CLOSING THE EQUITABLE LOOPHOLE: ASSESSING THE SUPREME COURT'S NEXT MOVE REGARDING THE AVAILABILITY OF EQUITABLE RELIEF FOR MILITARY PLAINTIFFS

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INTRODUCTION

In *Feres v. United States*,[1] the United States Supreme Court held that members of the military could not sue government officials for injuries that "arise out of or are in the course of activity incident to service."[2] In so finding, the Court established a military exception to the Federal Tort Claims Act's ("FTCA")[3] broad waiver of sovereign immunity.[4] Since *Feres*, the breadth of the intramilitary immunity doctrine has expanded to preclude a variety of claims brought by military plaintiffs against their superior officers.[5] In 1983, the

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

[2] *Id.* at 146.

[3] 28 U.S.C. §§ 2671-2680 (2004).

[4] *See* 28 U.S.C. § 2674 (2004). Under the FTCA, the United States is liable for the acts of its employees "in the same manner and to the same extent as a private individual under like circumstances." *Id.* The grant of jurisdiction to federal courts appears at 28 U.S.C. § 1346(b) (2004).

[5] *See* Andrew P. Doman, United States v. Stanley*: Has the Supreme Court Gone a Step too Far?*, 90 W. VA. L. REV. 473, 476 n.24 (1987) (noting that very few military claims have prevailed under the intramilitary immunity doctrine adopted in *Feres*); Kevin J. Mahoney, United States v. Stanley*: Has the* Feres *Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENG. L. REV. 767 (1989); *see also* United States v. Johnson, 481 U.S. 681 (1987) (denying an action for injuries sustained incident to service but caused by the negligence of civilian, rather than military, employees); United States v. Shearer, 473 U.S. 52 (1985) (denying military damages claims by a serviceman whose injury occurred off-base and off-duty); Aguilar v. United States, 818 F.2d 194 (2d Cir. 1987) (refusing recovery for injuries caused by exposure to chemical herbicide in Vietnam); Scheppan v. United States, 810 F.2d 461 (4th Cir. 1987) (precluding recovery for medical malpractice); Flowers v. United States, 764 F.2d 759

Supreme Court, in *Chappell v. Wallace*,[6] broadened the doctrine of intramilitary immunity to preclude certain claims for constitutional violations brought by aggrieved military personnel against their superiors.[7] It is now legally established that military subordinates may not maintain damages claims in civilian courts for alleged constitutional violations committed by superior officers.[8] The circumstances under which service members may initiate suits for equitable relief, however, remain entirely unclear.

The Supreme Court has never drawn a precise line dividing justiciable from nonjusticiable intramilitary claims for equitable relief.[9] As a result, there has been disagreement among several federal circuit courts of appeals as to when intramilitary actions for equitable relief are reviewable in civilian forums.[10] The United States Courts of Appeals for the First,[11] Third,[12] and Tenth[13] Circuits have embraced a general principle that intramilitary immunity only precludes claims in which military plaintiffs seek monetary damages. Accordingly, these circuits are quick to review intramilitary claims that challenge individualized military personnel decisions, so long as the relief sought happens to be equitable. The United States Courts of Appeals for the Second,[14] Fourth,[15] Fifth,[16] Seventh,[17] Eighth,[18] and

(11th Cir. 1985) (holding that *Feres* bars recovery for injuries sustained going to and from a place of duty); Torres v. United States, 621 F.2d 30 (1st Cir. 1980) (refusing recovery for wrongful dishonorable discharge); Charland v. United States, 615 F.2d 508 (9th Cir. 1980) (finding that the *Feres* doctrine bars claim for off-duty and off-base service member involved in a volunteer training program).

[6] 462 U.S. 296 (1983).

[7] *Id.* at 305. In *Chappell*, the Supreme Court held that enlisted military personnel were not entitled to a "*Bivens*-type remedy against their superior officers." *Id.* at 304. A "*Bivens* action," first pronounced by the Supreme Court in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), provides a private right of action to citizens whose constitutional rights have been violated by federal officials. *See id.* at 397. For a more in-depth description of *Bivens* actions, see *infra* notes 111-19 and accompanying text.

[8] *See* United States v. Stanley, 483 U.S. 669, 683-84 (1987) (holding that "no *Bivens* remedy is available [to military personnel] for injuries that 'arise out of or are in the course of activity incident to service.'") (quoting *Feres*, 340 U.S. at 146).

[9] *See* Dibble v. Fenimore, 339 F.3d 120, 126 (2d Cir. 2003).

[10] *See id.* at 126-28.

[11] Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000).

[12] Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3d Cir. 1986).

[13] Walden v. Bartlett, 840 F.2d 771 (10th Cir. 1988).

[14] *Dibble*, 339 F.3d at 127-28.

[15] Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641 (4th Cir. Sept. 23, 1993).

[16] Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986).

D.C.[19] Circuits, however, have adopted the position that intramilitary immunity prohibits actions for both monetary *and* equitable relief, except where equitable actions amount to broad challenges to the constitutionality of military rules or regulations. Not surprisingly, these circuits will not entertain equitable actions that challenge military personnel decisions, even where a service member's constitutional rights are allegedly violated.[20]

This Comment provides a detailed description of the current disagreement among the federal circuits as to the justiciability of equitable intramilitary actions that challenge personnel decision-making, and argues that the Supreme Court will expand the intramilitary immunity doctrine once more to preclude all intramilitary claims for equitable relief, unless the action amounts to a broad constitutional challenge to the facial validity of a military edict. Part I of this Comment briefly recounts the historical evolution of intramilitary immunity throughout common law England and under early American jurisprudence. Part II focuses on the Supreme Court's decisions in *Feres* and its progeny, and outlines the current state of intramilitary immunity. Part III sets forth a detailed circuit-by-circuit account of the current incongruity among federal courts regarding the availability of equitable relief for military plaintiffs. Finally, Part IV examines the instructions so far provided by the Supreme Court as to the availability of equitable relief for military plaintiffs, and proposes that, based on these precedents, the Supreme Court will eventually expand the doctrine of intramilitary immunity once again to preclude all intramilitary claims for equitable relief that do not amount to facial challenges to the constitutionality of military regulations.

I. INTRAMILITARY IMMUNITY: A HISTORICAL BACKGROUND

A. Intramilitary Immunity from Tort Liability in Common Law England

The roots of intramilitary immunity date back to early England.[21]

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[17] Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993).

[18] Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989).

[19] Kreis v. Sec'y of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989).

[20] *See Dibble*, 339 F.3d at 126.

[21] For an excellent account of the development of intramilitary immunity throughout common law England see generally Donald Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C. L. REV. 489 (1982). *See also*

Under English common law, no civil actions in tort were permitted against the Crown or any of its subordinates for misdeeds expressly authorized by the State, or for wrongs committed by state officials during the course of their employment.[22] By extension, English common law afforded immunity to the Crown from liability for all tort claims brought by military personnel against the national government.[23] Individual officers, however, did not enjoy the same immunity as the Crown.[24] As a consequence, most early English intramilitary claims involved suits for intentional conduct brought by military servicemen against their superior officers.[25]

Several cases highlight the development of intramilitary immunity under British common law. *Sutton v. Johnstone*[26] was the first case to set a major precedent in that realm. *Sutton* considered whether a naval officer could be held civilly liable when, under authority of the Crown, he maliciously and without good reason mistreated a subordinate officer.[27]

Johnstone was the squadron commander of a 1786 British Naval expedition.[28] After Johnstone's squadron came under attack by French war ships, Sutton, a subordinate commanding officer of one of the expedition's ships, failed upon a direct order to promptly pursue the French attackers.[29] Johnstone then, on grounds of cowardice, treachery, disloyalty, and disobedience, removed Sutton from command, arrested and imprisoned him for over two years, and later court-martialed him.[30] Sutton, after being acquitted on all

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Mahoney, *supra* note 5, at 768-71 (describing the development of intramilitary immunity from tort liability in common law England). This Comment recounts some of that development for the convenience of the reader.

[22] T. ELLIS LEWIS, WINFIELD ON TORTS 100 (6th ed. 1954). Neither heads of state departments nor superior officers of the state were personally liable for the tortious actions of their subordinates, unless they expressly authorized the wrongs committed. *Id.* at 100-01. In that instance, the individual could be liable in his personal capacity, but not as an agent or officer of the Crown. *Id.* at 101. Nor could the Crown or any state department be held vicariously liable for any such action. *Id.* State departments enjoyed the same immunity afforded the Crown unless expressly provided otherwise by statute. *Id.* (citing as an example the Ministry of Transport Act, 1919, 9 & 10 Geo. 5, c. 50, § 26 (Eng.)).

[23] *See* Zillman, *supra* note 21, at 492.

[24] *Id.*

[25] *Id.*

[26] 99 Eng. Rep. 1215 (K.B. 1786).

[27] *Id.* at 1220.

[28] *Id.* at 1218.

[29] *Id.* at 1216.

[30] *Id.* at 1217.

charges by a court-martial, brought civil claims against Johnstone for his arrest and suspension, for damage done to his reputation, and for malicious prosecution.[31] In his defense, Johnstone asserted that no civil cause of action could be established where claims involving court-martial proceeding were based upon actions taken by superior officers in the course of military discipline.[32] In the alternative, Johnstone claimed that Sutton's arrest and subsequent court-martial were warranted by his refusal to obey direct orders.[33] The Court of Exchequer, sitting on appeal, rejected both of Johnstone's contentions and affirmed judgment for Sutton.[34]

Upon writ of error, the Lord Chancellor found in Johnstone's favor, holding that no cause of action existed because Sutton's prosecution was established upon probable cause.[35] After addressing the essential issues raised, the court, in dicta, focused on the issue of immunity.[36] Amid concerns that civilian review of intramilitary claims might threaten military discipline, Justice Mansfield seemed to embrace the notion of absolute immunity.[37] The Justice reasoned

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[31] *Id.* at 1218.

[32] *Sutton*, 99 Eng. Rep. at 1220.

[33] *See* Zillman, *supra* note 21, at 493.

