The Federal Medical Care Recovery Act: A Case Study in the Creation of Federal Common Law

Joseph C. Long

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Common Law Commons, Conflict of Laws Commons, and the Legislation Commons

Recommended Citation

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE FEDERAL MEDICAL CARE RECOVERY ACT:
A CASE STUDY IN THE CREATION OF
FEDERAL COMMON LAW

JOSEPH C. LONG†

In 1962, Congress passed the Federal Medical Care Recovery Act.1
The Act was passed in response to a report of the Comptroller General2 indicating that the federal government was spending large sums annually for the treatment of military personnel, their dependents, civilian employees, and other persons entitled to medical treatment at government expense3 for injuries suffered as a result of the tortious conduct of a third party.4 The report concluded that in many cases there was no statutory authority for recovery of these costs and that no attempt was being made to recover them.5 As a result of this hiatus the tortfeasor or the injured party received a windfall at the Government’s expense.6

† Associate Professor, University of Oklahoma College of Law. A.B., University of Missouri, 1961, J.D., 1963; LL.M., University of Virginia, 1972. Member, Missouri and Illinois Bars.
2. COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF THE GOVERNMENT’S RIGHTS AND PRACTICES CONCERNING RECOVERY OF THE COST OF HOSPITALIZATION AND MEDICAL SERVICES IN NEGLIGENT THIRD PARTY CASES (1960) [hereinafter cited as COMPTROLLER GENERAL’S REPORT].
4. The Comptroller General’s report indicates that between January 1957 and June 1959, the Department of Defense spent $10.5 million per year for the treatment of military personnel (excluding dependents) for injuries received in accidents involving private vehicles. In 40 per cent of these accidents, resulting in care amounting to $4.2 million, the military personnel were either passengers or pedestrians. COMPTROLLER GENERAL’S REPORT, supra note 2, at 4.
5. There were two notable exceptions. Both the Veterans Administration and the Bureau of Employees’ Compensation, Department of Labor, had recovery programs of long standing. See text accompanying notes 31–36 infra.
6. Whether the tortfeasor or the injured party would receive the windfall depended upon whether the injured party could recover medical costs which he had not incurred. If the jurisdiction recognized the collateral source rule, then he could recover; if not, then the windfall went to the tortfeasor. See Annot., 7 A.L.R.3d 516 (1966) (listing states recognizing the collateral source rule).
The Recovery Act (the Act) as finally enacted7 provides that the federal government shall have the right to recover from tortfeasors the cost of medical care furnished tort victims by it or at its expense,8 if the third party is liable to respond in damages to the injured party.9 Unfortunately, the statute is far from being all inclusive; it is poorly drafted, and ambiguous in a number of respects.10 As a result, the courts have been left with the rather bewildering task of interpreting the statute and creating "interstitial" federal common law to fill the gaps left by the legislation. Clearly the federal courts, as a result of

7. Congress at the time also considered three other bills. H.R. 4815, S. 1019 & H.R. 298, 87th Cong., 1st Sess. (1961). The bill as originally introduced underwent extensive modification by the House Committee on the Judiciary prior to its enactment. Both the House and the Senate published reports on the version of the bill as finally passed. See H.R. Rep. No. 1534, 87th Cong., 2d Sess. (1962); S. Rep. No. 1945, 87th Cong., 2d Sess. (1962). Both reports appended comments of the various agencies affected by the legislation. However, these comments must be viewed with great care since the majority of them were based upon the original draft bill before it was amended to give the Government an independent right of recovery as well as the subrogated right provided in the original bill.

8. One of the major unanswered questions under the Recovery Act is its application to payments made under the Medicare Act, 42 U.S.C. §§ 1395 et seq. (1970), where the Government is forced to pay for care to a medicare recipient and injury was the result of a tortious act of a third party. The scant authority available seems to answer in the negative. The General Counsel, Bureau of Health Insurance, Social Security Administration, has often taken this position. See, e.g., Op. Gen. Coun., Bur. of Health Insurance Jan. 16, 1968, cited in The Defense Research Institute, Inc., Subrogation Rights Under Medicare; 11 For the Defense 44 (1970). The General Counsel bases his conclusion on an interpretation that the Recovery Act applies only where the Government furnishes the care, not where it simply pays for it. This position was also adopted in the only reported case to consider the issue. Our Lady of Mercy Hosp. v. McIntosh, 461 S.W.2d 377, 379 (Ky. 1970). In McIntosh, the court allowed the injured recipient to recover his medical costs under the collateral source rule over the defendant's objection that the Government, not the plaintiff, had a right to recover these costs under the Recovery Act. Cf. Imvris v. Michigan Millers Mut. Ins. Co., 39 Mich. App. 406, 198 N.W.2d 36 (1972).

The language of the Recovery Act does read in terms of furnishing care, yet it is questionable whether its application ought to be limited to those cases where care is physically furnished in a government hospital. While to the author's knowledge this question has never been litigated, it is clear that the Government has recovered in many cases where the treatment has been rendered to military personnel and dependents by civilian institutions, and the Government has paid the bills. See, e.g., United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967). Likewise, it would seem that the Government should be able to recover where the military member pays for the care initially, and the Government reimburses him and then seeks to recover its costs. Cf. American Indemnity Co. v. Olesijuk, 533 S.W.2d 71 (Tex. Civ. App. 1962); Smith v. United Servs. Auto. Ass'n, 52 Wis. 2d 672, 190 N.W.2d 873 (1971). It is submitted that it should not matter whether the obligation on behalf of the Government to pay for the care arises under the Military and Dependents Medical Care Act, 10 U.S.C. §§ 1071-87 (Supp. I, 1971), or the Medicare Act, 42 U.S.C. §§ 1395 et seq. (1970), and that the word "furnished" in the Recovery Act should be interpreted to cover all situations where the United States bears the financial burden of paying for the care.


10. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 532-34 (1954), argues that such poor drafting of legislation is another reason why Congress should not be given the responsibility of making this type of law in the first place. He persuasively argues that the nuts and bolts type of tort law should be developed under federal common law, without the need for enabling powers from Congress.
the *Lincoln Mills* doctrine,¹¹ have the power to create this body of
law, and the Act represents a prime example of — to paraphrase
Judge Friendly — Congress transferring part of its load to the federal
judges.¹²

The first reported case under the Act was decided in 1965.¹³ Since
that time some fifty other cases have been decided. Because of
the poor draftsmanship, the meager guidelines articulated and the
manageable number of actions brought pursuant to the Act, this area
affords an ideal vehicle for the study of the process surrounding the
creation of federal common law. First, this Article will examine the
general rules established by the Supreme Court governing the creation
of federal common law or federal rules of decision. Next, it will
attempt to establish the congressional intent behind the passage of the
Recovery Act. Since the Act was not passed in a vacuum, but was
enacted against a background of earlier attempts at governmental re-
covery, this Article will also briefly present this history and then will
examine in detail the cases decided under the Act to ascertain how
the courts have fared in their task of interpreting the Act and creating
“interstitial” federal common law. Since some of the decisions are
inconsistent and contradictory, the Article will suggest areas where the
present decisions are not responsive to either the guidelines for federal
rules of decision laid down by the Supreme Court, or to the congres-
sional policy behind the Recovery Act. Finally, the Article will present
a series of internally consistent rules which, hopefully, are in harmony
with the congressional purpose and the guidelines of the Supreme Court.
The starting point for this study would seem to be to relate briefly the
history of governmental recovery and the rules governing the
creation of federal common law.

I. History of Governmental Recovery

Recovery of medical costs for treatment of injured government
workers is not unique to the federal government. It has been a source
of concern and litigation by governmental units, both national and
local, world-wide, since before 1920.¹⁴ A study of these various attempts

for the proposition that federal courts can create federal common law only in those
areas where Congress has authorized it. For a full discussion of the doctrine, see

¹². Friendly, supra note 11, at 419.


¹⁴. The first case, in 1916, involved an attempt to recover the costs of death
benefits paid to a serviceman’s survivors. *Admiralty Comm’rs v. The S.S. *Amerika*,
[1917] A.C. 38 (1916). This was followed by *Bradford Corp. v. Webster*, [1920]
2 K.B. 135, involving recovery for loss of the services of an injured policeman.
reveals that there are four separate theories which have been used to justify governmental recovery. Three of the theories — assignment, unjust enrichment or quasi-contract, and equitable subrogation — are derivative actions based in equity. The fourth, action per quod servitium amissit, is a direct action based in law.

Two problems have generally faced governmental units in their attempts to take advantage of any of the derivative rights of recovery. First, the law has been loathe to grant recovery to a volunteer, regardless of how meritorious his position might be. This, however, should pose no great problem to recovery by the federal government since it does not provide medical care except where required to do so by statute. Therefore, the Government should not be treated as a volunteer, but as one acting under statutory compulsion.


18. The action per quod servitium amissit is an ancient cause of action having been traced back to a case decided in 1293. Jones, Per Quod Servitium Amisit, 74 Law Q. Rev. 39, 40 n.6 (1958), citing Y.B. 21 Edw. I (Rolls Series, at 119) (1293). In Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 663 (1923), the author attempts to trace the beginning of the tort back to the right of the pater-familias to bring actio iniuriam for violence or insult to members of his extended household under Roman law.

19. See, e.g., United States ex rel. Continental Nat'l Bank & Trust Co. v. Western Contracting Corp., 341 F.2d 383, 388 (8th Cir. 1965); Parramore v. Williams, 215 Ga. 179, 122, 109 S.E.2d 745, 749 (1959). While this failure to recognize the claim of the volunteer has been criticized as one of the greatest flaws of all modern civilized legal systems (Shalgi, supra note 17, at 43), there appears little chance that the courts will make any substantial change in this area. But see Grosse, Moral Obligation as Consideration in Contracts, 17 Vill. L. Rev. 1 (1971).

20. Where the Government has the discretionary right to grant or withhold treatment, it would seem to be acting as a mere volunteer. See Loman v. Harrelson, 437 S.W.2d 123, 126-27 (Mo. App. 1968); City of Youngstown v. Cities Service Oil Co.,
February 1973]  

FEDERAL MEDICAL CARE 357

Secondly, since its rights are derivative, the government's right of recovery stands or falls on the right of the injured party to recover these costs from the tortfeasor initially.21 This problem presents no obstacle in jurisdictions where the courts recognize the collateral source rule allowing a victim to recover such expenses.22 Unfortunately, in those jurisdictions that do not recognize the collateral source rule, the courts have taken a narrow legalistic position in regard to the injured party's right to recover for the care furnished by the government. In England, for example, the Court of Appeal, in Receiver for the Metropolitan Police District v. Croydon Corp.,23 held that an injured policeman had no obligation to pay for the care furnished by the Receiver and therefore had not "in incurred" any loss.24 Since he had suffered no loss, the court reasoned, he could not recover these costs from the tortfeasor, as the tortfeasor's only obligation was to bear the losses incurred by the injured party.

This reasoning has been characterized as being a "verbal" argument which should not prevent the courts from reaching the real merits of the problem.25 While the argument may be logically sound, there is no question that it leads to a wooden, artificial result. Clearly, a very real monetary "loss" has been suffered in these cases. Whether suffered by the injured party or someone acting on his behalf, is irrelevant.26

The fourth theory, per quod servitium amisit, avoids these problems and attacks the question of recovery directly. Instead of allowing a right of recovery which derives from the injured party, it recognizes


21. Thus the right of recovery would be affected by the contributory negligence of, or assumption of risk by, the injured party, as well as by any immunity between the tortfeasor and the injured party, such as host-guest, interspousal, or parent-child. See notes 143-95 and accompanying text infra.

22. See Annot., supra note 6. In a number of cases decided prior to the Recovery Act, the injured servicemember or veteran had been allowed to recover for care furnished by the Government. See, e.g., Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954); Gillis v. Farmers Union Oil Co., 186 F. Supp. 331, 338 (D.N.D. 1960).


26. The fallacy of this line of reasoning is pointed up by the fact that it has been held that the serviceman "incur" these costs when he is originally billed for them, even though later they are paid by the Government, or when he pays them and is reimbursed by the Government. See American Indem. Co. v. Olesijuk, 353 S.W.2d 71 (Tex. Civ. App. 1962); Smith v. United Servs. Auto Ass'n, 52 Wis. 2d 672, 190 N.W.2d 873 (1971).
that injury to one individual may also cause injury or loss to others, and that this secondary loss should be recompensed directly, as is the loss of the injured party.

Unfortunately, this concept of recovery runs contrary to two well-defined trends in tort law which have developed in the last hundred years. First, the law has been reluctant to recognize an extended damage concept; and second, it has been even more reluctant to allow recovery for economic, as opposed to personal injury, damages.27 Furthermore, for economic reasons the tort of per quod practically disappeared during the nineteenth century,28 when governments began to seek recovery under per quod in the early part of the twentieth century, most courts considered the tort an anomaly and either abolished it or severely restricted its application. As a result, in a series of extremely technical, ill-reasoned opinions, the courts of every common law country, except Canada,29 eventually denied the government’s right to recovery under per quod.30

Attempts at recovery by our federal government generally paralleled developments in the rest of the world. The first attempt at recovery was the inclusion of a statutory subrogation-assignment provision in

27. Probably the classic American case denying economic damages incurred by a person other than the injured party is Stevenson v. East Ohio Gas Co., 73 N.E.2d 200, 203-04 (Ohio App. 1946), wherein the court denied an employee the right to recover for his loss of continued employment as a result of the gas company negligently destroying the manufacturing plant where he was employed, throwing him out of work.

28. The tort of per quod has never been a large source of litigation. Seevey, Liability to Master for Negligent Harm to Servant, 1956 Wash. U.L.Q. 309, 311. Apparently, less than twenty cases have considered the tort in the entire history of American jurisprudence. Annot., 57 A.L.R.2d 802 (1957). But this trickle almost completely ceased in the nineteenth century when labor was plentiful and the obligation of the employer to care for the employee injured in the scope of his employment had not yet been imposed. As a result, when an employee was injured through someone else’s negligence, the employer simply replaced the injured worker from the willing pool and did not have to resort to suit for damages. See Fleming, supra note 15, at 1485; Note, Federal Common Law in Governmental Action for Tort, 41 Ill. L. Rev. 551, 558 (1946).


the Federal Employee's Compensation Act of 1916.\textsuperscript{31} Similar provisions were later included in the Longshoremen's and Harbor Workers' Compensation Act\textsuperscript{32} and the Railroad Unemployment Insurance Act.\textsuperscript{33}

In the late 1930s, the Veterans Administration (V.A.) instituted a program to recover the costs of treating injured veterans for non-service connected injuries, based upon an administrative regulation requiring, as a condition for receiving care at V.A. facilities, that the veteran assign to it any rights he might have to recover the costs of his treatment.\textsuperscript{34} Direct statutory authority for this regulation is at best questionable.\textsuperscript{35} The program remains in effect as an alternative to the Recovery Act.\textsuperscript{36}

The last of the pre-Recovery Act programs, and probably the closest lineal ancestor to it, was the Army recovery program of World War II.\textsuperscript{37} In 1943, the War Department, without fanfare or explanation, amended an existing Army regulation providing for the administrative collection of damages for injury to government property to include collection for injury to Army personnel.\textsuperscript{38} The original amendment

\textsuperscript{31} 5 U.S.C. § 8131 (1970). Although the heading of the section refers to subrogation, the text actually provides that the injured employee may be required to assign his claim.


