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Constitutionality and Basic Fairness of the Government Drivers Law

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Notes

The Constitutionality and Basic Fairness of the Government Drivers Law

I. INTRODUCTION

The increasing use of motor vehicles by the federal government[1] coupled with the increasing rate of highway accidents has led to an unavoidable problem—an increasing number of citizens with claims arising from the negligent driving of government employees. Three conflicting interests are immediately apparent: 1) the victim's interest in just compensation for his personal injuries and property damage; 2) the government driver's interest in avoiding personal liability while acting within the scope of his employment, and 3) the federal government's interest both in protecting employees so that they may conscientiously perform their duties and in the maintenance of an efficient, economical method of settling the claims for which it may be vicariously liable. Another interest, although not as readily apparent, is that of the taxpaying public in having the federal government act in a proper fiduciary role when allocating the burden of money damages. Society, of course, has a further interest in deterring motor vehicle accidents by encouraging Government drivers, like all other drivers, to be safety conscious.

In 1961, Congress resolved these conflicting interests by enacting the Government Drivers Law[2] as an amendment to the Federal Tort Claims Act.[3] The Law grants personal immunity

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1. The General Services Administration, as transportation manager for a large sector of the federal government, increased its pool of vehicles from 21,009 in 1961 to 50,148 in 1967, an increase of nearly 250 percent in a mere six years. 1967 GEN. SERVS. ADMINISTRATION, ADM'RS ANN. REP. 41; 1961 GEN. SERVS. ADMINISTRATION, ANN. REP. OF THE ADM'R OF GEN. SERVS. 6.

2. 28 U.S.C. § 2679(b) (Supp. III, 1968):

> The remedy against the United States provided [under the Federal Tort Claims Act] for injury or loss of property or personal injury or death, resulting from the opeation by any employee of the Government of any motor vehicle while acting within the scope of his . . . employment, shall herafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

3. Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 812 (codified in scattered sections of 28 U.S.C.). The basic judicial remedy is provided by 28 U.S.C. § 1346(b) (1964).

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death

to negligent government drivers while acting within the scope of their employment and provides victims with an *exclusive* remedy against the federal government for the driver's misconduct. The immediate question posed by the law is its constitutionality under the fifth and seventh amendments to the United States Constitution. Of equal importance is the basic fairness of the scheme to all interested parties.

The problem created by government drivers is unique in the sense that in no other activity are government employees constantly in such potentially tortious contact with the majority of private citizens. This Note will present the law in the context of its background, point out the existing problems of constitutionality and fairness and propose possible solutions to accommodate the various interests affected.

II. BACKGROUND

A. The Doctrine of Sovereign Immunity

Sovereign immunity is a legal concept used by courts to give a governmental unit a "favored" status as a defendant in order to protect it from liability.[4] While the doctrine's origin is uncertain,[5] the underlying philosophy of English common law

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

The basic administrative remedy is provided by 28 U.S.C. § 2672 (1964), *as amended*, (Supp. III, 1968).

The head of each Federal agency . . . may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his . . . employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . . .

4. There are a number of other classes of defendants that the law has made immune for various policy reasons, *e.g.*, charities, public officers and members of a family with respect to each other. W. Prosser, Law of Torts 996 (3d ed. 1964). *See generally* Borchard, *Government Liability in Tort*, 26 Can. B. Rev. 399 (1948); Davis, *Tort Liability of Governmental Units*, 40 Minn. L. Rev. 751 (1956); James, *Tort Liability of Government Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

5. It may well have had its roots in Roman law. *See* Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167 (1952).

that "the King could do no wrong"[6] led to the idea that it would be a contradiction of his sovereignty to allow him to be sued in his own courts.[7] In 1821, the doctrine was first applied to our government when Chief Justice Marshall in *Cohens v. Virginia*,[8] giving no reasons, adopted the doctrine. Subsequent applications of the doctrine soon established the principle that the federal government could not be sued without its consent.[9] As a result of the failure of courts to provide relief against the Government, the practice developed of providing relief through private bills for injuries caused by the Government—not as a matter of right, but as a matter of legislative grace.[10] Over the years, an increasing number of such private bills placed a strain on Congress and the practice resulted in injustice to many unheard citizens.[11] At times, the Supreme Court felt obliged to circumvent the immunity doctrine in the name of "justice."[12] Criticism of the fairness of this means for redressing grievances finally led to the establishment of a Court of Claims in 1863, though it lacked general tort jurisdiction.[13] Areas of "consent" were broadened by limited waivers of immunity under the Tucker Act, the Patent Infringement Act, the Suits in Admiralty Act, the Public Vessels Act and many others.[14]

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6. For recognition of this phraseology, see Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 280 (1922).

7. 1 BLACKSTONE, COMMENTARIES *237. *See also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 49 (1793).

8. 19 U.S. (6 Wheat.) 82 (1821). *See* Briggs v. Light Boat Upper Cedar Point, 93 Mass. (11 Allen) 157, 162 (1865).

9. The traditional statement is that of Mr. Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907):

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

See The Western Maid, 257 U.S. 419 (1921). *See also* United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United States, 50 U.S. (9 How.) 385 (1850).

10. The first bill was passed in 1790 and the first tort bill in 1792. Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949). *See generally* McCabe, *Observations on the Federal Tort Claims Act*, 3 THE FORUM 66 (Jan. 1968).

11. McCabe, *supra* note 10, at 67.

12. *See, e.g.*, The Siren, 74 U.S. (7 Wall.) 152 (1868); United States v. Lee, 106 U.S. 196 (1882).

13. W. PROSSER, *supra* note 4, at 998. The Court of Claims, 28 U.S.C. § 2501 *et. seq.* (1964), *as amended*, (Supp. III, 1968), was established in 1855 by Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, but did not receive its present power to enter final judgments until amended by Act of March 3, 1863, ch. 92, 12 Stat. 765.

14. Yankwich, *supra* note 10, at 148. *See generally* Note, *Tort Claims against the United States*, 30 GEO. L.J. 462 (1942).

