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Exclusivity of Prisons Industries Fund: An Epilogue to United States v. Muniz

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COMMENT / Exclusivity of Prisons Industries Fund:

An Epilogue to *United States v. Muniz*

ON SEPTEMBER 21, 1965, Judge Freeman, writing for a unanimous Third Circuit, held[1] that the Federal Statute dealing with the Prison Industries Fund[2] was not the exclusive remedy for inmates injured in federal penitentiaries. When the inmate could show negligence on the part of prison authorities, he was entitled to sue the government in tort under the Federal Tort Claims Act.[3] Thus, Demko who was injured while performing maintenance work at Lewisburg Penitentiary, was not barred from recovery even though he was entitled to compensation.

Five months later, the Second Circuit was faced with the same question. The court affirmed a summary judgment for the defendant government.[4] Through Judge Waterman, the court held that the Prison Industries Fund was a comprehensive compensation scheme and by its nature exclusive.

The stage for this conflict between the circuits was set by the decision of the Supreme Court in *Muniz v. United States*.[5] Prior to *Muniz,* the existence of compensation was extraneous as the question before the courts was whether a prisoner had any cause of action for negligence under the Federal Tort Claims Act. Until *Muniz* allowed such suits, the question of the exclusivity between tort and compensation recoveries was, for all practical purposes, moot. Since *Muniz* represents the culmination of an evolution of recovery that began with civil death[6] and is presently at a stage that admits the possibilities of dual recovery for prisoners, the decision must be viewed in perspective.

Prior to *Muniz,* the weight of authority supported the government's contention that a prisoner injured through the negligence of his jailer had no cause of action against the United States.[7] In the absence of any federal stat-

[1] Demko v. United States, 350 F.2d 698 (3d Cir. 1965).
[2] 18 U.S.C. § 4126 (1964).
[3] Federal Tort Claims Act, Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).
[4] Grande v. United States, 356 F.2d 837 (2d Cir. 1956).
[5] 374 U.S. 150 (1963).
[6] Civil death is imposed only by statute. There is no such federal statute. See Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966); Winston v. United States, 305 F.2d 253 (2d Cir. 1962); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); 63 YALE L. J. 418 (1954).
[7] Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959).

ute imposing civil death upon prison inmates, the government relied upon the provisions of the Tort Claims Act itself. The Act provided a remedy against the United States when the claim arose:

> under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[8]

The case of *Berman v. United States*[9] is typical of the almost universal acceptance of this proposition by the courts. In *Berman,* the plaintiff sued for personal injuries caused by the negligence of government employees at the United States Public Health Hospital at Lexington, Kentucky. The plaintiff was a prisoner confined to the hospital for treatment as a narcotics addict. The court, in interpreting the Prison Industries Fund relied heavily on *Feres v. United States*[10] and held that the relationship between the government and the plaintiff was "distinctly Federal in character," that private citizens did not run prisons, and therefore the government could not be held liable as if it were a private person and subject to the local tort law as applied through the Federal Tort Claims Act.

A well-reasoned minority response to this status argument was given two years later by the Northern District of Alabama. In *Lawrence v. United States*[11] the plaintiff was a federal prisoner seeking recovery for injuries sustained while riding in a truck driven by a civilian employee of the Air Force.[12] In rejecting the proposition that there was anything in the federal government-prisoner status which precludes recovery, the court held:

> While it is rational to conclude that in the sphere of private individuals there is no equivalent of the jailer-prisoner relationship, it is running a good principle into the ground to declare in terms of categorical imperative that a federal prisoner, by virtue of his status alone, may not sue the United States under the provisions of the Federal Tort Claims Act where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status.[13]

It is ironic that this status argument, which so long delayed a final determination of the amount of recovery allowable to an injured prisoner, did not begin with a prisoner at all, but rather, is traceable to an action instituted by

[8] Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964).
[9] *Supra* note 7.
[10] 340 U.S. 135 (1950).
[11] 193 F. Supp. 243 (N.D. Ala. 1961).
[12] There was no dispute concerning the government's negligence in *Lawrence.* There were two government vehicles in the accident, both driven by government employees, and there was no doubt that one of them had been negligent.
[13] Lawrence v. United States, *supra* note 11, at 245.

