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Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out

Jonathan P. Tomes

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Jonathan P. Tomes*

To no one will we sell, to no one will we deny or delay right or justice.

Magna Carta § 40.

I. INTRODUCTION

With its decision in United States v. Stanley, the United States Supreme Court completed the virtual evisceration of servicemembers' constitutional rights begun thirty-seven years before in Feres v. United States. Although the courts have never expressly held that servicemembers do not enjoy the same constitutional rights that other citizens enjoy, the Supreme Court's decision in Stanley has left servicemembers without an effective remedy to vindicate their constitutional rights. Rights without means of enforcing them are meaningless.

* Visiting Associate Professor of Law, IIT Chicago-Kent College of Law; B.S., 1968, University of Cincinnati; J.D., 1975, Oklahoma City University. Author of The Servicemember's Legal Guide (1987) and The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker, 25 A.F. L. Rev. 1 (1985). I am grateful to Professors Joan Steinman and Stephen Sepinuck for their perceptive analyses of the draft of this article. Professor Michael Spak's assistance, analytical and otherwise, was, as always, invaluable. Thomas Dimitroff's jurisprudential skills, which were well honed at Oxford, served me well in writing this article as did Kenda Hick's research assistance.

4. "[R]ights which cannot be realized are worse than useless; they are traps of delay, expense and heartache." K. LLEWELLYN, THE BRAMBLE BUSH 9 (7th printing 1981).
This article demonstrates the flawed jurisprudence of Stanley by establishing that servicemembers have constitutional rights, and analyzes the Supreme Court decisions that have disabled aggrieved servicemembers from enforcing those rights. Finally, the article demonstrates that Stanley does not advance the utilitarian purposes it was meant to serve.

II. DO SERVICEMEMBERS HAVE CONSTITUTIONAL RIGHTS?

The easy answer is "of course, they do." As recently as 1957, however, Supreme Court Justice Black said, "[a]s yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." A judge of the United States Court of Military Appeals put it another way: "Does the Bill of Rights apply to service persons? The question has often been debated, and I guess the best answer is: Yes, a service person is afforded all the constitutional guarantees of freedom and liberty envisioned in the Bill of Rights—except when he does not enjoy them."

Courts and commentators have done little to settle the confusion engendered by the paucity of evidence as to what the framers of the Constitution intended with regard to the rights of members of the armed forces. The only language that expressly exempts servicemembers from constitutional protections appears in the fifth amendment's guarantees of prosecution by indictment and trial by jury. A close analysis of the contemporary practice and the litera-

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8. See, e.g., Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957). One problem with any attempt to determine whether or to what extent servicemembers have constitutional rights is that the Uniform Code of Military Justice ("UCMJ") provides them greater rights in many areas than the Constitution would require. See Cox, supra note 7, at 23-27. For example, the UCMJ enlarges the sixth amendment rights of military personnel by affording all servicemembers free, appointed defense counsel. Id. at 26; see arts. 27, 32, 38 & 70 UCMJ, 10 U.S.C. §§ 827, 832, 838, 870 (1988). The UCMJ may in fact create a right to counsel for servicemembers which is not guaranteed by the Constitution. See Wiener, Courts Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1 (1958) (opining that the framers never intended the sixth amendment to apply to courts martial).
9. The fifth amendment states:
   
   "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public
ture of the framing of the Constitution demonstrates that the better view is that all constitutional protections, other than indictment by grand jury and trial by petit jury, apply to those serving in the armed forces.\footnote{10}

Regardless of whether legal scholars believe that the framers intended for servicemembers to enjoy the protection of the Constitution, the Supreme Court now seems to concede that servicemembers have constitutional rights, even if the exigencies of military service constrain those rights.\footnote{11} Assuming that ser-

\footnote{danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V (emphasis added).}

\footnote{10. Henderson, \textit{supra} note 8, at 324. Cf. Wiener, \textit{Courts-Martial and the Bill of Rights: The Original Practice II}, 72 HARv. L. REV. 266 (1958). Even though Wiener postulates that the framers did not mean for the Bill of Rights to apply to servicemembers, he explains: But it does not follow from the foregoing demonstration that the framers of the Bill of Rights in 1789-1791 never intended its guarantees to apply to persons in the land and naval forces, that members of those forces must be held to have no constitutional rights today, or that they must be held to be unable to protect their rights in the same manner and by the same proceedings that are now available to civilians. \textit{Id.} at 294.}

\footnote{Weiner bases this conclusion on a number of factors. First, the Congressional extension of servicemembers' constitutional rights by statute gives servicemembers virtually the same rights or greater rights at courts-martial than civilians have in non-military trials. \textit{Id.} at 295-96. Second, the expansion of the Bill of Rights to include servicemembers is a lesser advance in constitutional interpretation than was Brown \textit{v. Board of Education}, 347 U.S. 483 (1954) (outlawing segregation in the public schools) and will not encounter the community opposition which arises when a new doctrine is in opposition to community mores. \textit{Id.} at 296-300. Third, the services themselves espouse the view that servicemembers have constitutional rights. \textit{Id.} at 300. Finally, the composition of today's military differs so greatly from its beginnings that an approach which denies servicemembers constitutional rights is wholly inappropriate. \textit{Id.} at 301-02. Weiner concludes: I do not rest this proposal [to recognize the constitutional rights of servicemembers] on any after-readings of the original understanding; I think I have sufficiently demonstrated that the original understanding was quite the other way. Rather, I place my faith in the oft-demonstrated proposition that the meaning and scope of the Constitution are not static, but that they change, just as all law changes. \ldots}

\footnote{11. \textit{See} Chappell \textit{v. Wallace}, 462 U.S. 296 (1983). Holding that enlisted servicemembers could not maintain a suit for monetary damages against their superior officers for alleged constitutional violations, Chief Justice Burger, writing for a unanimous court, stated:}
vicemembers do have constitutional rights, the real question then becomes whether they can enforce those rights.

III. THE DOOR TO THE COURTROOM SWINGS SHUT

With United States v. Stanley, the door to the courtroom swung completely shut, foreclosing military members from having an effective remedy for constitutional torts committed by the military. The current limitations on servicemembers' rights to sue the military for constitutional torts did not, however, begin with a constitutional tort case. Rather, Feres v. United States, decided thirty-seven years before Stanley, consolidated three cases brought under the Federal Tort Claims Act ("FTCA"). In Feres, all three plaintiffs were active duty servicemembers. One had died in a barracks fire allegedly caused by a faulty heating system, and the other two had suffered from Army surgeons' medical malpractice.

The FTCA's waiver of sovereign immunity for the tortious acts

"[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." . . . This court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.


In Goldman v. Weinberger, 475 U.S. 503 (1986), the Court recognized that servicemembers have first amendment rights although the military legitimately can place greater restrictions on those rights than would be proper in a civilian setting. See also Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (requirement that servicemembers obtain command approval before circulating petitions on base did not violate first amendment); Brown v. Glines, 444 U.S. 348 (1980) (Air Force removal of reserve officer who circulated petition without obtaining the required approval did not violate officer's first amendment rights); Greer v. Spock, 424 U.S. 828 (1976) (Army regulations banning partisan political speeches and distribution of literature by personnel without prior approval deemed constitutional). For an excellent discussion of the effect of Chappell v. Wallace on first amendment rights see Steinman, Backing Off Bivens and the Ramifications of This Retreat for the Vindication of First Amendment Rights, 83 MICH. L. REV. 269 (1985).

14. 28 U.S.C. §§ 2671-2680 (1988). In the FTCA, the federal government waived sovereign immunity for certain torts committed by employees of the United States. The FTCA provides for money damages:

[For injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b).
of its agents and employees has thirteen exemptions. One prohibits suits based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." None of the three Feres cases arose out of combatant activities in time of war. Nevertheless, in a unanimous opinion, the Supreme Court held that servicemembers who sustain injuries that arose out of or were in "the course of activity incident to service" cannot maintain an FTCA action.

In reaching that conclusion, the Court stressed the following rationale. First, since the FTCA created no new causes of action and since no American law ever permitted a servicemember to recover for the negligence of the military, the FTCA could not have created a cause of action for servicemembers against their military superiors or the government itself. Second, since the FTCA uses the law of the situs of the tort to determine liability, and active servicemembers have no real control over their geographic location, it made "no sense" to base liability in incident-to-service cases on the law of the state where the tort occurred. Third, since servicemembers have a comprehensive statutory compensation scheme of disability and veterans' benefits, Congress did not intend to give servicemembers an additional remedy.

One might expect that a unanimous Supreme Court decision would end servicemembers' attempts to recover under the FTCA for torts that involved their military status. Not only did Feres fail to preclude hundreds of cases in which servicemembers sought to avoid its bar on lawsuits for service-connected injuries, it also en-

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17. Id. § 2680(j).
18. Feres, 340 U.S. at 146.
19. Id. at 141-42.
21. Feres, 340 U.S. at 143.
22. Id. at 140.
23. See Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A.F. L. Rev. 24, 42 (Spring 1976) (noting Feres did not halt tort litigation by servicemembers, it simply assured that they would generally lose); Zillman, Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort, 60 N.C.L. Rev. 489, 511 nn.129-30 (noting that, upon review of 147 Feres type cases decided between 1955 and 1981, only eight were decided in the plaintiff's favor); Note, 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, of 81 cases between 1981 and October 26, 1987, only eight plaintiffs prevailed); see also United States v. Johnson, 481 U.S. 681 (1987) (refusing to allow FTCA action for injuries sustained incident to service but caused by the negligence of civilian, rather than military, employees of federal agencies); United States v. Shearer, 473 U.S. 52 (1985) (refusing to confine the incident-to-service test to on-
gendered a storm of criticism. This criticism, however, did not deter the Supreme Court from reaffirming *Feres* in the spring of 1987. In a five to three decision, the Court in *United States v. Johnson* held that the United States was not liable under the FTCA for a Coast Guard officer’s injuries sustained during an activity incident to his military service even if the cause of his injuries was negligence on the part of civilian employees of the United States. The Court relied on the distinctively federal nature of the relationship between the government and its servicemembers, the existence of generous statutory disability and death benefits, and the impropriety of the judiciary’s involvement “in sensitive military affairs at the expense of military discipline and effectiveness.”