\textsuperscript{33} 45 U.S.C. §§ 351–53 (1970). The money collected under these sections did not go into the general treasury, but instead was returned to the special fund created by Congress to provide the benefits granted under the acts. In the case of money recovered under the Recovery Act, the funds are credited to the medical care account of the agency furnishing the care. Each year, Congress reduces the medical appropriation for each agency from the amount requested in its budget by the estimated collections by the agency under the Recovery Act. All administrative costs for collection are borne by the agencies out of their regular appropriations and are not deducted from the amounts collected. See 45 Off. The Record 10 (1970).

\textsuperscript{34} 38 C.F.R. § 17.48(d) (2) (Supp. 1972). This assignment provision appears to be an implementation of section 17.62(a) which provides that charges will be made for services rendered where it is later established that the person is not eligible for such care. Id. § 17.62(a).

\textsuperscript{35} The legal basis for the programs was challenged in dicta in United States v. St. Paul Mercury Indem. Co., 238 F.2d 594, 598 (8th Cir. 1956). The Administrator buttressed his regulation upon his general supervisory power, 38 U.S.C. §§ 210(c), 621 (1970), and upon the fact that veterans are not entitled to treatment for non-service connected injuries, if they are financially able to pay for such care. Id. § 610(a)(1)(B).


\textsuperscript{37} See Comment, Federal Practice: The Rebirth of Federal Law, 34 Cornell L.Q. 110, 113 (1948), in which it was claimed that tort recovery in injured government workers was a settled policy under \textit{per quod servitium} prior to the Army program, citing Op. Sol. Post Office 590 (1926). This opinion advises that the Post Office might recover the costs of hiring a substitute mailman to replace one injured by a tortfeasor. This author's research has revealed no other reported attempts by government agencies to recover medical costs, except for the plans previously described.

\textsuperscript{38} Army Reg. 25–220 (May 13, 1943). The administrative procedure under this regulation was very similar to the present practice under the Recovery Act. The regulation provided, in addition to recovery for medical expenses, that the Government could recover the cost of transporting the injured serviceman, as well as his pay and allowances during the period of his disability. These items are not recoverable under the Recovery Act.
ment to the regulation cites no authority to support the War Department's right to make these collections. However, subsequent litigation challenging the program made clear that the Government was attempting to base its recovery on *per quod servitium amisit.*

It took slightly less than two years for the first test case, *United States v. Standard Oil Co.*, to reach the courts. In *Standard Oil*, one of the oil company's truck struck and injured an Army private as he was attempting to cross the street in a clearly marked crosswalk. As a result, the private was hospitalized and unable to perform his military duties. Although the negligence of the truck driver was rather clear, the company obtained a release from the private. Subsequently, the Government made a demand upon the oil company for the medical care it had furnished and for the private's pay while he was disabled. When *Standard Oil* refused to pay, suit was initiated.

In by far the most scholarly opinion in this series of cases, Judge Yankwich upheld the Government's right to recover. He disagreed with the contention that the private stood in a master-servant relationship with the United States; instead, he concluded that military service created a status similar to the French concept of *institution*.


40. 60 F. Supp. 807 (S.D. Cal. 1945).

41. *Id.* at 808.

42. The release was in standard form releasing the driver and Standard Oil from *all claims* arising out of the accident. Payment was in a lump sum, and there was no specific language dealing with hospital or medical expenses. *Id.* at 813.

43. *Id.* at 809.

44. This case was an extremely poor choice for a test case. The release clearly prevented the Government from attempting to support its recovery on its derivative claim. Further, the release put the Government in the unenviable position of asking the court to require Standard Oil, at least technically, to pay for the same items of damages twice. Finally, as will be seen in the discussion of the appeal, California has a statute which incorporates the cause of action *per quod servitium amisit*. Therefore, the outcome of this case would not be authority for recovery in other states not having the statute, unless the right of recovery can be based upon federal common law created independently of state law.

45. Similar holdings have been the basis for the rejection of governmental claims in most countries. Soldiers and policemen, for technical reasons, are held not to be servants. See Attorney-Gen. (N.S.W.) v. Perpetual Trustee Co., [1955] A.C. 457 (P.C.), *aff'd* 85 Commw. L.R. 217 (H.C. 1952) (police); Commonwealth v. Quince, 68 Commw. L.R. 227 (H.C. 1944) (military personnel). Judge Yankwich felt that, for the purposes of *per quod servitium amisit*, the master-servant relationship should be determined by the medieval standards when the tort first developed. Clearly, by the modern control standard, the private is a servant. Further, the Government could argue with great authority that the government-soldier relationship is in many ways the closest modern equivalent of the medieval master-servant relationship. See Fleming, *supra* note 15, at 1488.

46. *Institution* is a term coined by French jurists to characterize certain solidarities which lie at the basis of social action:

Such *institution* gives rise to droit institutionnel, a body of rights arising from the communality of the group . . ., in which each member exercises certain rights and has obligations not as an individual, but as a member of the *institution*, according to the position he occupies . . . .

60 F. Supp. at 811.
giving rise to certain rights and obligations. "These rights or obligations stem, not from the members as individuals . . . but from the basic fact which brought [the institution] into being." This buttressed his conclusion that:

[I]t is clear that both the soldier and the Government have certain rights and obligations arising from the [relationship or institution] and that a third party who, through his tortious act, interferes with it to the detriment of the Government, is responsible for the mischief he causes. . . . [T]he Government, which through the negligent act of a third party, is put to the expense of hospitalizing a soldier and loses his services during a period for which it is compelled to pay him his wages, has a claim cognizable in this court.

On appeal, the Ninth Circuit reversed. The court held that since the Government's claim was not based upon statute, its right to recover was no greater than any other private party in litigation, and was controlled by state, rather than federal, substantive law. The circuit court held that the matter was controlled by a California statute which allowed recovery for injury in the master-servant context, but agreed with the lower court that the government-soldier relationship was not one of master-servant.

The Government then appealed to the Supreme Court. Here again it made the mistake of arguing that the government-soldier relationship, while not a master-servant relationship, was similar, and that therefore per quod servitium amisit should be extended to cover it. Thus, rather than presenting a situation where it was asking the Court to extend an existing tort action to cover a different factual pattern, the Government was asking the Court to create a new tort or greatly

47. Id.
48. Id. at 810. Some ten months after the Yankwich decision, the issue was again raised in United States v. Atlantic Coast Lines R.R., 64 F. Supp. 289 (E.D.N.C. 1946). The Government's handling of this case was extremely inept. It did not distinguish between the torts of per quod servitium amisit and interference with contractual relations, engendering the subsequent confusion by the court. Further, taking the lead from Yankwich, it did not claim that the relationship between the injured serviceman and the Government was a master-servant relationship, but instead argued that it was analogous to that relationship. Finally, it did not dispute the court's characterization that the tort of per quod servitium was limited to menial servants. The result was predictable, the court refusing the Government's claim for recovery. Id. at 293.
49. 153 F.2d 958 (9th Cir. 1946).
50. This point is extremely important and one which has been much in dispute. The Ninth Circuit cited United States v. The Thekla, 266 U.S. 328, 339-40 (1924), to support its conclusion as to the applicability of state law.
51. CAL. CIV. CODE § 49 (West 1954). See id. § 2009. Under these sections, a movie actress was held to be a servant for the purpose of allowing the studio with which she was under contract to recover, if it could satisfactorily establish its damages. Darmour Prods. Corp. v. Herbert M. Baruch Corp., 135 Cal. App. 351, 27 P.2d 664 (Ct. App. 1933).
52. 332 U.S. 301 (1947).
broaden the scope of an old one. For reasons which will be considered in the next section, the majority of the Court was unwilling to do this. As a result of the adverse decision in Standard Oil the Army deleted the recovery provisions from its regulation in late 1942 and made no further attempt to recover these costs until after the passage of the Recovery Act.

II. HISTORY OF FEDERAL COMMON LAW AND RULES OF DECISION

Before Erie Railroad Co. v. Tompkins, the federal courts had developed a substantial body of federal common law separate and apart from state law. For this reason, it was not unusual for the federal district courts of a particular state to reach a result completely opposite to the local state courts. The Erie decision altered this approach, the Court holding that the federal courts would no longer be free to create a body of federal substantive law, but would be obligated to follow the substantive common law of the state wherein it sat.

In a series of cases beginning with Hinderlider v. La Plata Co., however, the Court made it clear that the Erie rule directly controlled only those cases involving jurisdiction based upon diversity of citizenship. The problem of delimiting those areas wherein federal common law was to take effect was ultimately left to the litigants to determine, a decision which they usually made on their own, with the knowledge that a federal court could not be compelled to apply its own substantive law. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 708 (1953); Hart, supra note 10, at 532–33; 26 Texas L. Rev. 333, 335 (1948).

53. Justice Jackson, in a strong, well-reasoned dissent, rejected the majority's arguments against acting as the moving force in the creation of tort law, and maintained that the Court should have created a new tort in view of its holding that federal rather than state substantive law should control. Id. at 318 (Jackson, J., dissenting). This restriction of the Court's role in the creation of law has been severely criticized by others. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 708 (1953); Hart, supra note 10, at 532–33; 26 Texas L. Rev. 333, 335 (1948).
55. 304 U.S. 64 (1938).
57. 304 U.S. 92 (1938).
58. Justice Rutledge summarized this conclusion in Standard Oil when he said: "The great object of the Erie case was to secure in the federal courts, in diversity cases, application of the same substantive law as would control if the suit were brought in the courts of the state where the federal courts sit." 332 U.S. at 307. Thus stated, the policy behind Erie is identified to be that there should be no difference between the substantive decision of a state court and the federal court where the suit is between private citizens and the jurisdiction of the federal court bas United States Circuit Courts of Appeals. See The Federalist, No. 80, at 588–90 (J. Hamilton ed. 1875) (A. Hamilton). So long as the local courts show no discrimination against the foreign plaintiff, there is no justification for different substantive conclusions by the federal and state courts within a particular state.

But this principle should not be limited to diversity suits; the same principle should also govern in other areas where private litigants have access to federal courts. Some courts have, in fact, concluded that Erie "applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." Maternity Sands, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956); See H. Hart & H. Wechsler, supra note 53, at 697; Friendly, supra note 11, at 408.
law would continue to exist was at least partially solved by Clearfield Trust Co. v. United States,\textsuperscript{69} in which the Court stated that whenever the federal government exercised one of its constitutional functions, any challenge to such an exercise presented a constitutional question to be resolved by federal, rather than state, law.\textsuperscript{60}

The impact of this decision was to free the federal courts from a constitutional imperative to apply state law in those areas involving the operation of the federal government. It did not mean that state law might not be held to be the controlling rule of law, but it did mean that the federal courts were not compelled to accept the state law rule. Instead, the federal courts were left free to fashion an appropriate rule from whatever source they chose, e.g., state common law, pre-Erie federal decisions, English common law, or scholarly writings. In Clearfield Trust itself, the Court rejected the prevailing state law rule in favor of the creation of a separate federal common law rule.\textsuperscript{61}

\textsuperscript{n.122. These authorities rely upon the language of Erie itself, 304 U.S. at 78, and the subsequent Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103 (1939).

This same principle may be applied to the Standard Oil situation. The United States, like any other citizen, has the right to protect its property under state law, and may seek a vindication of its rights by suit under state law in state courts. For a fine statement of this theory, see Justice Grier's opinion in Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850). When it does so, it is treated like any other private citizen. Lynch v. United States, 18 Okla. 142, 144, 73 P. 1095, 1096 (1903); United States v. Board of Fin. & Revenue, 369 Pa. 386, 399, 85 A.2d 156, 164 (1951). The result should be no different when it chooses to sue on the same right in its own courts, where that jurisdiction is based exclusively on the fact that the Government is the party-plaintiff. The Maternally Yours case suggests that state law should control. In this instance, the federal government is merely seeking to enforce its rights under state law in a federal court.

On the other hand, it should be clear that the federal government as sovereign has authority to establish rules for protection of its own property. This would seem to be a power inherent in the concept of sovereignty. The role of the federal courts, as opposed to Congress, in this area is the subject of dispute. However, when the federal courts have authority to act and create this body of federal law, the Erie principle suggests incorporation of state law as the guiding principle. It is submitted that this was what the Ninth Circuit meant when it cited Erie as authority for applying state law in Standard Oil.

59, 318 U.S. 363 (1943).

60. The problem with this line of reasoning is that it raises a constitutional question in every case involving the federal government's activities. The federal government, under the Constitution, is a government of specifically enumerated powers. Therefore, whenever it acts, it must act according to one of the powers granted by the Constitution or implied therefrom. See R. LEFLAR, AMERICAN CONFLICT OF LAWS § 67, at 156 (1968); Comment, Rules of Decision in Nondiversity Suits, 69 YALE L.J. 1428, 1443 (1960).

61. This decision and other cases where the Court has chosen to formulate special federal rules where government interests are involved has led to a tendency on the part of some writers to suggest that special rules should always govern when the federal government is a party to the litigation. See, e.g., Gorrell & Weed, Erie Railroad: Ten Years After, 9 Olin St. L.J. 276, 296 (1948); Comment, Erie Limited: The Confines of State Law in the Federal Courts, 40 CORNELL L.Q. 561, 569 (1955); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 HARV. L. REV. 1084, 1094 (1964).

On the other hand, there are those who argue that the creation of a special federal rule in Clearfield Trust was a mistake and that the state law rule should have been incorporated as the federal rule. Mishkin, The Variosness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797, 828-32 (1957). The Court itself seemed to back away from
It was against this background that the Standard Oil case reached the Supreme Court. Justice Rutledge, writing for the Court, first rejected the Ninth Circuit's application of Erie as the controlling principle in favor of the Clearfield Trust test. Turning then to the question of whether to incorporate state law as the federal rule of decision, he acknowledged that state law could be incorporated as the federal rule and outlined three instances where he felt that such incorporation was appropriate, namely: (1) cases involving title to real property purchased by the Government; (2) where Congress has consented to the application of state law by failing to provide a complete rule in an area of federal concern; or (3) where the state law furnished a convenient solution to the problem which was not inconsistent with the protection of federal interests.

