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Intramilitary Immunity and Constitutional Torts

Alleged violations of the constitutional rights of members of the armed forces, often involving particularly disturbing conduct, have attracted substantial public attention in the past several years. If one can believe the published accounts, soldiers have been beaten, kidnapped, tortured, and murdered, subjected to brutal correctional practices, and forced to participate in dangerous experiments testing the effects of powerful drugs and radiation on human subjects. These reports are even more shocking when one considers that the alleged perpetrators were not agents of a foreign government, but fellow members of the military establishment. A number of injured parties have attempted to recover damages for alleged constitutional


4. See Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980). In a suit against various military defendants, the widow and daughter of an Army counterintelligence agent alleged a bizarre tale that began after military intelligence officers discovered the decedent's intention to chronicle some of his experiences in a book following his imminent retirement. Sigler was allegedly ordered to Washington, D.C. and then taken to motels in Maryland. Army intelligence officers then confined and questioned him for nine days, after which he was found dead in a motel room, wrapped in the stripped cord of an electrical lamp. The Army and the Maryland State Police concluded that Sigler had committed suicide by electrocution. The plaintiffs claimed, among other things, intentional infliction of emotional distress, assault and battery, false imprisonment, and violations of the first, fourth, and fifth amendments to the Constitution. 485 F. Supp. at 188-89.


7. See Jaffee v. United States, 468 F. Supp. 632 (D.N.J. 1979), aff'd, No. 79-1543 (3d Cir. Nov. 2, 1981) (en banc); Hughe & Konigsberg, supra note 2. In Jaffee, an ex-soldier alleged that he suffered serious injury as a result of exposure to massive amounts of radiation when an atomic bomb was detonated 2000 yards from his location, six times closer than the minimum distance then recommended by the Atomic Energy Commission. The Department of Defense has since stated that some 80,000 servicemen viewed various detonations from trenches as close as one mile from ground zero during the testing program that lasted from November 1, 1951 until July 17, 1962. Hughe & Konigsberg, supra note 2, at 78.
violations by their superiors, but most of these suits have been unsuccessful. Many did not even reach trial because the courts held that the defendants, as federal officers, were entitled to some form of official immunity.

The nature and scope of this immunity, however, are currently unsettled. The Supreme Court has not specifically ruled on the scope of official immunity for intramilitary torts in well over a century, and the lower federal courts have not agreed to a single formulation. Some courts, relying on Feres v. United States, have held that intramilitary immunity is absolute and bars any suit, including one that alleges constitutional violations, brought by a serviceman injured "incident to service." Other courts, giving greater


12. 340 U.S. 135 (1950). In Feres, the Supreme Court held that an active-duty serviceman may not sue the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346(b)-1346(e), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2471-80 (1976), for injuries resulting from the negligence of fellow servicemen. See notes 104-06 infra and accompanying text.


Many courts have taken a very broad view of the term "incident to service." See, e.g., Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), cert. denied, 414 U.S. 819 (1973); Hass v. United States, 518 F.2d 1138 (9th Cir. 1975). But see Parker v. United States, 611 F.2d 1007 (5th Cir. 1980); Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965).
weight to more recent cases that reconcile traditional immunity principles with the interests served by causes of action for constitutional torts.\textsuperscript{14} have held that military officials may claim only a "qualified" immunity against claims based upon their unconstitutional conduct.\textsuperscript{15}

This Note examines the reasoning underlying these conflicting approaches and concludes that a general rule of qualified immunity, which more fully protects the constitutional rights of members of the armed forces, is also consistent with the legitimate needs of the military establishment. Part I demonstrates that courts considering the scope of immunity in constitutional tort cases cannot rely blindly upon the rules and policies applicable in nonconstitutional cases, but must also accommodate the constitutional interests. Part II applies this principle to cases involving military officers. It argues in Section A that \textit{Feres v. United States} does not support an absolute immunity rule in constitutional tort cases. Section B then analyzes the policies affected by the choice of an immunity rule and contends that the military's interest in discipline — the only functional justification for absolute immunity — is well served by the qualified immunity that has been established in other contexts.

I. COMMON-LAW DEVELOPMENT OF THE IMMUNITY DOCTRINE

The immunity of public officials to liability for their wrongdoing implicates "fundamentally antagonistic social policies."\textsuperscript{16} On the one hand, it is a basic tenet of Anglo-American jurisprudence that no man is above the law.\textsuperscript{17} This notion is rooted in practical, as well as moral, considerations. Civil damages are intended to compensate the victims of tortious conduct\textsuperscript{18} and to deter tortfeasors from engag—


\textsuperscript{16} Barr v. Matteo, 360 U.S. 564, 576 (1959) (plurality opinion).

\textsuperscript{17} "All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Butz v. Economou, 438 U.S. 478, 506 (1978) (quoting United States v. Lee, 106 U.S. 196, 220 (1882)). See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."). See also A. Dicey, \textit{Introduction to the Study and Law of the Constitution} 193 (10th ed. 1959) (officials "from the Prime Minister down to a constable" are liable for their wrongful acts).