B. THE FEDERAL TORT CLAIMS ACT

In 1946, Congress took a very significant step by enacting the Federal Tort Claims Act[15] which broadly waived the Government's immunity from tort liability.[16] The constitutional basis for the Act is article I, section 8 of the United States Constitution, which confers power upon Congress "to pay the debts . . . of the United States."[17]

The purpose of the Act's broad waiver of sovereign immunity was to provide citizens with a "satisfactory remedy" for the "common law" type of tort resulting from the negligent or wrongful acts or omissions of federal employees while acting within the scope of their employment.[18] The Act's legislative history makes this clear:

> With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles.[19]

The waiver of immunity, however, is subject to a number of specific exclusions, some of which deny relief for a great many claims.[20] One exclusion, which denies claims for employees' exercise of, or failure to exercise, discretionary functions, has

15. Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 812 (codified in scattered sections of 28 U.S.C.). The original Act placed a ban on consideration of private bills. For the basic remedial language, see note 3 *supra*.

16. President Truman deserves some degree of credit for the Act becoming law on August 2, 1946. A tort claims bill had passed Congress as early as 1928 only to be pocket vetoed by President Coolidge. Gottlieb, *Symposium on the Federal Tort Claims Act*, 24 FED. B.J. 136 (1964).

17. *See* United States v. Sherwood, 312 U.S. 584, 587 (1941); *Ex parte* Bakelite, 279 U.S. 438, 452 (1929).

18. Milva, *Sovereign Immunity: In a Democracy The Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 832 (1966).

19. S. REP. No. 1400, 79th Cong., 2d Sess. 30-31 *adopting and quoting from* H.R. REP. No. 1287, 79th Cong., 1st Sess. (1946).

20. 28 U.S.C. § 2680 (1964). The section is devoted solely to placing limits on the activities for which the Government may be held liable and among others excludes:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise . . . or the failure to exercise . . . a discretionary function . . . on the part of . . . an employee of the Government . . . .
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
> . . . .
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

caused the most litigation because of the difficulty of interpreting "discretionary function."[21] Claims arising from the "loss, miscarriage, or negligent transmission" of mail are also excluded from relief[22] but this does not apply to personal injury claims arising out of the negligent operation of mail vehicles.[23] Another significant exclusion denies relief from claims based upon the commission of intentional torts.[24] Since the Act's language of "wrongful act or omission" has been construed to exclude strict liability,[25] the Act will only provide relief for claims arising out of negligent or willful misconduct by government employees.

With regard to nonexcluded activities, the Act provides for the administrative settlement of tort claims.[26] In the event that a mutually satisfactory settlement cannot be reached, the claim

21. 28 U.S.C. § 2680(a) (1964). *See* note 20 *supra*. In construing the ambiguous language, courts seem to agree that the Government is immune with respect to decisions made at the "planning level" and liable for decisions made at the "operational level." The further ambiguity of these terms, however, makes reconciliation of cases difficult. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61 (1955) (liable for failure of government lighthouse); Dalehite v. United States, 346 U.S. 15 (1953) (immune for fertilizer explosion); Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955) (liable for faulty instructions given by federal airport tower controller); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965) (immune for gases due to dredging of river bottom).

22. 28 U.S.C. § 2680(b) (1964) *See* note 20 *supra*.

23. The Supreme Court has clearly stated that in view of the broad and remedial purpose of the Act, the doctrine of strict construction should not be applied so as to enlarge the exclusions. *See* United States v. Yellow Cab Co., 340 U.S. 543 (1951). In fact, mail vehicle collisions are one of the largest sources of claims brought under the Federal Tort Claims Act. *See, e.g.*, Nistendirk v. McGee, 225 F. Supp. 881 (W.D. Mo. 1963) (rural mail carrier); Jones v. United States, 265 F. Supp. 858 (S.D.N.Y. 1967) (postal truck).

24. 28 U.S.C. § 2680(h) (1964). *See* note 20 *supra*. Misrepresentation in all forms whether negligent or intentional or whether arising from an affirmative act or a failure to act has been held to be excluded by this section. *See, e.g.*, United States v. Neustadt, 366 U.S. 696 (1961); Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967); National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954).

25. The construction is based upon the premise that strict liability is not based on fault and that the Government must be at fault to be liable. *See* Dalehite v. United States, 346 U.S. 15 (1953); Harris v. United States, 205 F.2d 765 (10th Cir. 1953). The validity of the premise has been strongly denounced. *See* James, *The Federal Tort Claims Act and the "Discretionary Function" Exception*, 10 U. FLA. L. REV. 184 (1957); Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433 (1957).

26. 28 U.S.C. § 2672 (1964), *as amended*, (Supp. III, 1968). *See* note 3 *supra* for the relevant text.

may be adjudicated in the federal district courts.[27] The Act imposes liability on the Government "in the same manner and to the same extent as a private individual under like circumstances"[28] in accordance with the law of the jurisdiction where the tort occurs.[29] The relief provided by the Act, however, is somewhat more restricted than would generally be available under state law. A major amendment enacted in 1966 requires that before suit can be brought, the claimant must request administrative relief from the government agency whose driver is alleged to be involved.[30] If the claim is denied or the claimant is dissatisfied with the amount offered, he may bring suit in federal district court[31] but the amount requested must not exceed the amount of the claim presented administratively.[32] Furthermore, all actions brought under the Act must be tried without a jury,[33] regardless of whether the action is in the nature of a direct claim, counterclaim, cross-claim or third-party claim.[34] The claim must be presented within two years of the time at which the cause of action arose. If the claim is denied or if the claimant is dissatisfied with the agency's offer, suit must be brought

27. 28 U.S.C. § 1346(b) (1964). *See* note 3 *supra* for the relevant text.

28. 28 U.S.C. § 2674 (1964). *See* Big Head v. United States, 166 F. Supp. 510 (D. Mont. 1958).

29. The *whole* law of the state where the misconduct occurs governs, including the conflicts of law rules which, interestingly enough, generally apply the law of the state where the misconduct has its harmful effect, not where the misconduct occurs. *See* Richards v. United States, 369 U.S. 1 (1962).

30. 28 U.S.C. § 2675(a) (1964), *as amended*, (Supp. III, 1968):

> An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . .

The amendment, Pub. L. No. 89-506, § 2(a), 80 Stat. 306 (1966), applies only to claims arising after Jan. 18, 1967.