the executrix of a serviceman killed in a barracks fire. In *Feres v. United States,*[14] Mr. Justice Jackson writing for a unanimous court[15] held that the Federal Tort Claims Act did not extend its remedy to members of the armed forces who sustain, incident to their service, what would otherwise be actionable wrong. In the course of his opinion, Mr. Justice Jackson stated:

> The relationship between the government and members of its armed forces is "distinctively federal in character" as this court recognized in United States v. Standard Oil, 332 U.S. 30.[16]

Because of the "distinctively federal" relationship, the court doubted that Congress could have intended that servicemen have a remedy dependent upon local law.[17] The denial of recovery to members of the armed forces because of the federal character of their employment was easily analogous to the prison situation, and was subsequently imported into the latter area.[18] Until 1963, the denial of recovery, as represented by *Berman,*[19] was clearly the rule[20] with *Lawrence*[21] producing a unique exception.

Though the *Feres* decision (though modified) is still good law in the veterans' situation, in *United States v. Muniz*[22] the Supreme Court finally considered the specific case of a federal prisoner's recovery under the Federal Tort Claims Act. Carlos Muniz was a federal prisoner at Danbury, Connecticut. He alleged that he was beaten by twelve fellow inmates as a result of the negligence of prison guards. The District Court dismissed his complaint under the tort claims act, but the Second Circuit reversed on the grounds that an inmate could recover under the Act.[23]

In the Supreme Court, Chief Justice Warren, writing for a unanimous Court[24] held that while the government is not liable for the intentional torts of its employees, or for the acts or omissions of its employees exercising due care in the execution of a statute or regulation or in performing a discretionary function, it is liable for the negligent acts of its employees which cause personal injuries to federal prisoners.

[14] *Supra* note 10.
[15] Mr. Justice Douglas concurred in the result, but not in the reasoning of the court.
[16] Ferris v. United States, *supra* note 10, at 143.
[17] 28 U.S.C. § 2674 (1964).
[18] VanZuch v. United States, 118 F. Supp. 468 (S.D.N.Y. 1954); Sigmonv v. United States. 110 F. Supp. 906 (D. Va. 1953); Shew v. United States, 116 F. Supp. 1 (D.N.C. 1953); Lock v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957).
[19] Berman v. United States, *supra* note 7.
[20] See cases cited in note 18, *supra.*
[21] Lawrence v. United States, *supra* note 11.
[22] 374 U.S. 150 (1963).
[23] Muniz v. United States, 305 F.2d 285 (2d Cir. 1962).
[24] Mr. Justice White took no part in the consideration or decision of the case.

While *Muniz* swept away many of the traditional defenses interposed by the government as nonconductors of liability in suits by federal prisoners under the Federal Tort Claims Act, it left uncertain the effect of the availability of compensation under the Prison Industries Fund.[25] While the Chief Justice did say that "[T]he presence of a compensation system . . . does not necessarily preclude a suit for negligence,"[26] he went on to point out that Muniz was not covered by compensation. However, an indication of the court's present attitude toward the *Demko-Grande* controversy may be ascertained by the court's citing as authority for the proposition that a compensation system does not necessarily preclude tort recovery, the case of *United States v. Brown.*[27]

In *Brown,* the plaintiff was a member of the Army Air Force who had injured his knee on active duty. Seven years after his discharge, an operation was negligently performed on his knee at a Veterans Administration Hospital. The Supreme Court affirmed the Second Circuit's decision[28] for the plaintiff. Even though the plaintiff had been compensated for the injury under veteran's compensation,[29] the Court felt the Congress could have made veteran's compensation exclusive as they had made federal employees' compensation exclusive, but since Congress had not specifically done so, there was no reason to deny recovery under the Federal Tort Claims Act. Moreover, *Muniz* appears to affirm *Winston v. United States*[30] where the Second Circuit noted that in computing damages in any recovery under the Federal Tort Claims Act, the trial judge should deduct the amount of any compensation paid. While the deduction of a compensation recovery from the tort recovery is, in dollar amount, the equivalent of a single recovery, it still admits the availability of a tort action.