Since the facts of Standard Oil indicated that neither of the first two of these situations existed, the application of state law depended upon the outcome of the third test. To determine whether state law furnished a convenient solution, Justice Rutledge offered the following factors for consideration: (1) the need to protect federal supremacy in the performance of federal functions; (2) the need for uniformity of decision throughout the country; and (3) the inference that Congress did not want long-settled ways of handling problems changed, if it were aware of the problem and had not acted.

Justice Rutledge then applied these considerations to the problem of governmental recovery and concluded that federal, not state, law would provide the more appropriate rule. First, he pointed out that the soldier-government relationship was distinctively and exclusively a creature of federal law.

[W]e know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such right, should vary in accordance with different rulings of the several

its Clearfield Trust holding in Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 32-34 (1956). Justice Douglas dissented in Parnell, arguing that the majority decision was inconsistent with Clearfield Trust, and that the Clearfield Trust doctrine should have been re-examined. Id. at 35. 62. 332 U.S. 301 (1947). 63. Id. at 305. 64. Id. at 308-09. 65. Id. at 310. 66. While the relationship is clearly based on federal law, the relationship is not unique to federal law. The state militia or national guard, when not in federal service, is governed by state law. See, e.g., Hays v. Illinois Terminal Transp. Co., 363 Ill. 397, 2 N.E.2d 309 (1936); Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97 (1939). Likewise, we have seen from the British Commonwealth cases that the relationship between firemen and policemen and the government presents basically the same problems. There is a body of state law concerning the rights of state and local governments to recover for injuries to members of these groups. See, e.g., City of Birmingham v. Crow, 257 Ala. 216, 101 So. 2d 264 (1958); Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940).
states, simply because the soldier marches or today perhaps as often flies across state lines.\textsuperscript{67}

Having concluded that it was more appropriate to fashion a separate rule of federal substantive law than to incorporate the existing state law as the rule of decision, Justice Rutledge then proceeded to dispose of the Standard Oil case on the amazing grounds that the federal courts under the constitutional tripartite division of power had no authority to create new bodies of federal common law or new common law remedies without authority from Congress.\textsuperscript{68} Thus, the Standard Oil case does not stand for the principle that there is no common law remedy of \textit{per quo}d in the United States,\textsuperscript{69} but rather that the federal courts are powerless to extend the remedy beyond its existing limits.\textsuperscript{70} Such protection would have to come by act of Congress.

III. Guidelines

Our next task is to outline the guidelines which will be used to evaluate the courts' efforts at statutory interpretation and creation of supplemental federal common law. Professor Mishkin was one of the first to attempt to develop some uniform guidelines that the federal courts might use in creating interstitial federal common law.\textsuperscript{71} He indicates that, as in the case of statutory construction, the first guide should be the congressional intent behind the statute.\textsuperscript{72} Often this, or the language of the statute itself, will indicate whether the federal courts should incorporate state law as the federal rule or set about creating a new body of independent federal decisions. Even where it is not conclusive of the issue, it will often give some indication which way the decision should go.

\textsuperscript{67} 332 U.S. at 310.


\textsuperscript{69} The case is often cited for this proposition. See, e.g., Snow v. West, 250 Ore. 114, 440 P.2d 864 (1968). To the contrary, Justice Rutledge indicated that such a right existed under state common law in the United States. 332 U.S. at 303-04 nn.4-6.

\textsuperscript{70} The Government conceded that the soldier-government relationship was not one of master and servant, but claimed that the remedy should be extended by analogy. 332 U.S. at 303 n.3.

\textsuperscript{71} Mishkin, \textit{ supra} note 61, at 811.

\textsuperscript{72} \textit{Id.}
However, there are other considerations which differ from those applicable to statutory interpretation, because in this area the question is whether to incorporate existing state law or to create a new rule of federal law. Thus, we must not only consider what rule would give us the best substantive result, but also what effect the imposition of a potentially different federal rule will have upon existing rights and duties under state law. Beyond this, Professor Mishkin suggests that we should consider the distribution of power between the national and state governments and the roles of the two judiciaries.\textsuperscript{73}

Two commentators have subsequently attempted to build on the beginning made by Professor Mishkin, and give more concrete formulations to these guidelines.\textsuperscript{74} They conclude, for example, that the starting point is the Rules of Decision Act,\textsuperscript{75} which provides:

The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.\textsuperscript{76}

This statute, they argue, creates a presumption that state law should be incorporated as the federal common law on any given subject.\textsuperscript{77} However, this presumption can be overcome and a federal rule created. Whether to override this presumption depends upon our conclusions on two basic issues: whether a federal rule is necessary to foster federal policies,\textsuperscript{78} or for the purpose of uniformity.\textsuperscript{79} These tests are essentially the same tests proposed by Justice Rutledge in \textit{Standard Oil}.\textsuperscript{80} However, Justice Rutledge did not accept the presumption of the application of state law nor did he attempt to develop these tests.

Both commentators, however, caution that there must be a distinction made between the situation where a federal policy is involved and where the United States is merely a party to the controversy.\textsuperscript{81} In addition, a distinction is suggested between the active, policy-

\begin{itemize}
\item \textsuperscript{73} \textit{Id.} at 812.
\item \textsuperscript{75} \textit{The Federal Common Law}, \textit{supra} note 74, at 1515; Comment, \textit{supra} note 60, at 1431.
\item \textsuperscript{76} 28 U.S.C. \textsection 1652 (1970).
\item \textsuperscript{77} \textit{The Federal Common Law}, \textit{supra} note 74, at 1517-31; Comment, \textit{supra} note 60, at 1432.
\item \textsuperscript{78} \textit{The Federal Common Law}, \textit{supra} note 74, at 1527-29.
\item \textsuperscript{79} \textit{Id.} at 1529-31.
\item \textsuperscript{80} 322 U.S. at 310.
\item \textsuperscript{81} \textit{The Federal Common Law}, \textit{supra} note 74, at 1528; Comment, \textit{supra} note 60, at 1442.
\end{itemize}
making functions of the federal government, and its housekeeping functions, such as the protection of its property.\textsuperscript{82}

Finally, they argue that there are two significant justifications for uniformity: (1) to insure uniform decision throughout the United States, and (2) to avoid inconvenience to the federal government in administering its various operations throughout the country.\textsuperscript{83} However, Professor Mishkin\textsuperscript{84} and the others\textsuperscript{85} agree that too much stress has been placed on uniformity, such that it has become an end in itself. As a practical matter, uniformity within the federal system is a virtual impossibility absent action by the Supreme Court, and the Court, apparently, has neither the time nor the inclination to police the lower federal courts to ensure the uniform application of federal common law. Further, uniformity may have disastrous effects upon the rights of private parties, who must readjust their rights under state law after the federal government has been satisfied.\textsuperscript{86}

IV. NATURE OF THE GOVERNMENT'S RIGHT

The first major question to arise under the Act, and one which goes to the very heart of the recovery program, is the nature of the Government's right under the statute. The insurance industry and many defense attorneys have steadfastly maintained that the right is merely one of statutory subrogation.\textsuperscript{87} The Government has persistently argued that its right is an independent statutory right, not based on subrogation. The reason for this dispute, as will become readily apparent in the succeeding sections of this Article, is the effect of certain actions of the insured, such as a release, upon the Government's right to recover, and the necessity for notice of the Government's interest.

It is apparent that the dispute in this area focuses upon the common law theory of liability upon which the Recovery Act is based — whether it was the intent of Congress to allow only subrogation, or to create an independent right upon a theory of \textit{per quod servitium amitis}. Neither approach is entirely satisfactory. The subrogation approach is based upon an analogy of governmental care to medical payments coverage or health insurance. Unfortunately, the right of these insurers to equitable

\begin{footnotes}
\item[82] Comment, \textit{supra} note 60, at 1443.
\item[83] \textit{The Federal Common Law}, \textit{supra} note 74, at 1530.
\item[84] Mishkin, \textit{supra} note 61, at 813.
\item[85] \textit{The Federal Common Law}, \textit{supra} note 74, at 1530; Comment, \textit{supra} note 60, at 1447.
\item[86] Mishkin, \textit{supra} note 61, at 831.
\end{footnotes}
subrogation has never been firmly established.88 Beyond this, it has been claimed that the Government is not entitled to equitable subrogation.89 Thus, it would have to be argued that the Government's right is based upon legal subrogation, with the Recovery Act supplying the necessary subrogation clause normally found in the private insurance contract.

The per quod servitium approach also has its defects. Per quod is not well-recognized or accepted in the United States,90 and has never been extended beyond the master-servant, or possibly the more modern employer-employee, relationship.91 Clearly, however, the Recovery Act is not limited to persons in this relationship with the Government. Instead, it applies whenever the Government is required to furnish care.92 The largest single group of recipients — military personnel — have almost universally been held, in similar actions in other countries, not to be in a master-servant relationship with the governments they serve.93 While these decisions seem to be incorrectly decided, they nevertheless must be considered. In England, it has been held that no public servant — whether civil servant,94 police officer,95 or military personnel — is a servant for the purposes of per quod. Thus, it is clear that Congress, in adopting the Recovery Act, did not simply incorporate into federal law an existing common law remedy.

The difficulty as to the nature of the Government's right arose because the bill as originally introduced provided:

... (a) in any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall be subrogated to any right or claim that the injured or diseased person . . . has against such third person . . .

90. See, e.g., supra note 28.
92. See note 8 supra.
A staff memorandum prepared by the Department of Health, Education, and Welfare\(^97\) criticized this subrogation approach on the basis that any rights the injured party might have would depend upon the applicability of the collateral source doctrine since the injured party would not have incurred or paid these expenses.\(^98\) Thus, under the bill as introduced, the right of the United States to recover would be denied in those states not recognizing the collateral source rule.\(^99\) The House Judiciary Committee recognized the merits of this criticism, but rather than rewriting the entire Act to reflect the inclusion of an independent right, and thereby eliminate any ambiguity as to its intent,\(^100\) it merely supplemented the provision to provide that "the United States shall have a right to recover from said third party the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated . . . .\(^{101}\) In its report, the Committee indicated the purpose for this change to have been:

[To make] clear that the United States is granted a distinct right to recover its costs and that this right is to be effectuated through a partial subrogation to any right which the injured party or diseased person may have to proceed against the negligent third party.\(^102\)

The bill as amended passed Congress without further revision.

There would seem to be five possible interpretations as to the effect of the amendment. First, it could be argued that the change was simply poorly drafted and that the language dealing with subrogation is merely a residue from the earlier draft and to be treated as a dead letter.\(^103\) Such an approach obviously violates the canon of statutory construction which provides that some meaning is to be assigned to every part of a statute, if at all possible. Second, it could be argued that the subrogation language merely indicates that the independent right of the United States is conditioned upon there being liability on the part of the third person to the injured party.\(^104\) Or, third, it could be argued, as the insurance industry would prefer,\(^105\) that the basic right is one of subrogation and is

\(^{99}\) See note 6 supra.
\(^{100}\) United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968), severely criticized Congress for this approach.
\(^{103}\) Cf. United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968), which suggests a similar reading for the six-month provision in 42 U.S.C. § 2651(b) (1970).
\(^{104}\) United States v. Fort Benning Rifle & Pistol Club, 387 F.2d 884, 887 (5th Cir. 1967).
merely independently created by federal law. This position would clearly seem to ignore the reason for the amendment — to free the Government's right from the applicability of the collateral source rule. Fourth, it could be argued that the amendment merely creates an independent right in place of the original subrogated right, but additionally provides that the independent right can be procedurally enforced by subrogation. Finally, it could be argued that the statute was intended to do two things: to establish clearly that the Government had an independent cause of action to recover these costs, and to effect a legal subrogation of whatever rights the injured party had under state law to the United States. As indicated, equitable subrogation has never been recognized in health insurance or medical payments contracts. In all probability, since the Government's claim would have been treated similarly, the statutory subrogation provision was necessary to establish this right of subrogation.

The courts seem to be hopelessly confused over the proper interpretation which should be adopted. With the one exception of the early unreported decision in United States v. Freese, the courts have all agreed that the United States has an independent right. But here the agreement ends.

The United States District Court for the Northern District of Illinois, in United States v. Greene, adopted interpretation one, treating the subrogation language as a dead letter:

Furthermore, our attempted application of the legal analysis which underlies the concept of subrogation discloses the Congress could not have created a subrogation in the government for medical care it had dispensed even if Congress had so desired. The tortfeasor had no obligation to pay the tort victim for medical care which the victim had received gratis. Therefore, no underlying obligation existed which could support a subrogation analysis.

However, the Fifth Circuit, in United States v. Fort Benning Rifle & Pistol Club, specifically rejected interpretation five for interpretation two:

107. See text accompanying note 88 supra.
111. Id. at 980. It would seem that the judge ignored the possible application of the collateral source rule which might allow the injured party to recover these costs.
112. 387 F.2d 884 (5th Cir. 1967).
The problem with such a construction [interpretation five] is that the quoted language, instead of complementing the right created in the government with an additional right of subrogation, refers directly to and modifies the primary right initially created by the statute.

We think that, properly construed, the Act creates in the United States an independent right of recovery. This right, however, is "subrogated" to the extent that it is subject to any state substantive defenses which would negate the requirement that the injury arise "under circumstances creating a tort liability upon some third person."\textsuperscript{113}

Interpretation four is not without its champion. The Third Circuit, in \textit{United States v. Merrigan},\textsuperscript{114} concluded:

The right of recovery was thus conferred on the government and subrogation was made one of the remedial consequences of the government's right, a subsidiary equitable remedy, which did not limit the primary right.\textsuperscript{115}

As suggested, interpretation three is generally favored by the insurance industry.\textsuperscript{116} In \textit{United States v. Guinn},\textsuperscript{117} a district court said: "This statute creates an independent cause of action on the part of the government. . . . In prosecuting such an action, the Government is cast in the role of a subrogee."\textsuperscript{118}

Likewise, interpretation five has its supporters. The West Virginia court in \textit{Tolliver v. Shumate}\textsuperscript{119} stated:

The statute . . . not only confers upon the United States the right of subrogation to any claim which the person receiving such care and treatment may have . . . but it also creates an independent right in the United States to recover. . . .\textsuperscript{120}

It submitted that the last of these five alternatives as adopted by \textit{Tolliver} is the one which most nearly adheres to the intent of Con-

\textsuperscript{113} Id. at 887.
\textsuperscript{114} 389 F.2d 21 (3d Cir. 1968).
\textsuperscript{115} Id. at 24. This view has been accepted by a number of authors. See, e.g., Noon, \textit{May Plaintiff Include the United States' Claim Under the Federal Medical Care Recovery Act Without Government Intervention?}, 10 AF JAG L. REV. 20 (1968); Comment, supra note 106.
\textsuperscript{118} Id. at 773. This case held that the release by the injured party did not release the insurance company because it had knowledge of the Government's interest. The court's position would seem to have been overruled by United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968).
\textsuperscript{119} 151 W. Va. 105, 150 S.E.2d 579 (1966).
\textsuperscript{120} Id. at 109, 150 S.E.2d at 582. See Maddux v. Cox, 382 F.2d 119, 124 (8th Cir. 1967), \textit{rev'd in part} 255 F. Supp. 517 (E.D. Ark. 1966).
gress. Admittedly, the language of the section appears to lend itself better to alternative four. However, it must be remembered that the Act was enacted against the background of the prior experiences of the Veterans Administration and the Army. The V.A. procedure, like the older program under the Federal Employee's Compensation Act, followed the derived rights concept and was based on either subrogation or assignment from the injured party. The Army World War II program, rendered invalid by the Standard Oil case, was based upon the independent rights concept of per quod. The Comptroller General, in his report urging congressional action, acknowledged both of these programs as bases for his recommendation. Yet, it is clear that the Comptroller General did not realize that these recovery programs were based upon two entirely different legal concepts, each of which has a separate and distinct heritage rooted in the ancient common law, one equitable, the other purely legal.