[34] *Id.* Baron Eyre, writing the opinion for the Court of Exchequer, acknowledged circumstances in which civil courts must defer considerably to the decisions made by military superiors. *Id.* The court, however, refused to proffer absolute immunity to military officials from tort actions that arise incident to service, holding that civil review of military conduct would not adversely affect military effectiveness. *Id.* at 493-94.

[35] *Sutton*, 99 Eng. Rep. at 1243 ("There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal.").

[36] *See* Zillman, *supra* note 21, at 494.

[37] *Sutton*, 99 Eng. Rep. at 1246. The court explained:

> The salvation of this country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends, and harmless to the enemy.
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> Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places.
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> A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?

that military law, and not the civil system, was appropriately equipped to address all grievances by servicemen, even where superior officers use discretionary powers maliciously to abuse or oppress their subordinates.[38]

Eighty years later, in *Dawkins v. Lord Rokeby*,[39] the English court again addressed the availability of civil remedies for intramilitary transgressions. That case arose when Dawkins, an officer in the Coldstream Guards, was arrested and jailed for eleven days after refusing to shake hands with Lord Rokeby, his superior officer.[40] Rokeby ultimately caused Dawkins to retire from the military at half-pay.[41] Dawkins brought a civil action against Lord Rokeby for false imprisonment, malicious prosecution, and conspiracy to cause his early retirement from the military.[42] The court found that Dawkins could not obtain redress in civil court even if it were shown that Lord Rokeby acted maliciously and without probable cause.[43] The compact between soldier and the military, the court stated, prevents the former from seeking civil compensation.[44] The court reasoned that men who join the military forfeit some constitutional rights and subject themselves to "military rule and military discipline."[45] The court also suggested that civilian courts were incompetent to resolve military matters,[46] and that the military system of justice was a more

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> If this action is admitted, every acquittal before a court-martial will produce one.
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> Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.

Id. Subsequent opinions indicate that many in the House of Lords did not fully agree with Mansfield's assessment of the immunity issue. *See* Zillman, *supra* note 21, at 494 (citing Warden v. Bailey, 128 Eng. Rep. 253, 256 (K.B. 1811) (comment of Lawrence, J.)).

[38] *Sutton*, 99 Eng. Rep. at 1246 ("The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service."). Significantly however, the court, immediately following, recognized that such determinations as to the appropriateness of affording military officers absolute immunity from suit were not essential to its immediate holding, and indicated that such an important consideration was a question for the highest judicial authority. *Id.*

[39] 176 Eng. Rep. 800 (L.R.-C.P. 1866).

[40] *Id.* at 800-04.

[41] *Id.*

[42] *Id.* at 800.

[43] *Id.* at 812.

[44] *Id.* at 811.

[45] *Dawkins*, 176 Eng. Rep. at 811.

[46] *Id.* ("[A] man, by becoming a soldier, and receiving the Queen's pay, does

appropriate forum for Dawkins' claims.[47]

Dawkins brought a subsequent action for defamation against Lord Paulet, another of his superior officers.[48] That claim arose when Lord Paulet made derogatory comments about Dawkins to his superiors while forwarding along Dawkins' initial complaints about Lord Rokeby.[49] The court, in a split decision, held that Lord Paulet was entitled to immunity because the defamatory comments alleged were uttered while in performance of military duties.[50] Moreover, the court suggested that Lord Paulet could not be prosecuted in a civilian forum even for administering his military duties maliciously.[51] In finding Dawkins' claim nonjusticiable, the court, relying heavily on *Sutton*, echoed the military discipline and expertise rationales.[52] In its view, the Articles of War, promulgated by Parliament, had exclusive authority over Dawkins' claim.[53]

It is clear that English courts never adopted a policy of absolute immunity for military officers from civil tort claims arising out of actions taken in performance of military duties.[54] It is equally clear, however, that English courts were comfortable affording military officers substantial deference to administer their military duties.[55] Rationales for affording such deference included the need to ensure

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agree and consent that he shall be subject to military discipline, and he cannot appeal to civil courts to rescue him from his own compact.").

[47] *Id.* at 812. Dawkins brought a second claim against Lord Rokeby, alleging libel and slander for comments made by him during a court of inquiry regarding Dawkins' unsuitability for command. Dawkins v. Lord Rokeby, 8 L.R.-Q.B. 255 (1873). The court, while ultimately dismissing Dawkins' claims, limited its holding to the immunity afforded witnesses during civil proceedings, so the ruling was unclear as to the scope of immunity afforded military officials. *Id.* at 263-64. The court did state, however, that *Sutton* provided authority "that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal, and not by a court of law." *Id.* at 271.

[48] Dawkins v. Lord Paulet, 5 L.R.-Q.B. 94 (1869).

[49] *Id.* at 111-12.

[50] *Id.* at 113-15.

[51] *Id.* at 114 ("I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable [in a civilian court], however maliciously they may be.").

[52] *See id.* at 114-17.

[53] *Id.* at 117.

[54] *Dawkins*, 5 L.R.-Q.B. at 117; *see also* Frazer v. Balfour, 87 L.J.K.B. 1116 (1918) (recognizing that the issue of intramilitary immunity was still unresolved and noting that the issue involved "constitutional questions of the utmost gravity").

[55] *See Dawkins*, 176 Eng. Rep. at 812 (finding that a military subordinate might still be denied civil compensation for an injury caused by a superior officer acting maliciously and in bad faith).

an effective system of military discipline and the perceived incompetence of civilian courts to sit in plenary review of military matters. Perhaps not surprisingly, these same sentiments were echoed throughout early American common law, and continue to reverberate today in courthouses across the country struggling to determine the appropriate function of civilian courts in intramilitary disputes.

B. Intramilitary Immunity Under American Common Law

American common law did not always afford military officers absolute immunity from damages claims involving intramilitary torts.[56] In *Wilson v. Mackenzie*,[57] for example, a naval officer was sued for beating and imprisoning an enlisted landsman. The defendant claimed entitlement to absolute immunity by virtue of his position as a naval officer.[58] The New York Supreme Court of Judicature, however, allowed the claim to proceed, observing that English courts permitted civil suits for actions taken in the name of military discipline.[59]

In 1849, the United States Supreme Court first wrestled with the intramilitary immunity issue in *Wilkes v. Dinsman*.[60] In that case, Captain Wilkes, a United States naval commander, headed a government expedition to the South Seas.[61] Dinsman, a marine serving on one of the expedition's ships, refused to follow orders after a dispute arose concerning his status as an enlisted man.[62] Captain Wilkes, apparently concerned that Dinsman might incite mutiny, had the marine flogged, arrested, and imprisoned for refusing to perform his regular duties.[63] Dinsman eventually sought redress in civil court for assault, false imprisonment, and for violations of his constitutional rights.[64] The Supreme Court held that military officers are not liable in civil actions for exercising official discretion, unless power is exercised outside of military authority in a

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[56] *See* Zillman, *supra* note 21, at 499.
[57] 7 Hill 95 (N.Y. Sup. Ct. 1845).
[58] *Id.* at 100.
[59] *Id.*
[60] 48 U.S. (7 How.) 89 (1849).
[61] Zillman, *supra* note 21, at 499.
[62] *Id.* at 499-500.
[63] *Id.*
[64] *Id.* at 500.

malicious, cruel, or willfully oppressive manner.[65] The presumption existed, the Court held, that an officer has legitimately performed his duties in good faith unless it could be proven otherwise.[66] The Court emphasized that officers cannot be liable for errors in judgment, but may be punished civilly for administering military authority in bad conscience.[67]

Upon remand, a jury found in favor of Captain Wilkes and the Supreme Court granted certiorari for a second time.[68] The Court, attempting to clarify its earlier decision, reiterated that Captain Wilkes was not liable for discharging military authority in good faith, even where such authority was exercised in error.[69] Chief Justice Taney, recognizing the gravity of the issue and attempting to balance the needs of individual servicemen with the unique structure of the military, stated:

> The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.[70]

So, the Court, while recognizing the strong public interest in preserving the establishment of military discipline, did not go as far as many of its English predecessors, insofar as it recognized a civil cause of action where superior officers act maliciously or outside the scope of their authority.[71] Pursuant to *Dinsman*, therefore, military defendants were clearly not immune to judicial penalties.

As governments enacted statutes waiving sovereign immunity for the tortious acts of their agents, an alternative system of recovery for

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[65] *Wilkes*, 48 U.S. (7 How.) at 130.
[66] *Id.* at 130-32.
[67] *Id.* at 130-31.
[68] Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851).
[69] *Id.* at 403-04.
[70] *Id.* at 403.
[71] *See id.*

military plaintiffs emerged.[72] In *Dobson v. United States*,[73] for example, the United States Court of Appeals for the Second Circuit addressed whether military personnel could recover civil damages pursuant to the Public Vessels Act,[74] which subjected the federal government to liability for "damage caused by a public vessel of the United States."[75] In refusing to provide relief, the Second Circuit injected into the Public Vessels Act a prohibition against military claims, even though the statute itself was silent regarding torts arising incident to military service.[76] In reaching its determination, the court acknowledged the availability of military systems of recourse.[77]

In *Goldstein v. New York*,[78] a national guardsman sued the State of New York under the New York Court of Claims Act ("Claims Act") for the negligence of a fellow guardsman. The New York Court of Appeals ruled that military personnel were not "officers or employees" within the meaning of the Claims Act, and were therefore precluded from statutory recovery.[79] The court, however, seemed to echo the sentiment articulated in *Dobson*—that military systems of

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[72] *See, e.g.*, Suits in Admiralty Act, Pub. L. No. 66-156, 41 Stat. 525 (1920) (current version at 46 U.S.C. app. §§ 741-752 (2004)) (permitting suits against the United States in admiralty cases when the government's merchant vessels negligently caused injury); Public Vessels Act, Pub. L. No. 68-546, 43 Stat. 1112 (1925) (current version at 46 U.S.C. app. §§ 781-790 (2004)) (granting authority to sue the United States in admiralty when public vessels caused damages, and allowing recovery for towage and salvage services rendered to public vessels); Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (current version at 10 U.S.C. §§ 2731-2739 (2004)) (authorizing designated officers to administratively settle small claims for damages, loss of property, or for personal injury or death caused by military or civilian personnel); Federal Employee Compensation Act, Pub. L. No. 64-267, 39 Stat. 742 (1916) (current version at 5 U.S.C. §§ 8101-8152 (2004)) (providing compensation for federal civilian employees injured while performing their duties), *cited in* John Astley, Note, United States v. Johnson*:* Feres *Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 190 n.31 (1988).