\textsuperscript{18} See generally \textit{Restatement (Second) of Torts} § 5 (1965).
ing repeatedly in such conduct.\textsuperscript{19} Official immunity may undermine these fundamental goals. On the other hand, several factors related to the peculiar roles of government officials indicate that some form of immunity would be appropriate. Courts have suggested that it may be unfair to impose personal liability on officials whose positions require the exercise of judgment and discretion.\textsuperscript{20} It has also been claimed that the threat of a damage suit may deter officials from acting courageously in the public interest\textsuperscript{21} or discourage talented people from entering public service.\textsuperscript{22} Finally, if public officials must expend time and energy defending themselves in court, their governmental responsibilities may suffer, to the public's detriment.\textsuperscript{23}

These competing considerations can be balanced in several ways. First, courts could accord officials absolute immunity, which completely protects persons acting within the scope of their official duties.\textsuperscript{24} Because this immunity defeats suits at the outset of the litigation, it protects not only against liability but also against the burdens of a trial.\textsuperscript{25} Second, officials might receive only a qualified immunity, which protects persons acting reasonably and in good faith within the scope of their official duties.\textsuperscript{26} Because the official

\begin{footnotes}


\footnote{22. \textit{See} Miller v. Hope, 2 Shaw, H.L. 125, 134 (1824) (were he not immune for his mistakes, "no man but a beggar, or a fool, would be a Judge"); Jaffe, \textit{supra} note 8, at 220 ("if they have not made themselves beggars by conveying their property to their wives, they are indeed fools").


\footnote{24. \textit{See}, \textit{e.g.}, Imbler v. Pachtman, 424 U.S. 409, 427 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Barr v. Matteo, 360 U.S. 564 (1959) (plurality opinion). \textit{Cf.} Spalding v. Vilas, 161 U.S. 463 (1896) (the scope of immunity includes actions which have more or less connection with the general matters committed by law to his control or supervision).

\footnote{25. \textit{See} Imbler v. Pachtman, 424 U.S. at 419 n.13. The Court described the difference between absolute and qualified immunity as follows: The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

must prove good faith and reasonableness to claim this immunity, it does not protect against the burdens of a trial. Third, courts could deny officials any immunity and hold them liable whenever they act unlawfully. Implicit in each of these approaches is the different weight that its proponents give to the relevant interests.

Modern theories of immunity reconcile these opposing interests so as to produce the best results. Courts generally examine the official’s function and confer immunity only when the resulting public benefits outweigh the costs. A grant of immunity thus depends not on the official’s “particular location within the government but [on] the nature of [his] responsibilities.” When an individual acting within “the general scope of his official authority” exercises the discretion committed to his position, immunity protects him against fear of damage suits arising from his conduct. Although some courts and commentators are uneasy with an immunity doctrine limited to discretionary, as opposed to ministerial functions, this distinction is consistent with the rationale underlying grants of immunity — that the public interest requires decisions and actions for its benefit and protection.

The contours of the functional approach to immunity can be seen by examining the immunity accorded judges, legislators, and admin-
Administrative officers. Judges\(^37\) and legislators\(^38\) have enjoyed the most long-standing immunity. Courts immunize judges because the proper administration of justice requires judicial independence unconstrained by fear of personal liability.\(^39\) A similar rationale supports legislative immunity. By freeing legislators to discuss issues and reach decisions without fear of liability, immunity benefits their constituents and society as a whole.\(^40\) To promote these goals, judges and legislators are granted absolute immunity, which protects them from liability and from having to stand trial\(^41\) even if they acted with malice or in bad faith.\(^42\)

The immunity of administrative officers was less settled at early common law than legislative and judicial immunity.\(^43\) The Supreme Court first addressed the issue in *Spalding v. Vilas*,\(^44\) where the Postmaster General had allegedly distributed information that injured the plaintiff's reputation and damaged his contractual relations. The Court found that the act was not "manifestly or palpably beyond . . . [the official's] authority" but was "more or less connect[ed] with the general matters committed by law to his control or supervision."\(^45\) Since the public policy consideration that underlies judicial immunity — avoiding the effects of a potential damage suit on "the proper and effective administration of public affairs"\(^46\) — also applies to cabinet officials, the Court held that the Postmaster General could not be held liable for damages, however improper his mo-

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38. *See* Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 108 (1881); Stockdale v. Hansard, 112 Eng. Rep. 1112 (Q.B. 1839). Legislative immunity in England was secured in the Bill of Rights of 1689: "That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of Parliament." 1 W. & M., Sess. 2, 2 (1688). This tradition was adopted in our "speech or debate" clause. *See* U.S. CONST. art. I, § 6, cl. 1.

39. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871); Jennings, *supra* note 20, at 271-72. Prosecutors and grand jurors were immune at common law because their roles — exercising discretionary judgment based on the evidence before them — were functionally comparable to those of a judge. *See* Imbler v. Pachtman, 424 U.S. at 423 n.20.


41. *See* Imbler v. Pachtman, 424 U.S. at 419 n.13; Barr v. Mateo, 360 U.S. 564, 571 (1959) (plurality opinion); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) ("to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute"); RESTATEMENT (SECOND) OF TORTS § 895 D, Comment c (1965).


44. 161 U.S. 483 (1896).

45. 161 U.S. at 498.

46. 161 U.S. at 498.
Relying on *Spalding*, the federal courts granted absolute immunity to lower-echelon federal executives for a wide variety of alleged wrongs. A plurality of the Supreme Court adopted a similar rule in *Barr v. Matteo*, holding that discretionary acts within the “outer perimeter” of an official’s statutory authority were not actionable despite allegations of malice. Justice Harlan’s opinion cited *Spalding* and noted further that immunity had never been “a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government” based on the duties entrusted by law to the particular official. Because many governmental functions are delegated and redelegated throughout the executive branch, immunity should attach to the responsible official rather than to the cabinet officer at the top of the hierarchy.