The original drafters of the Act elected to follow the derived rights approach. Subsequently, the House Judiciary Committee was convinced that an independent right was more appropriate. Like the Comptroller General, the Committee does not seem to have fully appreciated the separate legal bases for the two approaches, so it simply proceeded to engraft the new independent right upon the already existing subrogation scheme in the original bill. The end result, admittedly inartfully drafted, would seem not only to establish the Government's independent right, but also to subrogate the Government to the injured party's claim, if any, under state law. The congressional committee reports indicate that the Judiciary Committee did not intend to change the pre-existing arrangement in the bill as originally drafted, but merely intended to add an independent right of recovery which would not be subject to the variations of the state collateral source rules.

Having concluded that it was the congressional intent to create these two separate rights, we will now turn to an examination of some of the particular problems under the Act and ascertain the consequences dependent upon whether the Government pursues its independent or subrogated right. Three areas will be considered: (1) substantive law and defenses, including statutes of limitation; (2) the effect of notice by the Government, releases by the injured parties, and the collateral source rules; and (3) procedural problems such as

---

122. It is not clear why this route was selected, but one can speculate that the drafters used the provision in the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, 8131 (1970), as a guideline, since neither the Veterans Administration nor the Army program were based upon statute.
V. SUBSTANTIVE LAW AND DEFENSES

A. Substantive Law

It should be clear in the case of the subrogated right that the Recovery Act does nothing more than subrogate the Government to the existing rights of the injured party under state law. Because of the supremacy clause, the Recovery Act would override any state law or policy against splitting a cause of action 124 or against subrogation in general. However, whether there is any claim on which the Recovery Act can operate depends upon state substantive law. 125 In order for the Government to have a subrogated claim, two things must be present under state law: the party causing the injury must be tortiously liable to the injured party, giving him a right to recover, and the state law must follow the collateral source rule, allowing the injured party to recover for care paid for by another. 126

It is not clear, however, what substantive law would govern if the Government were to pursue its independent right. We can immediately eliminate the issue of the collateral source rule, because it is clear that Congress has created the independent right in order to avoid any question of its application. However, the Act specifically provides that the United States shall have this independent right only "under circumstances creating a tort liability upon some third person." 127 How these circumstances are to be determined, i.e., by state or federal law, has never been directly litigated. The courts have assumed that state law applied, as have most of the government agencies commenting upon the Act.

The language of the Act, unlike that in the Federal Tort Claims Act, 128 does not specify that state substantive law will govern. However, since a federal statute is involved, clearly the matter is a question of federal, not state law. In the absence of such specific language by Congress, the Lincoln Mills doctrine, authorizing the federal

126. For a discussion of the problems with the application of the collateral source rule under the Recovery Act, see notes 259–63 and accompanying text infra.
courts to settle the matter under federal common law, would seem to be pertinent. This does not mean that the final outcome may not be the application of state law by incorporation, but simply that the courts are not compelled to incorporate state law. Thus, the courts are faced with a choice of a rule of decision which should be solved according to the standards outlined above. The choice at first glance may seem obvious, perhaps explaining why the lower courts have not addressed themselves to this point.

It is submitted, however, that the solution is not that obvious. It should be remembered that the Supreme Court in Standard Oil held that recovery in this area was a question of federal fiscal policy and that, as such, it was an inappropriate area for the incorporation of state law. Similarly, in Urie v. Thompson, the Supreme Court held that what constituted negligence under the Federal Employers' Liability Act was to be decided under federal, not state, substantive law.

The starting point for the solution of this issue would seem to be the presumption raised by the Rules of Decision Act, namely, that state law will govern. But as suggested in the previous discussion, this presumption is subject to challenge when the court is required to construe a federal statute. Therefore, the question is: Do the considerations involved in the choice of a rule of decision suggest that the court should override the presumption and create a body of federal substantive common law as was done in Standard Oil, Clearfield Trust, and Urie?

Turning first to the legislative history of the Act, it is clear from the language quoted earlier that the congressional intent was to reverse the Standard Oil decision and allow governmental recovery. This alone, however, is not of much help because the Court in Standard Oil contemplated that any recovery, if authorized by Congress, would be on the basis of a body of federal substantive law, not state law. Yet, the various reports written by the government agencies commenting on the bill, and the Senate and House committee reports,

129. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). See United States v. Moore, 469 F.2d 788 (3d Cir. 1972). Here the court held that section 2651(a) conferred on the United States an independent right of recovery free from limitations on recovery imposed by a state's family immunity law. Id. at 790.
130. See text accompanying notes 71-86 supra.
133. 45 U.S.C. § 51 (1970), which provides in part:
Every common carrier by a railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence . . . of such carrier . . . .
135. See text accompanying notes 96 & 102 supra.

https://digitalcommons.law.villanova.edu/vlr/vol18/iss3/1
all speak of the purpose of the bill as being to destroy the windfall to defendants resulting from the Government's inability to recover these costs. Thus, it would seem that the legislative intent was only remedial — to destroy a windfall only where a windfall existed. Since such a windfall would only exist where under state law the defendant would be liable for these costs, it can be argued that it was Congress' intent to tie the existence of the Government's right to state substantive law. The legislative intent, therefore, while not strong, would seem to be against overriding the presumption in favor of state law.

The second test which should be examined is whether federal law is necessary to foster the federal policy involved. Standard Oil identified the policy involved herein to be federal fiscal policy. Congress, through the Recovery Act, enunciated a fiscal policy whereby the Government should recover only where a windfall resulted from the Government's former inability to recover. As such, the problem is not one involving national sovereignty or disputes between states — areas which have been recognized as requiring the application of special federal rules of decision.\textsuperscript{136} Rather, it is a question of the Government protecting its proprietary interests as a body politic.\textsuperscript{137}

Traditionally, the Supreme Court has held that in the protection of its proprietary rights, the United States, as a body politic, is to be treated as any ordinary citizen, whose rights are governed by state law.\textsuperscript{138} However, in Standard Oil and Clearfield Trust, the Court moved away from this principle, on the ground that the use of state law would impinge on the constitutionally controlling federal policy. Yet, the Court in Standard Oil offered no explanation as to how the state law would have such an effect. As a result, a number of commentators have concluded that whenever the federal government is a party to a suit, in its capacity either as the sovereign or as a body politic, the outcome should be controlled by federal substantive law.\textsuperscript{139}

The validity of this conclusion is subject to challenge. Since proprietary suits do not significantly involve the policy-making function or the sovereign status of the federal government, unless it can be clearly demonstrated that the application of state law will impair the implementation of federal policy, there would seem to be no reason to displace state law as the rule for decision.\textsuperscript{140} In view of the apparent legislative purpose, the application of state law in the case of the


\textsuperscript{137} Comment, \textit{supra} note 60, at 1443.

\textsuperscript{138} See, e.g., Cotton v. United States, 52 U.S. (11 How.) 229 (1850).

\textsuperscript{139} Gorrell & Weed, \textit{supra} note 61; Hill, \textit{supra} note 136.

\textsuperscript{140} \textit{The Federal Common Law}, \textit{supra} note 74, at 1527.
Recovery Act would seem to further, rather than impinge upon, the federal policy.

The last test to be applied is the test of uniformity — whether the implementation of the federal policy behind the Recovery Act requires a uniform result. In order to answer this question, it is necessary to analyze the tangible product of the imposition of a uniform federal rule governing the Act. Notwithstanding the fact that the job of the enforcement agencies would be made much easier, and that there would be a certain symmetry to the law, it is submitted that these are not sufficiently important goals to merit the imposition of a uniform federal rule. In fact, the results of a uniform federal rule would run contrary to the expectations of most of the citizenry, who justifiably feel that the consequences of their tortious conduct should be the same, whether a private citizen or a private soldier has been injured. As pertinently noted by one commentator, this expectation plays a significant role:

Since the law stakes out the boundaries of permissible conduct, the more certain it is, the more efficiently society should be able to function. To the extent that a court's choice of applicable rules of decision contradicts the expectation of the party involved, the law becomes less certain and less able to serve as a guide to conduct.141

Therefore, the imposition of a federal rule of substantive law to govern initial tort liability under the Recovery Act would seem to be counterproductive, interfering with the matrix of expectations under the existing body of state law. A review of the factors to be considered in determining whether state or federal substantive law should govern the question of initial tort liability confirms the position taken by the courts in assuming that state law will control.142

B. Defenses

Having established that state substantive law should control the initial determination of liability, regardless of whether the Government is suing on its subrogated claim or its independent cause of

141. Comment, supra note 60, at 1445.
142. The reference is to the complete state law on torts, including strict liability as well as negligence. Cf. Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692 (E.D. Pa. 1972). In the rare places where there is no state common law, such as on federal enclaves and in admiralty, federal substantive law will govern in the absence of federal statutes to the contrary. It appears clear that there can be actions in admiralty under the statute, cf. Nikiforow v. Rittenhouse, 319 F. Supp. 697 (E.D. Pa. 1970), but the statute specifically excludes the most common admiralty suit — maintenance and cure. See 42 U.S.C. §§ 249, 2651 (1970).
action, this Article will now consider the effect upon governmental recovery of various defenses available under state law. The central question, therefore, is whether the rationale developed for the initial application of state law compels its application to matters of defense.

1. Contributory negligence of the injured party

It would seem that no detailed analysis should be necessary to conclude that when the Government is suing on its subrogated right, the state defense of the contributory negligence of the injured party should bar the Government's recovery. The subrogated right being derivative, the person holding that right stands in no better position than the person from whom the right is derived. Therefore, state law will determine initially whether there is tort liability and then whether this liability is excused in whole or in part.¹⁴³

This concept is illustrated by Ferguson v. Ben M. Hogan Co.,¹⁴⁴ in which a husband attempted to recover for medical expenses incurred by his wife. First, the court found that the wife was forty per cent contributorily negligent and then that the husband's claim was derivative. As a result, it reduced the husband's recovery pro tanto.¹⁴⁵

The question remains, however, whether this same analysis can apply where the Government is suing on its independent right. First, it should be emphasized that we are dealing with an area where state law, if it controls at all, does so through its incorporation as the federal rule. This does not mean that the entire state law must be incorporated. Federal policy may suggest incorporation of one part of the state law, while rejecting other parts. Thus, reference to state law for the purpose of establishing initial liability under the Recovery Act does not foreclose rejection of state law on the issue of contributory negligence, if the policy of the Act dictates a different conclusion on this issue.

The Ninth Circuit, by way of dicta in United States v. Housing Authority,¹⁴⁶ has been the only court to address itself to the effect of contributory negligence of the injured party on the Government's independent right:

Where the injured party is himself negligent, and where under state law that contributory negligence absolves the third person

---

¹⁴⁵ Id. at 664-66.
¹⁴⁶ 415 F.2d 239 (9th Cir. 1969).
from liability, then the United States cannot recover from that third person.\textsuperscript{147}

This dicta assumes two things: (1) that the language of the Recovery Act requires the use of state law for the determination of the effect of contributory negligence; and (2) that under state law contributory negligence would bar governmental recovery. It is submitted that neither of these assumptions is accurate.

Again, the critical language of the Recovery Act is “under circumstances creating tort liability upon some third person.”\textsuperscript{148} In all states, other than Illinois where the plaintiff must prove himself free from contributory negligence in order to be entitled to recover,\textsuperscript{149} contributory negligence is an affirmative defense, excusing liability already created. Thus, it would be consistent with the language of the Act to hold that state law would determine whether tort liability has been created, while rejecting state law for the purposes of determining when that liability will subsequently be excused.\textsuperscript{150}

Since the language of the Act does not compel the application of state law with respect to the effect of contributory negligence, we are again faced with making a determination as to whether the policy of the Act would be furthered by its incorporation as a matter of federal common law. The answer would seem to be yes. If the policy of the Act were to maximize governmental recovery, it would clearly be advantageous to reject state law as the rule of decision and adopt an independent rule of federal law that contributory negligence has no effect upon the Government's right of recovery. Such a rule could easily be supported under the Clearfield Trust and Standard Oil rationales. However, the policy behind the Act is merely that the United States should be able to recover when a private citizen is able to recover.\textsuperscript{151} The Government is merely attempting to protect its proprietary rights as a body politic and not attempting to seek any preferred position. Thus, state substantive law should control the effect of contributory negligence by the injured party just as it governs the initial issue of liability.

\textsuperscript{147} Id. at 243. See United States v. Haynes, 445 F.2d 907 (5th Cir. 1971). Cf. United States v. Fort Benning Rifle & Pistol Club, 287 F.2d 884 (5th Cir. 1967).
\textsuperscript{148} 42 U.S.C. \S 2651 (1970).
\textsuperscript{151} See text accompanying notes 87–123 supra.
February 1973]  

Federal Medical Care  

379

It is submitted that the dicta quoted above is also inaccurate in its forecast of the effect of contributory negligence under state law. As previously indicated, the independent right of the Government is patterned on the ancient right per quod servitium amisit. Furthermore, the right of parents to recover for medical care furnished their children and the similar right of the husband to recover for the care of his wife are both based on this doctrine. It has been held in a number of cases that the right of the parent or the husband is subject to the contributory negligence of the injured family member.\(^1\)\(^5\)

Significantly, however, the reasons for these decisions are often obscure\(^1\)\(^5\) and apparently stem from a misconception of the nature of the action. This has led Dean Prosser\(^1\)\(^5\) and other notable legal scholars\(^1\)\(^5\) to reject the conclusions of these cases and to argue that contributory negligence of a family member should have no bearing on recovery under per quod. The Victorian Supreme Court, in Lloyd \textit{v. Lewis},\(^1\)\(^5\) recognizing the true nature of the claim, recently reached this conclusion, refusing to allow contributory negligence to bar recovery. A similar result should occur when the Government is suing under the Recovery Act.\(^1\)\(^7\)

2. Interspousal and parent-child immunity

Again, where the Government is seeking recovery on its subrogated action, for the reasons outlined in the discussion on contributory negligence, state law will control in its own right and not by incorporation.