[73] 27 F.2d 807 (2d Cir. 1928).

[74] Act of Mar. 3, 1925, ch. 428, § 1, 43 Stat. 1112 (revised Aug. 26, 1983) (current version at 46 U.S.C. app. §§ 781-790 (2004)).

[75] *Id.*

[76] *See Dobson*, 27 F.2d at 808-09. The *Dobson* court explicitly acknowledged that no language within the Public Vessels Act precluded claims by members of the military. *Id.* at 808. The court, however, found that a statutory construction allowing military remedies would "involve[] so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning." *Id.* at 808-09.

[77] *Id.* The court made specific reference to a statutory pension system set up for enlisted naval personnel injured or killed in the line of duty. *Id.*

[78] 24 N.E.2d 97 (1939).

[79] *Id.* at 101.

compensation are the proper venue for servicemen seeking redress for injuries resulting from military service.[80]

American courts consistently found ways to deny relief to service members for injuries suffered during military activity.[81] On the whole, these courts, like their English predecessors, cited the importance of military discipline and the availability of alternative systems of redress as the principle reasons to deny relief.[82]

C. The Federal Tort Claims Act

A significant development in the evolution of the American doctrine of intramilitary immunity came in 1946, when Congress enacted the Federal Tort Claims Act.[83] Generally, the FTCA subjects the United States to liability for negligent or wrongful acts committed by governmental agents operating within the scope of their employment.[84] The FTCA arose in response to general concerns over the injustices presented when citizens, injured by the tortious acts of government officials, were denied recovery on the basis of sovereign immunity.[85] The Act provides, in part, that "[t]he United States shall be liable . . . to tort claims, in the same manner and to the same

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[80] *See id.* at 100 ("We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of pension . . . . [A] complete system is set up for handling such claims.").

[81] *See* Zillman, *supra* note 21, at 502.

[82] *See, e.g.*, Bradley v. United States, 151 F.2d 742 (2d Cir. 1845); O'Neal v. United States, 11 F.2d 869 (E.D.N.Y. 1925); Moon v. Hines, 87 So. 603 (Ala. 1921); Seidel v. Director General, 89 So. 308 (La. 1921); McAuliffe v. New York, 176 N.Y.S. 679 (N.Y. Ct. Cl. 1919), *cited in* Zillman, *supra* note 21, at 502 nn.68-69.

[83] 28 U.S.C. §§ 2671-2680 (2004).

[84] *See* 28 U.S.C. § 2674 (2004).

[85] *See* Rayonier, Inc. v. United States, 352 U.S. 315 (1957). As the *Rayonier* Court acknowledged:

> Congress was aware that when losses caused by [governmental] negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

Id. at 320; *see also* J. Thomas Morina, *Denial of Atomic Veterans' Tort Claims: The Enduring Fallout from* Feres v. United States, 24 WM. & MARY L. REV. 259, 261 (1983) (stating that the FTCA was motivated by a desire to avoid the "time consuming, inefficient, and often inequitable process of reviewing . . . private bills" sanctioning governmental liability).

extent as a private individual under like circumstances."[86] Furthermore, the terms of the FTCA allow for governmental liability in the state where the incident occurs.[87] The FTCA, therefore, extended existing common law tort jurisprudence to the United States as a defendant.

Congress specified several exceptions in which liability pursuant to the FTCA does not extend to the United States.[88] Although

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[86] 28 U.S.C. § 2674.

[87] *See* 28 U.S.C. § 1346(b) (2004).

[88] 28 U.S.C. § 2680 (2004). The exceptions read as follows:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law

Congress considered many provisions significantly limiting governmental exposure to liability in situations involving military personnel,[89] it ultimately chose to preclude only "claim[s] arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[90]

In 1949, the United States Supreme Court had its first opportunity to determine whether military personnel could maintain actions against the federal government pursuant to the FTCA. In *Brooks v. United States*,[91] two claims were filed against the government after a negligently driven Army truck struck the vehicle of two servicemen while both were off-base and off-duty; one serviceman was injured and the other was killed.[92] The government sought dismissal of both actions, arguing that each plaintiff was precluded from civil recovery given his enlisted status at the time of the accident.[93] The Court, recognizing that Congress considered and then refused

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> enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
>
> (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.
>
> (l) Any claim arising from the activities of the Tennessee Valley Authority.
>
> (m) Any claim arising from the activities of the Panama Canal Company.
>
> (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

[89] *See* H.R. 12178, 68th Cong. (1925); H.R. 12179, 68th Cong. (1925); S. 1912, 69th Cong. (1925); H.R. 6716, 69th Cong. (1926); H.R. 8914, 69th Cong. (1926); H.R. 9285, 70th Cong. (1928); S. 4377, 71st Cong. (1930); H.R. 15428, 71st Cong. (1931); H.R. 16429, 71st Cong. (1931); H.R. 17168, 71st Cong. (1931); H.R. 5065, 72d Cong. (1932); S. 211, 72d Cong. (1932); S. 4567, 72d Cong. (1932); S. 1833, 73d Cong. (1933); H.R. 129, 73d Cong. (1933); H.R. 8561, 73d Cong. (1934); H.R. 2028, 74th Cong. (1935); S. 1043, 74th Cong. (1935), *cited in* Brooks v. United States, 337 U.S. 49, 51 (1949).

[90] 28 U.S.C. § 2860(j) (2004).

[91] 337 U.S. 49 (1949).

[92] *Id.* at 50.

[93] *Id.* at 50-51.

several versions of the FTCA that would have provided immunity from military claims, held that military personnel were not necessarily precluded from redress under the Act.[94] While the Court allowed the claims to proceed, it predicated its decision upon findings that the military plaintiffs involved were not engaged in military activities at the time of the incident.[95] Thus, the Court did not adjudicate the broader issue of whether military personnel could sustain FTCA claims for injuries suffered during military service.[96]

II. THE EVOLUTION OF THE *FERES* DOCTRINE

A. Feres v. United States

In 1950, the Supreme Court dealt a severe blow to the aggrieved military plaintiff's ability to recover damages under the FTCA for injuries suffered during military service. *Feres v. United States*[97] involved three negligence claims brought by servicemen against the government for injuries resulting from their military activities. The first claim was brought on behalf of Rudolph J. Feres, a serviceman killed in a barracks fire.[98] The second suit, brought by serviceman Arthur K. Jefferson, arose after military doctors mistakenly left a towel inside of his abdomen during a routine surgical procedure.[99] The final action, also for medical negligence, was brought on behalf of deceased serviceman Dudley R. Griggs.[100] The Supreme Court, after consolidating the three claims, held that the federal government is not liable under the FTCA for injuries to servicemen that arise from activities "incident to service."[101]

The Court articulated several justifications for its decision. First, American law traditionally did not allow recovery for servicemen injured during military performance.[102] The Court reasoned that the responsibility for clarifying the intent of the FTCA in that respect rested exclusively with Congress.[103] Second, the Court foresaw

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[94] *Id.* at 51-54.
[95] *Id.* at 52-53.
[96] *See id.*
[97] 340 U.S. 135 (1950).
[98] Feres v. United States, 177 F.2d 535 (2d Cir. 1949).
[99] Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).
[100] Griggs v. United States, 178 F.2d 1 (10th Cir. 1949).
[101] *Feres*, 340 U.S. at 146.
[102] *Id.* at 141-42.
[103] *Id.* at 138-41.

impracticality in applying the FTCA to military claims because the controlling substantive law in each action would depend upon the location where the injury occurred.[104] Subjecting military personnel to the nuances of each state's body of tort law would be irrational, the Court explained, especially given the distinctly federal nature of the relationship between soldier and government.[105] Lastly, the Court reasoned that military compensation schemes were analogous to workmen's compensation, and suggested that military injuries could be appropriately addressed within those specialized venues.[106]

The *Feres* Court, thus, succeeded in creating a relatively broad sphere of immunity for government officials from military claims by establishing such a significant exception to the FTCA.[107] While the decision is certainly not immune from criticism,[108] it is now quite clear that service members are precluded from bringing actions under the FTCA for injuries suffered during military activity.[109] Since *Feres*, the Supreme Court has observed that the *Feres* doctrine is designed largely to prevent federal courts from interfering with military discipline and decision-making.[110]

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[104] *Id.* at 142-43.

[105] *Id.* at 143 (citing United States v. Standard Oil Co., 332 U.S. 301 (1947)).

[106] *Id.* at 144-45.

[107] *Feres*, 340 U.S. at 144-45.

[108] *See, e. g.*, Sanchez v. United States, 813 F.2d 593, 595 (2d Cir. 1987); Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985); Hinkie v. United States, 715 F.2d 96, 97 (3d Cir. 1983); Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983); Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982); LaBash v. United States Dept. of Army, 668 F.2d 1153, 1156 (10th Cir. 1982); Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981); Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980); Veillette v. United States, 615 F.2d 505, 506 (9th Cir. 1980); Parker v. United States, 611 F.2d 1007, 1011 (5th Cir. 1980); Peluso v. United States, 474 F.2d 605, 606 (3d Cir. 1973); Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1985); Lt. Col. Robert A. Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954); Capt. Robert L. Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); Mark Lloyd Smith, Note, *Federal Tort Claims Act – Government Liability for Personal Injuries to Military Personnel*, 51 J. AIR L. & COM. 1087 (1986); Susan Cohen-Klein & Howard Berkower, Note, *The Cancer Spreads: Atomic Veterans Powerless in the Aftermath of* Feres v. United States, 6 CARDOZO L. REV. 391 (1984); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979); Note, *Military Rights Under the FTCA*, 43 ST. JOHN'S L. REV. 455 (1969), *cited in* United States v. Johnson, 481 U.S. 681, 701 (1987) (Scalia, J., dissenting). In *Johnson*, Justice Scalia indicated that *Feres* should be overruled, and suggested that any criticism the decision has ever received is "heartily deserve[d]." *Id.* at 700-01 (Scalia, J., dissenting).