Although the common law granted federal executive officials absolute immunity for discretionary actions within the scope of their authority, the scope of this immunity has been reconsidered in recent years. For example, in *Butz v. Economou*, 438 U.S. 478, 494 n.21 (1978), the court acknowledged that the decision in *Barr* was only a plurality opinion, but implicitly accorded it precedential authority. Lower courts have frequently followed, with very little discussion, the rationale of the plurality in *Barr*. See, e.g., *Bridges v. IRS*, 433 F.2d 299 (5th Cir. 1970) (Internal revenue officers — conversion); *Morgan v. Willingham*, 424 F.2d 200 (10th Cir. 1970) (federal prison officers — battery); *Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967) (U.S. Treasury officers — trespass); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964) (Attorney General — false arrest, battery), cert. denied, 380 U.S. 981 (1965).

The scope of the immunity traditionally available to the highest executive officials in state government is in dispute. Some authorities characterize “gubernatorial” immunity as absolute. See W. Prosser, *supra* note 33, at 988. Others indicate that governors, see *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976); *Gray, supra* note 20, at 344-45, along with lower state administrative officials, received a narrower immunity — a “qualified” privilege, W. Prosser, *supra* note 33, at 989, conditioned on the absence of malice or improper purpose. See, e.g., *Paoli v. Mason*, 325 Ill. App. 197, 209, 59 N.E.2d 499, 504 (1945); *Tillotson v. Fair*, 160 Kan. 81, 89, 159 P.2d 471, 476 (1945); *Taulli v. Gregory*, 223 La. 195, 198, 65 So. 2d 312, 312 (1955); *Schwartz v. Heffernan*, 204 N.Y. 474, 482, 109 N.E.2d 68 (1952); *State ex. rel. Robertson v. Farmers’ State Bank*, 162 Tenn. 499, 505, 39 S.W.2d 281, 282-83 (1931); *Logan City v. Allen*, 86 Utah 375, 380, 44 P.2d 1085, 1087 (1935); *Gray, supra* note 20, at 342 & n.246. Qualified immunity implicitly rests on the balancing inherent in immunity doctrine, see notes 16-36 *supra* and accompanying text, and on the judgment that deliberate misconduct by public officials harms society more than does the burden of actual or potential inquiries into an official’s state of mind. See *Barr v. Matteo*, 360 U.S. 564, 586-92 (1959) (Brennan, J., dissenting).

53. See *Barr v. Matteo*, 360 U.S. 564, 574-75 (1959) (plurality opinion).
cent years. In particular, the availability of causes of action for constitutional torts has forced the Supreme Court to review traditional immunity doctrines and to consider their applicability to claims of official misconduct violating constitutional rights. Monroe v. Pape, which gave life to the federal cause of action under the Civil Rights Act of 1871, supplied the initial impetus. Several courts have noted that the Act's language does not explicitly recognize any defenses or immunities, and it has been suggested that the provision abrogated the traditional immunity of judges and legislators.

The Supreme Court, however, has not accepted this view. Instead, the Court has concluded that the immunity traditionally granted to legislators, judges, and state prosecutors was so well-established that had Congress wished to abolish it, the statutory language would have revealed that intent more explicitly. Accordingly, section 1983 “is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.” In each case, therefore, the Court engages in a “considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”


Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


59. See Picking v. Pennsylvania R.R., 151 F.2d 240, 250-51 (3d Cir. 1945); cf. Ex parte Virginia, 100 U.S. 339 (1879) (holding that a state judge could be held liable for violating a federal statute prohibiting racial discrimination in jury selection).


63. 424 U.S. at 418.

quiry, the Court has held that the public interest in unrestrained leg­
islative expression underlying the traditional grant of immunity⁶⁵
warrants absolute legislative immunity to liability under section
1983.⁶⁶ The Court has also concluded that the public interest in free­
ing judges and prosecutors to exercise their judgment without fear of
personal liability⁶⁷ justifies absolute immunity to constitutional as
well as to common law claims.⁶⁸

Administrative officials have not fared as well when charged with
constitutional violations. Although judges, prosecutors, and legisla­
tors are absolutely immune to section 1983 liability,⁶⁹ a variety of
other public servants, including prison officials,⁷⁰ state hospital ad­
ministrators,⁷¹ police officers,⁷² school board members,⁷³ and state
executive officers,⁷⁴ receive a more limited “qualified” immunity
against constitutional tort claims. The Court first attempted to de­
fine the parameters of this qualified immunity and to explain its ra­
tionale in Scheuer v. Rhodes.⁷⁵ The plaintiff in Scheuer brought a
section 1983 claim against the Governor of Ohio based on his con­
duct as head of the state militia during the shootings at Kent State
University in 1970. To resolve the immunity question, the Court was
forced to balance several competing policies. On the one hand, the
“virtually infinite” range of choices typically confronting high execu­
tive officials⁷⁶ and the confusing effect of a civil disorder on official
decision-making argue in favor of allowing officials broad discre­
ption.⁷⁷ On the other hand, broad immunity may be inconsistent with
Congress’s intention in section 1983 to provide “a remedy to parties
derived of constitutional rights . . . by an official’s use of his posi­
tion.”⁷⁸ The Court struck a balance between these policies by grant­
ing a qualified immunity, the scope of which varies with “the scope
of discretion and responsibilities of the office and all the circum-

⁶⁵. See notes 40-42 supra and accompanying text.
Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979) (members of interstate planning
agency acting in “legislative capacity” absolutely immune to § 1983 claims).
⁶⁷. See note 39 supra and accompanying text.
⁶⁹. The official must be acting
within
the “outer perimeter” of his statutory authority. See
note 39 supra and accompanying text.
⁷⁶. 416 U.S. at 246.
⁷⁷. 416 U.S. at 246-47.
stances as they reasonably appeared.” 79