However, the effect of familial immunity doctrines on the subrogated right is not easily predictable.\(^1\)\(^8\) It has been held that the immunities, unlike contributory negligence, do not excuse the underlying tort liability, but merely present a procedural bar to its enforce-

---


3. \textit{Id.} at 893.


6. However, if such a result under state law should not be forthcoming, the federal courts should not use this as an excuse to replace state, with federal, substantive law. The like or dislike for a particular state rule should have no bearing on the rule of decision choice, unless the state position impinges upon the government program. Mishkin, \textit{supra} note 61, at 817. Here, since the Government is simply seeking the same treatment that would be accorded the average citizen, denying his right, as well as the Government's, does not affect the government policy.

7. Hopefully, as time passes the need for such prediction will diminish. W. Prosser, \textit{Torts} 864, 868 (4th ed. 1971), indicates that 19 jurisdictions have abandoned inter-spousal immunity and 13 have abrogated parent-child immunity, many within the last decade.
ment on policy grounds concerning the possible effect of litigation upon the family relationship.\textsuperscript{159} Presently, the almost unanimous position of the courts is that a third-party who is vicariously liable to the injured spouse cannot escape liability by asserting the interspousal immunity of the primary tortfeasor.\textsuperscript{160} The immunities have taken on the character of a personal defense which cannot be raised or used by one outside the relationship. It can be expected that states following the immunity theories will extend their coverage to prevent recovery by a subrogee, thus barring the Government's recovery on its subrogated claim.

Two circuits, the Third\textsuperscript{161} and the Fifth,\textsuperscript{162} have recently considered the immunities problem in connection with the Government's independent right. The Fifth Circuit, in \textit{United States v. Haynes},\textsuperscript{163} relying on cases involving state statutes of limitations,\textsuperscript{164} held that the Government's right was not controlled by the peculiar Louisiana provision giving the husband, as the master of the community, the right of recovery for medical care furnished his wife. Instead, it concluded that this statute did not have any effect upon the creation of the tort liability and, therefore, was not a part of the federal common law developed under the Act. Thus, the court adopted the \textit{Clearfield Trust} and \textit{Standard Oil} concept of an independent body of common law separate from state substantive law.

The Third Circuit, in \textit{United States v. Moore},\textsuperscript{165} has flip-flopped on this issue. In its original opinion, Judge Biggs, speaking for the majority, had recognized the right of the federal courts to create federal common law in those areas where Congress had authorized the courts to do so.\textsuperscript{166} Judge Biggs further stated, as the district court had held,\textsuperscript{167} that the language of section 2651(a)\textsuperscript{168} mandated the appli-
cation of state law. Additionally, he agreed with the lower court that it was impossible to distinguish between substantive and procedural defenses.\textsuperscript{169} Judge Biggs summarized these conclusions as follows:

[W]e conclude that in the instant case the preferable test lies in the language of the statute itself, in particular the phrase “circumstances creating a tort liability upon a third person.” We think we cannot avoid construing this as a reference to the tort law of a State or Territory. Congress was not looking toward some federal tort but to local laws of torts, and it would seem to us to be a highly metaphysical argument to contend that intrafamilial or interspousal immunities, while they may be part of the familial law of a State, such as Maine, are not under the circumstances at bar completely applicable to Maine tort law. It follows, we think, that the creation of liability under Maine law cannot be considered apart from the Maine doctrines of immunity. . . . We think that we must take the Maine law as a whole . . . .\textsuperscript{170}

Finally, Judge Biggs determined that the United States could not recover its medical costs because Maine law\textsuperscript{171} provided that intra-family immunity extinguished any tort liability which may have existed on Mrs. Moore’s part with respect to her husband and children, and as a result with respect to the United States.

Upon resubmission,\textsuperscript{172} Judge Kalodner, who had vigorously dissented in the first decision,\textsuperscript{173} wrote the majority opinion. He indicated that state law should not govern:

We are of the opinion that the Medical Care Recovery Act confers on the United States an independent right of recovery which is unimpaired by the vagaries of state family immunity laws; otherwise stated, enforcement of the Act is free of the impact of right-to-sue limitations imposed by a state’s family immunity laws.\textsuperscript{174}

In support of this conclusion, Judge Kalodner relied heavily on the \textit{Haynes} decision and earlier decisions holding that governmental recovery was not subject to state statutes of limitations.\textsuperscript{175} He relied

\begin{footnotes}
\item 169. Such a distinction had been developed in United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967). This division between substantive and procedural defenses is clearly unproductive because, as the Supreme Court has remarked: “[T]he line between ‘substance’ and ‘procedure’ shifts as the legal context changes.” Hanna v. Plumer, 380 U.S. 460, 471 (1965).
\item 170. No. 19,070, at 13.
\item 172. United States v. Moore, 469 F.2d 788 (3d Cir. 1972).
\item 173. No. 19,070, at 15.
\item 174. 469 F.2d at 790.
\item 175. In contrasting the present case with the statute of limitations cases, Kalodner reasoned that “[i]t cannot reasonably be contended that a disability to sue by reason of a statute of limitations is different than a disability to sue imposed on a spouse or minor child under a state’s family immunity laws.” \textit{Id.} at 791. With all due respect
\end{footnotes}
most heavily, however, upon the rationale of the *Standard Oil* case, holding that the relationship between the Government and its men in uniform is a matter of federal law and should not vary according to the differences in various state family immunity laws.\textsuperscript{176} A contrary holding, in his opinion, would have been "grievous error, in utter disregard of the Congressional intent in enacting the . . . Act. Subjection of enforcement of the Act to vagaries of state laws would make a shambles of the Act."\textsuperscript{177} As an alternative holding, Judge Kalodner based the reversal of the trial court upon the grounds that it misinterpreted the effect of the Maine intrafamily immunity doctrine.\textsuperscript{178} Kalodner felt that the doctrine did not destroy liability for tortious conduct by the spouse or parent, but merely placed a procedural obstacle to the court's enforcement of such liability when the plaintiff is the other spouse or a child. Predictably, Judge Biggs strongly dissented.\textsuperscript{179}

It is clear that Judge Kalodner believed that the congressional intent behind the Act mandated the creation of a rule of federal common law and that such a rule should be uniform, fashioned by the federal courts without reference to the variations of state law. On the other hand, it is clear that Judge Biggs believed that the language of the Recovery Act demanded the application of state law in this area.

It is unfortunate that most of the judges appear to be confused as to the role that the state law of intrafamily immunity should play under the Recovery Act. The language of the Act does not demand that state substantive law control the existence of tort liability, as Judge Biggs suggested. The language of the Act merely indicates that there must be original tort liability upon the third person before the Act can operate. As we have already determined, the policy behind the Act suggests incorporation of state substantive law as the federal rule of decision to determine original liability.\textsuperscript{180} However, it is not clear whether this same policy suggests the adoption of the state substantive defense of intrafamily immunity. In the view of the district court and Judge Biggs in *Moore*, this question did not arise; nor did the *Haynes* court address itself to this problem, since it merely assumed that state law did not govern by incorporation.\textsuperscript{181}

\begin{footnotes}
\item \textsuperscript{176} 469 F.2d at 792-94.
\item \textsuperscript{177} Id. at 792.
\item \textsuperscript{178} Id. at 794.
\item \textsuperscript{179} Id. at 794-803 (Biggs, J., dissenting).
\item \textsuperscript{180} See notes 124-42 and accompanying text supra.
\item \textsuperscript{181} It is submitted that the *Haynes* court was attempting to resort to federal law to avoid application of the state law which it felt reached an undesirable conclusion. As suggested (see note 137 supra), dislike for the particular state rule is not a proper
\end{footnotes}
Only Judge Kalodner considered this problem, concluding from the *Standard Oil* and *Clearfield Trust* cases that the Government’s rights should not be subject to differences in state law. He, therefore, opted for the creation of a uniform rule of federal common law, which was to take precedence over a state law concerning the substantive defense of intrafamily immunity.\(^{182}\)

At this juncture, it is pertinent to recall that the *Standard Oil* and *Clearfield Trust* concept of an independent federal common law has been discredited, except in those situations where state law would improperly impinge upon federal policy.\(^ {183}\) Likewise, we have seen that there has been too much stress upon uniformity of result in federal cases, to the point where uniformity has become an end in itself.\(^ {184}\) We have already established that the primary purpose of the Recovery Act was to insure that the federal government would be able to recover medical costs like any private citizen. Since the rights of a private citizen will vary according to the availability of state affirmative defenses, including intrafamily immunity, an alteration of this result in favor of the Government by the application of a separate federal rule of decision would defeat the policy underlying the Act. Thus, the policy of the Act reinforces the presumption that state law rather than independent federal law should control.\(^ {185}\) Therefore, the district court and Judge Biggs were correct in applying state law, but for the wrong reason.

Having suggested that the policy behind the Recovery Act dictates incorporation of the state substantive law in regard to intrafamily immunity, it is appropriate to discuss the effect of the defense on the Government’s recovery, since it appears that both the district court and Judge Biggs in *Moore*, and the court in *Haynes*, misinterpreted the effect of the state substantive law upon the Government’s claim. In both cases there was no question that the act of the spouse created tort liability. Therefore, under the terms of the Act, an independent cause of action arose on behalf of the Government. The question then is whether, in either case, the state substantive defense should bar the enforcement of that right.

---

182. As to what the federal common law rule should be, Judge Kalodner would appear to favor the nonrecognition of intrafamily immunity. He discusses at some length the trend toward abandonment of the doctrine by an increasing number of courts in recent years. 469 F.2d at 794 n.4. Incidentally, this position would maximize governmental recovery.

183. See notes 138-40 and accompanying text supra.

184. See text accompanying notes 84-86 supra.

185. See notes 74-82 and accompanying text supra.
In the *Moore* case, both the district court and Judge Biggs on appeal, were of the opinion that the Maine intrafamily immunity doctrine destroyed the spouse's cause of action rather than merely barring an action to recover on the wrong. The majority, through Judge Kalodner, disagreed. He felt that the doctrine merely barred enforcement for policy reasons, but that the underlying liability remained. Further, he concluded that the doctrine constituted a personal defense, not applicable to third parties. This interpretation is consistent with the conclusion reached by the majority of states under similar situations. Thus the policy reason for the Maine intrafamily immunity doctrine, the maintenance of domestic tranquility, is absent when the Government seeks to assert its independent claim. Also, unlike the situation where the Government is suing on its subrogated claim, its claim is not derivative, and it is not being placed in a better position than the person from whom the claim derives. Thus, under state law, the doctrine of interspousal immunity should have no effect upon the Government's independent claim.

The Louisiana problem presented in the *Haynes* case is slightly different. While the effect of the Louisiana provision is the same as interspousal immunity, at least where the husband is the tortfeaso, its legal basis is apparently quite different. Under Louisiana law, the claim for medical expenses for the injured wife is an item of community property. Likewise, the husband is held to be the master of the community and the party entitled to sue to protect its interests. Where the husband is both plaintiff and defendant, as he is in such a case since he caused his wife's injury, under Louisiana law there is "confusion" and the cause of action is destroyed.

As far as the Recovery Act is concerned, the problem here is no different than in those states which do not allow the splitting of a personal injury cause of action, even by subrogation. Although Okla-

---

186. This is the position taken by the vast majority of courts in connection with the statute of limitations. The running of the statute does not destroy the underlying right, but merely bars use of the courts to enforce the right if the statute is pleaded as an affirmative defense. If the statute is not pleaded, then the court will enforce the right. If the statute destroyed the right, then the court of its own motion would have to dismiss the action even though the defendant did not plead the statute.


188. *See* note 160 and accompanying text supra.


190. Dombrink, supra note 150. Dombrink makes a similar analysis of the guest statutes in those few states in which the statute does not prevent the creation of tortious liability but merely presents a procedural bar to recovery. In those states, he properly concludes that the Government could recover its costs.

homa is one such state,\textsuperscript{192} the court in \textit{United States v. Nation}\textsuperscript{193} properly held that the Recovery Act provision creating the independent cause of action in the Government overrode, by virtue of the supremacy clause, the state policy against subrogation.\textsuperscript{194}

Similarly, in the \textit{Haynes} case, the Recovery Act's creation of the independent right should have overridden the state policy assigning this claim to the community. As to the Government's claim, there would have been no "confusion." Faced with the identical situation presented in \textit{Haynes}, another district court earlier had apparently followed this analysis, refusing to dismiss the Government's suit.\textsuperscript{195}

In light of the apparent difficulty that both the Fifth and Third Circuits have had with the question of whether state or federal law should govern the applicability of intrafamily immunity, the problem cannot be considered settled. However, it would seem from the policy considerations behind the Act that state law, rather than an independent federal common law rule, should become the rule of decision by incorporation. However, in most instances, the state rule should be interpreted only as a bar to suit by the spouse or child, and therefore not applicable to suit by the United States, at least when that suit is based upon its independent cause of action.

3. Contributory negligence of the United States

Three cases have examined the question of what effect the negligence of the United States should have on its right of recovery.\textsuperscript{196} All three involve military personnel, further complicating analysis, since servicemen cannot sue under the Federal Tort Claims Act.\textsuperscript{197} Further, in all cases, the contributory negligence on the part of the Government was passive, vicarious negligence based solely upon the negligence of one of its employees, other than the injured party. Finally, in all cases, the United States appears to have pursued its independent, rather than subrogated right.

\begin{figure}
\begin{itemize}
\item \textsuperscript{193} 299 F. Supp. 266 (N.D. Okla. 1969).
\item \textsuperscript{194} \textit{Id}. at 267-68.
\item \textsuperscript{195} United States v. Allstate Ins. Co., Civil No. 14,961 (W.D. La., Jan. 1, 1970).
\item \textsuperscript{197} Feres v. United States, 340 U.S. 135 (1950). Their remedy is an administrative one through military channels. The exclusion of military personnel from the coverage of the Tort Claims Act means that sovereign immunity has not been waived as to them.
\end{itemize}
\end{figure}
In two of the cases, *Nikiforow v. Rittenhouse*,¹⁹⁸ and *California-Pacific Utilities Co. v. United States*,¹⁹⁹ the court held that the contributory negligence of the Government would bar recovery, while the third, *Maddux v. Cox*,²⁰⁰ held it would not. None of the cases discuss the problem in any detail, and thus they are not very enlightening.

