

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-393

TITLE UNITED STATES, ET AL., Petitioners V.
JAMES B. STANLEY, ET AL.

PLACE Washington, D. C.

DATE April 21, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, ET AL., :
4 Petitioners, :
5 V. : No. 86-393
6 JAMES B. STANLEY, ET AL. :
7 -----x

8 Washington, D.C.

9 Tuesday, April 21, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:35 o'clock p.m.

13 APPEARANCES:

14 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor
15 General, Department of Justice, Washington, D.C.; on
16 behalf of the petitioners.

17 RICHARD A. KUPFER, ESQ., West Palm Beach, Florida; on
18 behalf of the respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

CHRISTOPHER J. WRIGHT, ESQ.,

on behalf of the petitioners

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RICHARD A. KUPFER, ESQ.,

on behalf of the respondents

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CHRISTOPHER J. WRIGHT, ESQ.,

on behalf of the petitioners - rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 86-393, the United States versus James B. Stanley.

Mr. Wright, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. WRIGHT: Mr. Chief Justice, and may it please the Court, in the 1950s the Army conducted tests regarding the effects of LSD, and respondent was one of the servicemen who participated in those tests. He alleges that he was secretly administered LSD on four occasions in February, 1958, at the Army's chemical warfare laboratories while he was supposedly testing gas masks, and that he did not know he had been given LSD until 1975, when the Army asked him to participate in a follow-up study. He alleges that he sustained mental injuries as a result of taking the drug.

The procedural history of this case is noteworthy because it shows that respondent gave up on both of his claims during the course of this litigation. Respondent's original complaint, which alleged a claim under the Federal Tort Claims Act, was dismissed by the District Court on the basis that

1 respondent had been injured incident to military service
2 and the Fifth Circuit in 1981 held that that claim was
3 barred by this Court's decision in Feres.

4 Respondent filed an amended complaint that
5 contained an FTCA claim and a Bivens claim as well, but
6 the District Court dismissed the FTCA claim and granted
7 final judgment in favor of the United States.

8 Respondent did not appeal the dismissal of the FTCA.

9 QUESTION: Well, Mr. Weight, when you say
10 granted final judgment, was there ever a judgment
11 ordered in compliance with the separate document
12 required? What is that, Rule 58?

13 MR. WRIGHT: Yes, Your Honor. It is printed
14 at Pages 54 to 55 of the appendix to our petition. The
15 Judge entered -- wrote an opinion which is printed at
16 Pages 56 to 66, and then he entered this two-page order
17 which says that "there is no just reason for delay in
18 expressly directing the entry of judgment in favor of
19 the United States and that such relief is hereby
20 granted." And I would like to note that "hereby
21 granted" is printed in all capital letters. That is
22 about as plain a final judgment under Rule 54B as there
23 can be.

24 QUESTION: Well, but how about the separate
25 instrument requirement of Rule 58?

1 MR. WRIGHT: We contend that this order is a
2 separate document.

3 QUESTION: You say it satisfies both those
4 rules?

5 MR. WRIGHT: Yes. The purpose of the rule is
6 that there should not merely be some apparently
7 dispositive language in the opinion, as there is in the
8 opinion that is printed on Pages 56 to 66, but that
9 there should be a separate order that complies with the
10 rule. We asked, the government asked the District Court
11 to enter this final order pursuant to Rule 54B
12 dismissing the United States, and the District Court
13 did.

14 Respondent didn't appeal that dismissal as he
15 was required to do, but instead filed a second amended
16 complaint which is the live complaint in this case and
17 which is printed in the --

18 QUESTION: Before we leave that point, Mr.
19 Wright, I guess the respondent argues that, on this same
20 order you refer us to, in the next paragraph it says,
21 "Further ordered that the clerk enter final judgment in
22 favor of the United States," and the clerk never did.

23 MR. WRIGHT: The clerk is required to enter a
24 final judgment on the docket sheet, and we printed that
25 in Page 2 of our joint appendix. And if I may quote

1 from it, it says "Motion for partial final judgment by
2 defendant USA is granted."

3 QUESTION: That is in the appendix also?

4 MR. WRIGHT: That is in the joint appendix.

5 QUESTION: Yes.

6 QUESTION: You didn't read it all. That
7 is -- the motion is granted. Then it says, "The clerk
8 to enter final judgment in favor of the U.S.." Is that
9 right? Maybe I am reading the wrong thing.

10 MR. WRIGHT: No, that is correct.

11 QUESTION: What does that mean? Doesn't it
12 mean there is something more to be done?

13 MR. WRIGHT: Well, we do not think that there
14 is anything more to be done. That is tracking the
15 language of the order that the judge entered. The judge
16 said "Final judgment is hereby granted. The clerk shall
17 enter the order." The clerk then said, "Final judgment
18 is granted, and repeated that "the clerk to enter final
19 judgment." There was never any dispute that final
20 judgment was entered. In the letter that counsel for
21 respondent wrote to the District Court after this
22 Court's decision in Chappell v. Wallace counsel said
23 "You entered judgment in favor of the United States in
24 this case a few months ago." The Eleventh Circuit in
25 this case acknowledged at the beginning of its opinion

1 that final judgment was entered in favor of the United
2 States. There has simply never been any real doubt
3 about that. And in the face of a statement in the order
4 saying final judgment in favor of the United States is
5 hereby granted, we just do not think there can be any
6 real dispute on that. And it is further shown that
7 respondent understood that by the fact that he filed a
8 second amended complaint that contained Bivens claims
9 but no FTCA claim.

10 Then this Court issued its decision in
11 Chappell v. Wallace and respondent wrote the letter to
12 the District Court that we reprinted in our reply brief
13 at the petition stage that says that counsel was
14 "ethically compelled to cite to the Court a recent
15 Supreme Court decision which we regret to say is
16 apparently dispositive of this case."