*Feres* and *Johnson* involved traditional torts, but what about constitutional torts? Could servicemembers sue for constitutional wrongs inflicted by military superiors? Perhaps not unsurprisingly, servicemembers fared no better when they were victims of constitutional torts than when they were victims of traditional torts. In *Chappell v. Wallace*, for example, a group of black Navy enlisted men accused their superior officers of racial discrimination and sought monetary damages as well as injunctive relief. A unanimous

base, on-duty injuries); *United States v. Brown*, 348 U.S. 110 (1954) (permitting a veteran to sue for a post-discharge injury); *In re “Agent Orange” Product Liability Litigation* (Aguiar v. United States) 818 F.2d 194 (2d Cir. 1987) (no recovery for injuries allegedly caused by exposure to chemical herbicide in Vietnam); *Scheppan v. United States*, 810 F.2d 461 (4th Cir. 1987) (no recovery for medical malpractice); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985) (*Feres* bars recovery from injuries going to or from place of duty); *Torres v. United States*, 621 F.2d 30 (1st Cir. 1980) (no FTCA recovery for wrongful dishonorable discharge); *Charland v. United States*, 615 F.2d 508 (9th Cir. 1980) (*Feres* bars suit for off-duty, off-base, servicemember volunteer in a training program).


26. Id. at 686-88. The Court noted: “Although all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine.” Id. at 686.

27. Id. at 689.

28. Id. at 689-90.

29. Id. at 690-91 (quoting *United States v. Shearer*, 473 U.S. 52, 59 (1985)).

Court held that servicemembers could not recover monetary damages from their military superiors for constitutional torts. Although the Court's earlier decision in *Bivens v. Six Unknown Federal Narcotics Agents* had authorized suits for damages against federal officials who had violated plaintiffs' constitutional rights, the *Chappell* Court reasoned that the language in *Bivens* limiting such remedies when "special factors counselling hesitation are present" made this remedy unavailable to servicemembers: "Taken 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."

The Court concluded that *Chappell* did not bar servicemembers from all redress in civilian courts for constitutional wrongs suffered in the course of military service. "But the special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'" However, this reasoning ultimately did lead the Court to preclude servicemembers from obtaining civil remedies for constitutional torts.

31. *Id.* at 305.
32. 403 U.S. 388 (1971). *Bivens* held that persons who suffer violations of their constitutional rights as a result of the actions of a federal official may sue that official for damages even though no statute authorizes such a suit. For a discussion of the current state of *Bivens* lawsuits see Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263 (1988-89).
33. 403 U.S. at 396.
34. 462 U.S. at 304.
35. *Id.*. The Court cited the following cases as examples of situations in which servicemembers could sue the military: Brown v. Glines, 444 U.S. 348 (1980) (reversing decision of the court of appeals holding that an Air Force regulation restricting the circulation of petitions on air force bases violated the first amendment); Parker v. Levy, 417 U.S. 733 (1974) (upholding articles 133 and 134 of the UCMJ, 10 U.S.C. §§ 933-34 (1970), which proscribe "conduct unbecoming an officer and a gentleman," art. 133, and "disorders and neglects to the prejudice of good order and discipline in the armed forces," art. 134 against claims of unconstitutional vagueness); and Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that statutes which categorized female spouses of male servicemembers as "dependents" for purposes of obtaining quarters allowances and medical and dental benefits, but failed to similarly categorize male spouses of female servicemembers as "dependents" unless the latter provided over one-half of the male's support violated the fifth amendment by unjustifiably affording differential treatment to male and female servicemembers). Significantly, none of these suits involved damages.
IV. The Court Shuts the Door—and Throws Away the Key

*United States v. Stanley,*37 decided thirty-seven years after *Feres*, effectively barred servicemembers from redress for constitutional torts committed by the military. While on active duty, Stanley was the victim of an Army program that tested the effects of Lysergic Acid Diethylamide (“LSD”) by secretly administering the drug to servicemembers who had volunteered for a chemical warfare testing program. The drug caused severe personality changes in Stanley that led to his discharge from the service and to the breakup of his marriage.38 After his discharge and upon learning that the military had administered LSD to him, Stanley filed an FTCA action alleging that the military was negligent in administering, supervising, and monitoring the LSD testing program. The District Court for the Southern District of Florida held that *Feres* barred Stanley’s negligence claim and granted the government’s motion for summary judgment.39 The Court of Appeals for the Fifth Circuit granted interlocutory review and held that although the *Feres* doctrine barred his suit against the United States, Stanley had a potential constitutional claim under *Bivens*, and remanded the case to the district court to allow Stanley to amend his pleadings.40 Stanley amended his complaint to add a constitutional complaint against unknown individual officers. The district court reaffirmed its dismissal of the FTCA claim but refused to dismiss the *Bivens* claim and recertified its order for an interlocutory appeal.41 Stanley again amended his complaint adding nine individual federal officers as defendants. The Eleventh Circuit affirmed the district court’s decision regarding the constitutional claim but reasoned that its decision in *Johnson v. United States*42 might also

38. Id. at 671.
39. Id. at 672.
40. Stanley v. CIA, 639 F.2d 1146, 1148 (5th Cir. 1981).
41. Id. at 1159-60.
42. 749 F.2d 1530 (11th Cir. 1984), rev’d, 481 U.S. 681 (1987); see supra notes 23-29 and accompanying text. The Eleventh Circuit had reasoned that the evolution of the *Feres* doctrine warranted a determination of the doctrine’s applicability based upon the status of the alleged tortfeasor. The court declared that the only real rationale for *Feres* was the “desire to avoid civilian court inquiry” into matters of the military, which is “a specialized society separate from civilian society.” Id. at 1538 (quoting Parker v. Levy, 417 U.S. 733 (1974)). When the tortfeasor was not a member of the military, but rather was a civilian employee of the government, the court reasoned the *Feres* rationale did not apply. Id. at 1539. The court
allow an FTCA action and remanded the case so the district court could reconsider whether Stanley had a viable FTCA Claim. The Eleventh Circuit concluded that neither of the special factors that were present in Chappell, the unique nature of military discipline and Congress' plenary power to regulate military justice and the administrative remedies for servicemembers, precluded Stanley's claim. Nor could the administrative remedies for servicemembers properly compensate Stanley. The Supreme Court granted certiorari because of the lack of uniformity in the courts of appeals' interpretations of Feres and because the Eleventh Circuit's reinstatement of Stanley's claim seemed to be an unsound judicial practice.

Although all the Justices agreed with Part I of Justice Scalia's opinion, which found that the procedure the court of appeals used to reinstate Stanley's claim was improper, only four Justices agreed with Justice Scalia that the Court of Appeals erred in ruling that Stanley could proceed with his Bivens claims despite Chappell. The Court reasoned that the Fifth Circuit "took an unduly narrow view of the circumstances in which courts should decline to permit nonstatutory damages actions for injuries arising out of military service."

Stanley had contended that Chappell's "special factors counseling hesitation"—the "need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice"—did not apply in his case for two reasons. First, Stanley said Chappell's special factors did not apply because the defendants were not his superior
military officers and that fact precluded the adverse effects on discipline that were present in *Chappell* and other cases involving the chain of command.\(^5\) Second, Stanley contended that *Chappell's* special factors did not apply because no evidence supported the notion that his injury was incident to service because the nature of the drug testing program was unknown.\(^6\)

After briefly noting that the Fifth Circuit had already decided the incident-to-service question against Stanley, the Court admitted that perhaps his case implicated military chain-of-command concerns less than did *Chappell*\(^5\)—but no matter: “Since *Feres* did not consider the officer-subordinate relationship crucial, but established instead an ‘incident to service’ test, it is plain that our reasoning in *Chappell* does not support the distinction Stanley would rely on.”\(^7\) The Court also noted “varying levels of generality at which one may apply ‘special factors’ analysis,”\(^8\) from allowing suits for egregious officer conduct to disallowing suits by servicemen entirely.\(^9\)

Where one locates the rule along this spectrum depends on how prophylactic one thinks the prohibition should be (i.e., how much occasional, unintended impairment of military discipline one is willing to tolerate), which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be. This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer. Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any the less protective of military concerns

\(^{51}\) 483 U.S. at 679; see Gaspard v. United States, 713 F.2d 1097, 1103-04 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984). In *Gaspard*, former servicemen sued for damages arising from their participation in atmospheric atomic weapons testing pursuant to military orders. In finding that their FTCA and *Bivens* claims were barred, the court found “it is the need to avoid the inquiry into military orders, and not the consequences of the inquiry, that justifies the military exclusion from the FTCA.” *Id.* at 1102. (Emphasis by the court.) The court stated: “The need for plenary discretion in military affairs and the existence of an adequate, congressionally-imposed compensation scheme instruct us to avoid either imposing or inquiring into monetary damages when a service person is injured.” *Id.* at 1103. (Citations omitted, emphasis by the court).