31. 28 U.S.C. § 1346(b) (1964). This, of course, requires that the suit conform to the Federal Rules of Civil Procedure and thus, pursuant to the Federal Venue Statute, the action must be brought in either the district where the claimant resides or the district where the wrongful act occurred. 28 U.S.C. § 1402(b) (1964).

32. 28 U.S.C. § 2675(b) (1964), *as amended*, (Supp. III, 1968). An exception is made by the Act "where the increased amount is based upon newly discovered evidence . . . or upon allegation and proof of intervening facts, relating to the amount of the claim." *See* Morgan v. United States, 123 F. Supp. 794 (S.D.N.Y. 1954).

33. 28 U.S.C. § 2402 (1964).

34. United States v. Rosati, 97 F. Supp. 747 (D.N.J. 1951). Likewise, the claimant would probably be denied a jury trial with respect to a counterclaim brought by the federal government. *See* McElrath v. United States, 102 U.S. 426, 440 (1880).

within six months of the agency's action.[35] While the Act provides for post-judgment interest at the rate of four percent, it exempts the Government from paying any interest prior to final judgment regardless of the state law on the matter.[36] Except where state law provides exclusively for punitive damages in case of death, the Act exempts the federal government from liability for punitive damages.[37] Attorney's fees are specifically limited to 20 percent of administrative awards and 25 percent of judicial recoveries.[38] Finally, the Act has been construed to allow the government to be impleaded and become liable not only for contribution as a joint tortfeasor[39] but for indemnity to employees' insurers on subrogation claims.[40]

C. THE GOVERNMENT DRIVERS LAW

Prior to the enactment of the Government Drivers Law, a person involved in a motor vehicle accident with a federal employee acting within the scope of his employment had a choice of defendants.[41] He could either sue the employee by asserting his common law right against the tortfeasor[42] or go against the gov-

35. 28 U.S.C. § 2401(b) (1964), *as amended*, (Supp. III, 1968). If the claim has been timely submitted but no notice of denial has been mailed, six months after presentation the claimant may consider the claim denied and begin suit. 28 U.S.C. § 2675(a) (1964), *as amended*, (Supp. III, 1968). *See also* Corboy, *The Revised Federal Tort Claims Act: A Practitioner's View*, 2 THE FORUM 67 (Jan. 1967).

36. 28 U.S.C. § 2411(b) (1964). Some state courts allow interest on the general principle of compensating for the delay which occurs between the date of the injury and the date of the award, especially in the case of property damage. *See, e.g.*, King v. Southern Pacific Co., 109 Cal. 96, 41 P. 786 (1895). Other jurisdictions have statutes providing for the payment of interest from the time of filing suit. *See, e.g.*, Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963).

37. 28 U.S.C. § 2674 (1964). Where a death occurs and the state law provides *only* for punitive damages, the recovery of "actual or compensatory" damages is allowed. *Id.*

38. 28 U.S.C. § 2678 (1964), *as amended*, (Supp. III 1968).

39. United States v. Yellow Cab Co., 340 U.S. 543 (1951). Of course, the claimant may seek recovery in a separate proceeding. *See, e.g.*, Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960).

40. United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949); Old Colony Ins. Co. v. United States, 168 F.2d 931 (6th Cir. 1948). But voluntary assignments, as distinguished from assignments by operation of law, transfer no valid rights against the United States. *See* United States v. Shannon, 342 U.S. 288 (1952).

41. Annot., 16 A.L.R.3d 1394, 1396 (1967). For a good historical discussion, see McCord, *Fault Without Liability: Immunity of Federal Employees*, 1966 U. ILL. L.F. 849 (1966).

42. *See* United States v. First Sec. Bank, 208 F.2d 424 (10th Cir. 1953); Burks v. United States, 116 F. Supp. 337 (S.D. Tex. 1953).

ernment on the basis of *respondeat superior*.[43] This imposed a financial burden on government employees since they were forced to carry their own liability insurance[44] or risk personal liability in the course of official duty.[45]

The Government Drivers Law, enacted to alleviate this financial burden, substitutes the liability of the Government *exclusively* for that of its drivers while acting within the scope of their employment and thereby renders government drivers absolutely immune.[46] The scheme used to accomplish this appears to be "unique in Anglo-American law."[47]

The Law applies only to government drivers;[48] other employees may still be sued for their torts individually or jointly with the federal government.[49] The driver also remains solely responsible for torts committed while acting outside the scope of his employment.[50] In addition the Law applies only to claims which are otherwise covered by the Federal Tort Claims Act,[51]

43. Under the Tort Claims Act, the Government's liability is determined by conventional *respondeat superior* principles. *See, e.g.*, Williams v. United States, 350 U.S. 857 (1955); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960).

44. Since the federal government, unlike most employers, carries no liability insurance for employees acting within the scope of their duties, employees felt financially compelled to carry their own. This, of course, resulted in a financial burden on employees measured by the following: (1) To employees using their own family vehicle on the job, the difference in cost between a "personal" rate policy and a "business" rate policy on the family vehicle. (2) To employees using their employer's vehicle, the cost of a "business" rate policy on the employer's vehicle.

45. S. REP. No. 736, 87th Cong., 1st Sess. 2-6 (1961); H.R. REP. No. 297, 87th Cong., 1st Sess. 2-4 (1961); 1961 U.S. CODE CONG. & AD. NEWS 2784. *See also* Whealton v. United States, 271 F. Supp. 770 (E.D. Va. 1967); Perez v. United States, 218 F. Supp. 571 (S.D.N.Y. 1963).

46. 28 U.S.C. § 2679(b) (1964), *as amended*, (Supp. III, 1968). *See, e.g.*, Beesley v. United States, 364 F.2d 194 (10th Cir. 1966); United States v. Delta Indus. Inc., 275 F. Supp. 934 (N.D. Ohio 1966).

47. McCabe, *supra* note 10, at 77.

48. Other government employees are protected by no comparable provision under the Tort Claims Act, except for certain Veteran's Administration medical personnel with respect to malpractice claims. 38 U.S.C. § 4116 (1964), *as amended*, (Supp. III, 1968).

49. Joinder of other employees in the same suit with the federal government is permitted. *See* United States v. Yellow Cab Co., 340 U.S. 543 (1951).