However, there is much contrary authority. In *Nobles v. Federal Prison Industries, Inc.,*[31] the district court held that since the plaintiff was covered by compensation:

> It was extremely unlikely that Congress, under the Federal Tort Claims Act, intended to impose any broad tort liability upon the part of the government to its prisoners.[32]

[25] Prison Industries Fund, 18 U.S.C. § 4126 (1964), provides compensation pursuant to regulations promulgated by the Attorney General:
. . . to inmates or their dependents for injuries suffered in an industry or in any activity in connection with the maintenance or operation of the institution where confined.
[26] Muniz v. United States, *supra* note 22, at 160.
[27] 348 U.S. 110 (1954).
[28] Brown v. United States, 209 F.2d 463 (2d Cir. 1954).
[29] Veteran's Compensation Act, 38 U.S.C. 501(a) (1964).
[30] 305 F.2d 253 (2d Cir. 1962).
[31] 213 F. Supp. 731 (D. Ga. 1963). But this case was decided before *Muniz.*
[32] *Ibid.*

Both the *Demko* and *Grande* decisions[33] rely heavily upon *Muniz*. While it appears doubtful that *Muniz* represents any authority as to the exclusiveness of the Prison Industries Fund, the following language from the Second Circuit opinion indicates the conflict which has arisen from the lower court's struggle to find an answer in *Muniz*.

> We realize that our reading of Muniz is at variance with that of the third circuit in Demko v. United States, 350 Fed. 2nd 698 (third circuit 1965), decided only a few months ago. It is our conclusion that the third circuit in *Demko* has misinterpreted the decision of the court in *Muniz*, and we do not adopt that interpretation.[34]

In the absence of any language controlling the question of exclusivity in the *Muniz* decision, and the subsequent controversy over the interpretation of that case, it might be more fruitful to focus attention upon the Court's reference to its decision in *Brown v. United States*. Although *Brown* dealt with veterans compensation, cursory observation reveals similarities between the Veterans' Compensation Act[35] and the Prison Industries Fund[36] so strong that the significance of *Brown* need not be limited to a mere indication of the future attitude of the Court on exclusivity. For all purposes relevant here, the acts are identical, at least insofar as neither act contains a provision for exclusiveness of recovery.[37] However, the applicability of *Brown* to the question of exclusivity in prison compensation goes beyond the similarity of the statutes. For the issue of exclusivity in *Brown* was also precipitated by the decision of the Supreme Court in *Feres v. United States*. The relevance of this is evident when it is realized that every decision concerning the exclusivity of prison compensation, arising after *Feres*, has considered it necessary to discuss the authority of *Feres*.[38] However, to appreciate the import of *Brown*, an examination of the viability of *Feres* is necessary.

Before the appearance of *Feres*, the leading case concerned with the exclusivity of the Veterans' Compensation Act, was *Brooks v. United States*.[39]

[33] Demko v. United States, *supra* note 1 and Grande v. United States, *supra* note 4.

[34] Grande v. United States, supra note 4, at 842. As a matter of fact, *Demko* was decided on September 21, 1965, after the decision of the district court in *Grande* had been filed, but before the Second Circuit heard oral argument on appeal.

[35] *Supra* note 29.

[36] *Supra* note 2.

[37] Both the Federal Employee's Compensation Act, 5 U.S.C. § 757(b) (1964), and the Longshoremen's and Harbor Workers' Act, 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964) are specifically exclusive.

[38] Cole v. United States, 249 F. Supp. 7 (N.D. Ga. 1965); Lawrence v. United States, 193 F. Supp. 243 (N.D. Ala. 1961); Gomez v. United States, 243 F. Supp. 145 (D. Colo. 1965); Demko v. United States, 350 F.2d 698 (3d Cir. 1965); Grande v. United States, 356 F.2d 837 (2d Cir. 1966); Nobles v. United States, 213 F. Supp. 731 (N.D. Ga. 1963).