Although the Scheuer Court may not have cut back on the immunity that would have been available to the Governor in a suit at common law, 80 several considerations unique to constitutional litigation under section 1983 merit special attention. First, because section 1983 applies only to persons acting under color of state law, 81 the remedy that it creates would be “drained of meaning” if government officials as a class were absolutely immune from liability for constitutional torts. 82 Section 1983 was not intended implicitly to repeal common-law immunities, 83 but a failure to consider seriously the congressional purpose underlying the section before immunizing defendants may lead to its effective repeal. Second, restricting immunity in section 1983 cases comports with the supremacy of the Federal Constitution. If federal courts accord absolute immunity to state executive officials for their unconstitutional conduct, “the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land.” 84 Third, violations of constitutional rights perpetrated by public officials injure more compelling societal interests than do violations of common-law duties. 85 The


In Wood v. Strickland, 420 U.S. 308 (1975), the Court refined the nature of qualified immunity. “If [the official] knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury,” he is not immune. 420 U.S. at 322 (emphasis added). It is now well-settled that Wood established two elements of the defense, one objective and one subjective. See, e.g., Procunier v. Navarette, 434 U.S. 555, 562 (1978); Fowler v. Cross, 635 F.2d 476, 482 (5th Cir. 1981); Atcherson v. Siebenmann, 605 F.2d 1058, 1065 (8th Cir. 1979). The objective element precludes the defense if the right allegedly infringed was “clearly established” at the time of the challenged conduct and provides a guidepost for assessing the reasonableness of the defendant’s belief in the legality of his conduct. See Procunier v. Navarette, 434 U.S. at 562. Since the inquiry is legal rather than factual, this aspect of a qualified immunity claim is amenable to determination on summary judgment. See Halperin v. Kissinger, 606 F.2d 1192, 1209 (D.C. Cir. 1979), aff’d by an equally divided court, 101 S. Ct. 3132 (1981). But since the subjective issue involves complex questions of fact, resolution on the basis of pleadings and affidavits is generally inappropriate. See Miller v. DeLaune, 602 F.2d 198, 199 (9th Cir. 1979); Rodgers v. Tolson, 582 F.2d 315, 319 (4th Cir. 1978).

80. See Imbler v. Pachtman, 424 U.S. 409, 419 (1976). The Court’s implied conclusion that governors held qualified and not absolute immunity may be incorrect. See note 52 supra and accompanying text.

81. See note 57 supra (quoting § 1983).

82. 416 U.S. at 248.


84. 416 U.S. at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)).

greater offense to public values that inheres in constitutional violations represents an additional factor to be weighed against the benefits derived from immunity.86

After establishing a framework for analyzing official immunity to liability for constitutional torts in section 1983 cases, the Supreme Court addressed the immunity of federal officials sued directly under the Constitution in Butz v. Economou.87 The plaintiff in Butz sued the Secretary of Agriculture and various officials of the Agriculture Department for allegedly unconstitutional conduct in proceedings to suspend or revoke his company’s registration. The Court rejected the government’s claim of absolute immunity and held that, subject to specifically delineated exceptions, “qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations.”88 Consistent with the approach adopted in earlier cases,89 the Court first examined the immunity traditionally accorded federal executive officials and established that Butz’s constitutional dimension presented a more troubling question. Characterizing cases like Spalding v. Vilas and Barr v. Matteo as holdings based on the official’s authority to act,90 the Court distinguished them by equating unconstitutional conduct with the absence of authority.91 Because Spalding and Barr were not directly applicable to constitutional tort cases, the Court looked to its decisions on the immunity of state officials sued under section 1983 and found no basis for treating federal officials sued for infringing constitutional rights differently.92 Unless federal executive officials demonstrate “exceptional circumstances”93 or “special functions”94 that justify absolute immunity, they can claim only qualified immunity.

The Court’s current approach to the scope of the immunity accorded federal executive officials in constitutional tort cases can thus

88. 438 U.S. at 508.
89. See notes 60-64 supra and accompanying text.
90. 438 U.S. at 492-96.
91. 438 U.S. at 492.
92. 438 U.S. at 504.
93. 438 U.S. at 507.
94. 438 U.S. at 508. The Court did not expressly distinguish “special functions” from “exceptional circumstances.” Nevertheless, it seems plausible to consider them as alternative avenues to absolute immunity. Exceptional circumstances would confer absolute immunity on an official otherwise limited to qualified immunity. A special function routinely performed by a particular official belonging to a broader employment class may warrant absolute immunity notwithstanding a general rule of qualified immunity for the class.
be characterized as functional. After exploring the justifications for judicial and prosecutorial immunity, the Butz Court concluded that these officials were immune not because they were employees of a particular branch or agency of government, but because of the functions that they perform. Accordingly, officials discharging adjudicative and prosecutorial responsibilities within the Agriculture Department were absolutely immune. This functional perspective also appears in subsequent cases addressing the scope of legislative and judicial immunity. The Court has observed, for example, that it "is only for acts performed in his 'judicial' capacity that a judge is absolutely immune." And two cases involving congressmen have limited their absolute immunity to activities closely connected to the legislative functions that justify complete protection.

The Supreme Court has not yet applied this functional approach to determine the scope of immunity available to members of the mil-

95. Writing for the majority, Justice White emphasized the importance of the function performed by the official in determining the scope of his immunity no fewer than 12 times. See 438 U.S. at 484, 485, 468, 508 (twice), 510 (twice), 512, 513, 514, 515, 516.
96. See 438 U.S. at 508-11.
97. See 438 U.S. at 511-12.