50. *See* 1961 U.S. CODE CONG. & AD. NEWS 2784, 2787:

> Therefore the new language would only apply when the employee is acting in his official capacity at the time of the incident giving rise to the claim, and does not provide the basis for any liability against the United States based on the unauthorized use of Government motor vehicles.

51. L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 175.03 (1967).

thereby providing no immunity to drivers who commit intentional torts or who are responsible for the loss of mail.[52]

Even though the Law precludes suits against government drivers in their personal capacity, a procedure has been established to dispose of such a suit if brought in a state court.[53] The Attorney General is required to defend any action brought in *any* court against a government driver for misconduct within the scope of his employment[54] and any action brought in a state court must be removed to a federal district court before the federal government may properly be joined.[55] To accomplish removal and joinder, the Attorney General must present a certificate issued by the appropriate agency wherein the agency admits that the driver was acting within the scope of his employment at the time of the alleged misconduct.[56] After removal, but before trial on the merits, any party may move to remand and if the court finds that the government driver was not acting within the scope of his employment, the case will be remanded to the state court.[57] If the court, however, finds that the government driver was acting within the scope of his employment, he is absolutely immune and is dismissed from the proceeding. The suit is then deemed to be a tort action against the federal government under the Federal Tort Claim Act and thereby subject to such qualifications as the Act provides.[58]

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52. *See* text accompanying notes 22 & 24 *supra.*

53. 28 U.S.C. § 2679(c)-(e) (1964).

54. 28 U.S.C. § 2679(c) (1964). To insure that the Attorney General can appear and defend the suit, government drivers are required to deliver papers served upon them to their superiors who in turn must promptly furnish copies to the United States Attorney. *Id.*

55. 28 U.S.C. § 1441 (1964).

56. 28 U.S.C. § 2679(d) (1964), *as amended,* (Supp. III, 1968). If the Attorney General does not certify scope of employment, the action apparently cannot be removed to federal court, nor can a hearing be held on the scope of employment issue. Thus, the government driver will unavoidably be subject to personal liability regardless of whether he was actually within the scope of his employment. *See* Jarrell v. Gordy, 162 So. 2d 577 (La. Ct. App. 1964). Once having certified, however, the Attorney General is not entitled to withdraw certification and have the action remanded to state court. Stephen v. Madison, 223 F. Supp. 256 (E.D.N.Y. 1963).

57. 28 U.S.C. § 2679(d) (1964), *as amended,* (Supp. III, 1968). *See* Adams v. Jackel, 220 F. Supp. 764 (E.D.N.Y. 1963). The district court may even order a hearing on the scope of employment issue upon its own motion. *See* Reynaud v. United States, 259 F. Supp. 945 (W.D. Mo. 1966).

58. *See* Lipinski v. Bartko, 237 F. Supp. 688 (W.D. Pa. 1965). While not expressly stated, the same procedures must be followed when the action is initially brought in a federal district court in order to substitute the federal government for the driver except, of course, no

III. THE QUESTION OF CONSTITUTIONALITY

The remedy afforded by the Government Drivers Law raises serious questions as to its constitutionality under the fifth and seventh amendments. The unique nature of the Law's provisions means that the same questions have never arisen with regard to any other law.

A. Deprivation of Common Law Remedy

The Government Drivers Law grants victims of motor vehicle accidents caused by government drivers an *exclusive* remedy of suit against the federal government.[59] This means that the victim is completely deprived of his common law cause of action against the tortfeasor—a right recognized in every state in the United States.[60]

Under the United States Constitution, Congress has the express power "to pay the Debts . . . of the United States"[61] and, by the necessary and proper clause,[62] has the implied power to choose appropriate means to accomplish this. Since *McCulloch v. Maryland*[63] in 1819, federal legislation has been upheld if the ends are legitimate and the means are reasonably related to the attainment of those ends.[64] It can hardly be doubted that relieving government drivers from the financial burden of carrying liability insurance on official duty is a legitimate end.[65] But a cause of action is a property right and the abolition of old

removal is required. *See* Perez v. United States, 218 F. Supp. 571 (S.D.N.Y. 1963). But where the Attorney General does not certify scope of employment, upon the driver's motion a federal court has allowed a determination of the issue by a jury at trial. *See* Jones v. Polishuk, 252 F. Supp. 752 (E.D. Tenn. 1965).

59. 28 U.S.C. § 2679(b) (1964), *as amended*, (Supp. III, 1968). This section should be interpreted in view of its accompanying amendments. 28 U.S.C. § 2679(c)-(e) (1964). *See* note 53 *supra*.

60. In fact 37 states have constitutional provisions guaranteeing a "certain remedy for every wrong." *See, e.g.*, Minn. Const. art. 1, § 8. *See also* Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964). For the effect of these provisions on state legislation, see Comment, *Abolition of Breach of Promise in Wisconsin—Scope and Constitutionality*, 43 Marq. L. Rev. 341 (1960).

61. U.S. Const. art. 1, § 8, cl. 1.

62. U.S. Const. art. 1, § 8, cl. 18.

63. 17 U.S. (4 Wheat.) 415 (1819).

64. Stephenson v. Binford, 287 U.S. 251 (1932). *See also* Union Bridge Co. v. United States, 204 U.S. 364 (1907); Chicago, B. & Q. R.R. v. Illinois, 200 U.S. 561 (1906).

65. *See* 1961 U.S. Code Cong. & Ad. News 2789 (legislative history of the Government Drivers Law).

common law causes of action as a reasonable means to attain a permissible legislative objective[66] is a denial of due process *unless a substantial and efficient remedy remains or is provided.*[67]

In 1963, only two years after the enactment of the Government Drivers Law, two cases passed lightly over the issue of constitutionality, both upholding the validity of the exclusive remedy against the federal government. In *Gustafson v. Peck*,[68] a federal district court denied the existence of a "constitutional right to a cause of action against a government employee for committing a tort while acting within the scope of his employment."[69] The court based this conclusion on the premise that the Government is immune from suit except where consent has been given[70] and, therefore, congressional intent determines whether or not a government driver is granted immunity.[71] Since the Law expressly declares the tortfeasor immune,[72] there is really no question that the requisite intent for the driver to avoid direct liability is present. The court, however, added that the Law probably *does not* "completely obliterate the liability of the individual tortfeasor."[73] This interpretation of the "exclusive remedy" may be the real reason for the court's result.