[109] *See, e.g.*, *Johnson*, 481 U.S. at 691-92.

[110] *See* United States v. Muniz, 374 U.S. 150, 162 (1963). In *Muniz*, the Court explained:

B. Extension of the Feres *Doctrine to Constitutional Torts*

1. The Constitutional Tort

Tort claims for damages resulting from violations of constitutional rights have been a major development over the last several years.[111] Section 1983 of the Federal Civil Rights Act[112] was the first instrument to sanction individual claims to redress constitutional and statutory violations resulting from actions taken by state officials under the color of state law. Federal branches of the military, however, remain outside the purview of § 1983 because of the statutory requirement that constitutional violations be committed at the hands of state actors.[113] As a result, much of § 1983 litigation concerning military plaintiffs involves claims by national guardsmen against state officials.[114]

In 1971, the Supreme Court, on its own initiative, significantly expanded the ability of individuals to maintain actions against federal officials for constitutional violations, even when no federal statute authorizes a specific claim. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[115] a plaintiff sought damages for violations of his constitutional rights after federal agents, under the color of federal authority, ransacked his apartment during an unlawful and warrantless search and seizure.[116] The government urged that the plaintiff's asserted right to privacy was a creation of state law, and was

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> In the last analysis, *Feres* seems best explained by "the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ."

Id. (citing United States v. Brown, 348 U.S. 110, 112 (1954)); *see also* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672-73 (1977) (emphasizing that *Feres* is supported in part by the negative effect on military discipline that would result from second guessing military decision-making); *Johnson*, 481 U.S. at 684 (same).

[111] *See* Zillman, *supra* note 21, at 526.

[112] 42 U.S.C. § 1983 (2004).

[113] *See id.*

[114] *See, e.g.*, Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000); Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3d Cir. 1986); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Christoffersen v. Wash. State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988).

[115] 403 U.S. 388 (1971).

[116] *Id.* at 389.

therefore only redressable in state court.[117] The Supreme Court rejected the government's position, however, and held that the Fourth Amendment itself created a general right to maintain actions for damages when federal officials invade legal rights.[118] The Court concluded that the plaintiff could recover monetary damages because "no special factors counselling hesitation in the absence of affirmative action by Congress" were present.[119] Thus, *Bivens* created a federal common law counterpart to § 1983 for constitutional violations committed by federal officials.

2. *Chappell v. Wallace*—The "Equitable Exception" to Intramilitary Immunity Articulated

In 1972, the Supreme Court revisited its holding in *Bivens* to confront the issue of whether enlisted military personnel could maintain *Bivens*-type actions against their superior officers for constitutional violations suffered during military service. In *Chappell v. Wallace*,[120] five black Navy enlisted men brought claims to recover damages from several of their superior officers, alleging that they were discriminated against on the basis of race in violation of their constitutional rights.[121] The Supreme Court, rejecting a Ninth Circuit Court of Appeals conclusion that *Bivens* authorized damages for the constitutional violations alleged in the plaintiffs' complaints,[122] held that military personnel could not maintain damages claims against superior officers, even when their constitutional rights were violated.[123] Justice Burger, writing for a unanimous Court, offered several justifications for its decision. Initially, the Court reiterated that *Bivens*-type remedies should be precluded when "special factors counselling hesitation are present."[124] The Court then stressed the importance of maintaining the establishment of military discipline and noted several difficulties presented when civilian courts

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[117] *See id.* at 390-91.

[118] *Id.* at 395-97.

[119] *Id.* at 396. Since *Bivens*, the Supreme Court has found that actions for damages can be brought directly under the Due Process Clause of the Fifth Amendment, and under the Eighth Amendment's proscription against cruel and unusual punishment. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

[120] 462 U.S. 296 (1983).

[121] *Id.* at 297.

[122] *See* Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981).

[123] *Chappell*, 462 U.S. at 305.

[124] *Id.* at 298. The "special factors" analysis, the Court noted, also formed the basis for its decision in *Feres*. *Id.* at 298-99.

haphazardly interfere with "the peculiar and special relationship of the soldier to his superiors."[125] Accordingly, Justice Burger warned that civilian courts must think long and hard before tampering in matters concerning the unique relationship between officer and enlisted man—a bond essential to the establishment of an effective military structure.[126]

Next, the *Chappell* Court expressed its view that the United States Constitution provides Congress and the President, not civilian courts, with direct and exhaustive control over the framework of military rights, duties, and responsibilities, as well as over military regulations and procedures.[127] The Court posited that Congress exercised its plenary authority over the military by establishing an independent internal military system of justice to regulate disciplinary matters.[128] The Court also noted the availability of military administrative procedures to aggrieved enlisted men and suggested that those channels of redress, such as the disciplinary board specifically provided for by the Navy, are far more appropriate and better equipped to regulate military life than are federal courts.[129] Moreover, the Court reasoned, because Congress did not provide for a damages remedy within the military justice system for aggrieved servicemen, it would be entirely inconsistent for courts to do so—especially given the clear constitutional authority afforded Congress to regulate such matters.[130] The Court concluded that "[t]aken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."[131]

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[125] *Id.* at 300 (citing United States v. Brown, 348 U.S. 110, 112 (1954)).

[126] *Id.*

[127] *Id.* at 300-02 (citing U.S. CONST. art. I, § 8, cls. 12-14).

[128] *Chappell*, 462 U.S. at 302.

[129] *Id.* at 302-04. The Court made specific reference to the procedures and remedies established by Congress in Article 138 of the Uniform Code of Military Justice, which allows any aggrieved member of the armed forces to file complaints against his superior officers directly with the official "exercising general court-martial jurisdiction over the officer against whom [the complaint] is made." *Id.* at 302-03 (citing 10 U.S.C. § 938 (2004)). The Court also recognized the Board for the Correction of Naval Records set up by Congress as another means by which plaintiffs could have sought to correct the injustices alleged in their complaints. *Id.* at 303 (citing 10 U.S.C. § 1552(a) (2004)).

[130] *Id.* at 304.

[131] *Id.*

Before finalizing its opinion, the Court stated that it "has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."[132] Justice Burger then provided three examples of military claims maintained by servicemen to redress constitutional violations that were justiciable in federal courts.[133] Each case cited by the Court involved constitutional challenges by members of the armed services to the facial validity of established military rules or regulations.[134] Of the three viable actions cited by the Supreme Court, none involved a challenge to military personnel decisions, as was the case in *Chappell*. While only one plaintiff was successful in her claim,[135] all three were permitted access to the federal system without question. As it was, the Court in *Chappell* began sketching the obscured line dividing justiciable from nonjusticiable equitable intramilitary actions.

3. *United States v. Stanley*—The Equitable Exception to Intramilitary Immunity "Clarified"

In 1987, the Supreme Court had a chance to clarify its holding in *Chappell* regarding the justiciability of intramilitary claims for equitable relief. In *United States v. Stanley*,[136] a military plaintiff brought *Bivens* actions against several military officials after he was secretly administered lysergic acid diethylamide (LSD) as part of an Army scheme to test effects of the chemical on human subjects.[137]

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[132] *Chappell*, 462 U.S. at 304.

[133] *Id.* (citing Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973)). For an extended analysis of these decisions see *infra* Part IV.B.

[134] *Brown v. Glines* involved a First Amendment challenge to an Air Force regulation that required members of the service to obtain approval from their commanding officers before circulating petitions on Air Force bases. 444 U.S. at 349. In *Parker v. Levy*, the plaintiff, an Army physician, challenged several articles of the Uniform Code of Military Justice under the First and Fifth Amendments. 417 U.S. at 735-37. *Frontiero v. Richardson* involved a Due Process challenge to a federal statute under the Fifth Amendment. 411 U.S. at 678-80. For an extended analysis of these decisions see *infra* Part IV.B.

[135] *See Frontiero*, 411 U.S. at 690-91 (concluding that the differential treatment afforded male and female members of the armed services under the challenged federal statutes violated the Due Process Clause of the Fifth Amendment because of the requirement that female members prove the dependency of their husbands); *see also infra* Part IV.B.

[136] 483 U.S. 669 (1987).

[137] *Id.* at 671-72. The testing in this case resulted in severe personality changes to the plaintiff, and eventually led to the dissolution of his marriage. *Id.*

The United States Court of Appeals for the Eleventh Circuit, relying on a misinterpretation of *Chappell*, upheld a district court ruling that the plaintiff could proceed with his *Bivens* claims because the alleged wrongs did not involve an officer-subordinate relationship, and, as such, did not implicate the disciplinary concerns articulated in *Chappell*.[138] The Supreme Court, rejecting nearly every rationale offered by the court of appeals, held that the "special facto[r]" that "counsel[s] hesitation" in intramilitary actions is "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."[139] The Court concluded that no *Bivens* actions could be maintained for injuries that "arise out of or are in the course of activity incident to service."[140] Thus, the Court effectively precluded all claims by service members seeking monetary damages against superior officers for constitutional violations suffered during military activity.

The *Stanley* Court then expounded slightly upon its language in *Chappell* regarding the availability of equitable relief for military plaintiffs. Justice Scalia, reciting the three decisions referred to in *Chappell* as examples of justiciable intramilitary claims,[141] explained that those actions were maintainable in civilian forums because they were meant to "halt or prevent" constitutional violations rather than award monetary damages.[142] Such cases, the Court explained further, can proceed because they seek traditional forms of relief rather than a "new kind of cause of action."[143] Thus, while both *Chappell* and *Stanley* addressed the equitable exception to intramilitary immunity, neither succeeded in precisely defining its scope.

C. Chappell *and* Stanley *Extended to § 1983 Claims*

The Supreme Court expressly declined to determine whether statutory claims for alleged constitutional violations against state officials were similarly precluded under the *Chappell* rationale.[144] In

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[138] *See* Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986).

[139] *Stanley*, 483 U.S. at 683.