\(^{52}\) 483 U.S. at 680. In his dissent, Justice Brennan noted that the *Feres* rationale was most important in cases such as *Chappell* which involved a senior-subsordinate relationship. *Id.* at 102-03 (Brennan, J., dissenting). In *Stanley*, however, the Court did not know what Stanley’s relationship was with those involved in the drug testing program. *Id.* at 697.

\(^{53}\) *Id.* at 680.

\(^{54}\) *Id.* at 680-81.

\(^{55}\) *Id.* at 681.

\(^{56}\) *Id.*
than it has been with respect to FTCA suits . . . . In fact, if anything we might have felt freer to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," and rely upon inference for our own authority to allow money damages.57

The Court noted that Stanley’s test for liability, a test that depends on the extent to which a particular lawsuit would call into question military discipline and decision-making, would require the same judicial inquiry into military matters as it would to simply entertain the lawsuit:

Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime. The “incident to service” test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.

. . . .

We therefore reaffirm the reasoning of Chappell that the “special factors counselling hesitation”—“the unique disciplinary structure of the Military Establishment and Congress’ activity in the field,” extend beyond the situation in which an officer-subordinate relationship exists, and require abstention in the inferring of Bivens actions as extensive as the exception to the FTCA established by Feres and United States v. Johnson. We hold no Bivens remedy is available for injuries that “arise out of or are in the course of activity incident to service.”58

With that language, the Supreme Court ended servicemembers’ chances for vindicating a constitutional tort in court. The Court in Chappell did imply that servicemembers could seek injunctive relief.59 Of course, even if a court entertains a suit for an injunc-

57. Id. at 681-82 (quoting U.S. CONST. art. I, § 8, cl. 14) (emphasis by the Court).
58. Id. at 683-84.
In Stanley, the Supreme Court held that, at least insofar as servicemembers are concerned, constitutional rights are not "trumps" over the military's need for a disciplined fighting force. "[S]pecial factors counselling hesitation—the unique disciplinary structure of the Military Establishment and Congress' activity in the field" are, in the Court's opinion, more important than individual servicemembers' constitutional rights because those special factors enhance the general welfare by promoting a strong national defense.

Id. at 15. See also Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1292-96 (1976).

60. But see Gaspard v. United States, 713 F.2d 1097, 1103 n.12, (5th Cir. 1983) (noting "of course, injunctive relief, a matter of discretion in the district court, could not be used to obstruct necessary military orders").

61. "An injunction, however, comes to [sic] late for those already injured; for these victims, 'it is damages or nothing.'" Stanley, 483 U.S. at 690 (Brennan, J., dissenting) (quoting Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)). Monetary damages have always been viewed as the traditional remedy for violations of personal liberty. Davis v. Passman, 442 U.S. 228, 245 (1979).


[A] right is by definition a situation in which the individual interest trumps the collective well being. . . . One has a right to a result if one must obtain that result despite its effect on the collective good. Rights are based on the superiority of a moral principle to the policy in question.


V. Stanley Does Not Advance the Utilitarian Goals It Purports to Serve

Stanley would seem, therefore, to be based on a utilitarian principle, i.e., that the maximization of the general welfare by promoting a strong national defense outweighs the constitutional rights of servicemembers.64

When a servicemember enlists in the armed forces, that servicemember accepts some limitations upon his or her personal autonomy.65 However, signing an enlistment contract or accepting a

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64. The Supreme Court used a similar utilitarian calculation in Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require an evidentiary hearing prior to the termination of disability benefits). See also, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule need not be applied at an administrative hearing). One commentator has suggested that the Supreme Court has no particular competence in calculating utilitarian benefits:

[T]he three-factor analysis enunciated in Eldridge appears to be a type of utilitarian, social welfare function. That function first takes into account the social value at stake in a legitimate private claim; it discounts that value by the probability that it will be preserved through the available administrative procedures, and it then subtracts from that discounted value the social cost of introducing additional procedures... .

The problem with a utilitarian calculus is not merely that the Court may define the relevant costs and benefits too narrowly. However broadly conceived, the calculus asks unanswerable questions. For example, what is the social value, and the social cost, of continuing disability payments until after an oral hearing for persons initially determined to be ineligible? Answers to those questions require a technique for measuring the social value and social cost of government income transfers, but no such technique exists... .

Finally, it is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action. Therefore, a... decision about procedure, one arguably reflecting the intensity of the contending social values and representing an optimum position from the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded. A balancing analysis that would have the Court merely redetermine the question of social utility is similarly inadequate. There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision.


65. See supra notes 5-10 and accompanying text; see also Tomes, The Servicemember's Legal Guide 26-42 (1987). Joseph Raz has stated that "an autonomous person is part author of his own life... . A person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of those options." J. Raz, The Morality of Freedom 204 (1986). A servicemember's options are certainly limited by the military mission, his commander's orders, military regulations, and the like.
commission does not mean that the servicemember forgoes all interest in himself and in the rights that normally secure those interests for him. Joining the military means accepting limitations on one's freedom of action, not accepting the elimination of one's freedom of action. For example, the military may compel a servicemember to obey orders but surely the military cannot compel him to divorce his wife. This acceptance of limitations upon personal autonomy comes from the concept of service to the nation. The very definition of a "servicemember" is one who serves for the greater interests of the society which he is serving. However, what is called into question by the Court's decision in Stanley is just how a Supreme Court decision that fails to either compensate for or deter constitutional torts against servicemembers can advance the interests of society.

The result of this trilogy of cases, Feres, Chappell, and Stanley, is to deprive servicemembers who have been victims of constitutional violations during their military service of their chance for vindication in the courts and to grant virtual immunity from suit to both military officers and civilian federal officials who violate servicemembers' constitutional rights. The Court's rationale is that to allow servicemembers the ability to sue for constitutional torts would jeopardize discipline and harm combat readiness. Stanley strips servicemembers of their rights to be free from constitutional violations, however, without advancing the very utilitarian goals that the Supreme Court relied upon in reaching its decision. Rather than advancing the goal of maximizing welfare by

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66. See e.g., Department of the Army Pamphlet 600-68, White Paper, 1986: Values: The Bedrock of Our Profession 7, 9 (June 1986), cited in Riley, Serve Your Soldiers to Win, 66 Mn. Rev. 11 (1986). The professional Army ethic establishes a duty of service and the sense of purpose necessary to preserve the nation. The four facets of this ethic include: loyalty to the Nation, the Army, and the unit; duty; selfless service; and integrity. Id.


68. See notes 47-63 and accompanying text.

69. A leading constitutional scholar has noted that the Court has used cost-benefit analysis in interpreting 42 U.S.C. § 1983 (1988). His thesis states that by interpreting constitutional tort liability under § 1983, and by using tort rhetoric rather than constitutional language, the Court dilutes the protections the statute offers to persons who have suffered violations of their constitutional rights.

Tort rhetoric also operates at a somewhat more subtle level than that of explicit doctrine: it facilitates the use of cost-benefits analysis. . . . [O]ne can fairly describe the current judicial perspective on tort law as a "law and economics" approach that emphasizes either efficiency, loss-spreading, or some combination thereof. Courts taking this latter approach only recognize those values that can be actually or theoretically...
strengthening the national defense, this disenfranchisement of servicemembers harms the defense effort. Further, Stanley thwarts the public's need to deter constitutional violations by the military. Nor does the decision further the need for civilian control of the military.

A. Stanley Does Not Help the Defense Effort

No one can doubt that one of the basic goals of our country is to "provide for the common defense." In The Federalist, Alexander Hamilton: "saw four principal purposes of the union of the States; of these, two—and the first two at that—were 'the common defense of the members' and 'the preservation of the public peace, as well against internal convulsions as external attacks.' " The Constitution provided the Congress and the President the powers that were essential to provide for the common defense. American courts have long recognized the need for a well-disciplined military to defend the country:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

The Court itself seems to recognize that this need for a disciplined fighting force is the only rationale left for the Feres doctrine and for the Chappell and Stanley decisions.
Feres and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the Feres doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Even if military negligence is not specifically alleged in a tort action, a suit based on service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally, duty and loyalty to one's service and to one's country. Suits brought by servicemembers against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.76

Contrary to the unsupported conclusions of the courts, military scholars find coercive discipline (blind obedience to orders to avoid punishment) to be the least effective means of motivating soldiers to do their duty. Numerous studies have found that soldiers fight for two reasons, to protect their comrades and to get home safely.76

Studies conducted during the Korean and Vietnam Wars confirmed the "seeming irrelevance" of traditional concepts of discipline. . . . [T]hese studies found that the basic drive to return home safely and the intimacy of the group were the primary motivations under fire. An infantryman's identification with his "buddies" "[a]lthough often at odds with the authority system . . . contributed to operational effectiveness." The rigidity of discipline actually

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detracted from morale and military efficiency, and increased dissen-
sion and unrest.\textsuperscript{77}

In at least two respects, the military's own doctrine de-empha-
sizes discipline as a major component of combat leadership. First,
military doctrine downplays discipline in that military law requires
servicemembers to disobey illegal orders,\textsuperscript{78} because blind obedience
leads to war crimes.\textsuperscript{79} Second, the military's tactical doctrine em-
phasizes initiative over blind obedience. For example, one of the
Army's key operational concepts is initiative.\textsuperscript{80}