In *Nistendirk v. McGee*,[74] another federal district court focused more directly on the issue of whether or not Congress could validly replace this common law right with a statutory one.[75] After finding that the legislative objective was a permissible one, the court stated that whether or not the Government Drivers Law accomplishes the objective was not open

66. *See* Silver v. Silver, 280 U.S. 117 (1929); Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927); New York Cent. R.R. v. White, 243 U.S. 188 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

67. Gibbes v. Zimmerman, 290 U.S. 326 (1933); Crane v. Hahlo, 258 U.S. 142 (1922); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903).

68. 216 F. Supp. 370 (N.D. Iowa 1963).

69. *Id.* at 372.

70. *Id.* The court cited Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1938); Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). *See* text accompanying note 9 *supra.*

71. 216 F. Supp. 370, 372 (N.D. Iowa 1963).

72. The court supported its stand by a reading of legislative history stating that "the remedy against the United States is to be exclusive and is to protect the Government drivers against the hazard of being subjected to suits." *Id.* at 373.

73. *Id.* at 372.

74. 225 F. Supp. 881 (W.D. Mo. 1963).

75. The court analogized the Government Drivers Law to the numerous workmen's compensation statutes. *Id.* at 882.

to judicial inquiry.[76] From this alone, the court concluded that the statutory remedy was not violative of due process since it provided a substantial and efficient remedy.[77] Thus, the court concluded with the precise issue that must be determined, namely whether the exclusive remedy provided against the Government *is* substantial and efficient.

More recently, however, the question of whether an adequate substitute is provided was answered in the negative. In *Jenkins v. United States*,[78] a federal district court held that the Government Drivers Law is a denial of due process:

> While it is true that under the Tort Claims Act the government is subject to suit only through consent, it is also clear that its substantive liability under [the Government Drivers Law] is merely *vicarious* in nature under the doctrine of respondeat superior. Thus, plaintiff's common law right to sue the active tortfeasor is completely abridged . . . [The legislative objective] is not sufficient to allow the government to deprive the plaintiff of his common law right . . . .[79]

The legal significance of the *Jenkins* holding is that the exclusive remedy provided by the Law is not a substantial and efficient substitute for the common law remedy, at least in the eyes of one federal district court.

The only pertinent Supreme Court language indicates that the *Jenkins* decision may be meritorious. In *Richmond Screw Anchor Co. v. United States*,[80] an assignee of a patent sought to recover against the Government under an exclusive remedy statute[81] but faced the possible loss of the cause of action under the federal anti-assignment statute.[82] The Court suggested that to meet the test of due process, the exclusive remedy afforded the assignee must be the *exact equivalent* of the remedy it replaced.[83] Thus, the Court avoided application of the anti-assign-

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76. *Id.*, *citing* Silver v. Silver, 280 U.S. 117 (1929). *See* text accompanying note 66 *supra*.

77. 225 F. Supp. 881 (W.D. Mo. 1963), *citing* Crane v. Hahlo, 258 U.S. 142 (1922). *See* text accompanying note 67 *supra*.

78. Docket No. 68-666-Civ-EC (S.D. Fla., filed Aug. 15, 1968).

79. *Id.* The court similarly held that the accompanying provision, 28 U.S.C. § 2679(d) (1964), providing for removal of state court actions was unconstitutional and concluded that the federal government could be nothing more than a voluntary party.

80. 275 U.S. 331 (1928).

81. Suit was brought under the Patent Infringement Act, 28 U.S.C. § 1498 (Supp. III, 1968). *See* text accompanying note 102 *infra*.

82. 31 U.S.C. § 203 (1964).

83. Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 345 (1928).

ment statute in order to save the constitutionality of the exclusive remedy.

A literal reading of this language would seem to invalidate all substitute remedies, but it should be noted that the *Richmond* Court considered the assignability of claims "an important element in their value,"[84] making no mention of the many other differences in value between a claim against the federal government and one against a private entity. Later, however, in *Waite v. United States*,[85] a court did allow interest on a patentee's claim to make the compensation "entire." While questionable, this decision has been read as reasserting the requirement of absolute equivalence alluded to in *Richmond*.[86]

At a minimum, the Supreme Court would seem to require that the exclusive remedy not deprive the victim of any "important element" in the value of his claim. The *Jenkins* court—the first court to focus directly on the issue—has found sufficient deprivation to strike down the exclusive remedy afforded by the Law. In view of the many differences in value between a claim against the federal government under the Tort Claims Act and one against a private individual, as hereafter noted,[87] the *Jenkins* result may indeed be well-founded.

B. DENIAL OF A JURY TRIAL

Congress stated expressly that all actions brought against the Government under the Tort Claims Act must be tried without a jury.[88] Since, under the Government Drivers Law, the victim's exclusive remedy is against the federal government,[89] he is absolutely precluded from trying his action to a jury.

The seventh amendment expressly provides that in suits "at common law . . . the right of trial by jury shall be preserved . . . ."[90] Over the years, this language has been construed to mean that a jury trial is guaranteed only in those actions which would have been triable to a jury under common law when the

84. *Id.*
85. 57 Ct. Cl. 546 (1922).
86. *See* McCord, *supra* note 41.
87. *See* text, § IV *infra.*
88. 28 U.S.C. § 2402 (1964). *See* text accompanying notes 33 & 34 *supra.*
89. 28 U.S.C. § 2679(b) (1964), *as amended*, (Supp. III, 1968).
90. The exact wording restricts this to suits "where the value in controversy shall exceed twenty dollars . . . ." U.S. CONST. amend. VII.

seventh amendment was adopted.[91] This clearly does not include actions based upon purely statutory rights such as those brought under the Tort Claims Act. Furthermore, the Supreme Court has explicitly held that actions against the Government are not suits at common law within the meaning of the seventh amendment since the United States is immune from suit at common law and the waiver of such immunity is subject to those restrictions which Congress sees fit to impose, including the denial of a jury trial.[92]

The question of the victim's right to a jury trial was not before the court in *Gustafson*[93] or *Jenkins*,[94] but in *Nistendirk*[95] the court held that the Government Drivers Law did not unconstitutionally deny the victim the right to a jury trial. The court declared that since the victim's exclusive remedy was a statutory one against the Government, the guarantees of the seventh amendment were not applicable.[96]

The seventh amendment, however, preserves the victim's right to a jury trial in a suit based upon the traditional common law right against a tortfeasor.[97] Thus, the jury trial question is, for practical purposes, reduced to the basic question of whether or not Congress may constitutionally substitute the statutory remedy exclusively for the victim's common law remedy.[98] But the difference in value of a jury claim and a nonjury claim[99] is a valid consideration in such a determination and may have been

91. For a recent case originating in Minnesota and recognizing this interpretation, *see* Klein v. Shell Oil Co., 386 F.2d 659 (8th Cir. 1967). *See also* Dimick v. Schiedt, 293 U.S. 474 (1935); United States v. Certain Lands, 43 F. Supp. 418 (E.D.N.Y. 1942).