Other immunities have also been restricted recently. "Diplomatic immunity" traditionally provided absolute immunity to the representative of a foreign state, regardless of the function he was performing. See, e.g., Berrizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); The Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); Harvard Research in International Law, Diplomatic Privileges and Immunities, 26 AM. J. INTL. L. Supp. 15, 99 (1932). Within the past few years many nations, including the United States, have rejected absolute diplomatic immunity in favor of a "functional necessity" doctrine, which justifies privileges and immunities only when they are necessary to enable the diplomatic mission to perform its functions. See generally Garretson, The Immunities of Representatives of Foreign States, 41 N.Y.U. L. Rev. 67 (1966); Ling, A Comparative Study of the Privileges and Immunities of United Nations Members, Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents, 33 WASH. & LEE L. Rev. 91 (1976); O'Keefe, Privileges and Immunities of the Diplomatic Family, 25 INTL. & COMP. L.Q. 329 (1976). Congress responded to this change in philosophy regarding diplomatic immunity by passing the Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (28 U.S.C. § 1364 (Supp. III 1979)). The Act narrows the immunity available to diplomats, their families, and staffs. See Note, 10 CASE W. RES. J. INTL. L. 827 (1978). See also L. GORE-BOOTH, SATOW'S GUIDE TO DIPLOMATIC PRACTICE 120-55 (1979).

Restricting diplomatic immunity to particular functions is similar to the Supreme Court's approach to executive immunity for constitutional torts. Butz v. Economou emphasized that the crucial factor in determining whether an official would receive absolute immunity is whether such broad protection is necessary to enable the official to function effectively. 438 U.S. at 512. This reflects the idea that immunity is a burden on the general public that only a corresponding public benefit can justify.
itary charged with depriving fellow servicemen of their constitutional rights. Technically, members of the armed forces are "executive officials," and are thus subject to the Butz rule. The special perspective that the Court has recently brought to military affairs, however, may demand a more extensive policy analysis. In the absence of a definitive statement by the Supreme Court, many lower courts continue to apply immunity rules developed in nonconstitutional contexts. But recent developments in the law of immunity — specifically, the adoption of qualified immunity standards for constitutional suits against executive officials — justify a reexamination of the absolute immunity standard that these courts have applied to military officials. Part II undertakes such a reexamination.

II. A FUNCTIONAL APPROACH TO INTRAMILITARY IMMUNITY

A. Feres v. United States

Courts that hold military defendants absolutely immune to constitutional tort claims brought by other servicemen often rely on Feres v. United States, a case that can be plausibly distinguished, and on policy considerations such as the importance of military discipline that justify no more than a qualified immunity.

100. See note 9 supra.

101. See Brown v. Glines, 444 U.S. 348, 360 (1980); cf. Rostker v. Goldberg, 101 S. Ct. 2646 (1981) (upholding exclusion of women from draft registration statute); Note, Women and the Draft: The Constitutionality of All-Male Registration, 94 HARV. L. REV. 406, 421 (1980) ("The Supreme Court has thus set aside an area of military competence in which the judiciary will not apply the level of constitutional scrutiny applicable to similar governmental actions in other contexts.").


This unjust application of the Feres rule is perhaps best summed up in a colloquy between this Court and the government at oral argument:

The Court: [A]s I read the law, it doesn't matter if they stood up there and said, "one, two, three, left, right, left," and marched them over a cliff . . . You'd be protected under Feres . . . ?

Mr. Landman: Yes, your Honor.
that a negligently maintained furnace caused the barracks fire in which her husband died. The Supreme Court held that the United States could not be sued under the Federal Tort Claims Act of 1946 (FTCA) for injuries to active-duty servicemen resulting from the negligence of others in the armed forces. Despite strong criticisms of the *Feres* rule, its abandonment appears unlikely in light of the Court’s recent reaffirmation of its earlier decision in *Stencil Aero Engineering Corp. v. United States*.

Although *Feres* remains valid in negligence suits against the United States under the FTCA, it is a suspect foundation for broad intramilitary immunity from liability for constitutional torts. Because the plaintiff sued the United States rather than a member of the military, the decision in *Feres* turned on the Court’s view of the effect of the FTCA on the sovereign immunity of the United States and not on its interpretation of the principle of individual immunity. Despite this limitation on the Court’s holding, a number of lower courts have extended *Feres* to suits against individuals, citing Justice Jackson’s statement in the majority opinion that “[w]e know of no American law which has ever permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.” But this statement cannot even supply support by analogy for absolute intramilitary immunity against liability for constitutional torts since Justice Jackson implied that the United States would be liable for intentional torts. He buttressed his frequently cited statement with a comparative reference to *Jinsman v. Wilkes* and *Weaver v. Ward*, which indicate that intentional torts within the military were actionable at common law.

