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NOTES

FEDERAL EMPLOYEES COMPENSATION ACT AS BARRING SUIT UNDER SECTION 2679 OF THE FEDERAL TORT CLAIMS ACT

THE PROBLEM

A perplexing problem—concerning the right of an injured federal employee to collect compensation from the United States and subsequently to attempt to increase his recovery by a civil suit against the United States—confronts the federal courts in situations typified by the following hypothetical.

X, an employee of the United States Government, acting within the scope of his employment becomes involved in an accident caused by the negligent operation of a motor vehicle driven by Y. X receives benefits under the Federal Employees Compensation Act,¹ and institutes a tort proceeding in a state court against Y for damages resulting from the accident. Y, also a federal employee, was acting within the scope of his employment at the time of the accident.

The Government, pursuant to the provisions of section 2679 of the Federal Tort Claims Act,² removes the action to a federal district court and replaces Y as the defendant. Following removal, the Government files a motion for summary judgment relying on a provision of the Compensation Act.³ The relevant provision provides that the remedy against the United States afforded by the Compensation Act is exclusive as to an injured federal employee.⁴

This note examines the remedial law available to injured federal employees, particularly with reference to the interaction and relationship of the Federal Tort Claims Act⁵ and the Compensation Act.

The 1961 amendment to the Tort Claims Act, applicable to accidents involving federal employees operating motor vehicles within the scope of their employment, provides:

(a). The remedy by suit against the United States as provided

1. Federal Employees Compensation Act of 1916, 39 Stat. 742 (1916), 5 U.S.C. §§ 751-95 (1964).

2. Federal Tort Claims Act, 28 U.S.C. §§ 1346-2680 (1964).

3. 5 U.S.C. § 757 (1964).

4. See notes 9-12 *infra* and accompanying text.

5. 28 U.S.C. § 2679 (1964).

by section 1346(b)⁶ of this title for damages . . . resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee. . . .

(d). Upon certification by the Attorney General . . . any such civil action . . . shall be removed . . . to the district court . . . and the proceedings deemed a tort action brought against the United States.⁷

The effect of this section is that the liability of the United States is *substituted* for that of an employee who caused the injuries.⁸

The effect intended by the amendment to the Compensation Act is noted in subsection "b."⁹

The liability of the United States . . . with respect to injury or death of an employee shall be exclusive and in place, of all other liability of the United States . . . under any Federal tort liability statute. . . .¹⁰

The Tort Claims Act amendment has been held to abrogate a claimant's common-law remedy against an employee driver by substituting a new remedy against the United States.¹¹ In situations involving an injured federal employee, however, the Compensation Act expressly provides that the compensation remedy shall be the *exclusive* remedy against the Government—exclusive of "any Federal tort liability statute."¹² The combined effect is to deny a federal employee's common-law right to recover for injuries sustained in situations to which the Tort Claims Act amendment is applicable.

Only one litigated case has presented the problem of an attempted claim against the United States under section 2679 by a federal employee

6. 28 U.S.C. § 1346(b) (1964), is a statement of liability of the United States for injury resulting from the negligence of any of its employees.

7. 28 U.S.C. § 2679 (1964).

8. Reynaud v. United States, 259 F. Supp. 945 (D. Mo. 1966); Gustafson v. Peck, 216 F. Supp. 320, 322 (D. Iowa 1965).

9. Prior to the adoption of section 757(b), section 757(a) standing by itself indicated that the Compensation Act was to be "exclusive." Section 757(a) reads:

As long as the employee is in receipt of compensation . . . or, if he had been paid in a lump sum . . . he shall not receive from the United States any salary, pay or remuneration whatsoever except in return for services actually performed. . . .

5 U.S.C. § 757(a) (1964).

10. 5 U.S.C. § 757(b) (1964).

11. Gustafson v. Peck, 216 F. Supp. 320, 322 (D. Iowa 1965).

12. 5 U.S.C. § 757(b) (1964).

covered by the Compensation Act.¹³ In *Green v. Short*,¹⁴ the district court overruled the Government's motion for summary judgment and entered a judgment for the plaintiff.¹⁵ The plaintiff had been injured while riding as a passenger in defendant's automobile. The accident allegedly resulted from the defendant's negligence. Plaintiff initiated the action against the driver of the automobile, but the United States was substituted for the defendant according to the procedure outlined in the Tort Claims Act.¹⁶

In an *oral* opinion, Judge MacSwinford in imposing a double liability stated:

I hold that Miss Green did have a common law right of action against Mr. Short for injuries. After she sued in state court, the United States supplanted itself as defendant to discharge its obligation to him. The United States can not then claim that the plaintiff has no right of action. She is entitled to judgment against him and the Compensation law does not preclude this.¹⁷

As noted in the above language, the court disbelieved that Congress intended to abrogate the common-law right available to a federal employee injured by the negligent driving of a co-employee.

CONGRESSIONAL INTENT IN ADOPTING 28 U.S.C. § 2679 AND 5 U.S.C. § 757

Any attempt to resolve an apparent statutory conflict begins with an analysis of a legislature's intent in enacting the particular legislation.¹⁸

The Tort Claims Act has been hailed as a landmark waiver of sovereign immunity, a doctrine which had prevented recovery by many claimants.¹⁹ This generalization of the act's nature is unjustified in light of the limited purposes which compelled its adoption. For the Tort Claims Act was a means by which Congress sought to relieve its annual

13. See *Cox v. Maddox*, 255 F. Supp. 517 (D. Ark. 1966). A third-party complaint for contribution was disallowed. The court reasoned that under 28 U.S.C. § 2679 (1958) the injured party had no remedy against the federally-employed driver, but the plaintiff being a member of the military has no relief against the Government.

14. Civil No. 1107, E.D. Ky., Feb. 11, 1965.

15. The court expressly provided that the judgment for \$15,000.00 was not to be reduced by any compensation which the Government had already paid to the plaintiff.