17 The District Court refused to accept that
18 concession, although it did certify its order to that
19 effect for interlocutory appeal. The Court of Appeals
20 affirmed that decision and then, ignoring the fact that
21 respondent had abandoned his FTCA claim, resurrected
22 that claim as well. We contend that the Court of
23 Appeals should have dismissed respondent's Bivens claims
24 and should not have resurrected the FTCA claim because
25 this Court's decisions in Feres and Chappell compelled

1 the conclusion that servicemen injured incident to
2 military service may not pursue those sorts of claims.
3 We realize that under the result that we contend is
4 mandated by this Court's decisions respondent is barred
5 from challenging an Army program that was poorly
6 conducted and that may have harmed him, but respondent
7 is not without a remedy. As we have explained in our
8 briefs, if he was injured as a result of this program he
9 may obtain veterans' benefits, and the Army is not
10 vindicated by a decision holding that he may not pursue
11 damage actions. The Senate has studied the Army's LSD
12 testing program and issued a critical report concerning
13 that program that included instructions to the Army as
14 to how to conduct future chemical weapons tests.

15 Concerning the final judgment entered in favor
16 of the FTCA claim I would like to note only that the
17 whole point of Rule 54B is to resolve a case as to
18 certain issues or as to certain parties, and that this
19 case was resolved in favor of the United States when
20 respondent decided not to appeal that final judgment.
21 In addition I would like to note that the Eleventh
22 Circuit's jurisdiction in this case was based on its
23 acceptance for interlocutory appeal of the question
24 certified, which was the Bivens question, and the FTCA
25 question was clearly beyond the scope of that certified

1 question.

2 QUESTION: Are there decisions in the Courts
3 of Appeals as to whether or not the jurisdiction of the
4 Court of Appeals on a certified question extends only to
5 the certified question or whether its jurisdiction
6 extends to the whole case?

7 MR. WRIGHT: There are such decisions. We
8 have cited a number of them. It is sometimes difficult
9 to draw precisely the line as to where the certified
10 question ends and other matters begin, but I know of no
11 case that would even come close to the situation here
12 where it is an order as to another party on another
13 claim. We do not know of any case that would allow a
14 court to extend its jurisdiction on a certified question
15 under these facts.

16 Finally on that point I would just like to
17 note that the Eleventh Circuit did not even appear to be
18 aware that there was a jurisdictional problem, although
19 we did raise that in our rehearing petition that they
20 denied. In any event, as to the FTCA claim, it is clear
21 that that claim is barred by Feres because respondent
22 was administered LSD incident to his military service.
23 In its 1981 decision in this case, the Fifth Circuit
24 noted that in 1958 respondent was a master sergeant in
25 the Army who had volunteered to participate in an

1 official Army chemical warfare program, that the program
2 was conducted on an Army base by and for the benefit of
3 the Army, that respondent received military pay during
4 the month that he participated in the program, and that
5 he was promised a letter of commendation for his
6 participation. I might add as well that in the second
7 amended complaint, Paragraph 11, respondent says that he
8 was on active duty during that month. No court
9 disagreed with the conclusion that respondent was
10 participating in this program incident to his military
11 service, not even the Eleventh Circuit. It instead held
12 that an FTCA claim is not necessarily barred because the
13 injury on which the claim is based occurred incident to
14 military service.

15 We argued in Johnson, the FTCA case involving
16 a helicopter crash that was argued in this Court in
17 February, that this Court held in Feres shortly after
18 the FTCA was enacted that Congress did not intend to
19 waive sovereign immunity for torts occurring incident to
20 military service, and that there is no reason to revisit
21 that construction of the statute which Congress has not
22 seen fit to alter in 37 years.

23 I will not repeat that argument today but do
24 want to note that this case represents a significant
25 extension of the Eleventh Circuit's erroneous decision

1 in Johnson which distinguished Feres on the basis that
2 the tortfeasor there was a civilian air traffic
3 controller who is not in the military chain of command
4 but was instead employed by the Department of
5 Transportation. There is no question that the program
6 under which respondent was administered LSD was an Army
7 program. It was developed and conducted by the Army
8 Intelligence Board and the Army's chemical warfare
9 laboratories where the tests were conducted.

10 While respondent has named some civilian
11 doctors in his second amended complaint they were
12 obviously working for the Army in this case. The courts
13 below also erred in refusing to dismiss respondent's
14 Bivens claim. The letter that counsel for respondent
15 sent to the District Court after this Court issued its
16 decision in Chappell v. Wallace explained that this
17 Court "held that the same principles which underlie the
18 Feres doctrine and which require absolute immunity from
19 an FTCA action also require immunity from a Bivens
20 constitutional action against Federal officers." That
21 is an accurate description of this Court's holding.
22 Except for the courts below, all of the other courts of
23 Appeals that have considered the question have
24 understood that this Court barred servicemen from
25 bringing Bivens suits against their superiors and did

1 not authorize any case by case inquiry of the sort
2 mandated by the court below.

3 That is absolutely clear from this Court's
4 opinion in Chappell which reversed the Ninth Circuit
5 opinion that did not authorize the plaintiff to bring
6 their Bivens action but instead remanded the case for
7 application of certain tests similar to those set out in
8 the Fifth Circuit's *Mindes v. Seaman* case to determine
9 whether the plaintiffs there could proceed. This Court
10 rejected that balancing approach, holding instead that
11 enlisted military personnel may not maintain a suit to
12 recover damages from a superior officer for alleged
13 constitutional violations, a holding that the District
14 Court here described as an overbroad statement.

15 The courts below relied on this Court's
16 statement in Chappell that military personnel are not
17 barred from all redress in civilian courts for
18 constitutional wrongs. The courts obviously misread
19 that statement, which was followed by citations to three
20 cases that did not involve claims for damages. As at
21 least three other Courts of Appeals have concluded, this
22 Court in Chappell clearly held that servicemen may not
23 pursue Bivens actions while indicating by the statement
24 relied on by the courts below that in some cases they
25 may grant other sorts of relief.