On the basis of *Jinsman*, one may seriously question the extent to which absolute immunity was historically accorded members of

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105. 28 U.S.C. §§ 1291, 1346(b)-1346(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2671-80 (1976).
107. See Note, supra note 106, at 1100 n.8.
109. 340 U.S. at 138. (“The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining ‘incident to the service’ what under other circumstances would be an actionable wrong.”).
111. 340 U.S. at 141 (emphasis added) (citation omitted). Since *Feres* was an FTCA suit against the government, see note 109 supra, Justice Jackson’s reference to common-law actions against individual officers was dicta.
112. 53 U.S. (12 How.) 390 (1851).
114. See 340 U.S. at 141 n.10.
the military against claims brought by other servicemen.\textsuperscript{115} In that case, the Court held that an officer sued by a marine for false imprisonment was subject to liability if he had not acted in good faith.\textsuperscript{116} It is noteworthy that \textit{Dinsman} was cited not only in \textit{Feres}, but also in \textit{Butz v. Economou},\textsuperscript{117} which established the general rule according federal executive officials only a qualified immunity against constitutional tort claims. Like \textit{Butz}, \textit{Dinsman} reflects considered balancing of individual rights against the effective discharge of a governmental function;\textsuperscript{118} \textit{Dinsman}'s good faith rule is thus consistent with the immunity doctrine that the Court currently applies to other federal executive officials who have allegedly committed constitutional torts.\textsuperscript{119}

B. Military Discipline

\textit{Feres} does not provide precedential support for a rule of absolute intramilitary immunity in constitutional tort cases, but courts may find justification for such a rule in the policies underlying that decision. Chief among those policies is the need to maintain discipline within the military.\textsuperscript{120} In \textit{United States v. Brown},\textsuperscript{121} another negli-

\begin{itemize}
\item \textsuperscript{115} The absence of a common-law tradition of absolute immunity arguably means that the particular official would enjoy at most a qualified immunity to constitutional tort claims; nothing in recent immunity doctrine suggests that a constitutional tort suit requires greater immunity. Yet there appear to be no cases that apply this theoretical proposition. More importantly, it seems safe to presume that “the functions and responsibilities of . . . particular defendants’ and the purposes that constitutional tort liability serve constitute the heart of the immunity issue. See \textit{Scheuer v. Rhodes}, \textit{416 U.S.} 232, 243 (1974).
\item \textsuperscript{116} The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. . . . If they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover.
\item \textsuperscript{117} See \textit{438 U.S.} at 491-92. The Court expressly acknowledged that \textit{Dinsman} implicated military discipline, yet relied on it even though \textit{Feres} had been decided in the interim, thereby suggesting that the Court intended to leave claims for intramilitary intentional torts available. Justice Jackson, \textit{Feres}'s author, had only recently returned from service as chief United States prosecutor at the Nuremberg war crimes trials, see \textit{R. Jackson, The Nuremberg Case 97 (1947)}, and was likely to have retained a harsh view of military improprieties.
\item \textsuperscript{118} In \textit{Dinsman}, the Court stated:
\begin{quote}
[It] is essential to [military] security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.
\end{quote}
\textit{53 U.S. (12 How.)} at 403.
\item \textsuperscript{120} See \textit{Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After Butz v. Economou}, \textit{89 Mil. L. Rev.} 25, 42 (1980); \textit{Note, supra note 106, at 1109}.
\item \textsuperscript{121} \textit{348 U.S. 110 (1954)}.
\end{itemize}
gence suit brought under the FTCA, the Supreme Court explained that *Feres* reflected a concern for the adverse effects that FTCA suits based on "negligent orders given or negligent acts committed in the course of military duty" would have on military discipline. A number of courts have found this concern relevant not only to negligence suits but also to suits alleging intentional torts, and have thus barred suits between servicemen regardless of the potential defendant's subjective intent or the reasonableness of his belief in the legality of his actions. This Section analyzes the interest in military discipline in cases involving cognizable constitutional claims. It concludes that unless certain exceptional situations or special functions are involved, a general rule of qualified immunity adequately protects the needs of the military while affording broader recognition of servicemen's constitutional rights.

Courts that ground immunity in the need for military discipline fear that allowing servicemen to sue their superiors would undermine obedience and respect for officers. This fear is unfounded. Discipline is, of course, essential to the functioning of the armed forces, and the need to maintain discipline has justified narrowing the scope of servicemen's constitutional rights in certain instances. No one would seriously contend, however, that all constitutional


123. *See*, e.g., Bailey v. Van Buskirk, 345 F.2d 298, 298 (9th Cir. 1965) ("The idea is that an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the army over the performance of another man's army duty."); *cert. denied*, 383 U.S. 948 (1966); cf. Downes v. United States, 249 F. Supp. 626, 628 (E.D.N.C. 1965) (claim allowed only because alleged injury not "incident to service").

124. "Discipline" as used in this Note includes not only the willingness of subordinate servicemen to obey their superior officers but also encompasses qualities of loyalty and morale.


safeguards evaporate when a civilian enters military service.127 Yet absolute immunity precludes servicemen from bringing constitutional tort claims even if the potential defendants acted in bad faith or disregarded rights that are clearly protected despite military needs.128 The policy argument for absolute immunity thus rests on the dubious proposition that a serviceman is more likely to respect authority when he has no recourse for the intentional or malicious deprivation of his constitutional rights. The contrary idea—that safeguarding rights compatible with military needs will engender respect for authority and promote discipline—is more appealing. It has long been recognized that “[t]he discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an army.” 129 The exercise of authority in a manner consistent with both military interests and personal rights promotes discipline more effectively than irrational authoritarianism,130 and this fact has not been ignored by those who design the military’s training programs.131


128. See notes 25-26 and accompanying text and note 79 supra.

129. Address by Maj. General John M. Schofield to the class of 1879 at West Point, reprinted in AIR FORCE CADET WING, CONTRAILS 229 (1971 ed.). The statement must be memorized by all cadets during their first year.