16. Record, vol. 1, pp. 1-5.

17. Judge MacSwinford gave no written opinion. The quotation is excerpted from the transcript of his oral remarks.

18. See generally NUTTING & ELLIOTT, *CASES AND MATERIALS ON LEGISLATION* § 15 (3d ed. 1964).

19. *Dalhite v. United States*, 346 U.S. 15, 18 (1953).

burden of dealing with the numerous private claim bills that were introduced each session.²⁰ The act was proposed under the title: "More Efficient Use of Congressional Time."²¹ The Committee on the Reorganization of Congress, in recommending the act stated:

Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the United States. . . . We, therefore, recommend that all claims against the Government be transferred by law to the . . . U. S. district courts for proper adjudication.²²

Tort Claims Act Amendment in 1961

During the debate in the Senate on the Tort Claims Act amendment, the reasons favoring adoption were forcefully presented.²³ Senator Kenneth Keating summed up the arguments by noting that the amendment was intended to relieve a federal employee (whose duties included the operation of motor vehicles) of the burden imposed by the constant exposure to liability for negligence.²⁴ The continuing threat of liability had the effect of forcing many federal employees to purchase liability insurance, thereby placing a severe burden upon their "already small salaries."²⁵ The framers of the amendment, therefore, intended the Tort Claims Act remedy to be exclusive of any other remedy against the employee.²⁶

The 86th Congress enacted similar legislation²⁷ which President

20. Private claim bills are congressional response to claims which private parties have been unable to prosecute through administrative or judicial channels. Borchard, *Governmental Responsibility in Tort—A Proposed Statutory Reform*, 11 A.B.A.J. 495, 497 (1945). Successful private claim bills result in either a direct appropriation or a referral of the claim to the courts. The magnitude of this congressional problem is shown by the words of the Senate Committee on the Reorganization of Congress:

In the 68th Congress about 2200 private claim bills were introduced. . . . In the 70th Congress 2268 private claim bills were introduced. . . . In each of the 74th and 75th Congresses over 2300 private claim bills were introduced, seeking more than \$100,000,000.

S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946).

21. S. REP. NO. 1011, 79th Cong., 2d Sess. (1946).

22. *Id.*

23. 107 CONG. REC. 18499 (1961) (remarks of Senator Keating).

24. *Id.*

25. *Id.*

26. As precedents for its action Congress cited the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1964), and 28 U.S.C. § 1498 (1964). Section 745 of the Admiralty Act is applicable and reads:

That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . whose act or omission gave rise to the claim.

The Admiralty Act is discussed *infra* at notes 69-84 and accompanying text.

27. 107 CONG. REC. 18500 (1961) (remarks of several senators).

Eisenhower subsequently vetoed²⁸ containing a provision predicated removal to a federal district court on the plaintiff's consent. The provision for making the procedure operative only at the election of the plaintiff defeated the purpose of the amendment.²⁹

The actual House committee recommendation also required the consent of the plaintiff.³⁰ Congress rejected this provision because it left possible liability on the employee-driver when the plaintiff elected to sue him instead of the Government.³¹ The final version was the result of a compromise between those primarily interested in completely removing the possibility of liability and those who wished to protect the plaintiff from improper removal of his action.³² As enacted, therefore, the Tort Claims Act amendment was intended to abolish the burden that had been shouldered by operators of motor vehicles acting within the scope of their federal employment.³³

Compensation Act Amendment

The "exclusive" amendment to the Compensation Act was adopted to remedy a specific evil.³⁴ The Compensation Act, due to enactment of various general liability statutes, lost its position as the sole source of governmental liability.³⁵ Federal employees claimed that the general statutes covered them, and they attempted to sue the United States for injuries received in the course of their employment.³⁶ The "exclusive" amendment made clear that the general liability statutes were not intended to apply to federal employees.³⁷ Congress felt that the Compensation Act provided adequate relief and that "to permit other remedies by suit would . . . be unnecessary."³⁸

Congress enacted the Compensation Act amendment in 1949, prior to enacting the Tort Claims Act amendment in 1961. The House in 1949, therefore, could not have foreseen the ramifications of the Com-

28. *Id.*

29. The final form was not the only proposal which was considered. The others included: 1) that the Government would provide indemnity for the damages that the driver had been forced to pay; and 2) that the Government purchase insurance for the drivers. S. REP. NO. 736, 87th Cong., 1st Sess. (1961).

30. H. R. REP. NO. 297, 87th Cong., 1st Sess. 8 (1961). "It [the Committee] has been concerned, however, with the effect of the bill upon the rights of an individual plaintiff to maintain an action in a State court if he so desires." *Id.*

31. 107 CONG. REC. 18500 (1961) (remarks of several senators).

32. *Id.*

33. *Id.*

34. H.R. REP. NO. 729, 81st Cong., 1st Sess. 14 (1949).

35. *Id.*

36. *Id.*

37. See generally S. REP. NO. 836, 81st Cong., 1st Sess. 23 (1949).

38. H.R. REP. NO. 729, 81st Cong., 1st Sess. 14 (1949).

pensation Act amendment on the subsequent amendment to the Tort Claims Act. The Compensation Act amendment was, however, passed to remedy precisely the problem of the attempted claim under general liability statutes by claimant-employees already covered by the Compensation Act.

In sum, congressional debate over the amendments to the Tort Claims Act and the Compensation Act reveal no express legislative opinion upon the precise problem of the extent of remedies available to a federal employee injured by the negligent operation of a motor vehicle by another federal employee. The debates do, however, support the proposition that Congress did not intend to subject the United States to double liability.