It would appear that the conclusion on this issue again depends upon whether the United States seeks to enforce its independent or subrogated right. If it seeks to enforce its independent right, its position is not radically different from a suit to recover for injury to its personal property. In such cases, based upon the "both ways" test, the vast majority of courts have held that the contributory negligence of the employee will be imputed to the employer *both* for the purposes of making him liable to the other party *and* to prevent the employer from recovering for his own property damage.²⁰¹ This test is based on the logic that if negligence is to be imputed for one purpose, it should be imputed for all. However, this ignores the basis for the rule in the first place, which was to provide a solvent defendant in cases involving employees.²⁰² Certainly, the same policy does not require that the defendant be deprived of his right to recover for the injury to his property. The "both ways" test has been the subject of a great deal of criticism by legal scholars,²⁰³ and there are some indications that it will, in time, be discarded in the master-servant area as it has been in others.²⁰⁴ Until that time, however, it would bar the Government's independent suit.²⁰⁵

When the Government is suing on its subrogated claim, the conclusion should be different: the Government should be able to recover at least a portion of its costs. In such an instance, the claim comes from the injured party. With respect to this injured party, the Government is normally a joint tortfeasor,²⁰⁶ but its negligence is

---

¹⁹⁹. 194 Ct. Cl. 703 (1971).
²⁰⁰. 382 F.2d 119 (8th Cir. 1967).
²⁰¹. 2 F. HARPER & F. JAMES, TORTS § 23.6 (1956).
²⁰². Id.
²⁰⁶. In those cases where the injured party cannot sue under the *Tort Claims Act*, the entire loss should fall on the third-party tortfeasor, and theoretically the Government should recover its entire cost. However, since subrogation is an equitable remedy, adjustment should be made to reflect the negligence of the Government. *See*
derivative or vicarious, resulting from the act of its employee. Most states allow contribution between tortfeasors, at least where one of the tortfeasors' negligence is vicarious or passive. Thus, the Government should be able to recover its costs less any deductions for contribution.

4. Statute of limitations

Whether the Government's right is controlled by state or federal statutes of limitations now seems to be settled by federal statute. Although the Recovery Act itself contains no statute of limitations, in 1966 Congress enacted a general comprehensive statute of limitations of three years applicable in all government tort actions.

The applicability of this general statute of limitations to the Recovery Act was first examined in United States v. Gera, in which the court held that the federal statute of limitations did not apply because the Government's action under the Recovery Act was not an action founded in tort. The judge then went on to hold that

Dombri, The Right to Collect Contribution or Indemnity From the United States When a Federal Employee or Serviceman Is Injured, 27 JAG J. 69, 73 (1972).

It should be remembered that the Government has an action against its negligent employee. Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970). However, it is the Government's practice not to pursue this remedy unless the action of the employee was grossly negligent or he has the benefit of liability insurance. See, e.g., Army Reg. 27-38 (Jan. 15, 1969).

Any recovery should include any adjustment which should be made because the Government does not choose to seek indemnity from its own employee. Id. There is one other problem that often may appear at this point. In both California-Pacific Util. Co. v. United States, 194 Ct. Cl. 703 (1971), and Nikiforow v. Rittenhouse, 319 F. Supp. 697 (E.D. Pa. 1970), the Government had entered into contracts which the court interpreted to require it to reimburse the third-party tortfeasor for his costs, including judgment and litigation expenses. In such cases, attempting to assert medical care claims merely results in shifting funds from one of the Government's pockets into another, less the cost of litigation. This type of indemnity contract is quite common in government defense contracts. As a result, claims against government contractors are not to be asserted without permission of the Judge Advocate General of the service involved. See, e.g., Army Reg. 27-39 (Jan. 15, 1969); Judge Advocate General, Dep't of the Army, Federal Medical Care Recovery Act Letter No. 171, Apr. 27, 1971.


211. Id. § 2415(b). Normally, the statute starts running when the right of action first accrues, but the 1966 enactment included a special saving provision allowing all actions which had accrued before its effective date to be brought within three years thereafter. Cf. Forrester v. United States, 308 F. Supp. 1157 (W.D. Pa. 1970). Section 2416 contains a provision which may become very significant in Recovery Act cases. This section provides that the statute will be tolled where "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c) (1970). This may mean in Recovery Act cases that the statute will not start to run until the government official charged with recovery learns of the case or has information which would lead him to suspect that it involves a Recovery Act claim. Moreover, there appears to be substantial delay in acquiring this information in many cases involving civilian treatment. See Long, supra note 24.

There are no cases under the statute yet, so it is impossible to predict its eventual interpretation. The legislative history of the Act tends to support this theory. See S. Rep. No. 1328, 89th Cong., 2d Sess. (1966).

this statute did, however, show a congressional intent to do away with the
historic concept that statutes of limitations do not run against
the sovereign. Finally, concluding that he must fashion a limitations
provision as a matter of federal common law, he elected to incorporate
the state statute of limitations.218

On appeal, the Third Circuit reversed,214 concluding that the
Government was not subject to any state statute of limitations. It
then held that Recovery Act claims were subject to the three-year
federal statute.215 This conclusion would seem to be correct, since it is
clearly a tort action, albeit a statutory one, and the legislative history of
the federal statute makes it clear that it applies to all Government
tort actions.216

The Government's subrogated right presents a more difficult
problem. It has been consistently posited throughout this Article that
state, rather than federal, law controls the Government's subrogated
right. This position is based upon the contention that Congress in
the Recovery Act did no more than subrogate by federal statute the
Government to whatever right, if any, the injured party had. A
natural extension of this theory would be that the Government as the
subrogee would be subject to the state statute of limitations. How-
ever, the Recovery Act was enacted against a background of a long-
standing court-made rule that the federal government as sovereign
was not subject to any statute of limitations, regardless of whether it
was suing in its sovereign or proprietary capacity. Congress, by
enacting the federal statute of limitations, clearly intended to subject
the direct actions of the Government to the federal statute; whether
it also intended to subject the indirect or derivative actions to the
statute as well is less clear. That Congress had the power to do so if
it so desired is not to be debated.

The legislative history of the 1966 statute tends to support the
conclusion that Congress intended that it cover all actions by the Gov-
ernment, direct and indirect.217 The only case involving a derivative
right decided since the 1966 enactment also suggests this conclusion.218

Additional light can be shed on the congressional intent from the
decisions under the Recovery Act. The Gera case and three earlier

213. Id.
214. 400 F.2d 121 (3d Cir. 1968).
215. This holding was followed in Forrester v. United States, 308 F. Supp. 1157
217. Id. at 8-9.
218. United States v. Winter, 319 F. Supp. 520 (E.D. La. 1970), held that the
subrogated right of the United States was not subject to the state statute of limitations,
and then concluded in dicta that it was probably governed by 28 U.S.C. § 2415
(1970). Id. at 522.
cases, *United States v. Greene*,219 *United States v. Jones*,220 and *United States v. Fort Benning Rifle & Pistol Club*,221 held that the Government was not subject to state statutes of limitations.222 These holdings would seem to run contrary to the concept that in situations in which the Government is suing to protect its proprietary interests there is a presumption that state law controls. Instead, they seem to support the discredited concept of *Clearfield Trust* and *Standard Oil* that there is a separate body of federal common law, not tied to state law, which covers these actions.223

However, we have indicated that the presumption for applying state law can be overcome, if it can be shown that its application will unduly impinge upon some federal policy. While *Gera, Jones, Greene,* and *Fort Benning* do not reflect such an overriding federal policy, it is submitted that such a policy is considered to exist and that these cases should be limited strictly to the area of application of the statute of limitations. All of the cases, except *Greene,* make reference to earlier Supreme Court decisions holding the Government not subject to state statutes of limitations. In *Gera* and *Fort Benning* the reference was to *United States v. Summerlin.*224 *Summerlin* was merely the most recent of a long line of cases225 applying the ancient maxim *nullum tempus occurrit regi* — time does not run against the sovereign — a mysterious concept bound up in the equally mysterious concept of sovereignty.226 If the sole basis for the doctrine was that it was within the prerogative of the sovereign, it could be argued that the Government, in suing on its proprietary right, was not exercising the powers of a sovereign, but merely those of a private citizen, and state statutes of limitations should affect its rights like other state substantive provisions.227

However, there seems to be more to the doctrine. The Second Circuit has stated that:

The policy underlying this exemption is that the failure of a government employee to bring an action within the time pre-

221. 387 F.2d 884 (5th Cir. 1967).
222. None of these cases, except *Gera,* considered the effect of the new federal statute.
223. Cf., e.g., *United States v. Housing Authority,* 415 F.2d 239 (9th Cir. 1969); Comment, *supra* note 106, at 120.
224. 310 U.S. 414 (1940).
227. The *Greene* case indicates that the statute of limitations is a procedural provision which the federal courts are free to disregard. However, the Supreme Court has held that it is substantive as far as diversity of citizenship cases are concerned. *Hanna v. Plumer,* 380 U.S. 460 (1965).
scribed by a state statute of limitations should not bar the government from bringing the action if the action is one to enforce public rights or to protect the public fisc.\textsuperscript{228}

Thus, in Summerlin, the doctrine was applied to a case involving a subrogated right acquired as the result of the payment of a loan guarantee without discussion of the difference between the sovereign functions of the Government and its right as a body politic. Subsequently, in Weissinger \textit{v. United States},\textsuperscript{229} the Fifth Circuit held that it made no difference whether the suit was a result of the Government's sovereign or proprietary functions.

It seems clear that, in the narrow area of statutes of limitations, the presumption of the application of state law had been displaced in favor of a separate rule of federal common law that the Government was not subject to any statute of limitations. Congress, in turn, has supplanted the federal common law rule by federal statute. Moreover, the adoption of the federal statute suggests that Congress intended the 1966 statute to occupy the area to the exclusion of state law.\textsuperscript{230} Yet due to the peculiar history, the cases decided in this area are not precedent for the broader application of federal common law to other substantive areas.

\section{VI. Notice to Tortfeasors, Release by Injured Parties, and the Collateral Source Rule}

\subsection{A. Notice and Release}

It should be obvious that if the Government's right is an independent one, as characterized in the prior discussion on substantive law and defenses, it cannot be affected by any action of the injured party. Thus the release of the injured party would have no effect upon the Government when it seeks to enforce its independent right. Similarly, the giving of notice would not be required unless mandated by the Act or implementing regulations.\textsuperscript{231} Although the de-

\textsuperscript{228} United States \textit{v. 93 Court Corp.}, 350 F.2d 386, 389 (2d Cir. 1965).
\textsuperscript{229} 423 F.2d 782, 784 (5th Cir. 1968).
\textsuperscript{230} The one exception to this rule might be the rare case where the state statute of limitations does not merely bar any enforcement action, but extinguishes the basic liability. \textit{See United States \textit{v. Hartford Accident & Indem. Co.}, 460 F.2d 17 (9th Cir. 1972)}, where the Government was attempting to take advantage of a California uninsured motorist statute requiring that suit be brought within one year of the accident. When the Government did not sue within that period, the court sustained the defendant's motion for summary judgment on the basis that the one year statute was not a conventional statute of limitations, but destroyed the right to sue if the action was not brought within the allotted time. In other words, no right to recover vested in the Government until it had met the statutory prerequisite of filing within the statutory period. Any inchoate right it might have had was destroyed and did not vest when it failed to file in the allotted time.
The validity of these decisions does not seem open to question. At the time the original bill embodying the Recovery Act was being considered, the insurance industry urged Congress to include a provision conditioning the Government's right upon the giving of notice to the tortfeasor. However, when the Act was revised to give the Government its independent right, the Comptroller General strongly objected to such a condition. Congress was apparently persuaded, because no notice requirement was included in the final Act nor was any such statement added by subsequent regulation.

Once again, if the Government decides to sue on its subrogated right, its claim will be entirely controlled by state law as to notice requirements and the effect of releases from the injured party. In most states, payment to the injured party and a release from him will bar the claim of the subrogee unless the tortfeasor has notice of the subrogee's claim. Thus, in order to be able to sue on the subrogated right, the Government will have to give notice or show that the tortfeasor is aware of its claim.

There would seem, however, to be few cases where the tortfeasor or his insurance company would not have sufficient information to put them on notice to investigate further and discover the Government's interest in the case. It should be obvious that a potential claim is present whenever the injured party is an active duty or retired member of the armed forces. Further, it is difficult to conceive of an insurance company paying a claim without thoroughly determining what treatment was actually rendered, by whom, and at what cost. Such investigation would clearly put the company...

---


236. Id.


on notice in situations where the care was furnished in a government hospital, and should reveal that the Government paid the bills where civilian treatment was rendered.\textsuperscript{240} It submitted that the insurance industry, which, for economic reasons, opposed the Act from the time of its proposal has chosen this issue in order to fight a rearguard action against its implementation, rather than directing its attention and energies to solving the admittedly difficult problems of the effect of the Act upon the collateral source rule.

\textbf{B. Collateral Source Rule}

The insurance companies have been placed in a rather difficult position by the passage of the Act. It is clear that the Government has an independent claim which, as previously noted, is not barred by settlement with the injured party. However, the injured party may likewise be entitled to recover these costs under state law where the collateral source rule is recognized. If so, then the insurance company or the tortfeasor may, at least theoretically, be required to pay twice for the same damages. It is obvious that the tortfeasor should not have to pay these damages twice, and careful analysis of the problem will indicate how this can be avoided within the framework of the Act and existing state law.

The starting point must be the Recovery Act. The supremacy clause of the Constitution makes this Act superior to any state law inconsistent with it.\textsuperscript{241} Thus, if we cannot accommodate the Recovery Act with the collateral source rule as developed by state law, it is clear that the collateral source rule will have to give way. However, it is submitted that with certain adjustments the collateral source rule can be accommodated to the Recovery Act.

The Recovery Act not only creates an independent right in the Government to recover its medical costs, but also subrogates it to any claim that the injured party might have had to recover those costs.\textsuperscript{242} Simple logic should indicate that if there is an independent claim to recover these costs, the collateral source rule has no place, since its sole purpose was to avoid giving the tortfeasor a windfall. If there is an independent claim by the person furnishing the care, there is no windfall and, therefore, no reason to favor the injured party over the tortfeasor in its disposition. Further, even if the collateral source rule continues to have some viability as a result of the Re-

\textsuperscript{240} Id.
\textsuperscript{242} See text accompanying notes 87-123 supra.
covery Act, whatever rights the injured party might have, now belong to the Government by subrogation. Although a cursory reading of Arvin v. Patterson and Whitaker v. Talbott, the two cases which have discussed this issue, would seem to suggest the contrary — that the injured party’s rights to recover these costs under the collateral source rule have not been changed by the Recovery Act — a more careful reading reveals that these cases, in fact, suggest the key to accommodating the Government’s rights under the Recovery Act with the collateral source rule.