[39] Brooks v. United States, 337 U.S. 49 (1949).

In *Brooks,* plaintiff sought to recover for the wrongful death of his intestate which arose when a government-owned truck negligently collided with decedent's car. The government moved to dismiss on the ground that the decedent was a member of the armed forces. The fact that he had recovered under the Veterans' Compensation Act was used to buttress this contention. In allowing plaintiff to maintain his action, the court held:

> Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors . . . indicates no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workmen's compensation statute, *e.g.,* 33 U.S.C. § 905, there is nothing in the Tort Claims Act or the Veterans' Laws which provide for exclusiveness of remedy. . . . We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so.[40]

An awareness of the mechanics of the Court's opinion leads to a greater appreciation of the significance of *Feres.* In *Brooks,* the issue of exclusivity recognized the existence of a compensation system only subordinately. The issue before the Court was whether plaintiff, a member of the armed forces, could maintain a suit against the United States under the Tort Claims Act. The issue was not whether the existence of a compensation system made recovery under it exclusive. Rather, the availability of compensation was employed as an indication of a legislative purpose to except servicemen from recovery under the Tort Claims Act. The holding of the Court specifically focused upon the wording of the Tort Claims Act—"we are not persuaded that 'any claim' means 'any claim but that of servicemen.' "[41] The progeny of *Brooks* are unanimous in their focus upon the wording of the Tort Claims Act for the answer to exclusivity, which the courts interpreted as containing no implied exceptions.[42]

Therefore, when the *Feres* decision was handed down, the law on servicemen's recovery had been determined by the absence of any specific exclusion in the Tort Claims Act. *Feres* reversed this by holding that there could be no recovery under the Tort Claims Act for the death of an army officer caused by a fire in allegedly unsafe barracks where he was quartered while on active duty. The Court said that "the only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the [armed] service' what under other circumstances would be an actionable wrong."[43] In holding that the plaintiff could not recover, the Court held that

[40] *Id.* at 53.
[41] *Id.* at 51.
[42] Bandy v. United States, 92 F. Supp. 360 (D. Nev. 1950); Santana v. United States, 175 F.2d 320 (2d Cir. 1949).
[43] Feres v. United States, *supra* note 10, at 138.

the Tort Claims Act prescribes the test of allowable claims in "the same manner and to the same extent as a private individual under like circumstances. . . ."[44] It was reasoned that since a private person does not run armies:

> Plaintiff can point to no liability of a private individual, even remotely analogous to that which they are asserting against the United States . . . for no private individual has power to constrict or mobilize a private army. . . .[45]

However, the Court went beyond this determination of what was conceded to be the only issue before it. In a seeming attempt to mitigate and buttress its holding, the Court pointed to the existence of a compensation system under which *Feres* might recover. The Court said:

> This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments of Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation remedy excludes the tort remedy. *There is as much statutory authority for one as for the other of these conclusions.* If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. *The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injury incident to military service.* (Emphasis added.)[46]

Since it is the quoted language which has precipitated the present controversy, it requires intense analysis. What was the Court holding? If we accept the Court's determination of the issue before it, *Feres* held that a serviceman could not recover under the Tort Claims Act because of the Federal character of his status. The existence of a compensation system is, first, dicta; and secondly, used solely as a key in the determination of whether the Tort Claims Act expressly or impliedly excluded servicemen's claims.

However, the interpretation of this dicta by subsequent decisions, has been a process of gradual distortion. Thus, in 1952, an army nurse who had suffered a service-connected injury, was limited to recovery under the Vet-

[44] 28 U.S.C. § 2674 (1964).
[45] Feres v. United States, *supra* note 10, at 141.
[46] *Id.* at 144.

erans' Compensation Act.[47] The distortion of *Feres,* where the existence of compensation was used to read the Tort Claims Act, is evident from the language of Judge Harris:

> Thus, under the Supreme Court decision in *Feres v. United States,* plaintiff is precluded from suing under the Tort Claims Act.... Since there exists a Veterans' Compensation System which assures protection to plaintiff, at least as broad in scope as the Tort Claims Act, she is limited to her recovery under the Veterans' Compensation System which affords the exclusive remedy.[48]