THE FERES DOCTRINE

In 1950, a plaintiff sued the United States for the wrongful death of her husband, a soldier who had been injured while on active military duty.³⁹ The plaintiff alleged that the United States quartered her husband in barracks with an unsafe heating system. A resulting fire allegedly caused the death of her husband.⁴⁰

Ultimately the case reached the Supreme Court which considered the issue: "Whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."⁴¹ Because the case involved the death of a member of the armed forces whose widow alleged negligence by his superior officers, other issues were present in addition to the federal-employee-remedial law issue.⁴² The Court, however, did consider the system of compensation available to servicemen and its effect upon the applicability of the Tort Claims Act, stating that the purpose of the Tort Claims Act was to provide a remedy where *none* had previously existed.⁴³ This premise led the Court to conclude that any apparent creation of a "double remedy" by the provisions of the act would seem to be unintentional.⁴⁴ This ruling is called the *Feres* rule. The duty of the Court, as expressed by Mr. Justice Jackson, is to fit the new act "into the

39. *Feres v. United States*, 340 U.S. 135 (1950).

40. *Id.* at 138.

41. *Id.*

42. The other issues were: 1) the absence of parallel liability on the part of an individual since the Tort Claims Act provides for liability as if the Government were a private party, 2) the dearth of private claims bills presented by the military, 3) the "distinctly federal relationship" between military and the Government, and 4) the variations between the laws of the various states to which the military man would be subjected without choice.

43. 340 U.S. at 140.

44. *Id.*

entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."⁴⁵ The Court believed that if Congress had intended a double remedy, it would have specifically said so and would have adjusted the two remedies accordingly.⁴⁶ The failure to make such adjustment seemed indicative of a congressional unawareness that such an interpretation was possible.⁴⁷

The *Feres* rule has been followed by a majority of courts which have had to confront the question of the effect of a compensation system.⁴⁸ The first of the decisions applying *Feres* occurred two years after the Supreme Court's initial decision—the problem arising from an apparent overlapping of remedies provided by the Federal Employees Compensation Act and the Public Vessels Act.⁴⁹ The operative facts occurred after enactment of the "exclusive" amendment to the Compensation Act, but the Court did not consider the amendment controlling because Congress had expressly excluded maritime plaintiffs from the scope of the act.⁵⁰

*Johansen v. United States*⁵¹ involved a carpenter who lacerated his leg while working aboard a United States vessel.⁵² The Employees Compensation Commission granted him benefits under the Federal Employees Compensation Act. The carpenter then attempted to sue the United States for damages under the Public Vessels Act of 1925.⁵³ The ma-

45. *Id.* at 139.

46. *Id.*

47. The Court mentioned that *Feres* was the "wholly different" question reserved from their decision in *Brooks v. United States*, 337 U.S. 49 (1948). The *Brooks* case dealt with two soldiers on furlough. There the Court held that the suit by the soldiers was not barred by a compensation act which did not provide for exclusiveness or for an election of remedies.

When compared to the *Feres* case, the *Brooks* decision creates a dividing line as to the exclusiveness of the compensation remedy. This dividing line is based upon a determination of whether the injuries are incurred "incident to service." If they are incurred incident to service, *Feres* applies to make the compensation act the exclusive remedy. If not, *Brooks* applies.

48. The line of cases following the *Brooks* decision seems to be the only exception to the general trend. *E.g.*, *United States v. Price*, 288 F.2d 448 (4th Cir. 1961) and *Wham v. United States*, 180 F.2d 38 (D.C. Cir. 1950).

49. Public Vessels Act, 46 U.S.C. §§ 781-99 (1964).

50. 5 U.S.C. § 757(b) provides: "Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel."

51. 343 U.S. 427 (1951).

52. *Id.* at 429.

53. The history of the Public Vessels Act is itself interesting. There has been a considerable amount of litigation over the definition of the term "damages caused by a public vessel," with a resulting broadening of the phrase. *American Stevedores Inc. v. Porello*, 330 U.S. 446 (1947), held that the phrase covered personal injuries. *Canadian Aviator Ltd. v. United States*, 324 U.S. 215 (1945), held that injuries resulting from a navy escort negligently leading a vessel over a sunken craft was included within this term.

jority of the Supreme Court held that the presence of the Compensation Act barred the suit under the Public Vessels Act.⁵⁴

The dissenting opinion, written by Mr. Justice Black, noted that the class of employees to which the plaintiff belonged was expressly excluded from the effects of the exclusive amendment to the Compensation Act.⁵⁵ The dissenting justice cited the congressional debate concerning exclusion of maritime employees,⁵⁶ arguing that the debate evidenced the congressional intent that the remedy be available to maritime employees and that such remedy should not be removed without allowing the maritime employees a chance to be heard at committee hearings.⁵⁷

To Mr. Justice Black, precedent indicated that the plaintiff could elect a remedy.⁵⁸ This option should not, Mr. Justice Black argued, be altered by judicial opinion where Congress had expressly refused to alter the available remedy.⁵⁹

The majority, however, stated that the legislative history of acts such as the Public Vessels Act evidenced a disdaining of sovereign armor; that these enactments "were not usually directed toward cases where the United States had already put aside its sovereign armor, granting relief in other forms."⁶⁰ The Court thus hesitated to adopt the literal words of the statute which would create this double remedy.⁶¹

The Court next reviewed the congressional hearings on the Compensation Act amendment.⁶² The majority, unlike the dissent, felt that the conclusion to be drawn from these reports was that Congress had not expressly excluded federal employees from coverage of the Public Vessels Act.⁶³ The Court proceeded to analyze the various statutory remedies available to seamen as well as federal and private employees for damages normally within the admiralty jurisdiction of the federal district court.⁶⁴ As a result of the preceding analysis, the Court reached the conclusion

54. 343 U.S. at 427.

55. *Id.* at 443.

56. The principle statement cited was by Senator Morse:

Under existing law, Government-employed seamen have been accorded rights against the United States under the Suits in Admiralty Act. . . . I feel that they should not be deprived of the benefits they have enjoyed for so many years without having their arguments carefully considered. . . .

95 CONG. REC. 13608 (1949).

57. 343 U.S. at 443.