[Initiative] requires a willingness and ability to act independently
within the framework of the higher commander's intent. . . .
[Initiative] requires audacity which may involve risk-taking and an
atmosphere that supports it. . . . In the chaos of battle, it is essen-
tial to decentralize decision authority to the lowest practical level
because overcentralization slows action and leads to inertia. . . .
Decentralization demands subordinates who are willing and able to
take risks and superiors who nurture that willingness and ability in
their subordinates.\textsuperscript{81}

This doctrine seems to make acting independently, within the lim-
its of the mission, the antithesis of blind obedience. Independent

\textsuperscript{77} Bennett, The Feres Doctrine, Discipline, and the Weapons of War, 29 St. Louis
ULJ 383, 408-09 (1985), (quoting Little, supra note 76, at 195) (emphasis in original).
\textsuperscript{78} United States v. Calley, 22 C.M.A. 534, 48 C.M.R. 19 (1973) (obedience to orders was
no defense when the defendant knew or should have known that the order to kill unresisting
civilians was illegal); United States v. Kinder, 14 C.M.R. 742 (1954) (obedience to orders
was not a defense for a soldier who shot a subdued prisoner); \textit{see generally}, R. Rivkin, The
Rights of Servicemen 105 (1972); Tomes, supra note 65, at 24-25.
\textsuperscript{79} \textit{Cf.} R. Gabriel & P. Savage, Crisis in Command 97-98 (1978) (describing how blind
acquiescence to bad military policies in Vietnam allowed unethical practice to continue).
The court in \textit{Calley} said: "[T]he obedience of a soldier is not the obedience of an auto-
man. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person." \textit{Calley} 22 C.M.A. at 541, 48 C.M.R. at 26.
\textsuperscript{80} \textit{Field Manual} 100-5, Operations 2-1 (May 1986) [hereinafter FM 100-5]. The other
operational concepts are depth (striking deep into the enemy rear), agility (acting and react-
ing faster than the enemy does), and synchronization (coordinated action of various units
and weapons systems). \textit{Id.} at 2-1, 2-2.
\textsuperscript{81} \textit{Id.} at 2-2; \textit{see also} Hirschhorn, supra note 62, at 221:
Modern firepower compels troops to disperse and take cover for protection and the
infantryman is often alone, unable to see what is happening around him and out of
contact with his superiors. To perform effectively, the infantryman must display both
endurance and initiative while frightened, exhausted, disgusted, and beyond the di-
rect supervision of officers.

\textit{Id.}
action is likely to become even more important in future wars than in past ones, because the devastating effects of modern weapons and the vulnerability of communications systems results in the need to keep troops dispersed.82

Decentralization of tactical control forced on land forces has been one of the most significant features of modern war. In the confused and often chaotic battlefield environments of today, only the smallest of groups are likely to keep together, particularly during critical movements. . . . Small groups and their leaders must be capable of going it alone like so many forlorn hopes.83

Not only does discipline play a relatively minor role in combat effectiveness, but little support exists for the proposition that allowing servicemembers to sue for damages for constitutional or other torts harms discipline. Neither Feres nor Chappell did much to deter tort suits by servicemembers,84 although those cases meant that servicemembers would seldom win. Further, servicemembers have not hesitated to bring lawsuits under other statutes, such as the Privacy Act.85 None of these suits seem to have harmed discipline.

[T]here is no evidence that negligence actions by service members over the past twenty-five years have degraded the military mission.

The modern soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, service members have vigorously asserted their positions in direct court actions against high ranking officials. The prolifera-

82. Modern target acquisition systems can locate electronic emanations, such as radios and radars, easily. FM 100-5 notes that:

Armies based on the Soviet model will attempt to control the electromagnetic spectrum through the use of radio electronic combat (REC). They will analyze an opponent's communications system by signals intelligence (SIGINT) to find the terminals, links, and relays vital to command and control. Then, following the commander's priorities, they will attempt to destroy or to disrupt those communications.

FM 100-5, supra note 80, at 4-4.


84. See supra note 23.

85. 5 U.S.C. § 552a (1988). This congressional authorization for servicemember suits, coupled with the language of the FTCA, excepting liability for claims "arising out of the combatant activities of the military . . . in time of war," 28 U.S.C. § 2680(j) (1988), indicates that Congress contemplated servicemember lawsuits. If Congress had felt that such suits would harm discipline, it could have expressly excepted servicemembers from bringing any such suits.
tion of this constitutional litigation apparently has not interfered substantially with military operations. 66

Furthermore, the disruption of military operations and of military discipline is no greater than that which occurs when a civilian sues the military or when a servicemember sues for a nonincident-to-service injury 67 or when a servicemember's defense counsel litigates a constitutional issue, such as the lawfulness of an order, at a court-martial. 68 In all of these cases, a commander, or other military superior, will be required to explain or justify his actions before a judge or jury. The disruption of military operations in such a civilian-plaintiff case, when a U.S. attorney brings a military commander into a federal court to defend his actions or in a court-martial proceeding when military defense counsel requires

86. Rhodes, supra note 23, at 42; cf. Zillman, supra note 23, at 521-26 (intentional tort suits cause more serious harm to military efficiency than do negligence suits).


The Court fears that military affairs might be disrupted by factual inquiries necessitated by Bivens actions. The judiciary is already involved, however, in cases that implicate military judgments and decisions, as when a soldier sues for nonservice-connected injury, when a soldier sues civilian contractors with the Government for service-connected injury, and when a civilian is injured and sues a civilian contractor with the military or a military tortfeasor.

Stanley, 483 U.S. at 703 (Brennan, J., dissenting).


88. Military courts often review matters that have serious implications for disrupting discipline. For example, to convict a servicemember of a violation of articles 90, 91, or 92, UCMJ, 10 U.S.C. §§ 890-92 (1988), involving disobedience of the order of a commissioned or a noncommissioned officer, or of any other lawful order or regulation, the prosecution must prove that the order was lawful. WINTHROP, MILITARY LAW AND PRECEDENTS 576 (2d ed. 1920); United States v. Martin, 1 C.M.A. 674, 5 C.M.R. 102 (1952); United States v. Smith, 1 M.J. 156 (C.M.A. 1975); United States v. Smith, 25 M.J. 545 (N.M.C.M.R. 1987). These court-martial confrontations may be worse for a commander than testifying in a federal district court far from the military base.

The chilling effect of potential embarrassment through civilian factual inquiries should not be overemphasized however. First, it is far from clear that disclosures at a civilian tribunal can bring greater dishonor upon a military officer than disclosures at a military tribunal, since a military officer may well place greater value on the judgment of his military peers than on that of a civilian judge and jury. Second, intramilitary inquiries and courts-martial are not necessarily shielded from civilian scrutiny anyway. . . . Court-martial proceedings must be open to the public, unless classified information would be disclosed.

the commander to testify is no worse than the disruption that occurs in a constitutional torts proceeding against servicemembers. However, these civilian lawsuits against the military for similar wrongs are not perceived as a threat to discipline and the Supreme Court reviews courts-martial without disrupting discipline. Clearly, since lawsuits for constitutional torts do not involve the judiciary in sensitive military matters any more than these other challenges, a federal court intervention is unlikely to be more disruptive than the military’s own procedures to resolve grievances, such as an inspector general investigation or a complaint under article 138 of the Uniform Code of Military Justice (“UCMJ”).

Further, the Supreme Court has recently given the military a powerful weapon to enforce discipline—a return to unrestricted subject-matter jurisdiction of courts-martial. In Solorio v. United States, the Court overturned O’Callahan v. Parker, which had held that the military could not court-martial a servicemember for an off-post offense unless that offense was “service-connected.” Now, the only test for court-martial jurisdiction is whether the accused is a member of the armed forces and whether his crime is an offense under the UCMJ. One of the Supreme Court’s reasons

89. Cf. United States v. Muniz, 374 U.S. 150 (1963). The Court noted that the government’s contention that allowing prisoners to sue the government would erode prison discipline was more potential than actual. Id. at 163.

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of, and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Id.
95. The defendant at a court-martial is called “the accused.”
96. Solorio, 483 U.S. at 450-51. The UCMJ was enacted as part of the Act of May 5, 1950, ch. 169, 64 Stat. 108 (1950). It was thereafter codified as part of title 10 of the United States
for this expansion of court-martial jurisdiction was to improve discipline by giving the military the ability to try off-post offenses in the United States by court-martial.  

Whether or not the Court overrates discipline as a component of an effective fighting force, the importance of morale cannot be overstated. The Army's major doctrinal publication states: "Poor morale can weaken any unit." As one of the leading theorists on military doctrine noted:

The art of war is subject to many modifications by industrial and scientific progress. But one thing does not change, the heart of man. In the last analysis, success in battle is a matter of morale. In all matters which pertain to any army, organization, discipline and tactics, the human heart in the supreme moment of battle is the basic factor.  

What happens to servicemembers' morale when they learn that they cannot obtain redress in the courts for violations of their constitutional rights, rights guaranteed by the very Constitution they have sworn to uphold and defend? "The policy argument for absolute immunity... rests on the dubious proposition that a ser-

Note, supra note 94, at 1032-33.

