

TITLE 3

CIVIL DIVISION

U.S. ATTORNEY'S MANUAL 1970

TITLE 3

CIVIL DIVISION

CONTENTS

	Page
General instructions	1
Actions by the Government	3
Actions against the Government	4
Representation of Government officers and employees	5
General jurisdictional principles	6
Miscellaneous litigation matters	7
Advice as to papers filed in litigation	7
Privileged character of Government documents	8
Assistance by other attorneys	8
Assistance to Civil Division attorneys	9
Advice as to constitutional and other questions	9
Stipulations	9
Disbarment proceedings	9
Duties under Bankruptcy Act	10
Duty to assist court with deposited funds	10
Proposed findings and conclusions	10
Prior review of proposed judgments	10
Collections	10
Referral of claims from other agencies to the Department	11
Prejudgment collection efforts	12
Postjudgment collection efforts	20
Disposition of sums collected	26
Liaison with Civil Division	26
Delegation of authority to U.S. attorneys	26
Compromise, transfer to inactive status, and closing of cases	32
Payment and satisfaction of judgments against United States	42
Special instructions	44
Admiralty and Shipping Section	44
Foreign Litigation Unit	46
Fraud Section	47
Fraud cases	47
Statutes of limitation	48
General Claims Section	50
Bankruptcy and insolvency matters	52
Claims against decedents' estates	54
Claims of nonappropriated fund instrumentalities	55
Check reclamation proceedings	55
Claims for civil penalties	56
Customs duties	56
Planning advances	56
SBA claims	57
Walsh-Healey Act claims	58
Conversion of mortgaged property	58

June 1, 1970

TITLE 3: CIVIL DIVISION

	Page
Gifts and bequests	59
Veterans' matters	59
Suits on veterans' insurance policies	60
Suits to quiet title or for foreclosure of liens on property on which Government claims a lien	61
General Litigation Section	63
Tucker Act cases	63
Suits to enforce governmental functions	63
Renegotiation cases	64
Civil enforcement of Interstate Commerce Act	65
Department of Agriculture matters	65
Defense of suits against Federal agencies and officers	66
Participation in suits involving Government "cost-plus" contractors Intervention in actions questioning the constitutionality of an act of Congress	67
Filing of briefs <i>amicus curiae</i> in cases affecting interests of the United States	68
Judgment and Collection Unit	69
Torts Section	69
1966 amendments to Federal Tort Claims Act	70
Basic issues frequently raised	73
Cases in which exceptions to the Tort Claims Act are applicable ..	76
Representation of Government drivers pursuant to P.L. 87-258....	76
Federal Medical Care Recovery Act	77
Medical malpractice cases	78
Aviation litigation	79
Delegation of settlement authority to U.S. Attorneys	79
Settlement offers exceeding your delegated authority	80
Administrative settlement of tort claims against the Department of Justice	81
Interest	82
Use of FBI in tort investigations	83
Suits on affirmative tort claims	83
Payments of judgments and compromises	84

June 1, 1970

TITLE 3: CIVIL DIVISION

ORGANIZATIONAL NOTE

The current organization to handle the workload of the Civil Division includes nine Sections and two Units denominated as follows:

Admiralty and Shipping
Appellate
Court of Claims
Customs
Foreign Litigation Unit
Frauds
General Claims
General Litigation
Judgment and Collection Unit
Patent
Torts

Special instructions concerning the work of particular Sections are placed after the more general instructions which follow immediately.

The Assistant Attorney General in charge of the Civil Division also serves as the Director of the Office of Alien Property (28 C.F.R. 0.47).

GENERAL INSTRUCTIONS

The protection and prosecution of the interests of the United States in civil and criminal litigation is the function and duty of the Attorney General of the United States, except as to situations where specific statutes permit the legal divisions of specified Government agencies to represent these agencies in certain special types of civil litigation. By delegation of the Attorney General, the Assistant Attorney General in charge of the Civil Division has supervision over the functions described under Civil Division, Title I, *supra*. The direct handling of certain types of cases has been redelegated to the U.S. Attorneys. See pages 26 to 32 of this Title for a description of these cases and the exemption from forwarding papers thereon.

June 1, 1970

TITLE 3: CIVIL DIVISION

It will be obvious that effective and economical discharge of these delegated functions depends on the mutual interest, enthusiasm, confidence, and support of the Civil Division and the U.S. Attorneys. The Civil Division in Washington maintains close liaison with the national offices of the various Government agencies, and stands ready to collect and forward at the earliest possible moment such information as is essential to the preparation of complaints, pretrial conferences, answers, motions, etc., and will thereafter keep in close touch with all developments in each non-delegated case. While the burden of litigating cases against the United States, and cases referred to him by the Civil Division or by the various Government agencies direct, rests primarily on the U.S. Attorney, the Civil Division will always be fully available and eager to assist in the collection of information, discussion of legal and factual problems, briefing, or any other function, with respect to a case, which would best serve the Government's interest. U.S. Attorneys should not hesitate to request such assistance.

At the same time, the interests of the Government require the assumption on the part of U.S. Attorneys of correlative duties of cooperation. The Civil Division must be advised at once of every change in the status of every nondelegated matter within its jurisdiction regardless of whether suit has been instituted, and, as to matters in litigation, it must be informed as far in advance as possible of the dates of pretrial conferences, trials, hearings, or arguments, and of any continuances. In addition, prompt report should be made to the Civil Division of an infringement of the property or other interests of the Government warranting the institution of civil proceedings; and U.S. Attorneys should report to the Civil Division any property belonging to the United States which is not receiving proper care, any claim in favor of the United States not officially lodged with them which in their opinion can be collected, and any default of any officer or employee of the Government engaged in the collection of any debt due the United States or of the customs revenue, or in the disbursement of Government funds.

