at 10 col. 3. *See also* Comment, *supra* note 6, at 393.

[62] 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68 (1976).

[63] The *Feres* Court did not list military discipline among its reasons for denying recovery under the FTCA. The concern for military discipline was first articulated in United States v. Brown, 348 U.S. 110, 112 (1954). *See* Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 671-72 (1977). Ironically, it has been suggested that military discipline is the only viable basis for the continuation of the *Feres* doctrine today. Rhodes, *supra* note 4, at 29.

[64] Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 673 (1977).

[65] 100 S. Ct. at 1473. *But see* Note, *Balancing the Vindication of Constitutional Guarantees Against the Effective Functioning of Government: The Official Immunity Scale Does Not Work*—Butz v. Economou, 28 DEPAUL L. REV. 143, 154-56 (1978).

of absolute immunity to intentional torts of a constitutional dimension and to "acts ordered or performed" in other than a tactical situation,[66] the court of appeals in *Jaffee* effectively balanced the competing interests inherent in the need for military discipline and the increasingly obvious need for deterrence. The scope of judicial review remains appropriately limited.

Judge Higginbotham concurred in the result of the court of appeals decision in *Jaffee* on the authority of the Supreme Court's decision in *Dinsman v. Wilkes*. But for *Dinsman*, he suggested, he would have adopted the views set forth "quite persuasively" by the district court of the District of Columbia in *Thornwell v. United States*.[67]

The Third Circuit has granted rehearing in banc in the *Jaffee* case.[68] *Thornwell*, to which Judge Higginbotham referred in his concurrence, suggests a partial remedy for the plaintiffs—albeit one not commensurate with the extent of the alleged wrongdoing—should the court on rehearing insist upon a blind application of *Feres* with regard to the immunity issue.[69] Like *Jaffee*, *Thornwell* was an action by a former serviceman for injuries incurred as a result of a "brutal . . . scheme of human experimentation."[70] While stationed in France in the 1950's. Thornwell was given LSD, without his knowledge or consent, pursuant to a covert government program which was intended to test the drug's efficacy as an aid to interrogation.[71] Although the *Thornwell* court felt bound by *Feres* to dismiss the claim for injuries sustained while on active duty,[72] the court held that plaintiff had stated a separate cause of action under the fifth amendment for the failure to "provide [Thornwell] with any follow-up

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[66] Slip op. at 5.

[67] Slip op. at 28 (Higginbotham, J., concurring)(citing Thornwell, 471 F. Supp. 344 (D.D.C. 1979)). Not only did *Thornwell* deal with allegations similar to those in *Jaffee*, *see* text accompanying notes 71-72 *infra*, but the court in *Thornwell* disposed of them in the same manner that the district court in *Jaffee* disposed of them. Plaintiffs in both cases sought to distinguish *Feres* on the ground that it applied to claims for negligence rather than to intentional deprivations of constitutional rights. *Compare* 471 F. Supp. 348 *with* 468 F. Supp. at 634. Both district courts rejected this argument reasoning that "neither the language nor the rationale of the Court's decision" supported the distinction. *See* 471 F. Supp. at 348; 468 F. Supp. at 634.

Judge Higginbotham noted that the court was "disadvantaged . . . because the Supreme Court has not, since 1851 . . . focused on the type of intentional tort in a military context that" was in issue in *Jaffee*. Moreover, the Court, with two exceptions, has consistently refused to address the question of the proper interpretation of *Feres*. *See* Rhodes, *supra* note 4, at 28.

[68] Jaffee v. United States, No. 79-1543 (3d Cir. Apr. 10, 1980)(order granting rehearing in banc and vacating judgment of Feb. 20, 1980).

[69] *See* 471 F. Supp. at 353-55; slip op. at 5 & n.4, 19 n.25.

[70] 471 F. Supp. at 346.

[71] *Id.*

[72] *See id.* at 347-49.

examinations, supervision, or other medical treatment during the seventeen years after his discharge."[73] The court found that such recovery was not only "consistent with *Feres*" but compelled by *United States v. Brown*,[74] a 1954 Supreme Court decision which permitted recovery under the FTCA for an injury incurred by a veteran after his discharge.[75] Furthermore, the court declard that "*Feres* . . . can have no application when [post discharge] intentional or unconstitutional conduct is involved."[76] Thus, even if the court on rehearing determines that *Feres* prohibits recovery for any injury incident to military service regardless of whether negligently or intentionally inflicted, plaintiffs in *Jaffee* may still seek recovery under the fifth amendment, including punitive damages,[77] for injuries sustained in the course of the post discharge cover-up of the nuclear experiments.

The arguments in favor of absolute immunity apply with far greater force to negligent activity than to willful deprivations of constitutional guarantees.[78] Immunity is an exception to the rule requiring individual responsibility, and as an exception it should not be construed so as to accomplish more than its intended purpose. A qualified immunity protects those who the courts are seeking to immunize by exposing to liability only those officials who demonstrate a

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[73] *Id.* at 349. Although this language was used in reference to a post discharge cause of action for negligence, the *Thornwell* court characterized count five, wherein Thornwell alleged an intentional cover-up, as an alternative to count four's claim for negligence. *Id.* at 353.

The Jaffees alleged that defendants failed to warn veterans who participated in the nuclear experiments of the ongoing risk from inhalated radioactive particles. The "[p]rospects for successful treatment" of the diseases which the atomic veterans have developed as a result of radiation exposure "decrease markedly when diagnosis and/or therapy is delayed." Amended Complaint at 9. *See also* slip op. at 5.

> [W]e have no occasion to consider whether an allegation that governmental officials knew of the risk of ongoing damage from ingested radioactive particles and deliberately or negligently failed to warn Jaffee of the ongoing hazard after Jaffee left military service would state a claim under [the FTCA].

Id.

[74] *Id.* at 349 (citing United States v. Brown, 348 U.S. 110 (1954)).

[75] 348 U.S. at 353.

[76] 471 F. Supp. at 353.

[77] *See* Carlson v. Green, 100 S. Ct. at 1473. Although the Supreme Court has not specifically addressed the question it has indicated that punitive damages are available in a *Bivens* action. *Id.*

The inadequacy of the FTCA as a mechanism for deterrence is reflected in its express prohibition against awarding punitive damages to the victims of unlawful governmental activity. *Id.* at 1474.

Plaintiffs in *Jaffee* sought $10,000,000.00 in punitive damages. Amended Complaint at 7.

[78] "[C]ivil-liability incentives may operate in different ways, varying in their effects with the class of act to which they are applied." Shepsle, *Official Errors and Official Liability*, 42 L. & CONTEMP. PROB. 35, 36 (1978).

deliberate and egregious disregard for the constitutional rights of servicemen: The abrogation of absolute immunity will promote "military responsive[ness] to basic principles of personal integrity."[79] Through a careful analysis of the interaction between federal common law and the law of immunity, the *Jaffee* court "achieve[d] a more finely ground product from the judicial mill,"[80] a product which insures the continued maintenance of military discipline and yet assures redress to the victims of willful military wrongs.

Maureen E. McTernan

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[79] Slip op. at 16.

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. . . . But I have been convinced that I was mistaken.

Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J.).

[80] Butz, 438 U.S. at 529 (Rehnquist, J., concurring in part, dissenting in part).