1 We do not think that courts should frequently
2 grant other sorts of relief to military personnel, but
3 we acknowledge that this Court has left open that
4 possibility in extreme cases. Proceeding to their case
5 by case inquiry, the courts below concluded that the
6 concerns underlying Feres and Chappell are not relevant
7 here because respondent was not ordered to take LSD.
8 While we do not think that any case by case inquiry is
9 warranted, it is nevertheless clear that the courts
10 below erred in reaching their conclusion. The concerns
11 underlying Feres are not limited to cases involving
12 direct orders, and it is not clear where the District
13 Court got its contrary idea. This Court's decision in
14 Feres nor this Court's decision in Shearer nor most of
15 the Feres cases in between involved any sort of direct
16 order. This Court's made clear that the rule of Feres
17 is based on the principle that the military is under the
18 control of the political branches and that the Judiciary
19 should generally not review military decisions since
20 such litigation would undermine military discipline and
21 effectiveness. This Court's decision in Shearer is
22 particularly instructive. The Court there concluded
23 that a claim against the Army based on its alleged
24 failure to discharge or supervise a serviceman who had
25 previously been convicted of manslaughter would require

1 the courts to review a decision of command and would
2 call into question basic choices about the supervision
3 and control of servicemen.

4 It could not be more clear that this case
5 involves such questions. The heart of respondent's
6 claim is that the Army should not have been using
7 servicemen to study the effects of LSD and that it made
8 a number of mistakes in the way it conducted those
9 tests. Respondent is therefore challenging decisions of
10 command and calling into question basic decisions made
11 by the Army in the 1950s concerning the use of military
12 personnel. His claims are therefore barred.

13 If there are no further questions, I would
14 like to reserve the remainder of my time.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Wright.

17 We will hear now from you, Mr. Kupfer.

18 ORAL ARGUMENT OF RICHARD A. KUPFER, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. KUPFER: Thank you, Mr. Chief Justice, and
21 may it please the Court, if the plaintiff in this case
22 had volunteered for LSD drug testing on behalf of the
23 Army, the government would have a much stronger argument
24 that this was something that was incident to his
25 military service, but that is not what happened in this

1 case.

2 The plaintiff did not volunteer for LSD drug
3 testing nor was he under orders to arrive at Edgewood
4 Arsenal for LSD drug testing, nor was he even on his
5 regular duty status for that one-month period of time
6 that he was up at Edgewood Arsenal. With the Courts
7 indulgence, what I would like to do if I could is spend
8 the first few minutes just discussing some of the unique
9 facts of this particular case which I think make this
10 case unlike any other Feres type of case which has been
11 before this Court previously.

12 QUESTION: Did he volunteer?

13 MR. KUPFER: He did not volunteer for LSD drug
14 testing. He did not. The plaintiff volunteered in this
15 case for a program that was ostensibly supposed to test
16 and develop gas masks and protective clothing. That was
17 the purpose of the program. That was the lure to
18 attract Mr. Stanley up to Edgewood Arsenal. There was
19 no compulsion for him to go up there. When he did go up
20 there they went through the charade of having him test
21 gas masks and protective clothing, but the real purpose
22 of this program was to unwittingly subject the plaintiff
23 to LSD which was secretly added to his drinking water
24 while he was up at Edgewood Arsenal.

25 QUESTION: Is it alleged in the complaint that

1 he and he alone received the LSD or that others in the
2 same program received it?

3 MR. KUPFER: We have not alleged that others
4 in the same program received it. We just allege that he
5 alone received it. At any time that he desired he could
6 leave the testing laboratories.

7 QUESTION: Did you say that, that he alone, or
8 did you just say that he received it?

9 MR. KUPFER: We just alleged -- we did not
10 make allegations that other soldiers also received it,
11 which was Justice Rehnquist's question. Our allegations
12 go entirely to this one claim.

13 QUESTION: Well, I think there is a lot of
14 difference between saying that he alone received it or
15 that he received it. I just wanted to be certain what
16 you allege.

17 MR. KUPFER: I am not saying that he was the
18 only person who received it. I am just saying that we
19 have not made any allegations in our complaint that go
20 outside the facts of Mr. Stanley's situation up at
21 Edgewood Arsenal. At any time he desired he could leave
22 that program. There is no evidence in the record as to
23 what his technical duty status was while he was up at
24 Edgewood Arsenal. There is no evidence that there was
25 any disciplinary relationship between the plaintiff --

1 QUESTION: (Inaudible) was he?

2 MR. KUPFER: There is no evidence what he was
3 on. There is no -- I don't believe the record
4 indicates --

5 QUESTION: You mean he went up there for rest
6 and recreation?

7 MR. KUPFER: No, he went up there to volunteer
8 for a program that was misrepresented to him. He went
9 up to volunteer for a program --

10 QUESTION: Whatever the program was, it was
11 part of the Army, though, wasn't it?

12 MR. KUPFER: Well, whether or not that was an
13 Army program is also in dispute because the complaint
14 alleges otherwise, okay. The complaint in this case --

15 QUESTION: How did anyone ever ask him to
16 volunteer or give him the opportunity? Who asked him,
17 or who made it available to him?

18 MR. KUPFER: There was a notice that was
19 posted at his Army barracks --

20 QUESTION: Why are you suing the Army if you
21 are not sure it is an Army program? I thought that
22 everyone was in agreement on that.

23 MR. KUPFER: We are not. We are not suing the
24 Army. We are suing the United States, and we are suing
25 civilian officers. We are suing doctors who are

1 civillians. We are suing the state university which is
2 alleged to have been an independent contractor. We are
3 suing individuals who we say were employed by Federal
4 civillian agencies such as but not limited to the CIA
5 that we say implemented it and was part of this
6 program. We are not suing Army officers as part of this
7 program, which is again one of those unique facts that I
8 started out saying which I think distinguishes this from
9 --

10 QUESTION: He didn't get leave, did he, from
11 Army duty for this program?

12 MR. KUPFER: The complaint alleges that he was
13 no longer -- he was no longer on his active duty service
14 for the time he was up there, that he returned back to
15 his active duties after the month. I don't believe
16 there is anything in the record as to what his duty
17 status was when he was up here. That is a question
18 mark, frankly.