100. Each person who enlists or who is commissioned in the Armed Forces takes the following oath:  

I, ________, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God. 10 U.S.C. § 502 (1988) (emphasis added).
viceman is more likely to respect authority when he has no recourse for the intentional or malicious deprivation of his constitutional rights. 1

In his dissent in United States v. Johnson, Justice Scalia commented on the effect on morale of barring recovery for torts: "After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the payment they might have recovered had he been piloting a commercial helicopter at the time of his death." 2

A belief that no judicial redress exists for constitutional torts seems even less likely to improve morale. Speaking of cases in which the court denied victims of atomic bomb testing relief under Feres, one commentator noted:

Even more than Chappell, these cases touch at the heart of Feres. The servicemen involved acted under military orders while on military maneuvers. And their own government is killing them. They cannot be expected to support its "larger mission." The Army's desertion of its men will not gain their agreement with its institutional objectives. Servicemen have been denied relief in order to preserve a respect for authority that already has been destroyed. Cast aside by the Feres doctrine, they can only rebel. 3

Barring servicemembers from suing for damages for constitutional (and other) torts harms the government's (and its citizens') interest in maintaining a credible defense force. It also diminishes military superiors' incentive to uphold their oaths "to support and defend the Constitution" because of the lack of a credible deterrent to constitutional violations. 4

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102. 481 U.S. at 692 (Scalia, J., dissenting).
104. See supra note 100.
105. See Note, supra note 88, at 1004.

Bivens and its progeny suggest a role for the courts in enforcing constitutional norms to deter unconstitutional tortious conduct where Congress has not created adequate remedial structures. The military system of compensation and justice presents such a situation: As an institution, the military is not competent to remedy certain instances of wrongfull conduct.

The purpose of deterrence by public tort remedies is to protect the norms of soci-
In Chappell, the Court relied on the system Congress had created to review servicemembers' complaints and grievances, implying that military and veterans' benefits were adequate to protect servicemembers from constitutional torts. If the very volume of lawsuits alleging such violations did not shatter that theory, a close analysis of the remedies servicemembers have would illustrate that these remedies are an ineffective deterrent for gross constitutional violations. For example, the article 138, UCMJ, complaint that the Court relied on to provide "for the review and remedy of complaints and grievances such as [constitutional torts]" in Chappell requires an aggrieved servicemember to ask his commander for redress before sending his complaint through the chain of command, hardly a confidence-inspiring procedure when the commander is the one who committed the constitutional tort. Further, those who rely on the forwarding of article 138 complaints to the service secretary to provide some semblance of civilian review ought to consider that the service secretaries have delegated their duties with regard to these complaints to military subordinates.

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ety governed by civilian law. Although civilian courts may lack a certain competence, in the sense of knowledge about military discipline, they are generally competent to weigh evidence on issues of great technical complexity, and they are more competent than the military to reach a substantively legitimate outcome in deciding when constitutional rights have been violated. The issue at the heart of the Feres doctrine is this: In the absence of congressional guidance, who will balance the military's discipline interest against civilian and constitutional norms—the courts or the military?

Id. at 1009-10.

In Note, The Death of Wilkes v. Dinsman: "Special Factors Counseling Hesitation" in Abandoning a Common Law Doctrine, 41 BAYLOR L. REV. 179, 201 (1989), the author remarks that the great mistake in disallowing challenges to military decisionmaking is that it "elevates the supposed need for blind obedience over the need for all individuals, at some elementary level to be held accountable to one another" (emphasis in original). But see, Richmond, Protecting the Power Brokers: Of Feres, Immunity, and Privilege, 22 SUFFOLK U.L. REV. 623 (1988) which argues that military decision makers should be protected from potential tort liability.

106. 462 U.S. at 304.


109. 462 U.S. at 302.


111. For example, § 20-12, Army Regulation 27-10 (March 18, 1988), directs the Judge
Similarly, article 98, UCMJ, which makes failure to comply with the safeguards of the Uniform Code a criminal offense, has never been used to prosecute a commander or other military supervisor (or indeed anyone) who has violated a servicemember's rights. Finally, veterans benefits are inadequate remedies because they are meager in comparison to damages in tort and Veterans Administration benefits are not available for servicemembers who are discharged under other than honorable conditions.

Thus, neither military nor veterans remedies adequately deter the armed forces from committing intentional or constitutional torts such as Master Sergeant Stanley suffered:

The Feres doctrine's failure to distinguish between negligent and intentional or constitutional torts has allowed courts applying the doctrine to gloss over the possible inadequacies of intramilitary remedies. . . . Intentional or constitutional torts offend societal norms in a way that deserves moral condemnation, and an action for dam-

Advocate General, U.S. Army, or his designee, to act on article 138 complaints on behalf of the Secretary of the Army. The Secretary of the Army has probably never seen an article 138 complaint, much less acted on one. This lack of real civilian review to fill the deterrent function of tort law nullifies the assertion that article 138 is "competent to punish and deter isolated misconduct of lower level officers that sharply departs from the military's own norms of behavior." Note, Intramilitary Tort Law, supra note 24, at 1000. Further, based on my twelve years' experience as a military attorney, I believe that only a small minority of servicemembers are aware of article 138. And the one such complaint made against me (long before I became a military attorney) certainly did not significantly deter me from commanding my unit as I saw fit. In fact, I remember throwing the request for redress under article 138 into the waste basket.


Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

113. In twelve years as an Army Judge Advocate General's Corps officer, including three years as a military judge, the author never heard of nor encountered a single prosecution for a violation of article 98. See H. Moyer, Justice and the Military § 3-100, at 677-78 (1972); Note, Intramilitary Tort Law, supra note 24, at 1002 n.40.


115. Howland, supra note 114, at 136. 38 C.F.R. § 3.12(c)(d) (1989) sets forth the types of discharge that bar payment of veterans benefits.
ages is a way to vindicate those norms, as well as to compensate the victim. The military justice system can be expected to fulfill this function by imposing administrative or criminal sanctions only where its norms and interests accord with civilian ones.\textsuperscript{116}

Stanley also impedes another important public goal, civilian scrutiny and ultimately civilian control over the military. Concern that judicial review will disrupt military decisionmaking is "a dubious basis for barring civilian factual inquiries, because there is a recognized public interest in having a military establishment that is not entirely closed, monolithic and secretive."\textsuperscript{117}

In Jaffee v. United States, a case involving exposure to atomic testing, the court barred an ex-servicemember's suit because "[m]ilitary decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently be called into a civilian court to answer for their actions."\textsuperscript{118} According to the dissent, the reason for this bar was to discourage public accountability of the military.\textsuperscript{119}

Rather than characterizing appropriate decisionmaking by military decisionmakers as "quick" and "forceful" in the absence of a threat of judicial review, one might equally use the terms "hurried" and "reckless." Although commanders need to make quick decisions on occasion, they always need to make correct ones. Current military doctrine calls for commanders to consult with their lawyers before making both administrative and tactical decisions.\textsuperscript{120} The possibility of civilian review, and judicial liability,

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\textsuperscript{116} Note, Intramilitary Tort Law, supra note 24, at 1002-03.
\textsuperscript{117} Id. at 1004. The author adds:
Occasional embarrassment to the military in the area of politics can be justified as necessary to the ability of Congress to fulfill its constitutional role of military policymaking. Although the judiciary is not charged with the same active oversight of executive branch affairs, it is far from clear that the interest of an executive agency in avoiding embarrassment justifies immunity from investigation in a judicial proceeding.
\textsuperscript{118} Jaffee, 663 F.2d at 1250 (Gibbons, J., dissenting).
\textsuperscript{119} Id. at 1004 n.49 (emphasis in original).
\textsuperscript{120} See Tomes, Indirect Responsibility for War Crimes, MILITARY REVIEW 37, 42 (November, 1986). Article 6 of the UCMJ, requires convening authorities (commanders who have the authority to establish courts-martial) to "at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice. . . ." 10 U.S.C. § 806(a) (1986).
\end{flushright}
means only that an additional factor, the true cost of war... will enter into the decisionmaking process.”

Forcing commanders to think about conserving the fighting force, to make the human cost part of tactical planning, is entirely consistent with tactical doctrine. Even if possible judicial scrutiny chills decisionmaking, such scrutiny is preferable to the involuntary administration of LSD or unnecessary exposure of service personnel to the effects of an atomic blast.

Rather than chilling decisionmaking, judicial scrutiny may inculcate values that will lessen abuses by the military. As one commentator noted: “Allowing constitutional suits is particularly important because these suits will promote the transfer of the dominant civilian values that are least reflected in the military. The military professional corps will become more responsive to civilian values, which will increase internal civilian control.”

In sum, federal court abstention from servicemembers’ constitutional tort cases harms the national defense by overemphasizing coercive discipline at the expense of morale, by failing to deter military superiors from infringing on the constitutional rights of servicemembers and civilians, and by lessening civilian control over the military. Barry Bennett sums it up well:

The lesson of the Fer... doctrine’s newest victims also must be broadly learned. Their cases reach to the very heart of our laws, our

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121. Bennett, supra note 77, at 419.
122. FM 100-5, lists seven combat imperatives:
   1. Insure unity of effort.
   2. Direct friendly strengths against enemy weaknesses.
   3. Designate and sustain the main effort.
   4. Sustain the fight.
   5. Move fast, strike hard, and finish rapidly.
   6. Use terrain and weather.
   7. Protect the force.

The discussion of the seventh factor notes: “Successful commanders preserve the strength of the force. They do so by assuring security, keeping troops healthy and equipment ready, and sustaining discipline and morale.” Id. at 2-10.

123. In Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), a former servicemember sued federal officers for injuries resulting from exposure to fallout from nuclear weapons testing. The court relied on Fer... in dismissing his Bivens cause of action. Id. at 1098-1100.
Similarly, the court in Ja... United States, 663 F.2d 1226 (3rd Cir. 1981), cert. denied, 456 U.S. 972 (1982), denied a Bivens action against military superiors who ordered plaintiff to stand in a field close to a nuclear detonation without any protective equipment.