58. *Id.* at 442.

59. *Id.*

60. *Id.* at 430.

61. *Id.* at 431.

62. See notes 34-38 *supra* and accompanying text.

63. 343 U.S. at 438.

64. *Id.*

that none of the seamen could recover under more than one remedy.⁶⁵ Citing the *Feres* rule,⁶⁶ the Court concluded that employees entitled to compensation benefits could not bring suit under the Public Vessels Act.⁶⁷

CONFLICT BETWEEN THE SUITS IN ADMIRALTY ACT AND THE COMPENSATION ACT

In adopting the Tort Claims Act amendment Congress cited the Suits in Admiralty Act⁶⁸ as precedent for making the liability of the United States exclusive of any liability of the federal employee who caused the injury.⁶⁹ Section 5 of the Suits in Admiralty Act⁷⁰ provides that the remedy by suit against the United States with respect to vessels or cargoes owned, operated or possessed by the United States shall be exclusive of any remedy against the employee or agent whose act or omission caused the injury.⁷¹ Unlike the Tort Claims Act amendment dealing with liability arising out of motor vehicle accidents, the Admiralty Act makes no provision for the substitution of the United States as defendant in actions erroneously brought against the employee.⁷² It merely provides that such suits shall not lie against the employee.⁷³

Prior to adoption of the "exclusive" provision of the Admiralty Act, there was confusion as to the responsibility for the torts of civil service masters and seamen.⁷⁴ This confusion induced the adoption of the "exclusive" provision⁷⁵ in 1950.⁷⁶ Thus, the federal employee, whose injuries were caused by a general agent of the United States and fell within the provisions of the Admiralty Act, was restricted to his remedy against the United States before the Compensation Act was expressly made exclusive.⁷⁷

It should be pointed out that the "exclusive" amendment to the Compensation Act contained a proviso which excluded maritime plaintiffs from its operation.⁷⁸ The unanswered question remained—whether the

65. *Id.* at 441.

66. *Id.* at 432.

67. *Id.* at 441.

68. *See* note 24 *supra*.

69. Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1964).

70. 46 U.S.C. § 745 (1964).

71. *Id.*

72. *See* note 7 *supra* and accompanying text.

73. *See* note 24 *supra*.

74. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949). *See also* *Caldora v. Eckert*, 332 U.S. 155 (1947) and *Lustgarten v. United States Shipping Emergency Fleet Co.*, 280 U.S. 320 (1930).

75. H.R. REP. No. 1292, 81st Cong., 1st Sess. 2 (1949).

76. *Id.*

77. *See* notes 34-38 *supra* and accompanying text.

78. *See* note 50 *supra*.

employee whose remedy was under the Admiralty Act would be further restricted to his recovery under the Compensation Act.

In 1959, the Supreme Court reviewed a claim under the Suits in Admiralty Act by a federal employee who was entitled to the benefits of the Compensation Act.⁷⁹ The employee attacked the ruling of the Court in the *Johansen* case.⁸⁰ In a per curiam opinion, however, the Supreme Court specifically refused to review *Johansen*.⁸¹ Instead, the Court held that the considerations which led to the *Johansen* ruling were equally applicable to suits under the Admiralty Act.⁸² Citing the *Johansen* opinion, the Court said that the United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress."⁸³ Accordingly, the Court held that the existence of the compensation system precluded suits against the Government under the Admiralty Act.⁸⁴

THE FEDERAL PRISON INDUSTRIES ACT

Until 1961, the Federal Prison Industries Act,⁸⁵ which provided the sole compensation remedy for federal prisoners, covered only those inmates injured while working for the Prison Industries Corporation.⁸⁶ Thus only twenty percent of federal prisoners were protected, and then only during work hours.⁸⁷ A 1961 amendment to the Federal Prison Industries Act extended the benefits to "inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institute where confined."⁸⁸ Reportedly, the amendment extended coverage to about ninety percent of the federal prisoners.⁸⁹ Provisions of the Prison Industries Act and the Federal Tort Claims Act have come in conflict in a number of cases.

79. *Patterson v. United States*, 359 U.S. 495 (1959).

80. *Id.* at 496.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Federal Prison Industries Act, 18 U.S.C. §§ 4121-28 (1964).

86. Prior to its amendment in 1961 section 4126 provided that the fund may be employed "in paying, under rules and regulations promulgated by the Attorney General . . . compensation to inmates or their dependents for injuries suffered in any industry." Federal Prison Industries Act, ch. 645, 62 Stat. 852 (1948).

87. 1957 ATT'Y GEN. ANN. REP. 409.

88. 18 U.S.C. § 4126 (1964), now reads:

The corporation . . . is authorized to employ the fund . . . in paying compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined. . . .

89. 1957 ATT'Y GEN. ANN. REP. 409, 410.

*United States v. Muniz*⁹⁰ concerned a claim by an injured federal prisoner who alleged that the Government was negligent in failing to provide proper supervision of the inmates and in failing to stop twelve inmates who were beating him.⁹¹ Although the Court decided the case in 1963, the operative facts occurred prior to enactment of the Industries Act amendment.⁹² The Court held that the compensation system did not preclude suit by prisoners under the Tort Claims Act.⁹³

At the outset of his opinion, Chief Justice Warren stated that the Federal Tort Claims Act taken alone permitted federal prisoners to sue the Government and declared that the act's intent was to remove the burdensome load of private claims presented annually to Congress.⁹⁴ He added that congressional failure to exclude the prisoners from the act indicated an intent to *include* them.⁹⁵

The Government, on the other hand, contended that the *Feres* decision was controlling and thereby precluded the bringing of the suit.⁹⁶ The Court, however, interpreted *Feres* as holding that the mere presence of a compensation system bars a cause of action.⁹⁷ Chief Justice Warren listed the various factors considered in *Feres*⁹⁸ and indicated that the presence of the compensation system was not the controlling factor.⁹⁹

The *Muniz* majority cited the "distinctly federal relationship" between the Government and servicemen as being the decisive feature in *Feres*.¹⁰⁰ Chief Justice Warren distinguished *Feres* from the factual context of the *Muniz* case by holding that the "distinctly federal relationship" did not exist between the Government and prison inmates.¹⁰¹

For purposes of this note, the significant portion of the *Muniz* decision is that concerning the *Feres* rule and its effect on remedial rights under federal tort liability statutes. The Chief Justice cited *United States v. Brown*¹⁰² for the proposition that the presence of a compensation

90. 374 U.S. 150 (1963).