19 QUESTION: But he was still in the Army?

20 MR. KUPFER: He was still in the Army, yes.
21 Now, Mr. Wright has pointed out in his brief that while
22 he was still receiving military pay while he was up
23 there for that one month, but a soldier who is on
24 furlough receives military pay for one month also. This
25 Court has held in the Brooks case that a soldier on
 furlough is allowed to sue the government under the

1 Federal Tort Claims Act for negligence.

2 The plaintiff in this case was given false
3 information as to the program. The dosage of LSD that
4 he received is unknown at this point. It was apparently
5 substantial, judging from his reactions to it. He
6 experienced the usual hallucinations that a person
7 experiences, but he had no idea what was happening to
8 him. For that one month period of time nobody told him
9 what was happening to him. When he left the Army base
10 nobody debriefed him. He went back to his active duty
11 services. He continued to have flashback recurrences on
12 his active duty services. He went for months and years
13 doubting his own sanity but he was afraid to say
14 anything to anybody for fear that he would be discharged
15 from the military service.

16 The complaint alleges that -- and I think the
17 damages are important in this case because of the
18 alternative remedy that the government alleges, which is
19 why I am getting into the damages. The complaint
20 alleges that on one occasion in fact he even awoke late
21 at night in a rage without any provocation, beat up his
22 wife, and beat up his children, and threw the TV through
23 the wall and went back to sleep and woke up again the
24 next morning and had no recall of that event.

25 The complaint also alleges that as a result of

1 the LSD testing he was unable to officially perform his
2 duties in the military. He would be absent without
3 leave for period of time and would suddenly show up, and
4 when he was questioned as to his whereabouts he couldn't
5 explain his whereabouts, and he was eventually reduced
6 in rank in the military because of inefficiency. I
7 should mention that up until the drug testing he was in
8 the Army for about seven years and had an unblemished
9 record in the Army, and he had intended to make the
10 military his career.

11 It was not until seven years after he retired
12 from military service, which is 18 years after the drug
13 testing, that he finally got a letter from Walter Reed
14 Medical Center telling him for the first time that he
15 had been an unwitting LSD subject back in the late
16 1950s, and the purpose of that letter was to solicit him
17 to go back up to Walter Reed now to do follow-up studies
18 of the long-range effects of LSD. When he learned that
19 he filed an administrative claims with the United States
20 Army Claims Service. Those administrative claims were
21 denied by the Claims Service with the statement that
22 there is no appropriation available to the Army to pay
23 this kind of a claim, and the Army told him, if you are
24 dissatisfied with this determination you have six months
25 to file a lawsuit in Federal District Court, which is

1 what he did. They did not tell him go seek veterans'
2 benefits. They told him to file a lawsuit in Federal
3 Court.

4 Now, we have alleged, to answer the question
5 asked earlier --

6 QUESTION: He made his claim with the Army?

7 MR. KUPFER: He made his claim with the Army
8 Claims Service.

9 QUESTION: So he thought the Army had had
10 something to do with the program at that stage.

11 MR. KUPFER: Initially --

12 QUESTION: You are now telling us you are not
13 sure that it was even the Army.

14 MR. KUPFER: Well, we are alleging that the
15 program was -- certainly the Army was involved in the
16 program. We are claiming the program was actually
17 implemented by nonmilitary defendants. The case is
18 coming up to appeal just on the pleadings because there
19 has been -- this is not a summary judgment. There is no
20 evidence in the record. The case got to the Eleventh
21 Circuit on a motion to dismiss the complaint based on
22 the allegation --

23 QUESTION: I assume that all you are telling
24 us is in the record, all this stuff you are telling us
25 is not all extra-record material.

1 MR. KUPFER: Everything I am telling you is
2 either in materials that were filed with the District
3 Court when there was an earlier summary judgment motion
4 years ago, there were some documentary materials filed
5 with this Court, and what I am telling you also comes
6 out of the allegations in the complaint, so it is in the
7 record. I have indicated who we are suing in this
8 case. We are not -- the complaint itself does not
9 purport to sue superior military officers within the
10 disciplinary context that this Court was speaking about
11 in the Chappell versus Wallace case and on the
12 government's motion to dismiss the complaint as the
13 allegations of the complaint should be deemed to be
14 true. The CIA's own records about their involvement in
15 drug testing programs in general back in the fifties
16 were unfortunately destroyed back in 1973 pursuant to
17 orders of the director of the CIA who is also a
18 defendant in this lawsuit, and we have not been able to
19 engage in discovery to any great extent in this case
20 because the District Judge entered several orders
21 protecting the government from discovery until we
22 disposed of the Feres issue.

23 What we are asking at this point is the
24 opportunity to go back to District Court and to prove
25 the allegations that we are making in our complaint. It

1 is our position that this case falls outside of the
2 typical Feres factual paradigm Is the phrase that was
3 used by the Eleventh Circuit in this case, and that this
4 is not the type of claim that would require the judicial
5 involvement into a sensitive military issues at the
6 expense of military discipline. The very worst fact
7 that we have to deal with in this case is that this
8 program, whoever implemented the program, occurred on an
9 Army base, and there is no dispute about that. Edgewood
10 Arsenal is an Army base. But this Court held in the
11 Shearer case that the site of the incident is not nearly
12 as important as whether the case, taking the case in a
13 complete perspective, whether that case requires a
14 civilian court to second guess the wisdom of military
15 decisions, and this Court said that Feres today is best
16 explained by the military discipline rationale, and that
17 can't be reduced to just a few bright lines rules as to
18 whether an incident occurred on an Army base or off of
19 an Army case.

20 Now, the lower courts in this case, both the
21 District Court and the Circuit Court of Appeals, have
22 held that this is clearly not just your garden variety
23 Feres type of case. The facts of this case read like
24 they have been lifted out of a novel by George Orwell
25 where even a person's own creative thought process is

1 tinkered with by the government, and altered, and
2 controlled by the government, and we believe that the
3 Constitution of the United States if it guarantees
4 anything surely guarantees the right of all Americans to
5 control their own mind and to control their own
6 intellectual thought process and the content of their
7 own bloodstream. That is where these constitutional
8 claims come from.

9 QUESTION: Would it have made any difference
10 if when they were interviewing him they said, by the
11 way, will you drink this glass of liquid, it has LSD in
12 it, we just want to see how it affects you? And he
13 just, down he went?