92. United States v. Sherwood, 312 U.S. 584 (1941); McElrath v. United States, 102 U.S. 426 (1880). In *Sherwood*, it was held that the Court of Claims is a "legislative court" and not a "constitutional court," and therefore Congress could dispense with a jury trial in actions brought therein. *See also* Gustafson v. Peck, 216 F. Supp. 370, 372 (N.D. Iowa 1963).

93. 216 F. Supp. 370 (N.D. Iowa 1963). At that time, the seventh amendment did not operate to guarantee a right to jury trial in a state court and the issue was not raised with respect to the federal court. *Id.* at 372.

94. Docket No. 68-666-Civ-EC (S.D. Fla., filed Aug. 15, 1968).

95. 225 F. Supp. 881 (W.D. Mo. 1963).

96. *Id.* at 882. The court also held that the government driver's insurer who was impleaded by the federal government was not denied its seventh amendment right to a jury trial since it must stand in the shoes of the Government, which has no such right.

97. *Id.*

98. *See* text accompanying note 87 *supra.*

99. For a discussion of the difference, see text accompanying notes 132 & 133 *infra.*

an underlying reason for the finding of unconstitutionality in *Jenkins*.

Nevertheless, even if the exclusive remedy of the Government Drivers Law is constitutional on that ground, it is arguable that the victim's seventh amendment right to a jury trial still cannot be denied by such an indirect means.[100] The historically strong federal policy favoring jury trials gives further support to this contention.[101]

C. Other Exclusive Remedies Against the Federal Government

Two other federal acts have exclusive provisions somewhat analogous to that provided by the Government Drivers Law. The Patent Infringement Act[102] grants the owner of a patent the exclusive remedy of an action against the federal government in place of his infringement claim against a government contractor. The Supreme Court has upheld the constitutionality of the provision,[103] but the Patent Act and the Drivers Law differ in one very important aspect. The Patent Act substitutes an exclusive statutory remedy for a prior *statutory* remedy[104] rather than a common law remedy. The Suits in Admiralty Act[105] states that remedies provided by that Act with respect to vessels or cargoes owned, operated or possessed by the federal govern-

100. *See* Singh, *"What Cannot Be Done Directly Cannot Be Done Indirectly": Its Meaning and Logical Status in Constitutionalism*, 29 Modern L. Rev. 273 (1966).

101. *See* Ballard v. Moore-McCormack Lines, Inc., 285 F. Supp. 290 (S.D.N.Y. 1968); Doughty v. Nebel Towing Co., 270 F. Supp. 957 (E.D. La. 1967). These courts indicate that this policy is still viable today.

102. 28 U.S.C. § 1498(a) (1964):

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof . . . , the owner's remedy shall be by action against the United States . . . for the recovery of his reasonable and entire compensation for such use and manufacture.

This has been construed to provide an exclusive remedy. *See* Stelma, Inc. v. Bridge Electronics Co., 300 F.2d 761 (3d Cir. 1962); Dearborn Chemical Co. v. Arvey Corp., 114 F. Supp. 369 (N.D. Ill. 1953).

103. Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928). *See* Yearsley v. Ross Const. Co., 309 U.S. 18 (1940); Hurley v. Kincaid, 285 U.S. 95 (1932).

104. 35 U.S.C. § 281 (1964): "A patentee shall have remedy by civil action for infringement of his patent."

105. 46 U.S.C. § 745 (1964):

> [W]here a remedy is provided . . . [under the Suits in Admiralty Act], 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.

ment shall be exclusive of any other action against the employee whose act or omission gives rise to the claim. While no court has directly concerned itself with the constitutionality of this provision,[106] the question again differs from that presented by the Government Drivers Law. The remedy replaced by the Suits in Admiralty Act is recognized only under the law of admiralty;[107] it is not considered a part of the common law.[108] The uniqueness of the Government Drivers Law, therefore, gives courts little, if any, precedent upon which to rely in dealing with the questions of constitutionality presented by the exclusive remedy.

IV. PROBLEMS OF BASIC FAIRNESS

The Government Drivers Law not only provides victims with an exclusive remedy against the Government, but implicitly allows the defendant Government rather than the plaintiff to dictate the means by which suit may be brought.[109] This aspect of the exclusive remedy not only may be determinative of its constitutionality[110] but presents some serious problems relating to the basic fairness of the Law.

A. Administrative Settlement of Claims

A 1966 amendment to the Tort Claims Act requires that all tort claims be presented to the appropriate federal agency for settlement before suit may be instituted,[111] and if denied, the claimant may not sue for an amount in excess of the amount of the claim presented.[112] For some victims these provisions for

106. *See* Tebbs v. Baker-Whitely Towing Co., 227 F. Supp. 656, 658 (D. Md. 1964), where an action against a United States Marshal was dismissed on the basis of this provision.

107. The federal courts have exclusive jurisdiction over cases in admiralty. U.S. Const. art. III, § 2, cl. 1.

108. Like the prior patent infringement remedy, the Suits in Admiralty Act does not provide for a trial by jury. W. Prosser, Law of Torts 445 (3d ed. 1964).

109. *See* text accompanying note 58 *supra.*

110. *See* text accompanying note 87 *supra.*

111. 28 U.S.C. § 2675(a) (1964), *as amended,* (Supp. III, 1968). *See* text accompanying note 30 *supra.* Prior to the amendment, courts had construed the section to mean that the claimant was not initially required to submit his claim for administrative settlement. *See* Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966); Schlingman v. United States, 229 F. Supp. 454 (S.D. Cal. 1963).