124. Howland, supra note 114, at 146.
society, and our humanity. . . . A legal system that dismisses the veterans' appeal to its laws must ask where it stands among the world's systems of justice. And a society that rejects their claim on its humanity must ask what place it holds among the world's civilizations.  

B. Stanley Also Violates Public Tort Theory

Traditionally, the law of torts has had three goals: compensation, deterrence, and retributive justice. All three goals support a utilitarian jurisprudence. Thus, under the Anglo-American law of torts, a tort victim can recover damages to compensate him for his loss, to deter the tort-feasor or others similarly situated from committing future torts, and, in some cases, to punish the tort-feasor. Obviously, society in general has a utilitarian interest in compensating those of its members who are victims of torts and in deterring those who might commit torts from so doing, whether the tort-feasor is an individual or the government.

Public tort law then is meant to provide remedies for citizens that have been harmed by the activity of government officials. It "attempts to encourage vigorous conduct of governmental activities while compensating victims of those activities and deterring wrongful conduct by officials."  

Obviously, however, not all persons are liable in tort. A person may be subject to liability in tort if he has caused harm to another, if he has failed to perform his duty to protect another dependent on him, or if something in his possession or something or someone over whom he has control has caused harm to another. Of course, in many cases, several bases of liability exist. When a commander harms a servicemember, for example, he may also fail to

125. Bennett, supra note 77, at 421.
126. See generally, Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 72-73 (1942).
127. Id.
129. See Note, Intramilitary Tort Law, supra note 24, at 997. Another commentator identifies five primary social goals for public tort law: "to deter wrongdoing, to encourage vigorous decisionmaking by officials, to compensate victims of official misconduct, to exemplify society's moral principles, and to achieve institutional competence and legitimacy." Schuck, supra note 59, at 16.
130. Seavy, Principles of Torts, supra note 126, at 74.
perform a duty to protect him. But it must be asked whether a commander or other military superior has a duty to protect those under his control. Many articles of the Uniform Code of Military Justice\textsuperscript{131} indicate that he has such a duty: article 31 prohibits compulsory self-incrimination; article 37 prohibits illegal command influence; article 55 prohibits cruel and unusual punishment; article 93 makes cruelty toward or maltreatment of a subordinate criminal; article 97 prohibits unlawful detention; and article 98 makes failure to comply with procedural rules in criminal matters an offense. Further, a military superior's oath "to support and defend the Constitution"\textsuperscript{132} would seem to require him to avoid violating his military subordinate's constitutional rights.

The result of these decisions that bar servicemembers from receiving damage awards for constitutional torts is to deny these victims compensation for their injuries, a compensation that the FTCA itself would seem to favor:

The Tort Claims Act reflects a strong public policy, recognized by Congress, to protect the citizenry from torts committed by the public servants, to lift the risks that may be ruinous if left to lie upon the individual victim of the particular accident . . . and to achieve an allocation and apportionment of the loss among not a relatively small segment of the consuming public, but among the entire federal taxpaying public.\textsuperscript{133}

Although the Court in Johnson based its decision, in part, on the "generous statutory disability and death benefits"\textsuperscript{134} of the Veterans Benefits Act,\textsuperscript{135} that Act does not encompass constitutional torts that do not result in disabling injury.\textsuperscript{136} Unlike the situation in Chappell,\textsuperscript{137} no intramilitary compensation system pro-
vides a remedy for the constitutional tort suffered by Stanley\textsuperscript{138} or for future victims of intentional constitutional torts. "[A]ction[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees."\textsuperscript{138} If the purpose of the military is to protect society,\textsuperscript{140} society ought to bear at least a portion of the burden of compensating those injured by the military's constitutional torts, including military as well as civilian victims.

Products liability law operates on the premise that consumer injuries are part of the cost of doing business. Similarly, service-connected injuries should be viewed as part of the nation's cost of defense. It is difficult to see why the injuries of those working for the whole should be borne exclusively by the individual.\textsuperscript{141}

Just as Stanley fails to fulfill the objective of victim compensation, it also fails to act as a deterrent upon tort-feasors within the military establishment from committing intentional or constitutional torts. Deterrence of government officials is more important than deterrence in general because abuses of public power threaten the integrity of the government itself.\textsuperscript{142} Justice Brandeis noted that:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.\textsuperscript{143}

\textsuperscript{138} Stanley, 48 U.S. at 691 (Brennan, J., dissenting). The district court in Stanley found that an award of back pay and promotions, provided by a board of correction of military records, was "meaningless" for Stanley because rather than seeking such remedies, he was seeking damages for mental illness and physical pain. 574 F. Supp. 474, 485 (S.D. Fla. 1983).


\textsuperscript{140} See supra notes 70-73 and accompanying text.

\textsuperscript{141} See supra note 95, at xi.

\textsuperscript{142} Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
As previously discussed, military remedies are inadequate to deter military officials from violating servicemembers' constitutional rights. Although the military justice system may sanction misconduct that departs from its own norms, the system fails to deal with widespread departures from civilian or constitutional norms. Such a result is inevitable in a justice system that is run by the very commanders who commit constitutional violations. After all, in the military, commanders, not lawyers, decide which cases go to court.

Thus, Feres, Chappell, and Stanley fail to accomplish the goals of public tort law because they neither compensate victims of constitutional torts nor effectively deter military misconduct.

At best, the Court's approach [in Stanley] remits servicemen to inadequate statutory remedies; at worst it sanctions complete deprivation of their constitutional rights. It is regrettable that those who serve and protect our nation and the Constitution upon which it is founded are stripped of the same rights we cherish for ourselves.

This critique of the Court's decision in Stanley could end at this point because the decision clearly does not accomplish the utilitarian goals the Court intended it to serve. But a further question deserves consideration: Where do servicemembers and servicemembers' rights fit into our system of jurisprudence?

144. See supra notes 106-16 and accompanying text.
145. See Intramilitary Tort Law, supra note 24, at 1002-03.

Of course, many of these servicemembers will return to civilian life with values they acquire while in the military, including negative values such as a lack of respect for constitutional rights. Over the past ten years, the military has reported that of approximately 3,000,000 servicemembers eligible to reenlist in the armed forces, 1,600,000 did. Therefore, 1,400,000 did not reenlist and returned to civilian life after their initial term of service. MILITARY MANPOWER RECRUITING AND REENLISTMENT RESULTS FOR THE ACTIVE COMPONENTS (1979-1988). Most of those that did reenlist eventually returned to civilian society.

146. Rule 601(a), Rules for Court-Martial (R.C.M.), Manual for Courts-Martial, United States, provides that "referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial." The UCMJ specifies that the President, service secretaries, and various commanding officers may convene courts-martial. 10 U.S.C. § 822 (1988). These commanders must receive advice from lawyers (judge advocates). Id. at § 806(b). Ultimately, though, the commanders decide whether to prosecute a case, Rule 601(d), and who comprises the court members (military jurors). Id. § 825(d)(2). This type of command control may result in illegal command influence. See United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Levite, 25 M.J. 334 (C.M.A. 1987); United States v. Thomas, 22 M.J. 398 (C.M.A. 1986), cert. denied, 479 U.S. 1085 (1987).

VI. Stanley and Jurisprudential Theory

The preceding section demonstrated that the utilitarian reasoning that the Court employed in Stanley will not yield the result the Court intended it to have. This section will demonstrate that even if the Court had arrived at the conclusion which a proper application of the utilitarian calculus demands, such a calculus violates constitutional rights in particular and the “public culture” which gives those rights their meaning.

Whether one approaches the analysis of constitutional rights from a utilitarian, libertarian, or communitarian standpoint, one cannot doubt the importance of rights148 to the founders of our country, for they said, “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights.”149

[W]ithin the political culture shared by men of property in 1787, the establishment of justice meant more than anything else the protection of rights. Natural rights, inalienable rights grounded in natural law; and above all, the rights to life, liberty, and property were at the core of the conception of justice.150

The framers based the Constitution on John Locke’s individualistic conception of natural rights.

For Locke, the rights to life, liberty, and property authorize people to pursue their own projects as they see fit provided that their activities do not violate the rights of others. Rights protect people from others’ unwarranted incursions, but they do not supply any positive

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148. A right is a “power, privilege, faculty, or demand, inherent in one person and incident upon another,” BLACK'S LAW DICTIONARY 1324 (6th Ed. 1990). Joseph Raz defines a right as:

“X has a right” if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.

... Note that since “a right” is a very general term, one rarely asserts that someone has a right without specifying what rights he has, just as one does not normally mention that a person is subject to a duty without saying something more about what duty it is.

Raz, supra note 65, at 166.

149. The Declaration of Independence para. 2 (U.S. 1776).

benefits. People are entitled to noninterference . . . but people are not entitled to aid. Likewise, natural rights are equal rights since all people possess these rights and since no one’s rights are weightier than anyone else’s. But Locke regarded the equality of natural rights as formal rather than substantive. Respecting natural rights does not require equality of outcomes; it requires observing impartial procedures.

This Lockean view of rights continues to dominate jurisprudence in the United States. Constitutional rights are seen as negative rights that guarantee spheres of personal liberty by forbidding unwarranted forms of government interference . . . .