14 MR. KUPFER: That would have made a
15 substantial amount of difference because then you
16 wouldn't have a violation of the Nuremberg Code, because
17 you wouldn't have an unwitting test subject. You would
18 have a soldier who was then volunteering for what he
19 understands to be a program to test LSD drugs. That
20 would make all the difference in the world in a case
21 like this, yes. Again, it is undisputed, I believe it
22 is undisputed --

23 QUESTION: I figure you probably will would
24 have been suing for giving him LSD without telling him
25 what it might do to him.

1 MR. KUPFER: Well, the Army says that back in
2 the early or late fifties that they themselves did not
3 know what it would do to him.

4 QUESTION: Exactly. Exactly.

5 MR. KUPFER: In fact, they say they thought
6 that it would just be temporary, the effects of it.

7 QUESTION: So if they had said, by the way,
8 this is LSD, he would have shaken his head and said, so
9 what? Nobody knew LSD was.

10 MR. KUPFER: Then, whether or not there would
11 be a negligence cause of action, I am not sure there
12 would be a constitutional cause of action. That is the
13 point because, you see --

14 QUESTION: Well, how about the tort claims?

15 MR. KUPFER: Well, on the tort claims, the
16 tort claims come under the Federal Tort Claims Act. We
17 say that because this type of program was patently
18 illegal, first of all -- the Nuremberg Code prohibits
19 involuntary human experimentation.

20 QUESTION: Does the Nuremberg Code have the
21 effect of law, civil, positive law in the United States?

22 MR. KUPFER: Well, it has been adopted by the
23 Chief and the Secretary of the Army and the Navy and the
24 Air Force, and it therefore is part of the Army's own
25 regulations. That goes to the question, do we have to

1 second guess the wisdom of military decisions? The
2 military itself has already made its own regulations in
3 this case, not only through the Nuremberg Code, but the
4 Inspector General of the Army has issued a report on
5 these drug experiments and the Inspector General himself
6 has found that this program was completely unauthorized
7 by any existing Army regulations.

8 QUESTION: That is true of many claims that
9 are barred by the Feres doctrine. There may be
10 something contrary to regulations, and the fact that it
11 is contrary to the regulations doesn't avoid the Feres
12 doctrine.

13 MR. KUPFER: We also think as one additional --

14 QUESTION: Does it?

15 MR. KUPFER: The fact that it --

16 QUESTION: Well, does the fact that our
17 military conduct violates regulations avoid the Feres
18 doctrine?

19 MR. KUPFER: It doesn't necessarily avoid it,
20 but it is a significant factor because the question is
21 whether or not -- do civil courts have to second guess
22 military decisions?

23 QUESTION: We don't really know that this was
24 in violation of Army regulations anyway, because you
25 have told us that we don't really know that the Army was

1 conducting this. And if the Army wasn't conducting it,
2 I presume whoever was conducting it didn't have to
3 comply with Army regulations.

4 MR. KUPFER: The Army was -- we are saying
5 that it was not initially implemented by the Army. It
6 did happen on an Army base. There were Army officers
7 there. There were civilian officers there. The
8 Inspector General himself has found that these --

9 QUESTION: Army regulations apply wherever
10 there are Army officers? Is that how the regulations
11 read? I assume they only govern the activities of the
12 Army.

13 MR. KUPFER: The Inspector General felt that
14 the programs were -- that this was an unauthorized
15 program, that the Army was involved. We don't know --

16 QUESTION: You think it was an Army program,
17 don't you?

18 MR. KUPFER: We don't know.

19 QUESTION: We don't know. Then I don't know
20 what you are talking about Army regulations for.

21 MR. KUPFER: Well, the regulations of the Army
22 should at the very least govern the Army in whatever
23 program the Army, if it is going to have Army personnel
24 involved in a program, even if the personnel is
25 implemented by a separate branch of the government it

1 would seem that the Army should follow its own
2 regulations. We have alleged that this does violate the
3 Army's own regulations. We have also alleged one other
4 important --

5 QUESTION: And why did it? Why did it?

6 MR. KUPFER: Why did it? Because it involved
7 unwitting human experimentation which violates the
8 Nuremberg Code and because there were no regulations
9 according to the Inspector General which even authorized
10 this type of a program for the Army.

11 QUESTION: So the regulations just bar any
12 kind of experiments with --

13 MR. KUPFER: Involuntary human experiments.

14 QUESTION: Is the government responsible for
15 unauthorized programs?

16 MR. KUPFER: The government -- we think the
17 government is responsible when government agents violate
18 within the course of their employment for the government
19 violate constitutional rights of servicemen or
20 civilians, that the government is responsible if the
21 case itself does not fall within the typical Feres
22 factual paradigm, one military officer suing another
23 military officer for negligence within the course of --

24 QUESTION: Well, this military officer walks
25 up to a guy and says, hey, I am going to shoot you with

1 some LSD. Is the government responsible for that?

2 MR. KUPFER: We think that the government is
3 responsible for that.

4 QUESTION: Really?

5 MR. KUPFER: Particularly when the
6 government -- well, if the soldier --

7 QUESTION: You don't "particularly" with my
8 questions. You use what you have. Without more, the
9 government is responsible?

10 MR. KUPFER: If the government -- if the
11 government --

12 QUESTION: Without more. Your "if" is out.

13 MR. KUPFER: Well, then, your hypothetical
14 assumes that he was told that it is LSD.

15 QUESTION: That he is what?

16 MR. KUPFER: That the serviceman was told that
17 it was LSD he was being shot with?

18 QUESTION: Yes.

19 MR. KUPFER: Okay, under those circumstances I
20 don't know if there is a tort claim, unless it maybe
21 would be failure to warn --

22 QUESTION: Of course. That is my whole --

23 MR. KUPFER: -- perhaps a failure to warn of
24 what the effects of the LSD --

25 QUESTION: My point is, up until now you have

1 not been able to show that this was authorized.

2 MR. KUPFER: We allege that it was not
3 authorized, in fact, the program. We also allege that
4 the government, that within the context of the Feres
5 doctrine, there is room for equitable principles, and
6 that there is room for an estoppel against the
7 government when the government is engaged in this type
8 of unconscionable conduct and when a military serviceman
9 detrimentally relies upon the government telling him
10 that he is volunteering for one kind of a program all
11 the while just intending to secretly mix LSD with his
12 drinking water under these limited circumstances, that
13 the government should be held to be estopped to even
14 argue that this was incident to military service.