The Government, by virtue of its rights under the Recovery Act, is the only one ultimately entitled to recover these costs. However, the Government often elects not to pursue its rights, or does so belatedly or elects to pursue its rights through the injured party. In these cases it would seem appropriate for the collateral source rule to be given effect.

If the Government does not pursue its right within the period of the federal statute of limitations, it no longer has a claim. In the absence of this claim by the person furnishing the care, the reason behind the collateral source rule is again applicable. The Whitaker court pointed out that the accident involved in that case had occurred in 1965, but that Whitaker had not filed his suit until three years after the effective date of the federal statute of limitations. It then concluded that Whitaker could recover these costs because to deny them to him would bestow upon the tortfeasor a windfall, which was precisely what the collateral source rule was developed to prevent. Similarly, the Government should be able to forego its independent right and allow the injured party to claim these costs in his action under the collateral source rule where there is a proper allegation that the injured party is collecting them on behalf of the Government as subrogee.

246. This last alternative would seem to be based upon the Government’s subrogated claim, which, in turn, is dependent upon the injured party being able to recover under the collateral source rule. See text accompanying notes 264-81 infra.
248. The court in Arvin v. Patterson, 427 S.W.2d 643 (Tex. Civ. App. 1968), reached the same conclusion on the same reasoning. However, the court in that case mistakenly interpreted the Recovery Act, 42 U.S.C. § 2651(b) (1970), to require that the Government intervene in the injured party’s suit if it is brought within six months after the injury. 427 S.W.2d at 644. For a discussion of this misinterpretation of the statute, see text accompanying notes 287-315 infra.
249. The ability to use this approach depends upon whether the state allows the subrogor in a partial subrogation situation to sue for the entire claim and to hold a portion of it for the benefit of the subrogee. Most states allow such a practice. See
A difficult problem arises where the injured party claims these costs and the Government’s claim is not known, or where the injured party makes no indication that he is going to hold the proceeds for the benefit of the United States and the Government has made no move to collect the costs separately. In the latter case, the tortfeasor certainly would be justified in refusing to settle until the positions are clarified and the Government committed. In either case, it would seem appropriate for the tortfeasor to demand that the settlement agreement include a provision obliging the injured party to hold the tortfeasor harmless from any future claims made upon him for these costs and to prosecute and bear the expense of any further litigation arising therefrom.250

Where the injured party claims these costs as an item of damages in his suit, in which he is not suing for the benefit of the United States, and the Government shows no inclination to join in the suit or to sue separately, it would seem appropriate, following the rationale of Arvin and Whitaker, to allow recovery under the collateral source rule. At this point the Government would seem to have two options. First, since the award to the injured party would have been contrary to the rights of the Government under the Recovery Act, the Government may still sue the tortfeasor on its independent cause of action. The judgment rendered for the injured party will be no defense,251 but the tortfeasor should be able to implead the injured party as a third-party defendant.252 Secondly, the Government ought to be allowed to sue the injured party to impress a trust for the amount of the medical costs recovered, since the Recovery Act subrogated the Government to the claim of the injured party. This latter approach was attempted in the first reported case decided under the Act, United States v. Ammons,253 in which Judge Carswell dismissed the Government’s case against the injured party on the basis that the Act only provided a right to recover against the third-party tortfeasor. Judge Carswell adopted the narrow interpretation of the power of the federal courts as set forth by Justice Rutledge in Standard Oil and refused to supply a remedy against the injured party.


250. Apparently, a similar provision was used in United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967), and United States v. Nation, 299 F. Supp. 266 (N.D. Okla. 1969), where the injured parties were joined as third-party defendants.


It is submitted that this decision is totally incorrect. As we have seen, the Rutledge concept of the power of the federal judiciary has been rejected by the Supreme Court in subsequent opinions. Given the power of the federal courts to create federal common law to supplement congressional acts, it is impossible to justify such a refusal to force the injured party to disgorge funds he has wrongfully received. Such a holding would simply apply to the statutory right of subrogation one of the well-recognized attributes inherent in the concept of subrogation. This single ill-considered decision by a district court can hardly foreclose further attempts to use this remedy in the future.

By allowing the application of the collateral source rule in the first instance, the injured party is permitted to retain the benefits normally due him under state law, subject to having those benefits readjusted in favor of the Government should it seek to enforce its rights under the Recovery Act at a later date. If the Government does pursue its remedy, the tortfeasor can avoid double payment by the techniques outlined above. Therefore, the collateral source rule can be accommodated to the Recovery Act.

VII. Procedural Effects of the Different Rights

The Act provides two means for the Government to enforce its rights: (1) it may at any time intervene in the injured party's suit, or (2) after an interval of six months has passed, it may

254. See notes 55-70 and accompanying text supra.
255. See note 68 supra.
257. This was the approach taken by the Comptroller General in an unpublished opinion subsequent to the Ammons case allowing the Government to withhold the amount of its claim from the injured party's pay where he had received a settlement or judgment which purportedly included the Government's claim. Comp. Gen. B-15093 (Jan. 26, 1966).
259. 42 U.S.C. § 2651(b) (1970). This right has been upheld in the federal courts in Forrester v. United States, 308 F. Supp. 1137 (W.D. Pa. 1970); Phillips v. Trame, 252 F. Supp. 948 (E.D. Ill. 1966); Murphy v. Smith, 243 F. Supp. 1006, 1008 (E.D.S.C. 1965). In the state courts, it has also been upheld. Heffernan v. Hertz Corp., 34 App. Div. 2d 552, 309 N.Y.S.2d 706 (1970); Toliver v. Shumate, 151 W. Va. 105, 150 S.E.2d 579 (1966). This right is clearly a matter of federal law and should override any state procedural laws to the contrary. The states do not have to furnish a forum for the federal government, but if they provide a forum, they are controlled by the supremacy clause and must follow the federal statute. This is a right of intervention not subject to the discretion of the trial judge. Heffernan v. Hertz Corp., supra.
institute suit on its own.\textsuperscript{260} The latter suit may be brought in the name of the Government or the injured party, separately or in conjunction with the injured party.\textsuperscript{261} Thus, this section provides a means for enforcing both the independent and the subrogated rights. The independent right can be asserted through intervention or separate suit, while the subrogated right can be enforced by a suit in the name of the injured party for the benefit of the Government. However, these suits are directed by the United States Attorney. Because of the lack of staff available in the enforcement agencies and the heavy case load of the various United States Attorneys, the Government has developed another collection technique\textsuperscript{262} — requesting counsel for the injured party to include an allegation in his suit claiming these damages for the benefit of the Government.\textsuperscript{263} Obviously, the injured party cannot attempt to collect through the independent right of the United States, so this procedure necessarily is based upon the subrogated right.

A. Collection Through Private Suit of the Injured Party

It is questionable whether this new technique is authorized. The language of section 2651(b) does not seem to lend much support for

\textsuperscript{260} 42 U.S.C. § 2651(b) (1970). It was held in United States v. Thomas Jefferson Corp., 309 F. Supp. 1246 (W.D. Va. 1970), that the Government does not have to join in the injured party's suit filed after the initial six-month period, but may maintain a separate suit in its own name. The meaning of this six-month provision has caused considerable controversy. \textit{See} text accompanying notes 288-316 infra.

\textsuperscript{261} 42 U.S.C. § 2651(b) (1970). This provision has raised some question as to whether it provides an additional source of jurisdiction for the federal courts to hear the injured party's claim. Normally, the injured party would have no access to the federal courts unless there existed diversity of citizenship between the tortfeasor and the injured party. In Becote v. South Carolina State Highway Dep't, 308 F. Supp. 1266 (D.S.C. 1970), the injured party sued for himself and for the benefit of the United States. There was no diversity of citizenship since the defendant was a state agency, but the plaintiff claimed jurisdiction under the language of section 2651(b). The court dismissed the suit on the basis that the "conjunction" language does not give federal jurisdiction to hear \textit{private} suits. In Rogers v. Bates, 431 F.2d 16 (8th Cir. 1970), the Government filed suit under the Act and the conservator for the deceased veteran attempted to join. The trial court denied the joinder on the basis of the lack of diversity of citizenship. On appeal, the conservator argued for the first time that the Recovery Act allowed him to join in the Government's suit. The court in a most unsatisfactory opinion rejected his claim. Finally, in Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970), the injured party sued the Government under the Tort Claims Act. She did not sue the joint-tortfeasor because there was no diversity jurisdiction. The United States cross-claimed against the joint tortfeasor for contribution and for its medical costs under the Recovery Act. The court then allowed the plaintiff to file suit against the impleaded joint tortfeasor. There is merit in allowing the injured party to join in the Government's suit once it has been filed, since it allows the entire matter to be settled in a single suit and, therefore, \textit{Rogers} should not be considered the final word in this area.

\textsuperscript{262} For a detailed discussion of this unofficial collection procedure and the problems it has caused, \textit{see} Long, \textit{Administration of the Federal Medical Care Recovery Act}, 46 \textit{Notre Dame Law.} 253, 276-93 (1971).

\textsuperscript{263} \textit{See} note 274 infra.
it since it speaks in terms of instituting and prosecuting actions in conjunction with the injured party. This language would seem simply to authorize the United States to be a named party, working side-by-side with the injured person. However, this section might be thought to be inapplicable in such a case, since the United States is not enforcing any right; rather, the injured party is enforcing the Government's right on its behalf. Thus, the Recovery Act has merely created an interest which a third party can enforce on the Government's behalf. This, as we have seen, was supplied when Congress created both independent and subrogated rights. The Government should be able to pursue its subrogated right as any other party pursues a subrogated right under state law. This is the position taken by the Department of Justice and supported by several commentators.

However, the cases which have considered the matter are divided. The question was first raised in *Carrington v. Vanlinder,* in which the court held that the Government did not have a separate subrogated right, but, following the reasoning of the *Fort Benning* case, held that the Government had but a single independent right which was subrogated only in the limited sense that there had to be liability on the part of the tortfeasor to the injured party under state law. Since there was only the independent right, the injured party could not enforce this for the Government. The matter was again considered in *Conley v. Maattala.* The Conley court recognized that the Government had three ways to enforce its rights under the Recovery Act, one of which was subrogation. The court went on to hold that which of these three methods the Government chose to use was solely within its discretion and that the defendant could not object if it elected to follow the subrogation route through the injured party's suit. Subsequently, four other federal district courts have followed this reasoning and have denied defendants' motions to dismiss the plaintiffs' allegations on behalf of the United States.

---

264. See text accompanying notes 87-123 supra.
267. 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).
268. 387 F.2d 884 (5th Cir. 1967).
269. Cassady, supra note 266. Cassady based his conclusion on a letter (see id. at 34 n.56) from the Chief of the Justice Department's Civil Division to the Judge Advocate General of the Navy which indicated that three of the District of Columbia district court judges had held that the United States would have to intervene. Apparently, this opinion was rendered informally in chambers and the reasoning of the judges is not available.
While the reasoning of neither Carrington nor Conley is entirely satisfactory, it would seem that the Conley analysis is superior. Our earlier analysis examined and rejected the concept that the Government has only one right which has certain subrogation characteristics. Similarly, the concept that there was only one right which could be procedurally enforced in a variety of different ways was also rejected. There are in fact two separate rights, one independent and one subrogated. However, the Conley court was correct in recognizing that the Government should be able to avail itself to the full extent of its subrogated right. The critical difference is that the subrogated right depends solely upon state procedure and state substantive law.

Therefore, the question shifts from whether or not collection through the injured party is authorized by federal law to whether the technique is available under state law. In most states, the subrogor, in the case of a partial subrogation, is entitled to bring suit upon the entire claim without joining the partial subrogee as a party plaintiff; the subrogee not being considered a real party in interest. There are a few states, notably Louisiana, which require that the subrogee bring suit in his own name. In those states, since the United States cannot be forced to join under the state real party-in-interest statutes, the plaintiff's allegation should be dismissed or recovery denied as was done in two Louisiana cases.

Cuttrell, Civil No. 70-254 (W.D. Okla., Aug. 4, 1970); Kaplan v. Bella, Civil No. 66-229 (W.D. Tex., May 26, 1969). Albright held, however, that the plaintiff may not include the amount of the Government's claim in calculating the amount in controversy necessary to establish the jurisdictional amount in diversity cases. 350 F. Supp. at 350-51.

272. Turner, supra note 89.

273. See note 249 supra.

274. McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (W.D.S.C. 1941), held that the defendant can be sued by the real party in interest so that the judgment would fully protect him against further suits. To avoid this problem, in some cases the Government has specifically authorized plaintiff's lawyer, by letter filed with the court, to include the allegation, indicating that the Government has agreed to be bound by the outcome of the litigation. Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692 (E.D. Pa. 1972); Marshall v. Cuttrell, Civil No. 70-254 (W.D. Okla., Aug. 4, 1970); Conley v. Maattala, 303 F. Supp. 484 (D.N.H.; 1969); Kaplan v. Bella, Civil No. 68-229 (W.D. Tex., May 26, 1969). Having once consented to be bound by the decision, the Government would be estopped from attempting to relitigate the matter. Palmer v. Sterling Drugs, Inc., supra at 695.

275. 2 L.A. CODE CIV. PRO. ANN. art. 697 (West 1960).


277. This result would not prevent the Government from then suing in its own right on its independent cause of action, or from voluntarily intervening in the state court proceedings.