131. See M. JANOWITZ, THE PROFESSIONAL SOLDIER 43-44 (1960); Campbell & McCormack, Military Experience and Attitudes Toward Authority, 62 AM. J. SOC. 482 (1957); Hollander, Authoritarianism and Leadership Choice in a Military Setting, 49 J. ABNORMAL & SOC. PSYCH. 365 (1954); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 IND. L.J. 539, 572 (1974). In his work, Janowitz relies in part upon an Air Force report that notes: “We are on the discipline target when an airman feels that he is living under
Recent Supreme Court decisions reflect a similar theme. Cases restricting the constitutional protections afforded servicemen\textsuperscript{132} expressly leave actionable conduct that "irrationally, invidiously or arbitrarily" deprives servicemen of rights that civilians enjoy.\textsuperscript{133} It is at least tenable to conclude that Supreme Court recognition of claims arising from such behavior impliedly rejects a general rule of absolute immunity precluding them.\textsuperscript{134}

Further evidence against a rule of absolute intramilitary immunity to liability for constitutional torts can be found in congressional enactments regulating military conduct. The Uniform Code of Military Justice\textsuperscript{135} (UCMJ), the military's judicial code, contains two provisions evincing Congress's belief that some acts are neither necessary nor tolerable in an effective military organization.\textsuperscript{136} The UCMJ imposes criminal sanctions for many of the actions that would give rise to constitutional tort claims.\textsuperscript{137} Individual civil liability in such cases represents an additional deterrent to conduct that violates the military's own standard of conduct. And article 139 of the UCMJ allows a subordinate to recover damages when his supe-rules which protect and support him." Office of the Air Provost Marshall, The Inspector General Headquarters, U.S. Air Force, \textit{Discipline in the U.S. Air Force} 6 (1955) [hereinafter cited as \textit{Air Force Discipline}].


133. \textit{See} Secretary of the Navy v. Huff, 444 U.S. at 458 n.5 ("[T]he federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them."); Brown v. Glines, 444 U.S. at 357 n.15 (quoting Greer v. Spock, 424 U.S. 828, 840 (1976)).

134. Cf. Monell v. Department of Social Servs., 436 U.S. 658, 701 (1978) (rendering municipalities amenable to suit under \S 1983 would be meaningless if absolute immunity were available).


\[\text{W\text{hether a man wears a uniform or a business suit, he is entitled to the protection afforded by the fundamental principles of American justice which I believe were contemplated when the Constitution was adopted.}\]

Some of the excesses of the military in the administration of military justice in the history of this country are simply shocking. As a Member of the Senate I shall raise my voice in doing what I can to see to it that the basic principles of justice . . . are written into any court-martial bill passed by the Congress.

rior officer willfully takes or injures his property. In these areas, at least, the UCMJ rejects the notion that litigation over certain behavior within the military will interfere with the effectiveness of the armed forces. Both the criminal and civil provisions, moreover, are consistent with restricting immunity to actions taken in good faith and within the scope of established constitutional standards.

Eliminating the general rule of absolute intramilitary immunity has several practical advantages as well. Greater recognition of servicemen's constitutional rights will not only promote respect for authority within the military, but should also enable the armed forces to meet their manpower needs more successfully. Surveys demonstrate that servicemen most frequently explain their failure to re-enlist by citing "excessive interference with personal autonomy and personal dignity." It seems reasonable to presume that media reports of peacetime military practices that cause injury or death to servicemen undermine the military's public image and consequently impair recruiting efforts. An opportunity to redress constitutional violations would be a significant step toward correcting this handicap. But the military must be concerned with the quality of its recruits and training experience as well as sheer numbers. The increased complexity and sophistication of modern warfare require servicemen capable of exercising independent judgment and initiative. Psychological studies indicating a decrease in authoritarian tendencies upon completion of air cadet training imply that group interdependence rather than formal authority structure provides the foundation for modern military effectiveness. These studies provide inferential support for the proposition that a rule of qualified immunity, which should reduce authoritarianism, is more consistent

139. See note 79 supra.
140. The armed forces' recent difficulties in meeting recruitment goals have raised public concern and spawned suggestions to resume the draft. See, e.g., 126 CONG. REC. S16267-72 (daily ed. Dec. 11, 1980) (remarks of Sen. Durenburger); Maskos, How to Save the All-Volunteer Force, PUB. INTEREST, Fall 1980, at 74; Bill Introduced in Senate to Reissue Draft, N.Y. Times, Mar. 25, 1981, at B7, col. 2. Quality as well as quantity is a matter of serious concern to responsible officials. See, e.g., Laird Calls U.S. Forces Ill-Armed to Deter War, N.Y. Times, Sept. 21, 1980, at 47, col. 4; Tower Calls Some Jets and Carriers Unready, N.Y. Times, Sept. 26, 1980, at A24, col. 5; Halloran, Army Recruiters Troubled by Poor Quality of Volunteers, N.Y. Times, July 6, 1980, at 15, col. 1.
141. M. JANOWITZ, supra note 131, at xxi-xxii.
142. See note 2 supra.
143. See M. JANOWITZ & R. LITTLE, supra note 130, at 43; Walsh, Can the Military Cope With Thirteen Books?, 50 A.B.A. J. 67 (1964); Army's Chief Calls Weapons Adequate, N.Y. Times, July 16, 1980, at 20, col. 1. See generally S.L.A. MARSHALL, MEN AGAINST FIRE (1947). The failure of individual soldiers to exercise some independent judgment before executing orders may have even more devastating consequences than an inefficient military. See generally S. HERSH, MY LAI 4 (1979); R. JACKSON, supra note 117.
144. See M. JANOWITZ, supra note 131, at 42-43; Campbell & McCormack, supra note 131.
with the needs of a modern military establishment than is the traditional rule of absolute immunity.