Thus, for the court in *Pettis,* the existence of a compensation system was no longer a key to the intent of Congress in the Tort Claims Act, but rather the intent of Congress in the passage of the Compensation Act. It was no longer necessary for the courts to look at the Tort Claims Act—preclusion from recovery was to be found in the compensation system. This is the argument of *Grande.* Relying on the rationale of these post-*Feres* cases,[49] the court concluded that "when Congress provides a system of simple, certain, and uniform benefits, it intends this system to be the exclusive means of redress for all those within its scope."[50]

It is at this point that the decision of *Brown* becomes of major significance. For, in the very area in which the *Feres* decision operated—Veterans' Compensation—the Supreme Court ended the possibility of preclusion from Tort Claims Act coverage because of the existence of compensation. In holding that the plaintiff's ability to recover compensation did not preclude a tort action, the Court, after distinguishing *Johansen v. United States,*[51] because of the specific exclusion in the Federal Employees Compensation Act, held in *Brown* that:

> Congress [has] given no indication that it made the right to compensation the Veteran's exclusive remedy, ... the receipt of disability payments under the Veterans' Act [is] not an election of remedies and [does] not preclude recovery under the Tort Claims Act....[52]

Thus, the argument and authority relied upon in those decisions holding the Prison Compensation Act to be exclusive, is no longer the law in its own area. *Feres* is presently authority only for the proposition that a serviceman injured while performing a function incident to his service, cannot recover

[47] Pettis v. United States, 108 F. Supp 500 (N.D. Cal. 1952); O'Neil v. United States, 202 F.2d 366 (D.C. Cir. 1953).
[48] Pettis v. United States, *supra* note 47, at 501-02.
[49] *Supra* note 38.
[50] Grande v. United States, *supra* note 4, at 841.
[51] Johansen v. United States, 343 U.S. 427 (1952).
[52] Brown v. United States, *supra* note 27, at 113.

under the Tort Claims Act. This decision operates irrespective of the existence of a Compensation System. The result is that a court can rely on *Feres* for either its holding or its dicta. However, its holding is inapplicable to prison compensation because the Court in *Muniz* rejected the contention that the "distinctively federal character" of maintaining penal institutions precludes recovery by an inmate. Therefore, what the courts are holding out as Supreme Court authority is, in reality, nothing but dicta, and more importantly, dicta which has been decisively rejected by *Brown*.

It is at this point that the inevitability of controversy can be appreciated. The court in *Demko* admitted that it was second-guessing its authority. The court in *Grande* was relying upon rejected dicta. However, to dismiss the *Grande* decision as patent misreading of authority, would smack of injustice, for perhaps the Court in *Feres* inadvertently articulated a proposition which would find sympathy in later decisions. For there is some appeal to the notion that Congress could not have intended dual recovery in tort actions where the victim is also covered by compensation. This argument was obliquely accepted by the Supreme Court in *Johansen* where it was said that "there is no reason to have two systems of redress."[53]

The fact that the Federal Employees Compensation Act contains a provision for exclusivity acts as a catalyst to the cogency of this argument. It must be presumed that Congress acts with a certain amount of fairness and consistency. Proceeding from this assumption, it seems to make no sense that Congress would hold its federal employees to single recovery while allowing dual recovery for prisoners. However, the fatal flaw in the argument is that it must proceed from a subjective conception of what Congress intended. Because of the absence of any controlling language, the decisions of those courts finding exclusivity of remedy under prison compensation, are, of necessity, bottomed upon the assumption that Congress could not have intended dual recovery.[54]

[53] Johansen v. United States, *supra* note 51.