15 Now, this Court has never intimated, I don't
16 believe, in any Feres case, that equitable estoppel
17 cannot apply.

18 QUESTION: What was the last case in which we
19 held the government was estopped?

20 MR. KUPFER: The last case was a case where
21 actually the majority left the question open as to --

22 QUESTION: So that really wouldn't be an
23 answer to my question then, would it? What I asked you
24 was --

25 MR. KUPFER: This Court has never held -- this

1 Court has never held --

2 QUESTION: We have never held the government
3 was estopped.

4 MR. KUPFER: That's true, but in Heckler
5 versus Community Health the majority opinion of this
6 Court held that there may be a case some day where the
7 public interest would warrant an estoppel against the
8 government. This Court --

9 QUESTION: (Inaudible.)

10 MR. KUPFER: I say this is it. I say this is
11 it, and I think that by finding an estoppel in this
12 case, Number One, you would not be undermining the
13 viability of the Feres doctrine in general because this
14 is a very limited case. You would not be opening up a
15 floodgate for other litigants, only those litigants that
16 are similarly situation to Mr. Stanley, and if this
17 program had been what it was described to be, if it had
18 been really a program to test gas masks and protective
19 clothing, and if Mr. Stanley had been injured inhaling
20 fumes from a gas mask, then again the government would
21 have a much better argument that this was incident to
22 his military service, this is what he volunteered for,
23 but when we say that when the government intentionally
24 misleads its own servicemen to volunteer for one kind of
25 a program and that is not the program that he is really

1 volunteering for, that the government should be estopped
2 to argue that this is something that is incident to his
3 military service. At any rate, we think the
4 circumstances of this case do not involve the type of
5 close military judgment calls that the Feres doctrine
6 was really designed to insulate from review, and we
7 don't believe that the prosecution of this claim would
8 undermine the disciplinary structure of the military to
9 allow it to proceed.

10 As far as the Bivens action, even if the Feres
11 doctrine does preclude our claim against the government
12 it would not necessarily preclude the Constitutional
13 claim against the individual defendants. The government
14 relies upon Chappell versus Wallace.

15 QUESTION: (Inaudible.)

16 MR. KUPFER: Yes, this is the -- I am getting
17 to the Bivens argument now, Your Honor. This case is
18 much different than the Chappell or Chappell case. The
19 Chappell case involved soldiers who were clearly
20 superior military officers who were on board a Navy
21 combat vessel along with the plaintiffs, and they were
22 being sued specifically for making certain command
23 decisions and taking certain disciplinary actions that
24 were alleged to be racially motivated. Now, those facts
25 are radically different from the facts that we have

1 involved in this case, and this Court in Chappell
2 specifically cautioned that the opinion should not be
3 read to mean that military personnel are barred from
4 seeking all redress in the civil courts for all kinds of
5 constitutional violations that they may suffer in the
6 course of military service. I think a fair reading of
7 the Chappell case would lead the Court to believe that
8 was really intended to be limited to the facts that were
9 before this Court in that case.

10 Now, the government here says that this case
11 could involve an inquiry somehow into military
12 decisionmaking somewhere along the line, maybe there was
13 some military decisionmaking involved here, but if you
14 accept that, if that alone precludes a Bivens action,
15 then what you are saying is that no matter what kind of
16 a wrongful act is perpetrated on an active duty
17 serviceman, the individual defendants can always remain
18 immune simply by asserting that their act was the result
19 of military decisionmaking. Boom, they are immune. And
20 to accept the government's --

21 QUESTION: (Inaudible) think that we should
22 instead hold that they are only immune no matter what
23 kind of wrongful act if they are superior officers? I
24 mean, does that strike you as less heinous?

25 MR. KUPFER: It strikes me as --

1 QUESTION: I mean, you know, it is -- either
2 line sounds pretty arbitrary, doesn't it?

3 MR. KUPFER: I am just -- I am taking the view
4 that a --

5 QUESTION: The gravity of the act has nothing
6 to do with where you draw the line, it seems to me.

7 MR. KUPFER: The act?

8 QUESTION: The gravity of the act has nothing
9 to do with whether you draw the lines with superior
10 officers or not.

11 MR. KUPFER: I think if it involves a
12 potential estoppel situation it should. I think that is
13 where you should draw the line. There has to be --
14 unless you draw the line no place then surely -- then
15 the situation that you are left with is that there is
16 no, absolutely no limit to the immunity doctrine without
17 an arbitrary line some place, and a line doesn't have to
18 be so arbitrary, I think, when you have facts like
19 this. I think when Federal officers willfully and
20 knowingly violate the constitutional rights of active
21 duty servicemen, to say that there is absolute immunity
22 in that type of a situation, Number One, that is not
23 going to promote discipline in the military. The whole
24 purpose of the Feres doctrine is to promote discipline.

25 QUESTION: (Inaudible) beats up a subordinate,

1 and really beats him up. Is there a Bivens action?

2 MR. KUPFER: I think that there could be a
3 potential Bivens action. If an officer, let's say an
4 officer kills an active duty serviceman.

5 QUESTION: Maybe he did it deliberately, he
6 just deliberately beats him up. He is not negligent or
7 anything. He just does it on purpose. And it is in
8 violation of all the regulations. Is there a Federal
9 Tort Claims Act?

10 MR. KUPFER: Whether there is a Federal Tort
11 Claims Act because of certain exclusions for some
12 intentional torts in assault and battery is hard to
13 say. Whether there should be --

14 QUESTION: Well, let's forget that. Do you
15 think the Feres doctrine would bar that?

16 MR. KUPFER: I don't think the Feres doctrine
17 should because --

18 QUESTION: Well, does it or not? Has it been
19 held that or what?

20 MR. KUPFER: I don't know that there has been
21 a case of intentional beating up of an inferior officer
22 to test that, but I do think this. I think that when
23 you consider the purpose of the Feres doctrine, which is
24 to maintain discipline, okay, and you say that superior
25 officers can do anything they want to active duty

1 servicemen, and they need never fear of being held
2 accountable for damages in the civil justice system,
3 that is not going to promote discipline in the
4 military. That is going to create chaos.