Certainly Master Sergeant Stanley sought to vindicate the assault on his negative right, the right to be free from government inflicted intentional bodily injury. But his inability to vindicate the harm to that right suggests that the Lockean view of rights may not dominate current American jurisprudence. One might argue that the utilitarian goal of maximizing public welfare even at the expense of individual rights has overtaken rights-based jurisprudence in today’s society. As Professor Schwartz explains:

When the Constitution and the Bill of Rights were written, government was only an arbiter, allowing the individual to go unrestrained except at extreme limits of conduct. In the almost two centuries that followed, the system gradually shifted to one in which the government had a positive duty to promote the welfare of the community, even at the cost of individual rights. From a constitutional, as well as from a political view, the welfare state has become an established fact. . . .

In the welfare state, however, the emphasis inevitably shifts from liberty to equality. John Stuart Mill gives way to John Maynard Keynes and the primary function of the legal as of the social order becomes distributive. With the acceptance of those views that hold forth that the economic burdens incident to life must increasingly be borne by the society to ensure the individual at least the minimum requirements of a decent human life, the society assumes a


152. It matters little, however, whether the right involved is a negative right, such as freedom from bodily injury, or a fundamental liberal right such as the right to free speech, because Stanley, read with Chappell v. Wallace, 403 U.S. 388 (1971), indicates that servicemembers cannot vindicate any constitutional torts with monetary damages.
new distributive role. Its laws must likewise follow in this new path.153

Thus, one may argue that the legal and social order of the United States has moved from the pre-eminence of natural rights to the utilitarian view that the benefits of society should be distributed in a way that maximizes welfare.164 A utilitarian looks at the practical consequences, the utility, what works, as the main criteria for judicial decisions, not individual rights.165 If a utilitarian would grant people a right, that right must be one that maximizes the general welfare rather than one that overrides considerations of the general welfare.

Yet simply incorporating rights into our overall utilitarian calculus of general welfare does not make those rights the limitations on governmental power which are characteristic of a liberal democracy. Alternatively, an individualistic conception of rights, one in which rights merely act to check the government and others from invading individual rights, yields an impoverished moral landscape wholly unable to account for certain collective goods which give rights their meaning.166 “Asserting a right is more than

As early as the controversy over the National Road and as late as the debate over the New Deal it was argued that neither the taxing power nor the Commerce Clause was so broad as to allow the federal government to engage in vast projects or assume a general superintendence of the economy in order to ensure the well-being of the people as a whole. But the utilitarian perspective...has found increasing favor. The area of dispute has become instead the question of how much and what kind of intervention should be made by the national government.

Mazor, supra note 150, at 50.

154. The framers of the Constitution were not, however, adverse to the utilitarian idea of promoting the general welfare. The preamble to the Constitution lists promoting the general welfare as one of the reasons for establishing the Constitution. James Madison stated in THE FEDERALIST, No. 45, at 289 (J. Madison) (C. Rossitur Ed. 1961), that “[t]he public good, the real welfare of the great body of people, is the supreme object to be pursued.”

155. The classic utilitarian texts are J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789) and J.S. MILL, UTILITARIANISM (1957).

156. For a contemporary account of an individualistic conception of rights see R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). Nozick rejects the utilitarian principle that a right must be one that maximizes the general welfare rather than one that overrides consideration of the general welfare because it does not sufficiently account for the rights of individuals. He envisions a concept of individual autonomy which assumes that an individual is free when he is not interfered with by the state or other members of society. This definition of freedom is based on the concept that the individual is free to do other than he did when he had the ability to do so, given the same circumstances. This conception of individual autonomy, and the rights which protect it, stem from Nozick’s fundamentally Kantian position that persons should never be treated as the means to other ends but rather as ends in them-
issuing an injunction. Such an assertion has an essential conceptual background—some notion of the moral worth of certain properties or capacities without which it would not make sense.157

Joseph Raz, in The Morality of Freedom,158 argues that the Anglo-American liberal tradition is pursuing a culture in which autonomy is a fundamental value. Constitutional rights merit protection not because they are of inherent value. Rather, their enforcement fosters a public culture upon which our autonomy is predicated and defined. According to Raz, rights are the ground of duties in others.159 Thus, a right does not exist unless the interest of the right-holder is sufficient to hold another to be obligated to uphold that right.160

Which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations. If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist.161

Raz’s concept of liberty is also based on an ideal of personal autonomy, an autonomy that is possible only if various collective societal goods are available.

A right to autonomy can be had only if the interest of the right-holder justifies holding members of the society at large to be duty-

selves. Nozick’s conception of rights, in turn, stems from a polemic against utilitarian or “end state” political theories which seek to maximize society’s overall welfare at the expense of individual autonomy. As such, Nozick advocates a conception of rights as “side constraints” on the actions of the state and other individuals. These side constraints, then, preserve individual autonomy. But Nozick’s conception of rights as side constraints and individual autonomy is incomplete within the context of servicemembers’ rights because it does not account for the total harm which is suffered by both the service member and the community at large.

158. Raz, supra note 65.
159. Raz, supra note 65, at 167. Raz does not say that for every duty there is a corresponding right. He distinguishes the views of Richard Brandt who defines rights in terms of obligations, see R. BRANDT, ETHICAL THEORY 438 (1959), by noting that a right of one person is not a duty on another. “It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty.” Raz, supra note 65, at 171. Further, he contends that the dynamic nature of rights, their ability to create new duties based on changed circumstances, could not exist if rights were based only on duties as opposed to grounds of duties.
160. Raz, supra note 65, at 180-84.
161. Id. at 183.
bound to him to provide him with the social environment necessary
to give him a chance to have an autonomous life. Assuming that the
interest of one person cannot justify holding so many to be subject
to potentially burdensome duties . . . it follows that there is no
right to personal autonomy.\textsuperscript{162}

Consequently, Raz’s concept of rights rests on the importance of
those rights to the public good. When harm to an individual jeop-
ardizes the public good, then that harm also harms the community.
When the military administers LSD to a servicemember, that harm
also endangers the community, if for no other reason than because
permitting the military to harm servicemembers lessens the re-
straints that protect the remaining citizenry from such abuses.
“Constitutional rights contribute [to avoiding such harm]. They
are part of the institutional protection of the basic political culture
of a society.”\textsuperscript{163} Raz continues: “Fundamental liberal rights deserve
special protection and recognition: that is, they are valid moral
rights deserving legal-institutional protection over and above the
normal legal protection, because they express values which should
form a part of morally worthy political cultures.”\textsuperscript{164} Under this
theory, the only way to guarantee personal autonomy is for the
courts to enforce individuals’ rights to preserve the public good.

Ronald Dworkin’s rights-based jurisprudence, however, contends
that rights can, in some circumstances, be “trumps” over the gen-
eral welfare.

We need rights . . . only when some decision that injures some
people nevertheless finds prima-facie support in the claim that it
will make the community as a whole better off on some plausible
account of where the community’s general welfare lies. But the most
natural source of any objection we might have to such a decision is
that, in its concern with the welfare or prosperity or flourishing of
people on the whole, or in the fulfillment of some interest wide-
spread within the community, the decision pays insufficient atten-
tion to its impact on the minority . . . . We want to say that the
decision is wrong . . . because it does not take the damage it causes
to some into account in the right way and, therefore, does not treat
these people as equals entitled to the same concern as others.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{162} Id. at 247.
\item \textsuperscript{163} Id. at 260.
\item \textsuperscript{164} Id. at 262
\item \textsuperscript{165} Dworkin, \textit{Is There a Right to Pornography?}, 1 Oxford J. Legal Stud. 177, 211
\end{itemize}
As we have seen, the founding fathers meant for one minority, servicemembers, to have the inalienable rights that the framers of the Constitution added in the Bill of Rights. But, as Raz demonstrated, servicemembers cannot have rights unless those rights establish duties in others. If rights are the reciprocal of duties, and servicemembers are prevented from exercising their rights, what does this disenfranchisement of servicemembers say about their status in society? According to Raz, only members of the same moral community can have rights. If servicemembers do not have enforceable rights, then they must not be members of the same moral community. The result of Chappell and Stanley is that one group, the group that is sworn to defend constitutional rights, are apparently not of sufficient value for the courts to protect their rights. Thus servicemembers are excluded from the moral community they are to defend. One would hope that servicemembers do have some value that is derived from their contribution to society. Apparently however, the Court does not think that the societal status of the individual members of the armed forces is sufficient to ground a duty in the military to avoid violating servicemembers’ rights.

Further, although servicemembers give up a degree of autonomy when they enter the armed forces, they do not give up all autonomy. According to Raz, “[a] person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options.” One reason that Stanley is harmful is because the decision allows the government to restrict servicemembers’ autonomy beyond the degree that they surrender it when they join the service. That harm is not the only harm Stanley causes. Raz contends that the social conditions which constitute the options required for autonomy are collective goods. The existence of the

(1981). Dworkin does not believe that a right is a right “unless it overrides at least a marginal case of a general collective justification.” Dworkin, supra note 62, at 366. By this standard, Stanley appears to say that servicemembers do not have rights rather than merely saying that they cannot enforce them in the federal courts.

166. See supra notes 5-11 and accompanying text.
167. See supra notes 158-61.
168. Raz, supra note 65, at 176.
169. See supra notes 8-10 and accompanying text; see also Tomes, supra note 65, at 26-42.
170. Raz, supra note 65, at 204.
171. See supra notes 8-10 and accompanying text.
172. Raz, supra note 65, at 206.
armed forces is a collective good because they secure and protect the existence of the liberal democratic state. If personal autonomy is desirable, the military is desirable so long as there is a need to protect society’s freedom and autonomy. With its decision in Stanley, the Supreme Court dishonored the collective good by failing to guarantee personal autonomy as well as by dishonoring a rights-based jurisprudence such as the framers of the Constitution conceptualized in formulating the Bill of Rights.