91. *Id.*

92. *Id.* at 152.

93. *Id.*

94. *Id.* at 153.

95. According to the Court, Congress passed a total of twenty-one private claim bills for prisoners from 1935 to 1946. These bills are a substantial total if taken with regard to the small percentage of private claim bills presented that were finally enacted.

96. 374 U.S. at 153.

97. *Id.* at 160.

98. See note 42 *supra*.

99. 374 U.S. at 160.

100. *Id.* at 162.

101. *Id.*

102. 348 U.S. 110 (1954).

system does not in every case bar suit for damages against the Government.¹⁰³ He said:

Also, the compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz would have been covered.¹⁰⁴

The *Muniz* court was not presented with and therefore did not deal with the effect of the Prison Industries Act in cases in which the injured party was actually within the act's provisions. Lower federal courts, when presented with this question, have reached conflicting results.¹⁰⁵ Two of these recent decisions are *Demko v. United States*¹⁰⁶ and *Granada v. United States*.¹⁰⁷

Granada concerned a prisoner injured while working on a public address system in a federal penitentiary.¹⁰⁸ He applied for compensation upon his discharge from prison, but in a separate administrative proceeding, the Prison Industries Commission denied his claim on the grounds that no disability remained which resulted from the injuries in question.¹⁰⁹ The Second Circuit Court of Appeals treated the *Feres* rule as a well-established rule of construction to which courts resort in an attempt to reconcile "disparate types of statutory remedies."¹¹⁰ The court, however, apparently misstated the rule by saying that *Feres* stands for the proposition that the mere presence of a compensation system implies that it is an exclusive remedy.¹¹¹ This misstatement is corrected in the remainder of the opinion for the court examined the comprehensiveness of the compensation system created by the Prison Industries Act.¹¹² After saying that the *Feres* rule is so well-established that the court would be inclined to apply it without any logical basis being given for its existence,¹¹³ the court asserted the policy of the rule.¹¹⁴ To the Second Circuit, the pre-

103. *Brown* is one of the cases following the *Brooks* decision mentioned in note 47 *supra*. A factor not mentioned by the Court was that the *Brown* decision required the plaintiff to pay back the compensation he had received, a condition not imposed by the compensation act with which the Court was dealing.

104. 374 U.S. at 160.

105. See generally *Nobels v. Federal Prison Indus.*, 213 F. Supp. 731 (N.D. Ga. 1963) and *Gomez v. United States*, 243 F. Supp. 145 (D. Colo. 1965).

106. 350 F.2d 698 (3d Cir. 1965), *rev'd*, 87 Sup. Ct. 382 (1966).

107. 356 F.2d 837 (2d Cir. 1965).

108. *Id.* at 839.

109. *Id.*

110. *Id.* at 840.

111. *Id.*

112. *Id.* at 842.

113. *Id.* at 840.

114. *Id.* at 841.

sumption of exclusiveness was merely a part of the *quid pro quo*.¹¹⁵

The *Granada* court interpreted the *Muniz* decision as being confined to instances dealing with prisoners not covered by the compensation system.¹¹⁶ This, the court felt, precluded actual consideration of the *Feres* rule of construction as followed in *Johansen*¹¹⁷ and *Patterson*¹¹⁸ simply because *Muniz* did not present the issue.¹¹⁹

Proceeding to a consideration of the compensation system, the court noted that, because of the 1961 amendment,¹²⁰ its opinion of the Prison Industries Act had changed.¹²¹ The amendment increased the percentage of inmates covered by the act.¹²² The court noted that, although the act itself merely permitted the creation of a system, various regulations had in fact developed one.¹²³ The court said that the existence of a system precluded the plaintiff's attack upon the act as vague and uncertain.¹²⁴ The Second Circuit also rejected the plaintiff's contention that the fact that no compensation was paid while in prison and that payments after release were predicated on continuing disability made the system non-comprehensive,¹²⁵ noting that during the period of convalescence, the prisoners were paid as if they had been working and, therefore, suffered no economic loss.¹²⁶ Also, if there were no further disability after release, no loss would be incurred, and if disability continued, the compensation would be paid according to the schedules set up by the Employees Compensation Act.¹²⁷

The Second Circuit concluded that the Prison Industries Act—in fact comprehensive¹²⁸—placed the case under the requirements of *Feres*. Applying the *Feres* rule, the court held that the plaintiff's suit was barred.¹²⁹

In *Demko*, the Third Circuit Court of Appeals dealt with the same problem but reached the opposite result. In that case the plaintiff, *Demko*,

115. *Id.*

116. *Id.*

117. See notes 51-67 *supra* and accompanying text.

118. See notes 68-84 *supra* and accompanying text.

119. 356 F.2d at 842. Certiorari was granted in *Muniz* to decide the question of whether the compensation act precluded suit by prisoners simply because of their status without regard to the available coverage. None of the decisions that were mentioned as being in conflict dealt with prisoners actually covered by the Industries Act. *Id.*

120. 356 F.2d at 842.

121. The Second Circuit considered both the *Granada* and *Muniz* cases.

122. See notes 85-89 *supra* and accompanying text.

123. 356 F.2d at 843.

124. *Id.*

125. *Id.*

126. *Id.* at 844.