5 QUESTION: What do you think the Feres
6 doctrine says? They can only do what, moderately bad
7 things?

8 MR. KUPFER: No, I think the Feres doctrine
9 should apply in cases where the facts of the case are
10 such that if you allow that particular type of case, if
11 it falls outside a typical Feres situation, if you allow
12 that kind of case to go into the civil justice system,
13 then it will have a negative impact on discipline in the
14 services.

15 QUESTION: It always has a negative impact.
16 You don't think the officer is going to admit he beat
17 him up. He is always going to say, I didn't beat him
18 up. I mean, you are talking lawsuits here, not
19 acknowledged guilt.

20 MR. KUPFER: If you allow --

21 QUESTION: And it is going to get into the
22 civil court system whether you are suing him for beating
23 him up or whether you are suing him for calling him a
24 name. In either event it is going to disrupt the
25 military discipline, isn't it?

1 MR. KUPFER: I think if you allow those kind
2 of claims to go forward I don't think it will disrupt
3 discipline. In fact, I think it will promote discipline
4 because then inferior servicemen, enlisted men can then
5 obey military orders without any fear that there is
6 going to be some kind of undetected harm that is going
7 to befall them, like swallowing LSD. I think you have
8 got to look at the facts of the case. I think you have
9 to consider discipline not only at the level of the
10 enlisted man, but I think you need to consider
11 discipline at the higher echelon levels of the
12 government as well. The government's interpretation,
13 strict interpretation of the Chappell doctrine would
14 also mean that an American serviceman like Mr. Stanley,
15 a sergeant in the Army, would be actually reduced to a
16 position inferior, even to a convicted and incarcerated
17 Federal prisoner who is allowed to bring an FTCA action
18 and a Bivens action against prison officials.

19 QUESTION: Why not limit Feres to medical?

20 MR. KUPFER: Limit it to medical malpractice
21 cases? I think Congress is trying to open it up for
22 medical malpractice cases, in fact, but I think that
23 Feres should be limited to those cases where the
24 rationale of the doctrine applies. That is the cases
25 that it should be limited to. It should be limited to

1 those cases where the rationale of the doctrine
2 applies. Veterans' benefits were mentioned briefly as
3 being an --

4 QUESTION: It certainly applies in negligence
5 cases, doesn't it?

6 MR. KUPFER: It applies in most negligence
7 cases. Yes. I don't think it applies at all in this
8 kind of a case. I don't think it --

9 QUESTION: How does that ever affect
10 discipline? If some officer just is negligent?

11 MR. KUPFER: I have trouble realizing how a
12 medical malpractice case --

13 QUESTION: So when would Feres ever apply? It
14 doesn't apply to intentional things, it doesn't apply to
15 negligence.

16 MR. KUPFER: Where it should apply most often
17 is in cases where a soldier is suing a superior officer
18 for orders that were given, or like in the Chappell
19 case, for giving them poor performance evaluations and
20 for keeping them from being promoted within the Navy and
21 for command decisions in the military services, surely
22 it is clear in those cases that the military courts are
23 the proper forum to hear those kind of cases, but when
24 you have a fact situation which involves widespread
25 egregious conduct -- the government admits, they admit

1 to at least a thousand servicemen that they did this
2 to. They have admitted this in their brief.

3 QUESTION: Well, a serviceman sues, claiming
4 that he was riding in an airplane with his superior, who
5 was piloting, and the superior was just negligent, and
6 they crashed, and he was hurt.

7 MR. KUPFER: There is a stronger argument for
8 applying the Feres doctrine in that kind of a case.

9 QUESTION: What military discipline is
10 involved in that?

11 MR. KUPFER: Well, because then if upper level
12 servicemen had to be afraid all the time of any
13 negligent acts that they might take, that they might be
14 hauled into a civil court, they would be afraid to do
15 anything. They would have such a chilling effect on
16 higher level servicemen that certain negligence cases it
17 does comport with the rationale of Feres, but an
18 intentional violation of constitutional rights, if you
19 are taking the Feres doctrine and you --

20 QUESTION: Or anything that could be -- all
21 you have to do to get around it is to allege in your
22 complaint that it was intentional?

23 MR. KUPFER: Well, this is not just a matter
24 of artful pleading in a case like this. We -- this
25 obviously he was given LSD. Nobody accidentally dropped

1 LSD in his drinking water. He was intentionally given
2 LSD. And according to the -- and he was intentionally
3 denied the knowledge that he was given LSD. I guess
4 artful pleading cases would have to be separated from
5 the true intentional tort cases or intentional
6 constitutional violation cases. But I think that when
7 you have a situation like this where there also is no
8 adequate remedy by veterans' benefits -- if I could just
9 one spend one moment on that, the government has
10 indicated that they think that veterans' benefits in
11 this case would be an adequate alternative remedy, and
12 therefore that is another reason why he shouldn't be
13 able to sue. You need -- it is necessary to consider
14 the type of injury that has been done here. Mr. Stanley
15 alleges that he has been deprived of some of his most
16 basic constitutional rights, including the right to
17 control his own mind and his own behavior and the right
18 to control his own intellectual thought process. He
19 suffered mental for all the years that he thought he was
20 going crazy. He suffered the disruption of his Army
21 career. His family and marriage has been dissolved and
22 broken down. There are no veterans' benefits that can
23 compensate for these kinds of injuries. Veterans'
24 benefits will also not serve a deterrent purpose, which
25 is one of the most important purposes behind the Bivens

1 action, is to discourage this type of shocking abuse of
2 power by Federal officials. Veterans' benefits do not
3 do that.