[140] *Id.* at 684 (quoting *Feres*, 340 U.S. at 146).

[141] *See supra* notes 133-34.

[142] *Stanley*, 483 U.S. at 683.

[143] *Id.* (quoting *Chappell*, 462 U.S. at 305 n.2).

[144] *See Chappell*, 462 U.S. at 305 n.3. The Court stated:

> We leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioners in violation of 42 U.S.C. § 1985(3) can be maintained. This issue was not adequately addressed either by the

Butz v. Economou,[145] however, the Court left little doubt that actions brought under § 1983 and those raised pursuant to *Bivens* must be treated identically, at least in terms of the immunity afforded government agents.[146] This notion seems hardly controversial since the Supreme Court has long recognized that the issue of immunities is the same whether suits involve federal, state, or local officials.[147] Accordingly, several federal circuits, acknowledging the breadth of intramilitary immunity, have extended the doctrine to actions brought by military personnel against state officers, as well as federal officials acting under the color of state law, pursuant to § 1983.[148] Many courts extending intramilitary immunity to bar § 1983 claims have observed that the disruptive effects on military discipline are the same regardless of whether military plaintiffs seek damages against state agents under § 1983 or against federal officers pursuant to *Bivens*.[149] Other federal courts, however, have expressly refused to apply *Chappell* to § 1983 claims.[150] In *Scott v. Rice*,[151] for example, the

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Court of Appeals or in the briefs and oral argument before this Court.

Id. 42 U.S.C. § 1985(3) (2004) provides a private right of action to individuals when state actors conspire to deprive or interfere with constitutional rights.

[145] 438 U.S. 478, 500 (1978).

[146] *Id.* at 500-02. In *Butz*, the federal government argued that federal officials should receive greater immunity from *Bivens* claims than state officials receive from claims brought pursuant to § 1983. *Id.* at 485. The Court, however, rejected the government's claim, stating that it is "untenable to draw a distinction . . . between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 504; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982) (following *Butz*).

[147] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 265 n.17 (1997) (citing *Harlow*, 457 U.S. at 809).

[148] *See, e.g.*, Speigner v. Alexander, 248 F.3d 1292 (11th Cir. 2001); Wigginton v. Centracchio, 205 F.3d 504, 510-12 (1st Cir. 2000); Jones v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 51-52 (2d Cir. 1999); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993); Crawford v. Tex. Army Nat'l Guard, 749 F.2d 1034 (5th Cir. 1971); Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 104-08 (3d Cir. 1986); Brown v. United States, 739 F.2d 362, 367 (8th Cir. 1984); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984).

[149] *See, e.g.*, Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1007 (8th Cir. 1989) ("The concern for the disruption of military discipline upon which *Feres*, *Chappell*, and *Stanley* are based applies equally when a court is asked to entertain an intra-military suit under § 1983.").

[150] *See, e.g.*, Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641, at *6 (4th Cir. Sept. 23, 1993); Christofferson v. Wash. State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988). These circuits have adopted the four-part *Mindes* test, first advanced in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), for determining whether certain intramilitary claims against military defendants may be maintained in civilian courts outside of the *Bivens* context. Under the *Mindes* test, once an allegation has been

Fourth Circuit held that *Chappell* and *Stanley* were inapplicable to § 1983 claims because the decisions involved judicially created actions for monetary damages brought directly under the Federal Constitution.[152] In any instance, courts which have applied *Chappell* to § 1983 actions have had the same difficulty determining which intramilitary claims brought under § 1983 for equitable relief are justiciable.[153]

D. Conclusion

The Supreme Court has, in recent years, inaugurated upon a campaign dedicated to broadening the scope of the intramilitary immunity doctrine. While it is now clear that military plaintiffs may not sue their superior officers for monetary damages pursuant to *Bivens*, it is equally clear that the military's freedom from suit is not absolute.[154] *Chappell* and *Stanley* shed some light on the state of intramilitary justiciability, but the decisions did not succeed in precisely defining the scope of intramilitary immunity when an equitable remedy is sought. As a result, federal courts have struggled to apply *Chappell* to equitable actions with any uniformity.[155] This has led to uncertainty and inconsistency for military personnel seeking to enforce their constitutional rights in civilian forums. This result is particularly objectionable because the viability of intramilitary claims now depends less upon the merits they promulgate and more upon the federal circuit in which they are promulgated. Without categorical guidance by the Supreme Court on this issue, it appears

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adequately subjected to all available military remedies, a court "must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters," balancing four factors: (1) "The nature and strength of the plaintiff's challenge to the military determination"; (2) "The potential injury to the plaintiff if review is refused"; (3) "The type and degree of anticipated interference with the military function"; and (4) "The extent to which the exercise of military expertise or discretion is involved." 453 F.2d at 201. The Ninth Circuit has since modified the *Mindes* test, although the substance of the four factors originally identified remains very much the same. *See* Wenger v. Monroe, 282 F.3d 1068, 1072-73 (9th Cir. 2002).

[151] 1993 U.S. App. LEXIS 24641, at *5.

[152] *Id.* at *6.

[153] *Compare Wigginton*, 205 F.3d at 511-12 (finding a military plaintiff's § 1983 claim for reinstatement was justiciable pursuant to *Feres*, *Chappell*, and *Stanley*), *with Crawford*, 794 F.2d at 1036-37 (concluding that plaintiff's § 1983 claims for reinstatement were nonjusticiable pursuant to *Feres*, *Chappell*, and *Stanley*).

[154] *See* Dibble v. Fenimore, 339 F.3d 120, 126 (2003).

[155] *See id.*

that the precise scope of equitable relief available to military personnel in civilian courts will remain entirely unsettled.

III. THE DISAGREEMENT AMONG FEDERAL CIRCUITS REGARDING THE AVAILABILITY OF EQUITABLE RELIEF FOR MILITARY PLAINTIFFS

Since *Chappell*, courts across the country have questioned whether the decision should be interpreted narrowly, based on its holding, or broadly, based on its reasoning.[156] Two general camps have subsequently emerged among federal circuits regarding the availability of equitable relief for military plaintiffs. The First, Third, and Tenth Circuits have adopted an exceptionally narrow interpretation of the *Feres-Chappell-Stanley* trilogy, and have embraced the principle that those cases swallowed up all potential damages claims, but left the area of equitable relief untouched.[157] Accordingly, these circuits have entertained equitable claims attacking military personnel decisions that were not facial challenges to the constitutionality of military rules or regulations. In contrast, the Second, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits have interpreted the governing rule to allow equitable protests only when they constitute broad challenges to the constitutionality of military regulations, and not in cases involving individualized personnel decisions.[158]

A. Courts Adopting a Narrow Interpretation of Intramilitary Immunity by Allowing Actions that Challenge Military Personnel Decisions

The First, Third, and Tenth Circuits have embraced a narrow interpretation of intramilitary immunity as it relates to the availability of equitable relief for aggrieved members of the military.[159] According to these courts, intramilitary immunity establishes only a per se prohibition of damages actions, so that requests for equitable relief against the armed services remain, as a general matter, justiciable. Accordingly, these circuits are quick to entertain actions by military subordinates protesting the personnel decisions of their superiors, so long as the relief sought happens to be equitable.[160]

The Third Circuit affirmed this position in *Jorden v. National*

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[156] *See Jorden*, 799 F.2d at 107 (surveying case law on this issue).
[157] *See Dibble*, 339 F.3d at 126-28.
[158] *Id.*
[159] *See id.* at 126.
[160] *See id.*

Guard Bureau.[161] In *Jorden*, the court confronted the scope of susceptibility of National Guard officers to actions by guardsmen seeking reinstatement as an equitable remedy.[162] That case arose when the plaintiff, a member of the Pennsylvania Air National Guard ("PaANG"), filed a civil rights action pursuant to § 1983 in a federal district court alleging that several of his superior officers conspired to harass and discharge him on the basis of race and in retaliation for exercising his First Amendment rights.[163] Recognizing that the Supreme Court failed to pronounce a bright-line rule concerning the justiciability of equitable suits, the Third Circuit held that equitable actions against military defendants were presumed justiciable.[164]

In its opinion, the Third Circuit recounted the historical development of intramilitary immunity as it relates to injunctive relief and highlighted several instances in which the Supreme Court entertained equitable claims raised against the armed services without suggesting such actions were beyond the judicial boundaries of the federal system.[165] In particular, the court highlighted three decisions, *Gilligan v. Morgan*,[166] *Goldman v. Weinberger*,[167] and *Brown v. Glines*,[168] in which the Supreme Court failed to raise issues of justiciability even though each involved equitable claims in a military context.[169] The *Jorden* court noted that *Gilligan* involved an equitable claim by citizens against the Ohio National Guard.[170] Although the Supreme Court ultimately held the claim inappropriate for judicial deliverance because of the broad nature of the equitable relief sought, the Third Circuit found credence in Chief Justice Burger's explicit finding that military "conduct" was not "always beyond judicial review."[171]

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[161] 799 F.2d 99 (3d Cir. 1986). The Third Circuit adopted this position earlier in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981). *Dillard*, however, preceded the Supreme Court's decision in *Chappell*, and, as such, is less relevant for purposes of this discussion.

[162] 799 F.2d at 100.

[163] *Id.* at 102.

[164] *Id.* at 109. The court noted rare exceptions to this general rule in cases where the relief sought involves court action well outside of its judicial capacity and function. *See id.* (citing Gilligan v. Morgan, 413 U.S. 1, 7 (1973)).

[165] *Id.* at 108-09.

[166] 413 U.S. 1 (1973).

[167] 475 U.S. 503 (1986).

[168] 444 U.S. 348 (1980).

[169] *Jorden*, 799 F.2d at 108-09.

[170] *Id.* at 108.

[171] *Id.* at 108-09 (citing *Gilligan*, 413 U.S. at 11-12).