127. *Id.*

128. *Id.*

129. *Id.*

injured himself while working on prison maintenance.¹³⁰ The Prison Industries Commission acted favorably upon his application for compensation from the Prison Industries fund.¹³¹ Demko then sued the Government for negligence pursuant to the Federal Tort Claims Act.¹³² The Government contended that the compensation was his exclusive remedy against the United States.¹³³ The Third Circuit rejected this contention and permitted the suit under the Tort Claims Act.¹³⁴

The court believed that the statement of the Supreme Court calling the Prison Industries Act a far less comprehensive system than the one involved in the *Feres* case¹³⁵ was correct.¹³⁶ This fact, the Third Circuit believed, dictated a holding adverse to the Government's contention.¹³⁷ In support of its holding, the court analyzed the prisoner's compensation system and found it to be less comprehensive than either the Veteran's Act¹³⁸ or the Employees Compensation Act.¹³⁹ The court said:

If such compensation is intended to create either an election of remedies or an obliteration of the remedy for tort, it is to be expected that Congress will express such intention in the compensation statute, especially if it does not establish a full and comprehensive plan.¹⁴⁰

The Supreme Court on certiorari¹⁴¹ resolved the conflict between the Second and Third circuits by reversing the Third Circuit's decision in *Demko*.¹⁴² The Court, speaking through Mr. Justice Black, held that the *Johansen* principle rather than the *Muniz* decision was applicable to suits by federal prisoners covered by the compensation system.¹⁴³

Mr. Justice Black stated that, historically, compensation statutes were substitutes for, rather than supplements to, common-law tort lia-

130. 350 F.2d at 699.

131. *Id.*

132. *Id.*

133. *Id.* at 700.

134. *Id.* at 702.

135. The differences as found by the court were: 1) the Industries Act is permissive rather than mandatory; 2) the amount of compensation given rests entirely upon the discretion of the Attorney General; 3) the money is paid only at release and only if disability continues; and 4) the right to the award never becomes vested but is always conditioned upon continued lawful conduct by the injured.

136. 350 F.2d at 701.

137. *Id.* at 702.

138. *Id.*

139. See note 135 *supra*.

140. 350 F.2d at 700.

141. *United States v. Demko*, 87 Sup. Ct. 382 (1966).

142. *Id.* at 385.

143. *Id.* at 384.

bility.¹⁴⁴ This "historic truth," the Court said, has been recognized by a series of recent decisions which have established the general rule of the exclusiveness of compensation system remedies.¹⁴⁵ The rule is that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group."¹⁴⁶

The Court found no congressional purpose to make the Prison Industries Act non-exclusive.¹⁴⁷ Mr. Justice Black rejected the plaintiff's contention that the presumption of exclusiveness could not be applied to the Industries Act because the act was not comprehensive.¹⁴⁸ He stated that the benefits compared favorably with those of any other compensation statute and that any difference in protection afforded could be explained by the peculiar circumstances of prisoners.¹⁴⁹

Finally, the Court disposed of the argument that the decision in *Muniz*¹⁵⁰ dictated a contrary holding.¹⁵¹ Mr. Justice Black stated that the situation in *Muniz* was clearly distinguishable from the facts in *Demko*.¹⁵² The prisoners in *Muniz* were not afforded the protection of the compensation statute while the plaintiff in *Demko* did have this protection.¹⁵³

The *Feres* test, as originally propounded, stated that a compensation act was to be fit into the entire system of remedies to make an "equitable whole."¹⁵⁴ The Supreme Court clarified this further in *Johansen*¹⁵⁵ and *Patterson*¹⁵⁶ by declaring a presumption of exclusiveness when the compensation act was "comprehensive."¹⁵⁷ In *Demko*, the Supreme Court seems to have further modified the test by stating that the presumption of exclusiveness arises from history and is applicable where the compensation statute "reasonably and fairly" covers the particular group of workers.¹⁵⁸ Though the words of the test are different, the effect is not. In personal injury suits against the Government, the claimant will be barred from attempting to increase his total recovery by civil action

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. See notes 125-27 *supra* and accompanying text.

150. See notes 90-104 *supra* and accompanying text.

151. 87 Sup. Ct. at 385.

152. *Id.*

153. *Id.*

154. See notes 39-47 *supra* and accompanying text.

155. See notes 48-67 *supra* and accompanying text.

156. See notes 68-84 *supra* and accompanying text.

157. See note 104 *supra* and accompanying text.

158. See note 146 *supra* and accompanying text.

against the United States if he is covered by a compensation act which provides fair and adequate benefits, regardless of whether the compensation statute expressly provides that the compensation remedy is to be exclusive.¹⁵⁹

ELECTION OF REMEDIES UNDER THE FEDERAL EMPLOYEES
COMPENSATION ACT

The Federal Control Act of 1918¹⁶⁰ placed control of the railroads in the hands of the Government.¹⁶¹ This same act provided that suits which would have been brought against the railroads would, for the duration of the Control Act, lie solely against the Government through the Director General of Railroads.¹⁶²

Prior to adoption of the Control Act, it was possible for a federal employee to collect compensation under the Compensation Act *and* sue the railroads for damages.¹⁶³ By virtue of sections 776¹⁶⁴ and 777¹⁶⁵ of the Compensation Act, part of the recovery that the employee received from his common-law suit would be used to reimburse the United States for the compensation which it had awarded or would subsequently award him.¹⁶⁶ Thus, in a proper case, the employee had an absolute right to receive compensation *and* an opportunity to increase his recovery through a suit against the tort-feasor railroad.¹⁶⁷

The adoption of the Control Act, by removing responsibility from the railroads and placing it upon the Government, raised the issue of whether the employee injured by the railroads retained the opportunity to increase his recovery through a suit at common law.¹⁶⁸ Since the Compensation Act had not been expressly made exclusive, there appeared to be no explicit congressional dictate barring suit under the Control Act after a recovery under the Compensation Act.¹⁶⁹ The Supreme Court,

159. *Id.*

160. Federal Control Act, 40 Stat. 451 (1918).

161. *Id.* § 10.