4 At this stage it is almost 30 years after
5 those 1958 drug experiments. About the only thing that
6 veterans' benefits could do for Mr. Stanley now maybe is
7 pay for any future psychiatric care that he might need,
8 but he is not having flashbacks any more. That will be
9 nil. Veterans' benefits will not do anything for him.
10 In the Chappell case this Court found that the
11 administrative remedies would be adequate again. In
12 that case those plaintiffs were saying that they were
13 discriminated against and this Court found that they
14 could administratively receive pay increases and
15 retroactive pay increase and promotions and they could
16 receive everything administratively that they were
17 asking for in the civil lawsuit. You also said on the
18 same day that Chappell was decided in Bush versus Lucas
19 that before an alternative remedy is considered to be a
20 special factor militating against allowing a Bivens
21 action, it should at least provide meaningful remedies
22 for a plaintiff, meaningful remedies. We have no
23 meaningful remedies provided in this case. The VA, the
24 Veterans Benefits Act is not -- was never meant by
25 Congress to be an exclusive remedy. There is no

1 exclusive remedy provision. In fact, that Act expressly
2 recognizes the possibility of double recovery because
3 there is a provision in the Veterans' Act which provides
4 a method for offsetting cumulative recoveries, and this
5 Court held in the Brooks case and the Brown case that a
6 veteran who receives VA benefits is still not
7 necessarily precluded from suing. One important point
8 in conclusion also is that in a Bivens action defendants
9 are always entitled to raise a qualified immunity. If
10 they say they acted in good faith and if they reasonably
11 believed their conduct to be lawful, just like in a
12 civil rights case, then they are immune, but if this
13 Court gives these defendants under these kind of facts
14 an absolute immunity for the act that they have done, no
15 matter -- the message will be that no matter what a
16 serviceman does to a lower echelon serviceman, they need
17 never fear of being brought into the civil justice
18 system, and I think that after all the progress that has
19 been made since Bivens in the last 15 years with Bivens
20 and Carlson versus Green and United States versus Muniz
21 and so on, to recognize an absolute immunity from
22 liability in an egregious case like this would be a step
23 in the wrong direction, and we ask this Court to affirm
24 the Eleventh Circuit's decision. Thank you.

25 QUESTION: Thank you, Mr. Kupfer.

1 Mr. Wright, you have 14 minutes remaining.

2 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.,

3 ON BEHALF OF THE PETITIONERS

4 MR. WRIGHT: I have just a few comments,
5 please. We have been faced with something of a moving
6 target on the facts here, and I would just like to quote
7 from the second amended complaint which is reprinted in
8 the joint appendix that in Paragraph 11 on Page 6 says
9 that respondent was "on active duty" at the time he
10 suffered the wrongful act here, and on the next page in
11 Paragraph 14 says that the defendants were acting under
12 color of a covert Federal Army program, and that it was
13 the official policy that is responsible for the
14 deprivation of his rights. We take that to mean that
15 this was an Army program. We do not think that there is
16 any real question that it was an Army program, and
17 respondent has -

18 QUESTION: (Inaudible) the regulations giving
19 him LSD or not?

20 MR. WRIGHT: No, but --

21 QUESTION: No what? No what? No what?

22 MR. WRIGHT: -- I would like to mention that
23 the respondent has mischaracterized that. The Inspector
24 General did issue a report which is not in the record in
25 this case, it is not a public document, which admits

1 that a number of violations were made, but nowhere
2 suggests that testing chemical weapons was wrong. It
3 does suggest that the consent forms used here and the
4 debriefing that was done here was not done the way it
5 should have been done, but no, there are regulations
6 that say that chemical weapons tests can be done.

7 QUESTION: Was there any consent form involved
8 in this?

9 MR. WRIGHT: We don't have the facts on this.
10 The Senate report concerning the program prints one of
11 the sorts of consent forms that were used in this
12 program which the Senate criticized, but in any event --

13 QUESTION: (Inaudible) never had a program of
14 experimenting with LSD or did it?

15 MR. WRIGHT: I am sorry, Your Honor?

16 QUESTION: Did our government have a program
17 of experimenting with LSD?

18 MR. WRIGHT: Yes, it did.

19 QUESTION: On soldiers?

20 MR. WRIGHT: Yes, it did.

21 QUESTION: That is admitted?

22 MR. WRIGHT: Yes. There is no question about
23 that. Concerning the volunteer point, I would like to
24 mention only that we have returned to a prior stage.
25 The Fifth Circuit discussed respondent's volunteer point

1 in its 1981 opinion in the portion reprinted at Pages 72
2 to 74 of the appendix to the petition, and we think that
3 makes it perfectly clear that the fact that he was or
4 wasn't a volunteer, I am not sure exactly what
5 respondent's point is, doesn't matter in this case. As
6 a final point, an estoppel argument was raised in
7 respondent's argument. That has never been raised in
8 this case at any point before, including the briefs in
9 this Court.

10 QUESTION: Are there cases that bar a Federal
11 Tort Claims Act for intentional torts?

12 MR. WRIGHT: Well, there is an intentional
13 tort exception to the Federal Tort Claims Act.

14 QUESTION: Yes.

15 MR. WRIGHT: I think it is 2680(h).

16 QUESTION: Right. And so it would just be
17 sovereign immunity then?

18 MR. WRIGHT: The government has not waived
19 sovereign immunity for intentional torts.

20 QUESTION: How about suits against the
21 officers?

22 MR. WRIGHT: I am not sure that an intentional
23 tort of the sort somebody hit somebody has actually come
24 up. Chappell v. Wallace, I suppose race discrimination
25 is a form of intentional tort although it is not your

1 run of the mill form of intentional tort.

2 QUESTION: Well, is there any Federal
3 jurisdiction over an ordinary tort claim of one military
4 personnel over another? It is not really a 1983
5 action. It is not a Federal Tort Claims action because
6 the Federal Tort Claims Act provides that the United
7 States is the defendant in substitution for everyone
8 else.

9 MR. WRIGHT: That is right. In a case where
10 one serviceman happened to hit another off base at a bar
11 or something I suppose --

12 QUESTION: What about on base?

13 MR. WRIGHT: I am sure we would get into
14 disputes about these matters, but one would think that
15 that would be a normal state law cause of action that
16 one serviceman might have against another.

17 If there are no further questions.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Wright. The case is submitted.

20 (Whereupon, at 2:26 o'clock p.m., the case in
21 the above-entitled matter was submitted.)
22
23
24
25

CERTIFICATION

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##86-393 - UNITED STATES, ET AL., Petitioners V.

JAMES B. STANLEY, ET AL.

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BY Paul A. Richardson

(REPORTER)