By denying servicemembers a forum to vindicate their constitutional rights, the Supreme Court injures society in several ways. First, the policy reduces servicemembers to second-class citizens who cannot enforce for themselves the constitutional rights that they are sworn to defend. Second, it fails to inculcate the military with the values that our system of government and our society require. Third, it allows a powerful governmental entity to flout constitutional rights with impunity.

By denying servicemembers redress for constitutional violations, the Supreme Court has made them into second class citizens. As Dworkin notes:

There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. . . . If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court. . . .

The Court has turned servicemembers into second class citizens out of a belief that the need for discipline in the military is grounded in the military’s nature as being separate and distinct from the civilian world. To the Supreme Court, at least, “separateness connotes the isolation of the military and its personnel from civilians and civilian institutions.” But not everyone agrees with the Court’s position:

The Court’s assumptions about the military are open to criticism.

174. See Chappell, 462 U.S. at 300.
175. Howland, supra note 114, at 105.
First, changes in the military-civilian dichotomy and the military's disciplinary needs following World War II render the Court's hands-off policy and the treatment of the military—as separate and different—unjustifiable. Second, the present relationship between military and civilian society, and contemporary disciplinary needs may not favor continued adherence to the hands-off policy.  

The Court apparently still perceives servicemembers as it did before World War II when the military had little prestige and its members were kept isolated from civilian society so as not to contaminate it. Since World War II, however, the size of the military has increased drastically to more than two million servicemembers in 1989 the military has become a dominant force in; the economy and it has become a huge civilian-like bureaucracy in which most servicemembers serve in non-combat functions.

As the number of persons in military-type roles—the "primary sector"—dwindled, the number of persons holding "secondary sector" occupations, calling for technical skills, increased. Recently, the "tertiary," or administrative sector, has experienced an even larger increase, which reflects the progressive transfer of fighters to desk jobs. As a result, the "boundary between what is properly military and what is properly civilian, once so clear, has been blurred to a point where it hardly exists any longer. Resources the military still commands are used to attain goals with only a very loose relation to the primary mission."

Thus, by the time of the Supreme Court's switch to a hands-off policy after World War II, the military had developed into an institution that was by no means totally separate and different from large civilian institutions. The Court's argument that the military's separateness and differentness supports the hands-off policy is wrong. Rather the evolution of the military should have led the
court away from, not toward, a hands-off doctrine.\textsuperscript{181}

If servicemembers are an integral part of American society, they ought to have the same rights as other members of society, and the military ought to respect these rights. Raz contends that what duties one owes to another expresses the respect owed them:

The duties one owes a right-holder derive from or express respect for him as a person. Rights, one may say, are based neither on the right-holders' interest, nor on that of others. Rather, they express the right-holders' status as persons and the respect owed to them in recognition of that fact.\textsuperscript{182}

This respect for individuals is, or ought to be, the very foundation of our judicial system. "Democratic government and judicially-enforced minority rights \textit{are both based upon a single conception of respect owed to every individual by the government}.\textsuperscript{183}

If the military does not respect its own members, how can our country or our courts expect it to respect the constitutional rights of outsiders, such as civilians or enemy prisoners who are entitled to humane treatment under the Law of War?\textsuperscript{184}

A military establishment has at its command physical force beyond the resources of any police agency, and, unlike the civil authorities, it normally employs force against hostile societies without regard to the individual fault of any member of society. Both its strength and its doctrine make it able, in effect, to wage war against its own people in disregard of law.\textsuperscript{185}

Thus, unless the courts force the military to respect the values embodied in the Constitution, and to be a part of American society instead of apart from it, servicemembers risk more involuntary

\textsuperscript{181. Id. at 109-10 (quoting Lang, \textit{Trends in Military Occupational Structure and Their Political Implications}, in \textit{World Perspectives on the Sociology of the Military} 63 (G. Kourvetaris & B. Dobratz eds. 1977)).}

\textsuperscript{182. Raz, \textit{supra} note 65, at 188.}

\textsuperscript{183. Oakes, \textit{The Proper Role of the Federal Courts in Enforcing the Bill of Rights}, 54 N.Y.U. L. Rev. 911, 917 (1979) (emphasis added).}


\textsuperscript{185. Hirschhorn, \textit{supra} note 62, at 214.}
participation in LSD experiments and more planned exposure to nuclear testing, as well as other, perhaps as yet unknown, terrors. And, we cannot be certain that the military will limit these violations to servicemember victims. Thus, preventing servicemembers from suing for constitutional torts harms the utilitarian pursuit of the collective well-being and endangers the rights-based interests of our servicemembers.

The Court must be the ultimate enforcer of constitutional rights. *Marbury v. Madison*\(^{187}\) "gave birth to the Federal common-law doctrine of judicial review, which designated the Court as the ultimate arbiter of the Constitution, empowered to hold that governmental acts found to be inconsistent with the Constitution and Bill of Rights are unconstitutional."\(^{188}\) According to Professor Hirshhorn, servicemembers can count on neither the political branch nor military discipline to enforce constitutional rights:

Civilian political control, and the restriction of military discipline to a distinct segment of society, restrict [the military's] will and ability to use that power [to wage war against its own people]. There is no perfect security against this, but the best available is to keep legal sanctions against members of the general community under the direct control of the branch most able to protect individual rights—the judiciary. As long as the civil courts control the government's power of coercion against the individual, the war power cannot be used to destroy the public consent which restraints and legitimizes it.\(^{189}\)

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186. *Raz*, *supra* note 65, at 256. Raz said, "[t]he importance of liberal rights is in their service to the public good. . . . [O]ne reason for affording special protection to individual interests is that thereby one also protects a collective good, an aspect of public culture." *Id.*

187. 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall's words in *Marbury* do not support the results of *Feres, Chappell, and Stanley*: "The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163.

188. Brodsky, Chappell v. Wallace: A Bivens Answer to a Political Question, 35 Naval L. Rev. 1, 25 (1986). A discussion of the scope of such judicial review of constitutional torts is beyond the scope of this article. For a discussion of the scope of and limitations on judicial review, see *id.* at 40-46; Howland, *supra* note 114, at 149-55; Comment, Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act, 12 Conn. L. Rev. 492, 499-511 (1980); Note, In Support of the Feres Doctrine and a Better Definition of "Incident to Service," 56 St. John's L. Rev. 485, 504-14 (1982); Note, Intramilitary Tort Law, *supra* note 24, at 1010-16; see also *Davis v. Passman*, 442 U.S. 228, 241-42 (1979); *Zwickler v. Koota*, 389 U.S. 241, 247 (1967) (for the proposition that the Constitution intended the courts to be the branch of government that is primarily responsible for enforcing the Bill of Rights).

189. Hirshhorn, *supra* note 62 at 214. Hirshhorn states:
Allowing suits against the military for constitutional torts will make constitutional violations by the military less likely by inculcating military superiors with fundamental values through the sanctioning of behavior that is not consistent with those values. According to Professor Howland:

[T]ort jurisprudence emphasizes dominant American values and attempts to reinforce them. All personal tort liability buttresses concern for equality, freedom, and individual worth, because its focus is on the person.

The allowance of intramilitary tort suits would transfer those values to the military and . . . would thereby promote civilian internal control of the military. Actions for negligent, intentional, and constitutional torts each implicate particular values whose transfer to the military would enhance this desired control.

Constitutional torts are most likely to transfer dominant civilian values to the military because constitutional standards reflect fundamental notions of equality, freedom, and individual worth.190

Feres, Chappell, and Stanley do not honor either a rights-based jurisprudence or a utilitarian one. Because the Supreme Court incorrectly perceives servicemembers as separate and apart from the rest of society, these cases transform those who are sworn to uphold the fundamental moral values of our country and our Constitution into second class citizens who cannot enforce their own constitutional rights. Further, this lack of respect for servicemembers and their rights fails to reinforce those fundamental values in military superiors and may lead to abuses against society in general as well as against servicemembers. Allowing the military to flout a servicemember's constitutional rights with impunity establishes a

The common core of these principles [fundamental individual rights] . . . is the moral conception that "government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived." This is said to be the ruling principle of the system of government established by the Constitution; it justifies both democracy and the use of judicial review to check the tendency of democracy to violate fundamental rights.

Id. at 232 (quoting Dworkin, supra note 62, at 135-37).

190. Howland, supra note 114, at 144. Speaking of discrimination suits, Professor Howland noted that they "transfer the value of equality in two ways: they enforce the general concepts of individual equality, freedom and individual worth; and they enforce the inclusion of an excluded group's perspective in the definition of the activity and dominant values." Id. at 145.
dangerous precedent. As Thomas Paine said, "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates that duty he establishes a precedent that will reach himself." If the military must guard its enemies from oppression, a priori, it must guard its own from oppression. And even if the military fails in this regard, the courts cannot.

VII. Conclusion

With these cases, beginning with Feres, going through Chappell, and culminating in Stanley, the Supreme Court did not further the utilitarian goals it used as the justification for each of its holdings. Rather than advancing the public good, these decisions harmed the government's defense efforts and failed to accomplish any of the goals of public tort law. In addition, the Court violated jurisprudential theory by harming both the rights of servicemembers and harming the society they protect. The words of Justice Marshall, dissenting in Solorio v. United States, equally apply to Stanley: "The Court's action . . . reflects contempt, both for the members of our armed forces and for the constitutional safeguards intended to protect us all."