112. An exception is made where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim. 28 U.S.C. § 2675(b) (Supp. III, 1968). *See* note 32 *supra.*

administrative settlement will provide an efficient and equitable procedure, but for others they may easily result in a cumbersome, time-consuming and costly experience, since the Government's liability is limited by the amount of the administrative claim. Therefore, by refusing to pay the claim and going to court, the Government has nothing to lose and much, if not all, to gain. It is difficult to see how this procedure gives victims the bargaining power they have when settling claims under threat of bringing suit for a greater amount.

B. Time Limitation Upon Institution of Suit

The Tort Claims Act requires that if an agency denies the claim or proposes an unsatisfactory settlement, the claimant must bring any court action within six months.[113] If the victim presented his claim immediately after the accident involving the government driver, a prompt denial by the appropriate agency would bar victims in just over six months rather than the usual time of two or three years under most state statutes of limitation.[114] Courts have held that actions not timely brought under the Tort Claims Act are not only dismissed with respect to the Government but also with respect to the government driver since otherwise the victim's remedy would not be exclusive as required.[115] Apart from considerations of the desirability of a short or long time limit, many victims of accidents with government drivers or their attorneys are undoubtedly without notice of the special time limit imposed and consequently will be barred by relying on their state statute.[116]

C. Damages Allowed

The Tort Claims Act specifically disallows recovery of punitive damages by the victim,[117] whereas most states permit the

113. 28 U.S.C. § 2401(b) (Supp. III, 1968). *See* text accompanying note 35 *supra.*

114. *See, e.g.*, Ill. Ann. Stat. ch. 83, § 15 (Smith-Hurd 1966) (two years); Mich. Comp. Laws § 600.5805(7) (1968) (three years); Minn. Stat. § 541.07 (1967) (two years); N.Y. Civ. Prac. § 214 (McKinney 1963) (three years). The same problem is likely to exist with respect to shorter periods. *See, e.g.*, Cal. Civ. Pro. § 340 (West 1954) (one year).

115. *See* Reynaud v. United States, 259 F. Supp. 945 (W.D. Mo. 1966); Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y. 1965); Fancher v. Baker, 240 Ark. 288, 399 S.W.2d 280 (1966).

116. *See* the dissenting opinion in Fancher v. Baker, 240 Ark. 288, 399 S.W.2d 280 (1966), claiming that the Government Drivers Law is unconstitutional on the ground that Congress was forbidden from shortening the state statute of limitations.

117. 28 U.S.C. § 2674 (1964). *See* text accompanying note 37 *supra.*

award of such damages where warranted by the circumstances.[118] Willful or wanton misconduct such as drunken driving[119] is generally required by the states, but this type of conduct is clearly within the purview of the exclusive remedy.[120] In addition, the victim of an accident with a government driver is deprived of all interest prior to judgment, regardless of state laws providing for the running of interest from the commencement of the action.[121] The court in *Jenkins*, however, suggested that the victim may have a constitutional right to the recovery of these damages.[122]

The requirement that the suit be tried without a jury is likely to further diminish the amount recovered by victims and may even affect their chances of recovery at all. Statistics from a recent survey[123] suggest that the victim forced to bring suit under the Tort Claims Act should expect at least 25 percent less in damages and an eight percent decrease in his chance of any recovery at all because of his inability to proceed against the Government in a jury trial. The victim can also expect 10 percent less in damages because of his inability to go against the driver individually.[124] Apart from the question of what recovery of damages is most appropriate, the disparity exists merely because the victim was unfortunate enough to be involved in an accident with a government driver.

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118. W. PROSSER, *supra* note 108, at 9. *See* C. MCCORMICK, DAMAGES § 278 (1935); Note, *Exemplary Damages In the Law of Torts*, 70 HARV. L. REV. 517 (1957).

119. *See* Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954), where the court held that actual malice is not necessary to allow punitive damages for drunken driving.

120. For coverage by the Tort Claims Act, see text accompanying note 25 *supra*. Such conduct is also clearly within the "scope of employment," under the Government Drivers Law. *See* note 43 *supra*; W. PROSSER, *supra* note 108, at 476.

121. 28 U.S.C. § 2411(b) (1964). *See* text accompanying note 36 *supra*.

122. Docket No. 68-666-Civ-EC (S.D. Fla., filed Aug. 15, 1968):

> Thus, plaintiff's common law right to sue the active tortfeasor is completely abridged by section 2679. Further, any right the plaintiff may have to recover punitive damages or interest before judgment is removed by the operation of this statute.

123. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 750 (1959).

124. *Id.* Statistics show, however, that on the question of finding liability with respect to the individual defendant, judges and juries find for the victim in nearly the same percentage of cases. *Id.*

D. FELLOW EMPLOYEES AS VICTIMS

When the victim of the accident caused by a government driver is a fellow employee of the Government, the exclusive remedy against the Government provided by the Government Drivers Law has even further reaching implications. Under the Federal Employees Compensation Act,[125] the compensation benefits provided to federal employees are exclusive and in place of all other liability of the Government including liability under the Tort Claims Act.[126] Courts have allowed victims to bring suit against fellow employee tortfeasors who are not government drivers.[127] On the other hand, the federal employee who is a victim in an accident *with a government driver* has been held to be entitled *exclusively* to benefits under the Federal Employees Compensation Act and may not bring suit either against the driver or the federal government.[128]

While the Compensation Act provides a comprehensive schedule of payments for various types of disabling injuries and for death, its payments are based on wage-earning capacity and do not provide for many elements of damages which might be included in a judicial award.[129] For example, the Compensation Act makes no provision for pain, suffering, nondisabling disfigurement, loss of services or loss of companionship.[130] Thus the

125. 5 U.S.C. § 757(b) (1964). *See* S. REP. No. 836, 81st Cong., 1st Sess., 23, 30 (1949); H.R. REP. No. 729, 81st Cong., 1st Sess., 14-15 (1949).