The Third Circuit also relied on the Supreme Court's decision in *Goldman* to bolster its conclusion that equitable suits were indeed justiciable.[172] That case involved a First Amendment challenge to a military regulation prohibiting a serviceman, an orthodox Jew and ordained rabbi, from wearing a yarmulke while on duty and in uniform.[173] Although the Supreme Court ultimately upheld the regulation, the *Jorden* court emphasized that the claim was entertained without concerns over justiciability.[174]

Finally, the Third Circuit recognized the 1980 Supreme Court decision of *Brown v. Glines*, which involved a First Amendment challenge to an Air Force regulation prohibiting the circulation of on-base petitions.[175] Specifically, the Third Circuit seized upon footnoted language in which Justice Powell suggested that legitimate constitutional challenges could arise from the application of military rules and regulations.[176] In the view of the Third Circuit, such language confirmed that "judicial scrutiny was not limited to facial constitutional challenges."[177] Taken together, the Third Circuit concluded, *Gilligan*, *Goldman*, and *Brown* verified that equitable claims against the military are generally reviewable, notwithstanding rare exceptions when the relief sought "would involve the court in tasks well outside of its capacity and function."[178]

The Third Circuit also held that allowing equitable remedies for aggrieved military plaintiffs, while denying monetary relief, was supported by the policy considerations underlying *Chappell*.[179] Recognizing that *Chappell* was based largely upon concerns that judicial interference in military matters would undermine the process of military decision-making, the Third Circuit reasoned that the threat of injunctions would do little to inhibit the vigorous decision-

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[172] *Id.* at 110.

[173] *Goldman*, 475 U.S. at 504-05.

[174] *Jorden*, 799 F.2d at 109.

[175] *Id.*

[176] *Id.* at 110 (citing Brown v. Glines, 444 U.S. 348, 357 n.15 (1980)). *Brown* was one of three cases cited by the Supreme Court in *Chappell* as an example of a viable intramilitary claim. *See infra* Part IV.B. In *Brown*, Justice Powell suggested that legitimate claims could be raised under the First Amendment when military regulations are applied "irrationally, invidiously, or arbitrarily." *Brown*, 444 U.S. at 357 n.15 (citing Greer v. Spock, 424 U.S. 828, 840 (1976)).

[177] *Jorden*, 799 F.2d at 109.

[178] *Id.*

[179] *Id.* at 110.

making required of military officials.[180] In short, the Third Circuit assumed that judicial intervention in the form of equitable relief would have negligible impacts on the aspects of military structure that the Supreme Court focused on in *Chappell*—namely, the need to preserve military discipline.[181] Accordingly, the Third Circuit held that the plaintiff was entitled to reinstatement upon showing that the discharge amounted to a violation of his constitutional rights.[182] More significantly, the court established a clear precedent in light of *Chappell* that permits judicial review in situations involving individualized military personnel decisions.

The Tenth and First Circuits have since followed *Jorden*'s rationale and adopted narrow interpretations of the intramilitary immunity doctrine. These circuits also allow military service members to challenge the personnel decisions of their superior officers, although their analyses on the issue have been somewhat less comprehensive. In *Walden v. Bartlett*,[183] the Tenth Circuit held that *Chappell* and *Stanley* together support the proposition that claims for equitable relief challenging military decision-making are justiciable.[184] The plaintiff in that case, a member of the United States Army, was convicted by court-martial for military crimes committed while on active duty and sought injunctive and declaratory judgments for alleged due process violations by military officials during disciplinary proceedings.[185] The court recognized that *Chappell* did not categorically preclude equitable remedies for military plaintiffs, and noted the Supreme Court's holding in *Stanley* that service members' claims designed to "halt or prevent the constitutional violation rather than the award of money damages" were cognizable in the civilian system.[186] In addition, the Tenth Circuit, echoing the First Circuit's sentiments in *Jorden*, reasoned that the rationales underlying *Feres* and its progeny were not implicated by the issuance of federal injunctions

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[180] *Id.*

[181] *Id.*

[182] *Id.* at 111.

[183] 840 F.2d 771 (10th Cir. 1988).

[184] *See id.* at 774-75.

[185] *Id.* at 772. Plaintiff sought injunctive relief in the form of restoration of good time credits, prohibition of his summary transfer to segregated housing, and removal of a lieutenant colonel as the presiding officer of the United States Disciplinary Barracks Disciplinary and Adjustment Board in Fort Leavenworth, Kansas. *Id.* Plaintiff also sought a declaratory judgment that the military violated his constitutional rights. *Id.*

[186] *Id.* at 775 (quoting *Stanley*, 483 U.S. at 683).

because the threat of judicial intervention in the form of equitable relief would have de minimus effects on the institution of military discipline.[187] In so determining, the court noted that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[188]

In *Wigginton v. Centracchio*,[189] the First Circuit held that a § 1983 claim for reinstatement brought by a member of the Rhode Island Army National Guard against his superiors was justiciable. In its decision, the court again acknowledged that *Chappell* itself did not foreclose all civil redress where military service members raise constitutional violations.[190] The circuit court also referenced an extended opinion in *Stanley*, in which Justice Brennan, joined by Justice Marshall, concurring in part and dissenting in part, suggested that the field of equitable relief remained undisturbed, insofar as it relates to halting constitutional violations.[191] Based entirely upon these findings, the First Circuit held that, in general, military claims seeking review of personnel decisions were cognizable in the federal system.[192]

The Third, Tenth, and First Circuits, therefore, can be categorized neatly as those that allow military personnel to challenge the decision-making of their superior officers, provided the action involves a constitutional question and calls for an equitable remedy. Several justifications have been proffered in the process: namely, the Supreme Court's failure to categorically preclude such actions and the Court's historical willingness to entertain equitable claims, in some cases without raising issues of justiciability. More notably, these circuits have determined, as a policy matter, that the threat of declaratory and injunctive relief does little to inhibit autonomous decision-making on the part of military officials, so that the effectiveness of military establishments are not disrupted by equitable intervention on the part of the civilian judiciary.

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[187] 840 F.2d at 774 (reasoning that "the rationales supporting *Feres* are not implicated by an action for injunctive and declaratory relief").

[188] *Id.* at 775 (quoting Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)).

[189] 205 F.3d 504 (1st Cir. 2000).

[190] *Id.* at 512.

[191] *Id.* at 513.

[192] *Id.*

B. Circuits Adopting a Broad Interpretation of Intramilitary Immunity by Precluding Actions that Challenge Military Personnel Decisions

The Second, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits have adopted a much broader interpretation of the intramilitary immunity doctrine, and have embraced the view that equitable intramilitary actions are only justiciable when they amount to broad challenges to the constitutionality of military rules or regulations.[193] These circuits recognize a governing principal that discourages judicial interference in the form of equitable relief, and will not entertain claims challenging individualized military decision-making.[194] This approach derives largely from the reasoning underlying the Supreme Court's decisions in *Feres*, *Chappell*, and *Stanley*, rather than the specific holdings of each case.[195]

The Fifth Circuit first addressed the intramilitary immunity issue as it applies to equitable relief in *Crawford v. Texas Army National Guard*.[196] In that case, plaintiffs, members of the Texas Army National Guard ("TARNG"), filed § 1983 claims against the service, the governor of Texas, and twelve other military personnel, seeking equitable relief in the form of reinstatement after they were allegedly dismissed from the service in violation of their constitutional rights.[197] The circuit court, relying on the three separate decisions deemed appropriate for judicial review by the Supreme Court in *Chappell*, found that the governing principle derived from those decisions is that civilian courts may not exercise unlimited review over intramilitary matters.[198] The scope of intramilitary suits amenable to civil law, the court stated, was "at the very least, narrowly circumscribed."[199] The *Crawford* court then noted that each of the intramilitary actions cited by the Supreme Court in *Chappell* involved facial challenges to the constitutionality of military regulations, and none required judicial oversight of military decision-making.[200] As the

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[193] *See* Dibble v. Fenimore, 339 F.3d 120, 126 (2003).

[194] *Id.*

[195] *See supra* Parts II.A & B.

[196] 794 F.2d 1034 (5th Cir. 1986).

[197] *Id.* at 1035. Plaintiffs in *Crawford* claimed that they were improperly dismissed or put on inactive reserve for reporting criminal activity, and alleged that black personnel were discriminated against and mistreated by the TARNG. *Id.*

[198] *Id.* at 1036-37. The court in *Crawford* cited the Supreme Court rulings in *Feres*, *Chappell*, and *Shearer* to bolster its conclusion as to the justiciability of intramilitary claims. *See id.*

[199] *Id.*

[200] *Crawford*, 794 F.2d at 1036.

Fifth Circuit noted, "[t]he nature of the lawsuits, rather than the relief sought, rendered them justiciable."[201] If exercised without judicial caution, the court warned, the equitable exception advocated by the plaintiffs could "swallow *Chappell*'s rule of deference" entirely.[202] Accordingly, the Fifth Circuit dismissed the plaintiffs' claims for reinstatement and suggested that equitable actions be proscribed in much the same fashion as those seeking monetary relief.[203] Indeed, the court proclaimed, injunctive claims, "*like those for monetary damages*, must be carefully regulated in order to prevent intrusion of the courts into the military structure."[204]

Three years later, the Eighth Circuit, in *Watson v. Arkansas National Guard*,[205] addressed the availability of equitable relief for military plaintiffs in situations involving personnel decisions. In *Watson*, the plaintiff, alleging racial discrimination, brought an action for reinstatement against the Arkansas National Guard and several military personnel.[206] Finding plaintiff's claims nonjusticiable, the *Watson* court concerned itself primarily with the underlying policies upon which *Feres* and its progeny were based, and reasoned that those concerns, together with subsequent Supreme Court cases expounding upon the intramilitary immunity doctrine, "weigh[ed] heavily in favor of precluding claims for equitable relief."[207] In particular, the court cited the military's unique need for "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel,"[208] and opined that such concerns were undermined each time soldiers drag a superior officer into court.[209] Thus, the *Watson* court embraced the notion that claims for monetary and equitable relief should be treated somewhat similarly, and categorically rejected the Third Circuit's contention in *Jorden* that the prospect of injunctive relief does not threaten the institution of military discipline.[210] Indeed, as the Eighth Circuit noted, "the threat to the 'special nature of military life' is present

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[201] *Id.*

[202] *Id.*

[203] *Id.* at 1036-37.