162. *Id.*

163. See notes 191-204 *infra* and accompanying text.

164. 5 U.S.C. § 776 (1964). See notes 194-96 *infra* and accompanying text.

165. 5 U.S.C. § 777 (1964). See notes 197-200 *infra* and accompanying text.

166. See notes 201-204 *infra* and accompanying text.

167. Sections 776 and 777 as discussed in notes 191-204 *infra* were present in the same form at the time of the adoption of the Control Act.

168. See generally 31 OP. ATT'Y GEN. 365 (1918), wherein the Attorney General rejects the contention that the Commission's right to require assignment of the injured employee's claim against a third party is defeated where the United States is the party ultimately responsible. The purpose of this requirement is to insure that the compensation remedy is used only to the extent that compensation is not available from "other sources."

169. *Id.*

however, in *Dahn v. Davis*,¹⁷⁰ held that the Control Act did not permit the injured federal employee to collect compensation *and* sue the Government.¹⁷¹ Rather, the employee must elect one remedy and lose the other.¹⁷²

In *Dahn*, a postal employee was injured in the course of his employment while the railroads were being operated by the Director General.¹⁷³ The employee received compensation under the Compensation Act.¹⁷⁴ Subsequently, he initiated an action against the Director General under the provisions of the Control Act.¹⁷⁵ The Supreme Court, noting that the provisions of the Control Act apparently gave a federal employee two remedies for one injury, held that the decision turned on whether the "petitioner, having pursued one of his remedies to a conclusion and payment, may pursue the other for a second satisfaction of the same wrong against the Government?"¹⁷⁶ Relying upon various provisions of the Compensation Act,¹⁷⁷ the Court held that the petitioner could not, declaring that the Compensation Act was intended to afford "full and final" payment.¹⁷⁸

In support of the holding that the payment of compensation formed an election of remedies barring further suit, the Court stated:

The Compensation Act deals with, and confers rights only upon, employees of the Government, who must be but a small percentage of those authorized to sue under the Federal Control Act, and it is impossible for us to conclude that Congress intended by the enactment of the latter law to allow an employee to claim and receive the compensation specially provided for him under the former and then, while enjoying the benefit, to institute suit against the Government under the Federal Control Act, which might require it to make further payment for the same injury and which must, in all cases subject it to expensive, harrassing and often long protracted litigation.¹⁷⁹

The election-of-remedies solution as pronounced by the *Dahn* case was used prior to the *Feres* decision and prior to adoption of the "exclu-

170. 258 U.S. 421 (1922).

171. *Id.* at 427.

172. *Id.*

173. *Id.*

174. *Id.*

175. 258 U.S. at 428.

176. *Id.*

177. The Court mentioned section 7 (5 U.S.C. § 757(a)), section 26 (5 U.S.C. § 776) and section 27 (5 U.S.C. § 777).

178. 258 U.S. at 432.

179. *Id.*

sive" provision of the Compensation Act.¹⁸⁰ It should be noted that this election solution differs from the solution adopted in the *Green* case.¹⁸¹ The election-of-remedies theory would allow a federal employee injured in a motor vehicle accident to sue the Government only if the employee elected to reject the compensation due him under the Compensation Act. The election-of-remedies solution has not been used in reported cases involving the Employees Compensation Act following the adoption of the "exclusive" provision which has been held to remove the election.¹⁸²

FEDERAL EMPLOYEES COMPENSATION ACT

The courts consider the Compensation Act a "comprehensive system to award payments for injuries."¹⁸³ The benefits provided for injured federal employees are, in general, greater than the benefits available under any comparable compensation system.¹⁸⁴ Furthermore, the awards and payment are made to the employee within an exceptionally short time period, thereby eliminating many of the hardships inherent in the long waiting period that accompanies a common-law recovery.¹⁸⁵

The 1966 amendment to the Compensation Act¹⁸⁶ made substantial increases in the size of the benefits available. As presently formulated, the Compensation Act provides benefits that have been deemed "fantastic."¹⁸⁷ The maximum rate is now \$1,400.00 per month¹⁸⁸ while the minimum is \$56.00 per month.¹⁸⁹ The rates are adjusted according to increases in the price index.¹⁹⁰

The Compensation Act contains express provisions dealing with accidents involving a potential liability of a party "other than the United States."¹⁹¹ The applicable sections of the act are sections 776¹⁹² and

180. See notes 34-38 *supra* and accompanying text.

181. See note 15 *supra*.

182. See notes 34-38 *supra* and accompanying text.

183. *Johansen v. United States*, 343 U.S. 427, 430 (1951).

184. Interview with Assistant District Director of the Bureau of Employees Compensation, Middle-West District, in Chicago, Ill., Oct. 11, 1966.

185. *Id.*

186. Federal Employees Compensation Act Amendments of 1966, 80 Stat. 252 (1966).

187. Interview, *supra* note 184.

188. 80 Stat. 252, § 3(b) (1966).

189. *Id.*

190. 80 Stat. 252, § 14 (1966).