Certain disadvantages which have not been fully appreciated accompany this private device to recoup medical costs. Since the injured party is suing on the Government’s subrogated right, the recovery of these items is subject to all the state substantive defenses outlined above. 279 However, in an effort to let the Government have its cake and eat it too, a number of commentators have attempted to claim that there is only one independent right and that this right can be enforced through subrogation. 280 Furthermore, it is claimed that the state substantive defenses do not apply to the Government’s right because it is an independent right, merely procedurally enforceable by subrogation. As we have seen, the Conley and Fort Benning cases tend to support the first proposition. It is submitted, however, that the Conley and Fort Benning interpretation of the Recovery Act is erroneous, and that, even if it were accepted, it should not be extended to exclude substantive state defenses where the injured party sues for the benefit of the Government. 281

B. Collateral Estoppel

A second procedural problem is the effect of a judgment obtained by either the injured party or the Government as res judicata in a suit by the other. Three cases have considered the matter, 282 and in all these cases the injured party first brought suit for his injuries and received a judgment. In United States v. Jones and United States v. Freese, the courts stated, without discussion, the judgment in favor of the injured party foreclosed further litigation of this point when the Government sought to recover its claim in a separate suit. 283 United States v. Stinnett, 284 on the other hand, considered the same question

279. Turner, supra note 89.
280. See, e.g., Noone, supra note 115; Comment, supra note 106, at 130.
281. One commentator argues that where the injured party brings suit, the state statute should govern. In certain instances this would be advantageous to the Government, since a few states have a longer tort statute than the three-year federal statute. Turner, supra note 89, at 48. Turner bases his reasoning on the theory that the subrogation provision in the Recovery Act constitutes a waiver of sovereign immunity as to the application of state statutes of limitations. He then concludes from the legislative history that the federal statute, 28 U.S.C. § 2415 (1970), does not apply where an existing statute governs. As appealing as this approach is, it will not stand close inspection. As we have seen (see text accompanying notes 210–30 supra), the statute of limitations question has a peculiar history which indicates that the problem has always been treated as a matter of federal law whenever a federal governmental interest was involved. Against this background, the statement in the legislative history about the new general statute not applying where an existing statute controlled clearly refers to an existing federal statute of limitations.
in detail, since it was the only issue raised. The earlier judgment involved therein was a consent judgment, the result of a court-approved settlement. The Stinnett court first determined that the Recovery Act gave the Government two separate rights, one independent and the other subrogated, and then concluded with respect to this subrogated right that the United States was in privity with the injured party. The court also believed that this privity prevented the tortfeasor from relitigating the question of liability.\(^{285}\)

On the basis of Stinnett, it would seem valid to conclude that when the Government sues on its subrogated right, because of the privity between the Government and the injured party, the tortfeasor will be barred from relitigating the question of liability.\(^{286}\) The only issue which would remain in such cases would be the necessity and reasonableness of the medical care.\(^{287}\) Yet when the Government brings suit on its independent right, it would seem that the same privity would not be present, and the tortfeasor could relitigate the question of liability.

\(^{285}\) Id. at 1338.

\(^{286}\) This conclusion is also supported by United States v. Freese, Civil No. 66C69(2) (E.D. Mo., Dec. 30, 1966), because the court there treated the Government’s right as solely one of subrogation. Both Stinnett and Freese leave one question unanswered: when the Government seeks to enforce its subrogated right, must it sue in the name of the injured party for the Government’s benefit or can it sue in its own name? In both cases the Government sued in its own name. Section 2651(b) indicates that suit can be brought in either the Government’s name or that of the injured party, but it is not clear whether this means that it will be brought in the Government’s name when the independent right is pursued and in the injured party’s name when the subrogated right is pressed. This language is patterned after the recovery provision in the Federal Employees’ Compensation Act, 5 U.S.C. § 751 (1970), in which the right granted is only a subrogated one and the Government is authorized to bring suit in its own name. Thus it would seem that the Government under the Recovery Act can sue in either manner. It should, however, identify in its pleading which right it is attempting to pursue.

\(^{287}\) The Government charges a flat per diem rate for hospital care it furnishes regardless of the treatment provided. This rate is presently $61 per in-patient day and $12 per visit to an out-patient facility. 36 Fed. Reg. 11327 (1971). The Act, 42 U.S.C. § 2652(a) (1970), gives the President the power to establish these rates. By Executive Order, President Kennedy delegated this rate making authority to the Bureau of the Budget. Exec. Order No. 11,060, 3 C.F.R. 651 (1963). It has been held that since the rates are established under the authority delegated by Congress, they are to be treated as a part of the statute, and are not subject to challenge. United States v. Jones, 264 F. Supp. 11, 14 (E.D. Va. 1967); Tolliver v. Shumate, 151 W. Va. 105, 150 S.E.2d 579 (1966). However, the defendant tortfeasor may challenge the reasonableness or necessity for the care. Id. The Jones court acknowledged that “servicemen are frequently kept in a hospital for a longer period than necessary for the obvious reason that they cannot be returned to duty and it is not appropriate to send them to their homes.” 264 F. Supp. at 14. One insurer has elaborated on this practice of retaining military patients beyond the medically required time. He indicated that one military hospital had divided its patients into five separate categories, of which only one was definitely required to be retained for medical reasons and two others were questionable. The remaining two categories were retained for military, rather than medical, reasons. See Long, supra note 262, at 291 n.284, citing Address of Edward S. Ring, Vice President, Government Employees Insurance Co., NAIIA Convention, May, 1967.
VIII. **The Six-Month Provision**

The second major statutory interpretation question which the courts have had to consider under the Recovery Act is what meaning to assign to the six-month provision of section 2651(b). The language in question reads:

The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured . . . person . . . or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States . . . institute and prosecute legal proceedings . . . either alone . . . or in conjunction with the injured . . . person . . . .

The dispute revolves around whether the emphasized language is a statute of limitations or merely a condition for the filing of a separate action by the Government. The proponents of the statute of limitations position argue that the language means that if the injured party files suit within the six-month period, then the Government must join in that suit or be barred from recovery by a subsequent independent suit after the six-month period has run. The net effect of this position would be to limit the Government to joining in the injured party’s suit under these circumstances, since the language clearly prevents the Government from filing an independent suit within the first six months.

Opponents of the statute of limitations approach argue with equal vigor that the emphasized language only requires the Government to delay filing an independent suit for six months — that the injured party is simply given six months in which to decide whether to settle or sue. If he does neither, there is no problem, since after six months the Government clearly can sue. If, however, he files within the six-month period, the opponents argue that the Government still has the option to join or go it alone by separate suit.

The question was initially raised in four suits before different federal district courts. In three of these, *United States v. Housing Authority,* *United States v. York,* and *United States v. Mer-

---


289. It is conceded that the Government does not have to join within the six-month period, but may join later. *See United States v. Merrigan,* 389 F.2d 21 (3d Cir. 1968). Likewise, it is conceded that the Government may join if the injured party brought suit at a later date. *Carrington v. Vanlinder,* 58 Misc. 2d 80, 294 N.Y.S.2d 412 (Sup. Ct. 1968).


the courts adopted the statute of limitations position. In the fourth, United States v. Wittrock, such an interpretation was rejected. On appeal, all three district courts favoring the statute of limitations position were reversed. The statute of limitations approach was rejected by yet another district court recently in United States v. Thomas Jefferson Corp.

The reasoning of these district courts in adopting the statute of limitations approach is not totally clear. It is apparent that both the York and Housing Authority courts were concerned with the fact that the defendant would be forced to litigate the question twice. Also, the York court expressed concern that the defendant might be required to pay these same costs twice and, therefore, that the Recovery Act should be strictly construed. However, we have seen that this conclusion is inaccurate, since the defendant tortfeasor can avoid double payment by bringing the injured party in as a third-party defendant. Finally, the Housing Authority court felt that its conclusion was the only construction which would give effect to the statutory language. This reasoning completely ignores the contention that the sole purpose of the provision is to give the injured party six months in which to bring his own suit first.

On appeal, all three courts adopted the idea suggested in United States v. Wittrock, that the language of section 2651(b) is permissive only, merely providing that the United States may intervene and sue. Thus, they concluded that other enforcement procedures were possible. The Merrigan court then went on to hold that "the

293. This position was also adopted in dicta in United States v. Bartholomew, 266 F. Supp. 213 (W.D. Okla. 1967).
295. United States v. Housing Authority, 415 F.2d 239 (9th Cir. 1969); United States v. York, 398 F.2d 582 (6th Cir. 1968); United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968).
297. See 415 F.2d 399 (9th Cir. 1969); 398 F.2d 582 (6th Cir. 1968).
298. Such a strict construction would appear to be contrary to the holding in Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), that procedural provisions are not to be strictly construed against the Government, but rather in aid of the statutory right created.
299. See text accompanying notes 251-52 supra.
300. 415 F.2d at 241.
302. United States v. Housing Authority, 415 F.2d 239, 241 (9th Cir. 1969); United States v. York, 398 F.2d 582, 586 (6th Cir. 1968); United States v. Merrigan, 389 F.2d 21, 24 (3d Cir. 1968). In Merrigan, Judge Hastie dissented. He felt that the case was squarely within the provisions of section 2651(b) and that the majority could not ignore this provision in favor of some other procedure not outlined in the statute. He is not opposed to governmental recovery in this situation, but merely feels that Congress did not adequately provide for the contingency in drafting the statute. See 389 F.2d at 26.
The six month provision is an incongruous residue left in the statute from the earlier intention to provide to the government no more than a derivative right of subrogation.\textsuperscript{303} It finally concluded that the provision meant nothing more than that the Government could not begin a separate suit for six months.

If the language of the statute is read strictly and without reference to its legislative history, it is difficult to avoid the conclusions reached by the district courts and Judge Hastie, dissenting in \textit{Merrigan}. It would seem that the procedures outlined in section 2651(b) are not intended to be mandatory, for we have seen that recovery through the private suit of the injured party is authorized by the statute.\textsuperscript{304} However, reference to a procedure outside the statute would not seem to be proper because, as Judge Hastie pointed out, the statutory language clearly covers the case.\textsuperscript{305}

The legislative history reveals that the Act originally provided only a subrogated right.\textsuperscript{306} The original language of section 2651(b) provided that the subrogated right could be enforced by direct suit or intervention. The comments of the Comptroller General on this provision are instructive:

The first portion of this provision apparently would permit the Government to take immediate action against the liable third person without permitting the injured or diseased person an opportunity to settle the claim himself. It would appear to be to the interest of both the Government and the injured or diseased person to permit that person to take the necessary action, with the Government doing so only when the injured or diseased person fails or refuses to do so within a reasonable time. . . . The committee may wish to consider the desirability of including in the bill itself a provision reserving to the injured or diseased person a specific period of time within which he may attempt to settle a claim. A provision reserving such a specific period in cases arising under the Longshoremen's and Harbor Workers' Compensation Act is contained in subsection 33(b) of that act . . . .\textsuperscript{307}

The original suggestion of the six-month delay provision was made in contemplation of a subrogated recovery system where the normal recovery procedure would be for the injured party to sue for the entire claim and reimburse the Government out of the proceeds. Under

\begin{footnotes}
303. 389 F.2d at 25.
304. \textit{See} text accompanying notes 259-81 \textit{supra}.
305. 389 F.2d at 25 (dissenting opinion).
306. \textit{See} text accompanying notes 87-123 \textit{supra}.
\end{footnotes}
these circumstances, the Government would only sue when the injured party failed or refused to sue.

The congressional intent is made even clearer upon examination of the language of the Longshoremen’s and Harbor Workers’ Compensation Act referred to by the Comptroller General:

Acceptance of such compensation [as provided by the Act] . . . shall operate as an assignment to the employer of all right[s] of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.\(^{308}\)

Under this section, if the injured longshoreman files suit within the six-month period, the compensation carrier is subrogated to the amount of the compensation paid.\(^{309}\) If no suit is filed, the employer or his compensation carrier is entitled to bring suit for the entire claim (both the injured party’s and its own), deduct expenses of suit, compensation paid, other benefits furnished, plus one-fifth of the excess, and pay over the remainder, if any, to the injured party.\(^{310}\)

It is submitted that Congress subsequently decided to shift the emphasis in the recovery program from a subrogated system, where the injured party would carry the brunt of the recovery responsibility as under the Longshoremen’s Act, to an independent right system. The Act left as a secondary recovery system the original subrogation provision, but did not include any requirement that the injured party’s suit include the interest of the Government. As a result, it has been held that the Government could not force him to include its claim.\(^{311}\) Thus, the primary reason suggested by the Comptroller General for including the delaying period disappeared.

Congress was, however, definitely concerned about the effect upon the injured party of the Government’s attempts to recover.\(^{312}\) As a result, it is submitted that Congress decided to include the delay period, as suggested by the Comptroller General, merely to give the injured party a chance to settle his portion of the injury claim with-


\(^{312}\) See 42 U.S.C. § 2652(c) (1970) which reads:

No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damages not covered hereunder.

That the Government’s intervention in the injured party’s private suit could be detrimental was recognized in Conley v. Maattala, 303 F. Supp. 484 (D.N.H. 1969), and used as one of the reasons for allowing the injured party to include allegations recovering these costs for the benefit of the Government.
out any adverse influence from the Government. Unfortunately, the drafters used the Longshoremen's Act as a model for their revision (as had been suggested by the Comptroller General) apparently not realizing the change in the nature of the Government's rights under the program. To reflect their intent of merely delaying initial action by the Government, the provision should have been worded:

The United States may, to enforce such right, (1) intervene . . . or (2) after six months from the first day in which care and treatment is furnished by the United States . . . institute and prosecute legal proceedings . . . .

In light of the fact that Congress never intended to prevent the Government from suing on its independent right, but merely to delay suit for six months, it is unclear what the courts should do. Judge Hastie would have them do nothing, on the ground that the courts cannot remedy the situation through judicial construction:

Congress specified the remedies it created in a way that excludes an independent action by the United States in this situation. Therefore, I think it is not within judicial competence to grant such a remedy, however desirable that course of action may seem.313

On the contrary, it is submitted that the court has a positive duty to interpret the statute in a way that will carry out the congressional intent. It has long been recognized that the courts are not to give a literal, but absurd, interpretation to a statute.314 The duty of the court to interpret the statute in accordance with congressional intent rather than to give merely a literal reading to the statutory language was summarized in Los Angeles Mailers Union v. NLRB.315

We may give language in a statute, if it will reasonably bear such a construction, the meaning Congress intends, though read literally it would bear a different meaning. The courts are under an obligation at times to do this in order to give legislation its proper application.316

Applying this rule of construction to the Recovery Act, it seems inescapable that section 2651(b) was not intended as a partial statute of limitations and should be interpreted as simply delaying the right of the Government to bring an independent action for a period of six months.

315. 311 F.2d 121 (D.C. Cir. 1962).
316. Id. at 124, citing Lynch v. Overholser, 369 U.S. 705, 710 (1962).
IX. Conclusion

The foregoing discussion has indicated that the courts have had a rather extensive and difficult task interstitially interpreting the Recovery Act. By and large, they have performed well. However, the courts have often decided the particular controversies before them without a great deal of thought as to the effect of their decisions on the body of jurisprudence involved. As a result, the group of decisions concerning the Recovery Act has tended to grow like Topsy, uncontrolled and undisciplined, with a number of contradictory and partially conflicting decisions. It has been the purpose of this Article to attempt to shape these into a consistent and symmetrical body of law which will correctly reflect the purpose of the Recovery Act and the policies behind the creation of federal common law.