[204] *Id.* (emphasis added); *see also* Farmer v. Mabus, 940 F.2d 921 (5th Cir. 1991) (following *Crawford*).

[205] 886 F.2d 1004, 1008 (1989).

[206] *Id.* at 1004-05.

[207] *Id.* at 1008.

[208] *Id.* (citing *Chappell*, 462 U.S. at 304).

[209] *Id.*

[210] *See id.*

regardless of the remedy the soldier seeks."[211] The court concluded that "disallow[ing] claims for damages while agreeing to review claims for injunctive relief arising from the same facts would be to exalt form over substance."[212]

The D.C. and Seventh Circuits have taken a similar approach, concluding that claims challenging personnel decisions lie outside the purview of the federal judiciary. In *Kreis v. Secretary of the Air Force*,[213] for example, the D.C. Circuit dismissed as nonreviewable a plaintiff's claim for retroactive promotion. Although the court did not rely directly on *Chappell*, it expressed similar concerns.[214] In particular, the D.C. Circuit was troubled that judicial meddling in such instances would violate the separation of powers and emphasized that the Constitution vests exclusive authority over the military to the legislative and executive branches of government.[215] As a result, the court concluded that civilian courts are "inherently unsuitable" and incompetent to oversee such matters.[216] Likewise, the Seventh Circuit, in *Knutson v. Wisconsin Air National Guard*,[217] held that a service member's due process claim seeking injunctive relief and reinstatement was nonjusticiable. The *Knutson* court focused primarily on the practical effects that judicial review over personnel decisions would pose on the National Guard's effectiveness. Specifically, the court recognized that reinstatement claims often linger unresolved for years, and would thus impede the military's ability to properly staff, train, and otherwise operate.[218]

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[211] *Watson*, 886 F.2d at 1008 (citing *Chappell*, 462 U.S. at 304).

[212] *Id.* at 1009; *see also* Wood v. United States, 968 F.2d 738 (8th Cir. 1992) (following *Watson*); Uhl v. Swanstrom, 876 F. Supp. 1545 (N.D. Iowa 1995) (same); Becker v. Rice, 827 F. Supp. 589 (W.D. Ark. 1993) (same).

[213] 866 F.2d 1508, 1512 (D.C. Cir. 1989). The plaintiff in that case, a major in the United States Air Force, was accused of "acting inappropriately" during an overseas military trip. *Id.* at 1509. As a result, the plaintiff was reprimanded and denied an assignment to a position of greater responsibility. *Id.*

[214] *See id.* at 1511-12. The court in *Kreis* found that *Chappell* was not controlling, and relied instead on two earlier Supreme Court decisions, Orloff v. Willoughby, 345 U.S. 83 (1953), and Gilligan v. Morgan, 413 U.S. 1 (1973), to dismiss plaintiff's claim. *Id.* at 1512.

[215] *Id.* at 1511.

[216] *Kreis*, 866 F.2d at 1511; *see also* Schamburg v. White, No. 02-5063, 2003 U.S. App. LEXIS 9427, at *2 (D.C. Cir. May 14, 2003) (following *Kreis*); Ostrow v. Sec'y of the Air Force, No. 93-5280, 1995 U.S. App. LEXIS 3200, at *6 (D.C. Cir. Feb. 16, 1995) (per curiam) (same); Cargill v. Marsh, No. 89-5296, 1990 U.S. App. LEXIS 7977, at *3 (D.C. Cir. May 18, 1990) (per curiam) (same).

[217] 995 F.2d 765, 771 (7th Cir. 1993).

[218] *Id.*

The most recent court to address this issue was the Second Circuit in *Dibble v. Fenimore*.[219] In that case, the plaintiff, a staff sergeant in the New York Air National Guard, brought a claim against his superior officer after he was allegedly discharged and denied re-enlistment in retaliation for exercising his constitutionally protected right to engage in union activity.[220] The Second Circuit held that the doctrine of intramilitary immunity rendered the plaintiff's claim nonjusticiable.[221] After acknowledging that the Supreme Court had not precisely defined the line separating justiciable from nonjusticiable intramilitary claims, the court found that *Chappell* and *Stanley* disfavored judicial intervention when individual military personnel decisions are challenged.[222] The court also expressly rejected the Third Circuit's policy judgment that equitable interference by the judiciary would involve negligible threats to military decision-making and discipline.[223] The court went on to propose that judicial intervention in the form of equitable relief could detract greatly from military effectiveness by altering the "peculiar and special relationship of the soldier to his superiors."[224] Although the Second Circuit recognized rare exceptions in which judicial review would be appropriate,[225] the court clearly followed in the footsteps of *Crawford* and *Watson* by adopting a judicial policy that precludes justiciability where military claims challenge personnel decisions.[226]

The Fourth Circuit has taken an entirely different analytic approach than the Second, Fifth, Seventh, Eighth, and D.C. Circuits—at least as applied to § 1983 claims—but has nonetheless similarly limited the equitable exception to intramilitary immunity to preclude claims challenging military decision-making. This circuit

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[219] 339 F.3d 120 (2d Cir. 2003).

[220] *Id.* at 122-23.

[221] *Id.* at 127-28.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 128 (citing *Brown*, 348 U.S. at 112).

[225] *See Dibble*, 339 F.3d at 128. The court held that "where the military has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member," judicial intervention is appropriate to redress the prejudice. *Id.* (quoting Jones v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 52 (2d Cir. 1998)); *see also Jones*, 166 F.3d at 52 (allowing claim for injunctive relief by a military plaintiff when the military "failed to follow its own mandatory regulations in a manner substantially prejudicing a service member").

[226] *Dibble*, 339 F.3d at 128.

has expressly refused to apply *Chappell* and *Stanley* to § 1983 claims, and has instead applied the multi-factored *Mindes* test, first outlined by the Fifth Circuit in *Mindes v. Seaman*.[227] In *Scott v. Rice*,[228] for example, the Fourth Circuit found that civilian review of a § 1983 sexual discrimination claim challenging military decision-making was inappropriate because it would impede commanding officers in "exercising [their] own discretion and military expertise with respect to personnel matters."[229] Thus, while the court's particular approach in analyzing that availability of equitable relief for military plaintiffs differs, the Fourth Circuit similarly precludes review in cases involving personnel decision-making.

IV. THE SUPREME COURT WILL EVENTUALLY ADOPT A MORE COMPREHENSIVE INTERPRETATION OF THE INTRAMILITARY IMMUNITY DOCTRINE AND PRECLUDE ALL CLAIMS THAT DO NOT AMOUNT TO BROAD CHALLENGES OF THE CONSTITUTIONALITY OF MILITARY REGULATIONS

Although the Supreme Court has not precisely defined the scope of equitable relief available to military plaintiffs, existing precedent gives every indication that the Court, when eventually faced with the issue, will hold that intramilitary immunity bars all claims for equitable relief, except where the action involves a facial challenge to the constitutionality of a military edict. Thus, the Court will inevitably side with the Second, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits, and expand intramilitary immunity once more to preclude all equitable claims that challenge individualized personnel decisions.

A. The Supreme Court has Long Forewarned of the Dangers Posed when the Civilian Judiciary Inappropriately Intrudes into Matters Involving Military Discipline, Training, or Readiness

In *Orloff v. Willoughby*[230] and *Gilligan v. Morgan*,[231] the Supreme Court was asked to exercise judicial authority over military personnel decisions and, in both cases, refused to do so. In *Orloff*, the Court

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[227] 452 F.2d 197 (5th Cir. 1971); *see also supra* notes 150-52 and accompanying text.

[228] No. 92-2463, 1993 U.S. App. LEXIS 24641, at *7 (4th Cir. Sept. 23, 1993).

[229] *Id.*

[230] 345 U.S. 83 (1953).

[231] 413 U.S. 1 (1973).

considered whether an Army doctor, as a matter of law, was entitled to military commission, and whether federal courts, by writ of habeas corpus, have the power to discharge a member of the armed services upon finding discrimination in assignments to duty.[232] As to the question of the doctor's commission, the Court found that it had no power whatsoever to influence or control the appointment of military positions.[233] The Court recognized the exclusive discretionary power of the executive over such matters and noted that "[w]hether Orloff deserves appointment is not for judges to say."[234] The Court then addressed whether it could properly exercise judicial review of the plaintiff's medical duty assignments in order to respond to his request for a court-ordered discharge.[235] The Court, again recognizing the "large area of discretion as to particular duties" left to commanding officers, refused to exercise jurisdiction, and, in an oft-quoted passage, remarked:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. *But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.* The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters . . . . While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.[236]

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[232] *Orloff*, 345 U.S. at 84-85. The Court also faced the issue of whether to accept the government's concession that a military statute be interpreted to require the Army to assign specially inducted medical personnel to duties within the category that rendered them eligible for induction. *Id.* at 87-88. While the Court found that it was not bound by the government's concession, it nonetheless agreed with its statutory interpretation. *Id.*

[233] *Id.* at 90.

[234] *Id.* at 91-92. The Court noted that "[i]t is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions." *Id.* at 90.

[235] *Orloff*, 345 U.S. at 92.

[236] *Id.* at 93-94 (emphasis added).

Similarly, in *Gilligan*, the Supreme Court was asked to review claims that were not constitutional challenges to military regulations. In that case, plaintiffs challenged actions taken by the Ohio Governor and the state's military personnel, and asked the Court to maintain continued surveillance over the "pattern of training, weaponry, and orders in the Ohio National Guard."[237] Perhaps not surprisingly, the Court, citing many of the same concerns raised in *Orloff*, refused to exercise jurisdiction. In finding the claim nonjusticiable, the Court noted the inappropriateness and impracticality of the judicial relief requested and stated: "*Any such relief*, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, *would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction*."[238] Moreover, in another strongly worded indication of the Court's aptitude in such matters, Chief Justice Burger, writing for the majority, warned:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible . . . . Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[239]

More recently, in *United States v. Shearer*,[240] the Court addressed the justiciability of a negligence action raised pursuant to the FTCA. Chief Justice Burger, reasserting the vitality of intramilitary immunity, explained that:

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode,

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[237] *Gilligan*, 413 U.S. at 4. Students and officers of the student government of Kent State University filed this claim after the shootings that took place in 1970. *Id.* at 3. The complaint alleged that the National Guard, called to order by the Governor of Ohio, violated students' rights to assembly and free speech and caused injury and death to several without legal justification. *Id.*

[238] *Id.* at 9 (emphasis in original) (quoting Morgan v. Rhodes, 456 F.2d 608, 619 (6th Cir. 1972)).