[54] The pressing question is, of course, why not. Is it any less valid to read the absence of any exclusivity provision in Prison Compensation as indicative of a Congressional purpose to allow dual recovery as it was in Veterans' Compensation? For example, it is so evident a fact that it can meet the requirements of judicial notice that Congress is a popularly elected body. Let us conjure in our mind's eye the picture of a legislator, representing the collective attitude of Congress, who appreciates that another election will soon be upon him. Now, he looks at the condition of the federal prisons and is disturbed. He sees problems of overcrowding, understaffing, and antiquated facilities. He recognizes these problems as dangerous and appreciates the direct proportion between injuries and unsafe conditions. However, he also realizes that monetary allocations to prisons are not too popular, especially when they are made at the expense of new schools, roads, and hospitals in his constituency. Therefore, he conceives of a way to improve prison conditions without angering his electors. He votes for a non-exclusive Compensation Act. He realizes that dual recovery may be expensive, but he is taking a long-range view. He realizes that as the dollar output by the United States under both systems of recovery increases, the more attractive and fiscally re-

The argument that since Congress usually makes compensation systems exclusive,[55] it must have intended (although it did not say so) prison compensation to be exclusive, must be questioned. There is a fallacious logic in the argument which has resulted from courts having assumed their major premise, i.e., that compensation systems are inherently presumed exclusive. This assumption was clearly rejected in *Brown*, and was not made by the Supreme Court in *Feres*. However, this is not to say that it is totally without merit. If recovery under both tort claims and prison compensation is not prohibited, a good argument[56] can be made that it should be. But there is a vast difference between making the argument and holding that the two acts are exclusive, buttressing this conclusion upon what is claimed to be Supreme Court authority.

Moreover, not only is analogy to the Federal Employees Compensation Act an unwarranted assumption, but an examination of the two acts reveals differences which preclude the validity of comparison. The Federal Employees Compensation Act provides a system of compensation so complete that it can be recognized as the *quid pro quo* of a waiver of tort liability. However, the differences between this act and the Prison Industries Fund are so great that they militate against a presumption that Congress ever intended the latter act to be a comprehensive substitute for tort liability.

The first difference between the two acts is, of course, obvious—while the prison act[57] has no provision for exclusiveness, the Federal Employees Compensation Act[58] provides that it will be an exclusive remedy. However, there are other less obvious provisions of the Prison Industries' Fund, which leave the act far short of a fair substitute for tort liability. Another example is the fact that the United States Code imposes a duty on the Bureau of Prisons to care for the safety of prisoners. The applicable provision reads:

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sponsible will be a measure to improve unsafe conditions thereby reducing accidents with their attendant claims. It is conceivable that if the dollar amount of recovery under Tort Claims and Prison Compensation soar, our Congressman may someday be able to allocate directly funds necessary to improve prison conditions. Should this result in a decrease in the prison accident rate, he may then be in a position to take the money saved by the reduction of claims and earmark it for new federal grants-in-aid to his constituency. Our Congressman has his cake, and has eaten it too.

The authors appreciate that this explanation of the intent of Congress in not putting an exclusivity provision in Prison Compensation may appear far-fetched. However, is it any less valid an hypothesis than one which assumes legislative inadvertence? The argument of *Grande* is that Congress usually makes compensation an exclusive recovery but apparently neglected to do so in prison compensation.

[55] Federal Employee's Compensation Act, 5 U.S.C. § 757(b) (1964); Longshoremen's and Harbor Workers' Act, 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[56] Grande v. United States, *supra* note 4, is typical of the court's frequent agreement with this argument.

[57] Prison Industries Fund, 18 U.S.C. § 4126 (1964).

[58] 5 U.S.C. § 757(b) (1964).

Duties of the Bureau of Prisons . . .

(2) Provide suitable quarters and provide for the safe-keeping, care, and subsistence of all . . . [prisoners]. . . .

(3) Provide for protection, instruction, and discipline of all . . . [prisons].[59]

Under the Prison Industries Fund even when recovery is allowed, there are many restrictions not found in the Federal Employees Compensation Act. Thus, under the prior act, an inmate receives compensation not at the time of the injury, but only upon his release.[60] A former inmate receives no compensation unless he is still disabled at the time of his release.[61] Contributory negligence on the part of the inmate would appear to preclude recovery.[62] While the foregoing restrictions may be justified in the prison situation since the prisoner is paid while he is disabled and receives free room, board and medical treatment, several other restrictions indicate that the prison compensation scheme is not intended as a comprehensive substitute for the right[63] to recover under the Federal Tort Claims Act.