191. For interpretation of the reasons for the inclusion of this clause see note 168 *supra*.

192. If a third party other than the United States is liable for the injury through which the employee claims compensation:

[T]he commission may require the beneficiary to assign to the United States any right of action he may have . . . or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said

777.¹⁹⁸

Section 776 deals with the situation in which a third party may be liable to the employee but the employee has brought no action against the third party.¹⁹⁴ This section provides that the Commission may *require* the employee to assign his right of action against the third party to the United States, or that the Commission may *require* the employee to prosecute the action in his own name.¹⁹⁵ Failure of the employee to comply with such requirement results in forfeiture of his claim under the Compensation Act.¹⁹⁶

Section 777 concerns situations in which the employee receives remuneration from the third party.¹⁹⁷ In effect, section 777 prior to 1966 required that any amount received from the third party be used to repay the compensation awarded by the Government.¹⁹⁸

Section 777 also makes provisions for the distribution of any money received from the third party prior to an award of compensation.¹⁹⁹ In such instances, the money is credited against any subsequent compensation claim based upon the same injury.²⁰⁰

The above-mentioned sections of the Compensation Act preclude an injured federal employee from retaining two recoveries for one injury. For clarification, assume that X, a federal employee, is injured by Y. X receives \$5,000.00 under the Compensation Act.²⁰¹ If X receives \$4,000.00 from his claim against Y, X will be required to pay the entire \$4,000.00 to the Government and he is, therefore, left solely with the amount of the Compensation Act award.²⁰² If X receives \$6,000.00 from

action . . . he shall not be entitled to any compensation under this chapter.
5 U.S.C. § 776 (1964).

193. Where a party has received payment from a third party, he shall after deducting his reasonable expenses for an attorney and cost of the suit apply money so received in the following manner:

- (A). If compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury.
- (B). If no compensation has been paid to him by the United States he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

5 U.S.C. § 777 (1964).

194. 5 U.S.C. § 776 (1964).

195. *Id.*

196. *Id.*

197. 5 U.S.C. § 777 (1964).

198. *Id.*

199. *Id.*

200. *Id.*

201. The distribution of money received from a third party is substantially the same whether the compensation has been paid by the Government before or after the recovery against the third party.

202. See note 192 *supra* and accompanying text.

Y, the Government is entitled to \$5,000.00²⁰³ and X is left with the amount of his recovery from Y.²⁰⁴ The total effect is to leave X with the greater of the two awards.

The procedure created by sections 776 and 777 is not merely theoretical but is used by the Government in situations in which there exists a possibility of third-party liability.²⁰⁵ In such situations, the Bureau of Employees Compensation submits a report to a special legal division which deals with third-party liability cases.²⁰⁶ If a probability of recovery exists, the Bureau acts to assert its "subrogation" rights.²⁰⁷

The 1966 amendment to the Compensation Act, in addition to increasing the available benefits,²⁰⁸ alters the method of distribution of recoveries made from a third party.²⁰⁹ Under section 776 and 777(A) the injured employee is now allowed to retain one-fifth of the recovery against the third party.²¹⁰ The change was intended to induce juries to award higher recoveries when the Government is the real party in interest.²¹¹ Also, Congress believed that the change would compensate employees who were *required* by the Commission to prosecute the action for their time and trouble.²¹²

The amendment does not indicate whether Congress considered the Compensation Act to be inadequate. Congress restricted its changes to the sections dealing with suits that were not voluntarily prosecuted by the injured employee.²¹³ Allowing the employee to retain a percentage of the recovery is akin to payment for services rendered—the services being the reduction of the Government's expenses.

CONCLUSION

In conclusion it is suggested that courts should not allow a federal employee whose injury is compensable under the terms of the Compensa-

203. See note 193 *supra*.

204. See notes 160-83 *supra* and accompanying text.

205. Interview with Assistant District Director of the Bureau of Employees Compensation, Middle-West District in Chicago, Ill., Oct. 11, 1966.

206. *Id.*

207. *Id.*

208. See notes 183-90 *supra* and accompanying text.

209. Federal Employees Compensation Act Amendments, 80 Stat. 252 (1966).

210. These sections were amended by the addition of the following phrase: *Provided*, that in any event the beneficiary shall be paid not less than one-fifth of the net amount of any settlement or recovery remaining after the expenses thereof have been deducted.

Federal Employees Compensation Act Amendments, § 10, 80 Stat. 252 (1966).

211. 112 CONG. REC. 4813 (1966) (remarks of Mr. O'Hara).

212. *Id.*

213. Note that the section dealing with distribution of proceeds from recovery prior to the award of compensation does not provide for the one-fifth guarantee. See Federal Employees Compensation Act Amendments, § 10, 80 Stat. 252 (1966).

tion Act to prosecute a suit under section 2679 of the Tort Claims Act. The Compensation Act expressly provides that it is to be the exclusive remedy of the injured employee against the United States.²¹⁴ This "exclusive" provision is indicative of congressional intent to have the benefits available under the Compensation Act treated as full payment by the United States for the injuries incurred by a federal employee, regardless of the creation of an apparent second remedy by general tort liability statutes.²¹⁵

In sum, the Supreme Court on numerous occasions has implied an exclusive character to compensation acts where no express "exclusive" provision has been adopted.²¹⁶ The test used on these occasions has been whether the compensation fairly and adequately protects the class of plaintiffs whose remedy is to be considered exclusive.²¹⁷

That federal employees who operate motor vehicles had, prior to adoption of section 2679, a right to institute suit against the tort-feasor should not be taken to defeat the clear wording of the "exclusive" provision of the Compensation Act. The injured employee's right to sue the third party is restricted by "subrogation" rights which the United States claims in the recovery.²¹⁸ Therefore, removing the injured employee's right to bring a civil suit will leave him with rights that are inferior to those of other employees only to the degree that a civil recovery would exceed the compensation award.²¹⁹

Even if the Compensation Act is not considered to be exclusive, the courts should not allow the injured employee to collect compensation *and* sue the Government. The situation is similar to that created by the Federal Control Act, where the Supreme Court required an injured employee to elect between his remedy under the Control Act and his remedy under the Compensation Act.²²⁰ It is suggested that, at a minimum, a federal employee injured by a co-employee under facts falling within section 2679 should be required to make this same election.

214. See notes 9-10 *supra* and accompanying text.

215. See notes 34-38 *supra* and accompanying text.

216. See notes 39-159 *supra* and accompanying text.

217. See notes 154-59 *supra* and accompanying text.

218. See notes 191-213 *supra* and accompanying text.

219. *Id.*

220. See notes 160-82 *supra* and accompanying text.