[239] *Id.* at 10.

[240] 473 U.S. 52 (1985).

> whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.[241]

Thus, although *Shearer* involved a damages claim, it expressed the same principle set forth in *Orloff* and *Gilligan*—that civilian courts cannot sit in plenary review over intramilitary disputes.

B. Chappell *and* Stanley *Suggest that Only Broad Constitutional Challenges to Military Regulations are Justiciable in Federal Courts*

Certainly, the clearest instructions so far provided by the Supreme Court regarding the availability of equitable relief for military plaintiffs came in the *Chappell* and *Stanley* decisions. In *Chappell*, the Court, reiterating that soldiers are not stripped of all basic rights by virtue of their military status, acknowledged that military plaintiffs are not barred from all civil redress for constitutional wrongs suffered during military service.[242] The *Chappell* Court then cited *Brown v. Glines*,[243] *Parker v. Levy*,[244] and *Frontiero v. Richardson*,[245] as examples of claims that can be appropriately maintained by military plaintiffs in civilian venues. As explained subsequently in *Stanley*, those suits were justiciable because they "referred to redress designed to halt or prevent . . . constitutional violation[s]."[246] These cited decisions are significant because they all dealt with facial challenges to the constitutionality of military regulations, and none involved individualized military decision-making.[247]

In *Brown v. Glines*, an enlisted serviceman challenged the constitutionality of an Air Force regulation that required service members first to obtain permission from their commanding officers before distributing petitions on Air Force bases.[248] The Court reviewed whether that regulation violated the soldier's rights to free

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[241] *Id.* at 58.

[242] *Chappell*, 462 U.S. at 304.

[243] 444 U.S. 348 (1980).

[244] 417 U.S. 733 (1974).

[245] 411 U.S. 677 (1973).

[246] *Stanley*, 483 U.S. at 683 (citing *Chappell*, 462 U.S. at 304).

[247] *See Crawford*, 794 F.2d at 1036-37 ("The common characteristic of these decisions is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters.").

[248] 444 U.S. at 349-50 (citing Air Force Reg. 35-15 (3)(a)(1) & (2) (1970), which allows commanders to deny the distribution of petitions that would result in "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission").

speech guaranteed under the First Amendment, and whether the rule violated 10 U.S.C § 1034.[249] The plaintiff in that case, a captain in the Air Force Reserves, was removed from active duty for circulating on-base petitions without the consent of his commanding officer.[250] The Court dismissed both claims, holding that the regulation did not violate the First Amendment because the constitutional protections related to free speech afforded military personnel were less substantial than those attributed to civilians.[251] The Court also found that the Air Force regulation did not violate § 1034 because the statute was not enacted to protect the circulation of petitions on military grounds.[252] Most importantly, the Court confined its ruling to the constitutionality of the military regulation challenged, and never considered the individualized actions of Glines' superior officers.

The two other cases cited by the Court in *Chappell* and *Stanley* as examples of justiciable intramilitary controversies presented broad constitutional challenges similar to those raised in *Brown*. In *Parker v. Levy*,[253] the Supreme Court entertained a claim brought by an Army physician who was court-martialed after he violated Army regulations by urging enlisted men to disobey orders to partake in the Vietnam War. After his court-martial conviction and exhaustion of military avenues of redress, the plaintiff sought habeas corpus relief in federal court challenging his sentence on the grounds that two military articles invoked during his conviction were unconstitutionally vague and overbroad.[254] The Court dismissed both claims, recognizing throughout its opinion the differences between military and civilian society—the former subject to more permissible constitutional restrictions than the latter.[255] Likewise, in *Frontiero v. Richardson*,[256] the

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[249] *Id.* 10 U.S.C. § 1034 (2004) prohibits unwarranted proscriptions on a service member's right to communicate with members of Congress. *Id.* The statute provides that "[no] person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." *Id.* at 358.

[250] *Id.* at 351.

[251] *Id.* at 354 (citing *Parker*, 417 U.S. at 758) (stating that "the different character of the military community and of the military mission requires a different application of [First Amendment] protections").

[252] 444 U.S. at 360-61.

[253] 417 U.S. 733 (1974).

[254] *Id.* at 735-38.

[255] *See id.* at 743-62.

[256] 411 U.S. 677, 678-79 (1973). The four statutes at issue were 37 U.S.C. §§ 401, 403 (2004), and 10 U.S.C. §§ 1072, 1076 (2004). *Id.*

Court reviewed the constitutionality of four statutes which provided, solely for administrative convenience, that servicemen could claim their wives as "dependents" regardless of whether their spouse was actually dependent for support, but that spouses of servicewomen were not "dependents" unless they relied on their wives for more than fifty percent of their income. An aggrieved servicewoman challenged the constitutionality of the statutes when she was denied increased benefits for her husband because she was unable to demonstrate that he was dependent upon her for more than one-half of his support.[257] The *Frontiero* Court found that the regulations violated the First and Fifth Amendments—insofar as they required women, and not men, to demonstrate the dependency of their spouses—primarily because the government provided no legitimate purpose for the disparate treatment.[258]

The fundamental feature in *Brown*, *Parker*, and *Frontiero*, is that each case involved broad constitutional challenges to military rules and regulations, and none invoked judicial review of personnel decision-making.[259] In comparing these decisions with *Gilligan* and *Orloff*, where the Supreme Court was asked to review challenges tied to military decision-making, it appears more likely that the Court based determinations of justiciability on the constitutional nature of the claims raised, rather than on the relief requested.[260] It stands to reason, therefore, that the Supreme Court will next expand intramilitary immunity to preclude claims challenging military decision-making.

C. The Equitable Exception to Intramilitary Immunity Promulgated by the First, Third, and Tenth Circuits is inconsistent with Chappell*'s Rule of Deference*

The Supreme Court has repeatedly noted that judicial deference "is at its apogee" when evaluating military actions.[261] Certainly, the

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[257] *Id.* at 680. A male service member in the plaintiff's position would have been provided increased benefits automatically. *Id.*

[258] *Id.* at 690-91. The determining factor in the case was that the differential treatment between male and female officers provided for under the challenged statutes was for the sole purpose of administrative convenience, and not to serve any compelling military purpose. *Id.* In addition, the government was unable to persuade the Court that the differential treatment in fact saved any money with regard to administration. 411 U.S. at 688-91.

[259] *See Crawford*, 794 F.2d at 1036.

[260] *See id.* 1036-37.

[261] Rostker v. Goldberg, 453 U.S. 57 (1981); *see also* Weiss v. United States, 510

Chappell and *Stanley* decisions were rationalized primarily on those grounds,[262] and the cases are illustrative of the unique deference that the Supreme Court has historically been willing to afford the military.[263] Not surprisingly, federal circuits on both sides of the equitable divide have acknowledged this reality.[264] Notwithstanding the wisdom of affording such deference,[265] however, the equitable loophole advocated by the First, Third, and Tenth Circuits is entirely inconsistent with *Chappell* because it renders all intramilitary claims justiciable, so long as a constitutional violation is alleged and the remedy sought happens to be equitable.[266] As the Fifth Circuit correctly noted, such an exception "could swallow *Chappell's* rule of deference" completely.[267] The Supreme Court, therefore, in order to accommodate the rule of deference that provided the foundation for its decision in *Chappell*, must preclude intramilitary claims that challenge individualized personnel decisions.

CONCLUSION

From its inception in *Feres*, the Supreme Court has consistently broadened the scope of intramilitary immunity. Along the way, a clear principle has emerged that comprehensive judicial deference is required by civilian courts dealing with intramilitary claims. The somewhat ambiguous nature of the instructions provided by the Supreme Court regarding the availability of equitable relief for military plaintiffs, however, has led to a disjointed understanding among the federal circuits as to the precise breadth of the intramilitary immunity doctrine. Nevertheless, the Supreme Court's historical hesitancy to deal with such matters, the directions so far provided in *Chappell* and *Stanley* regarding the availability of equitable relief, and the rule of deference underlying *Chappell* all suggest that claims challenging individualized personnel decisions are next in line

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U.S. 163 (1994) (following *Rostker*).

[262] *See supra* Parts II.B.2 & 3.

[263] *See supra* Part IV.A.

[264] *See, e.g.*, Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 110 (3d Cir. 1986); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034, 1036-37 (5th Cir. 1986).

[265] *See, e.g.*, Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985); Karen A. Ruzic, Note and Comment, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 CHI.-KENT. L. REV. 265 (1994); Kalyani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone too Far?*, 78 OR. L. REV. 767 (1999).

[266] *See supra* Part III.A.

[267] *Crawford*, 794 F.2d at 1036 (emphasis in original).

to be precluded.

The Supreme Court has repeatedly forewarned of the dangers posed when civilian courts haphazardly meddle in military matters. Additionally, where the Supreme Court has sat in review of intramilitary suits, it is more plausible that justiciability was appropriate because of the constitutional nature of the actions involved, and not because the relief sought happened to be equitable. To be sure, the unifying characteristic of the cases cited in *Chappell* as examples of justiciable intramilitary claims is that each raised broad constitutional challenges to military regulations, and none invoked judicial review of military decision-making. Finally, the equitable loophole advocated by the First, Third, and Tenth Circuits cannot be reconciled with *Chappell*'s rule of deference because it allows all intramilitary actions for alleged constitutional violations through the doors of civilian courthouses, provided an equitable remedy is sought. To base justiciability on such an arbitrary condition would be to ignore the substance of *Feres*, *Chappell*, and *Stanley*. Thus, the Supreme Court will again expand intramilitary immunity to preclude intramilitary claims that challenge personnel decisions because the intramilitary immunity doctrine as currently formulated can accommodate no other result.