126. *See* Posegate v. United States, 288 F.2d 11, 14 (9th Cir.), *cert. denied*, 368 U.S. 832 (1961); Johansen v. United States, 343 U.S. 427, 435-37 (1952). This exclusivity provision, however, has a different basis than that in the Government Drivers Law since in the former, the employee is in essence contracting out of his right to sue by working for the federal government. Private citizens, on the other hand, are not parties to such a contract.

127. *See* Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962). However, the Government is entitled to reimbursement for the amount recovered by the victim-employee. 5 U.S.C. § 8173 (1964), *as amended*, (Supp. III, 1968).

128. *See* Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967); Noga v. United States, 272 F. Supp. 51 (N.D. Cal. 1967). *But see* Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky. 1967), where the court declared the language too ambiguous to find that Congress had intended such an inroad upon the claimant's rights. For a comprehensive discussion, see L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 154.02 (3) (1967).

129. *See* L. JAYSON, *supra* note 128, at § 154.02(5).

130. *See* various provisions of the Compensation Act, 5 U.S.C. § 751 *et seq.* (1965). *See also* Posegate v. United States, 288 F.2d 11 (9th Cir.), *cert. denied*, 368 U.S. 832 (1961) (injuries resulted in impotency, which is not compensable under Compensation Act, but Tort Claims suit was dismissed); Thol v. United States, 218 F.2d 12 (9th Cir. 1954) (same result in suit for loss of comfort and society).

injured fellow employee of the government driver has no judicial recourse and is all but at the mercy of the Government.[131]

E. Depletion of Government Resources

The major impact of the exclusive remedy of the Government Drivers Law is undeniably upon the victim, but an often unrecognized burden is also placed upon the federal government and ultimately, of course, upon the taxpayers.

While at common law vicarious liability provides victims with a remedy against the tortfeasor's superior, the superior has a right to subrogation against the tortfeasor himself.[132] The federal government, however, has been held not to have this right to subrogation against the driver,[133] thereby affording the driver absolute immunity with respect to both the victim and the Government.

The Government has a responsibility not only to protect its drivers from financial burdens but a fiduciary responsibility to all taxpayers not to unduly deplete government resources. Thus, it is questionable whether the taxpayers, rather than the government driver, should bear the financial burden of the proximate consequences of all nonintentional acts committed by the driver, including conduct such as drunken driving.[134]

V. PROPOSALS

Any proposal to change the present law must necessarily be aimed at accommodating to the fullest extent the interests of all the parties involved—the government driver, the federal government, the victim and the taxpaying public. Since the purpose of a civil tort action is to compensate the victim for damages suffered,[135] the interest of the victim who is involved in an ac-

131. One commentator has called this interaction of the Tort Claims Act and the Employee Compensation Act unconstitutional under the *Richmond* rationale. *See* Thornock, *Exclusive Remedy Provision of the Federal Employees' Compensation Act—Fact or Fiction?*, 42 Mil. L. Rev. 1 (1968).

132. *See, e.g.*, Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 328 (1896). For a general discussion of vicarious liability, see W. Prosser, *supra* note 108, at 470.

133. *See* United States v. Gilman, 347 U.S. 507 (1954). Where the Government recovers from the driver's insurer, the action is based on the inclusion of the government as an insured under the terms of the insurance contract. *Id. See also* Taggert v. United States, 262 F. Supp. 572 (M.D. Pa. 1967).

134. *See* text accompanying note 120 *supra*.

135. W. Prosser, *supra* note 108, at 7.

cident with a government driver must be of primary importance.

Most of the inequities in the present law can be traced to the impact of the exclusivity requirement upon procedures of the Tort Claims Act—originally designed to be used as an alternative remedy. Modifying these procedures for claims required to be exclusively brought under the Act would likely provide the victim of an accident caused by a government driver with a remedy more closely approaching the remedy afforded other accident victims. For example, eliminating the requirement of a mandatory administrative presentation of the claim in favor of optional procedures for such a settlement would not only avoid costly and time consuming formalities for some victims, but would avoid placing a ceiling on the amount for which these victims could later bring suit. Likewise, the enactment of legislation allowing a jury on request would not unduly burden federal courts and would more equitably resolve the issue of damages.

Obviously, the constitutional questions presented by the exclusive remedy can best be avoided by repealing the Government Drivers Law, thereby assuring the victim of his usual choice of defendants. By itself, however, this would expose the government driver to either the financial burden of carrying liability insurance or personal liability if he is the victim's choice of defendants. Furthermore, if the victim chose to sue the Government, he would be faced with the same procedures as now exist under the Tort Claims Act.

The most equitable solution might be to enact legislation which places the federal government in a capacity similar to that of an insurer. To avoid prejudice in state courts, actions could still be required to be brought in a federal court but victims could be provided an optional advisory jury and other procedures closely reflecting procedures in other personal injury suits. Since the Government would be liable only within the terms of its "insurance contract," government drivers would be deterred from acting with such disregard of others that they could be held personally liable. Moreover, the Government would not be liable for willful or wanton misconduct and thus, the allocation of damages would result in the taxpaying public carrying no more than its fair share of the burden.

VI. CONCLUSIONS

The outdated doctrine of sovereign immunity has commendably been replaced by governmental responsibility for torts com-

mitted by federal government employees while acting within the scope of their employment. Nevertheless, the present law's *exclusive* remedy for damages resulting from the negligent operation of motor vehicles by government drivers balances on the edge of unconstitutionality under the fifth and seventh amendments. Furthermore, the law seems to favor unduly the Government and its drivers. Recovery in some cases by the United States against the driver's liability insurer suggests that the intended purpose of the present law—to relieve drivers of the financial burden of carrying their own liability insurance—has not been fulfilled. A victim involved in an accident with a government driver must proceed according to the defendant Government's procedures and even then is unlikely to receive compensation comparable to that of the victim in ordinary personal injury actions. Likewise, little consideration is given to the possible encouragement of irresponsible conduct on the part of government drivers and the unfair allocation of damages upon the taxpaying public.

The most equitable resolution of the conflicting interests would seem to be legislation making the federal government an insurer of its drivers. The crucial factor requiring a "fair" remedy is the necessarily close contact of government drivers with the activities of most private citizens. This demands that the citizen involved in an accident with a driver who happens to be a government employee be compensated to the same extent as other accident victims.