Under the Prison Act, the amount of an award rests entirely within the discretion of the Attorney General.[64] Moreover, payments are discontinued if the former inmate commits a crime, although the payments may be continued to dependents.[65] Normally, claims must be submitted through the person in charge of the claimant at the time of the injury[66] in spite of the fact that this is probably the very person whose negligence has caused the injury. Medical attention subsequent to discharge may be obtained only if the Commissioner of Prison Industries approves.[67]

Despite the fact that the prisoner can receive no compensation until after his release, the prison industry corporation has the right to pay his dependents in lieu of the former inmate.[68] Finally, the retention of an attorney is clearly discouraged. The regulations state that all just claims will be paid and no attorney is necessary. If one is retained, the inmate may not assign more than $25 to pay for these services.[69] Unlike the Federal Employees Com-

[59] 18 U.S.C. § 4042 (1964).
[60] 28 C.F.R. § 301.1 (1966).
[61] 28 C.F.R. § 301.2 (1966).
[62] 28 C.F.R. § 301.4 (1966).
[63] Whether a federal prisoner had a right to recover for the negligence of his jailer was disputed at common law. *Compare* Tyler v. Gobin, 94 Fed. 48 (1899) (recovery allowed), *with* Golub v. Krinsky, 185 F. Supp. 783 (S.D.N.Y. 1960) (recovery denied). These early cases involved suits against the jailer, not against the government which was protected by sovereign immunity. There can be no doubt that the federal prisoner now has the right to maintain an action against the government as a result of the decision in *Muniz*.
[64] 63 YALE L.J. 418, 419 (1954).
[65] 28 C.F.R. § 301.5 (1966).
[66] 28 C.F.R. § 301.7 (1966).
[67] 28 C.F.R. § 301.8 (1966).
[68] 28 C.F.R. § 301.9 (1966).
[69] 28 C.F.R. § 301.10 (1966).

pensation Act[70] the Prison Act makes no provision for a physical by a private physician or an opportunity for an administrative review.

An examination of the foregoing provisions makes it quite apparent that the government does not regard a prisoner's recovery under the Compensation Act as a matter of right. Since *Muniz* makes it clear that the prisoner has a right to recover for negligence, it is difficult to fathom the contention that a discretionary Prison Industries Fund can be substituted for this right.

Finally, the Prison Industries Fund allows:

> Compensation to inmates or their dependents for injuries suffered in any industry. In no event shall the compensation be paid in a greater amount than that provided in the Federal Employees Compensation Act.[71]

The argument can be made[72] that while compensation based on the income of the average federal employee is adequate, this standard is vitiated as a meaningful criterion in the prison situation which is notorious for its low wages.

In addition to differences between statutory provisions and dollar amount of recovery, there is another consideration which militates against the Prison Industries Fund being regarded as an exclusive means of redress. The result of a decision of exclusivity will arbitrarily create a class of individuals precluded from recovery under the Tort Claims Act. While Congress has seen fit to except certain claims from a right of recovery under the Tort Claims Act,[73] it has not asked the courts to add to the list of exceptions. The Supreme Court's initial reaction to the Act may have been one of strict construction against the claimant,[74] but later cases make it clear that this has been abandoned.

For example, in *Indian Towing Company v. United States*,[75] the Court rejected a government argument that the Tort Claims Act excluded liability in the performance of activities which private persons do not perform, and allowed the plaintiff to recover for damages caused by the negligence of the Coast Guard in causing a lighthouse to fall into disrepair. Mr. Justice Frankfurter's majority opinion recognizes both the expansive scope of the Tort Claims Act and the position occupied by the courts in its application. The opinion reads:

[70] See 5 U.S.C. § 757(b) (1964).
[71] 18 U.S.C. § 1426 (1964).
[72] For this argument see 38 WASH. L. REV. 338 (1961). It should be noted that the author was told by the Bureau of Prisons that the prison wage base for compensation is considered to be the minimum wage of $1.25 per hour.
[73] 28 U.S.C. § 2680 (1964).
[74] See, *e.g.*, Dalhite v. United States, 346 U.S. 15 (1953).
[75] 350 U.S. 61 (1955).

> Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.[76]

Two years later, the Court had an opportunity to reconsider its liberal application of the act in *Indian Towing*. In *Rayonier, Inc. v. United States*,[77] the Court again refused a restrictive interpretation of the Tort Claims Act,[78] and allowed the claimant to recover for the negligence of the Forest Service during a forest fire. In response to a government argument that to allow recovery for a forest fire would subject the Treasury to heavy burdens, the Court replied that this might be true but, "there is no justification for this Court to read exemptions into the act beyond those provided for by Congress."[79]

It is true that those courts which deny recovery by prisoners under the Tort Claims Act do not violate the letter of the Supreme Court's liberal holdings regarding recovery under that Act. This is so because the implied exclusion is read into the Compensation Act rather than the Tort Claims Act.[80] However, it is suggested that the *Grande* result violates the spirit of the *Rayonier,* decision. The Supreme Court has made it clear that they intend to allow tort recovery against the government except when Congress has clearly excluded a particular claim. Since Congress has not explicitly excluded prisoners' claims in either the Federal Tort Claims Act or the Prison Industries Fund, the Second Circuit's discovery of an implied exclusion in the nature of compensation would appear to be at variance with the Supreme Court's clear policy of liberal interpretation of the Tort Claims Act.

The Supreme Court has taken certiorari in *Demko*.[81] In so doing, it appears that the question of the inherent exclusiveness of compensation will be finally settled. The authors take the position that the Supreme Court should affirm the Third Circuit's decision and allow federal prisoners to recover under both the Prison Industries Fund and the Federal Tort Claims Act.

In taking this position, it is not denied that Congress could have prohibited such double recovery; but that only by torturing both law and logic can it be claimed that such denial is prescribed by the present state of the law. If the Court affirms *Demko,* Congress might consider amending the Prison

[76] *Id.* at 69.

[77] 352 U.S. 315 (1957).

[78] In fact, the Court was even more decisive in its rejection of a restrictive interpretation of the Tort Claims Act. *Indian Towing* was a 5-4 decision while *Rayonier* was 7-2.

[79] Rayonier v. United States, *supra* note 77, at 320.

[80] This, of course, is the rationale of *Grande* and the legacy of *Feres*.

[81] Demko v. United States, 383 U.S. 966 (1966).

Industries Fund so as to make recovery under it exclusive. However, it would seem that sound public policy would dictate against such exclusivity unless the amendment also made prison compensation a matter of right rather than the subject of executive benevolence.

The Court's consideration of *Demko* may mark the beginning of a significant new era in the development of human rights. Now that the "due process" clause has been effectively used to define the rights of the accused, it seems only fitting that the Court should be equally concerned with the rights of the convicted.

It remains only to point out two issues which will arise if *Demko* is affirmed. Will the decision be given retroactive effect? More specifically could *Grande* who was denied recovery in the Second Circuit, five months after the Third Circuit allowed Demko to recover, have his cause reconsidered in light of the fact that no petition for certiorari has been granted? What of the plaintiff who never brought an action because of the supposed exclusivity of the Compensation Act, but is not barred by the statute of limitations from now proceeding under the Tort Claims Act?

Finally, if recovery is allowed under both the Prison Industries Fund and the Federal Tort Claims Act should the amount of compensation recovered be deducted from the tort recovery? At least one case[82] has suggested that there should be such a deduction and this result appears logical. While there is no clear statutory authority for the deduction it would appear that as a simple matter of measure of damages in tort, double recovery could be denied.*

[82] Winston v. United States, 305 F.2d 253 (2d Cir. 1962).

* Unfortunately, the Supreme Court did not agree with the Third Circuit or the authors. On December 5, 1966, after the Comment went to press, the Court reversed *Demko*. 35 U.S.L. WEEK 4028 (U.S. Dec. 5, 1966) (No. 76).