An immunity of "varying scope,"\textsuperscript{145} moreover, is more consistent with the diverse nature of the military establishment than a general rule of absolute immunity. The military is an immense and complex organization,\textsuperscript{146} and many "military" responsibilities have exact counterparts in civilian life.\textsuperscript{147} Servicemen may be doctors, lawyers, accountants, cooks, photographers, and band directors as well as combat soldiers. \textbf{Butz v. Economou} and its predecessors\textsuperscript{148} teach that absolute immunity to liability for constitutional torts can be justified only by the nature of an official's responsibilities and the societal interests at stake.\textsuperscript{149} Military personnel performing "special functions" or confronting "exceptional" situations\textsuperscript{150} that demonstrably require absolute immunity will remain fully protected from both the risk of liability and the burdens of defending a suit. In \textbf{Tigue v. Swain},\textsuperscript{151} for example, the court held that while \textbf{Butz} precluded conferring absolute immunity on military officers in every peacetime situation, a "more particularized ground" could warrant barring suits against certain defendants.\textsuperscript{152} \textbf{Tigue} thus granted absolute immunity to a medical officer responsible for evaluating members of nuclear missile crews. Similarly, exceptional circumstances such as combat\textsuperscript{153} could also justify absolute immunity. In combat situa-

\begin{itemize}
  \item \textsuperscript{145} Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).
  \item \textsuperscript{146} As of 1979, there were 2,987,000 persons in the United States military. \textit{See} U.S. Department of Commerce: Bureau of the Census, \textit{Statistical Abstract of the United States} 1980, 374 (1980).
  \item \textsuperscript{147} \textit{See} Dept. of the Navy, Bureau of Naval Personnel, \textit{The Naval Officer Classification System} 10 (1962) (chart of Navy job classifications including "graphic arts," "food service," and "general dental"). As one court observed:
  
  [T]he defendants . . . are hardly at the brink of combat. These defendants are physicians. . . . The nature of defendants' actual duties tempers the military need for absolute immunity.
  
  
  \item \textsuperscript{149} \textit{See} Butz v. Economou, 438 U.S. at 511-12; Imbler v. Pachtman, 424 U.S. at 423; Scheuer v. Rhodes, 416 U.S. 246-51.
  \item \textsuperscript{150} \textit{See} notes 93-94 \textit{supra}.
  \item \textsuperscript{151} 585 F.2d 909 (8th Cir. 1978).
  \item \textsuperscript{153} Language in the FTCA reflected Congress's view that combat is a unique situation that should not give rise to civil damage suits among servicemen. \textit{See} 28 U.S.C. § 2680(j) (1976). The section led some commentators to believe that \textit{Feres} was wrong even as it applied.
\end{itemize}
tions, military commanders must act decisively to discharge their responsibilities in the public interest, and few would question the relevance of the traditional justifications for absolute immunity.

Even if an official cannot demonstrate circumstances that justify absolute immunity, several considerations suggest that the broader constitutional protection afforded by qualified immunity will not unduly burden a military defendant. First, the Supreme Court has tended to define the substantive constitutional rights of servicemen in a manner that entails substantial deference to the military's interest in discipline.154 Whether an official's action, if proved, would contravene a serviceman's constitutional rights can be addressed on a motion for summary judgment without imposing burdens significantly greater than those associated with claims of absolute immunity.155 Second, if the right in question is found valid despite military considerations, but is not yet "clearly established," the defendant may not be charged with knowledge of it.156 The defendant in such a case need only plead and prove157 subjective good faith to escape liability.158 Since these cases will typically involve irrational, invidious, or arbitrary conduct that deprives servicemen of constitutional rights enjoyed by other citizens,159 this moderate burden is fully warranted.

CONCLUSION

Federal courts that confer absolute immunity on military defendants facing constitutional tort suits brought by other servicemen to claims against the United States. See, e.g., Hitch, The Federal Tort Claims Act and Military Personnel, 8 RUTGERS L. REV. 316 (1954); Note, Federal Liability to Personnel of the Armed Forces, 20 GEO. WASH. L. REV. 90 (1951). However, the Court recently reaffirmed Feres's holding that a serviceman may not collect under the FTCA for the negligence of another serviceman in Stencel Aero Engr. Corp. v. United States, 431 U.S. 666 (1977).

154. See note 126 supra and accompanying text.
157. In Gomez v. Toledo, 446 U.S. 635 (1980), the Court held that qualified immunity is an affirmative defense that the defendant must plead, and reversed a First Circuit case which required a plaintiff to plead the absence of good faith. Justice Rehnquist concurred in a separate opinion in which he distinguished allocation of the burden of proof. 446 U.S. at 642 (Rehnquist, J., concurring). Most courts impose this burden on the defendants as well. See, e.g., Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978); Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir. 1976); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc), cert. denied, 426 U.S. 471 (1976); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972) (on remand).
159. See text at notes 127-28, 132-34 supra.
rely on either infirm precedent or misunderstood policy. Because *Feres v. United States* is a case far removed from the delicate balancing that conventional immunity analysis demands, the peculiar needs of the military establishment provide the only possible basis for absolute immunity. This Note has established that a general rule of qualified immunity, with a limited number of exceptions for special functions or circumstances, will not impair the acceptance of authority necessary in an effective military organization. Qualified immunity allows courts to tailor their rulings to the facts of particular cases — a significant advantage in light of the wide variety of tasks and functions that servicemen perform. This greater flexibility in turn enables courts to strike an appropriate balance between the need for an effective military establishment and greater protection for the constitutional rights that the military safeguards.