In coordinating the efforts of the many U.S. Attorneys, the Civil Division will seek to make available the latest precedents, which may not otherwise be available, work toward selecting the best vehicles for test purposes, assure reasonable uniformity of position and procedure, and make available expertise developed in certain specialties over the course of many years. The material which follows is a restatement of departmental orders, memorandums,

June 1, 1970

TITLE 3: CIVIL DIVISION

and practical suggestions which past experience indicates may be most frequently of value in handling civil work.

Actions by the Government

No civil action in the name of the United States or an officer thereof, in cases within the jurisdiction of this Division, should be begun without the specific authority of the Civil Division, except where the U.S. Attorneys are authorized in this Title to commence suit at the direct request of a department or agency. If an agency makes an emergency referral in a nondelegated case and there is not time to obtain Civil Division authorization before instituting suit or filing proof of claim, or the filing of an answer or motion is required, protective action may be taken if the U.S. Attorney is satisfied that such action is proper. If time permits, telephonic clearance should be obtained from the Civil Division. In any event a copy of the complaint, proof of claim, answer or motion filed, and the supporting submission of the client agency, should be forwarded to the Civil Division with the U.S. Attorney's report thereon.

When advice or information is desired as to the institution, conduct, or disposition of any suit within this Division's jurisdiction, by or against the United States, request therefor should be transmitted to the Civil Division accompanied by a clear and succinct statement of facts, the points of law involved, the authorities deemed applicable, and the opinion of the U.S. Attorney.

All actions must be brought in the name of the United States of America and instituted in a Federal court, unless specific authority to do otherwise is granted by the Civil Division. Except in emergencies, two copies of the complaint or libel must be submitted for the consideration of the Civil Division prior to the institution of any action. In cases where U.S. Attorneys are authorized to start suit at the direct request of a department or agency, a copy of the complaint or libel should be transmitted to the interested department or agency, except that the General Accounting Office requires no advice or documents but Form No. D.J.—80 (closing notice). Wherever appropriate, the prayer of each complaint for a money judgment should include a demand for interest and costs.

State statutes of limitations and laches are not applicable to suits by the Government. *United States v. Summerlin*, 310 U.S. 414; *Gaussen v. United States*, 97 U.S. 584, 590; *United States v. Verdier*, 164 U.S. 213, 219. See pages 48-49 for applicable Federal

TITLE 3: CIVIL DIVISION

statutes limiting the time within which Government claims must be asserted.

Except when authority is delegated to the U.S. Attorneys (see pp. 26 below), they should not compromise or close cases or claims, nor should they compromise, close or inactivate judgments, without the prior approval of the Civil Division.

Actions Against the Government

A Government department or agency (as distinguished from a Government official or employee) is not subject to suit in either a Federal or State court unless Congress has waived sovereign immunity with respect to that department or agency. *Blackmer v. Guerre*, 342 U.S. 512; *Taft Hotel v. Housing and Home Finance Agency*, 262 F. 2d 307 (C.A. 2), cert. denied, 350 U.S. 967; cf. *Federal Housing Administration v. Burr*, 309 U.S. 242.

U.S. Attorneys are not authorized to consent to suits against the United States, its officers, or agents and where jurisdiction of suits against the United States exists by statute, they are not authorized to waive objections as to venue or agree to substitutions, third party joinders, and the like, without first clearing such matters with the Civil Division which in turn will clear them with the affected agencies.

The Attorney General has designated the Deputy Attorney General and the Administrative Assistant to the Attorney General to accept service of pleadings and process for him. In the absence of specific authority from the Attorney General or his designees, U.S. Attorneys have no authority to accept such service.

It will expedite the collection of relevant data from interested agencies if the Civil Division receives two copies of the summons and complaint rather than merely the one copy which the Federal Rules of Civil Procedure require the Marshal, his deputy, or a court appointee to mail to the Attorney General; and it is requested that U.S. Attorneys, where feasible, seek the cooperation of plaintiffs' counsel in this respect by asking them to transmit direct or through the U.S. Attorney one or more additional copies of such documents when effecting service of the original on the Attorney General. If the complaint does not identify the agency involved, the U.S. Attorney should obtain this information from plaintiff's counsel and transmit it to the Civil Division. When material sufficient to permit preparation of the responsive pleading is not available, the U.S. Attorney will ordinarily be notified and requested to obtain an

June 1, 1970

TITLE 3: CIVIL DIVISION

extension of time to move, answer, or otherwise plead. The U.S. Attorney should under no circumstances allow the time for filing of the answer to expire without an answer having been filed or an extension of time obtained from the court.

Representation of Government Officers and Employees

It is the general policy of the Department to afford counsel and representation to Government officers and employees when suits for injunction, mandamus, etc., are brought against them in connection with their performance of their official duties. In situations where time does not permit communication through Department heads in Washington, U.S. Attorneys may, upon the request of a local officer of a Federal agency, afford counsel and representation to Government officers and employees in such cases. In the case of all such requests, the Civil Division should be promptly notified and advised by the U.S. Attorney of the circumstances of the case. It is the policy of the Civil Division to remove to the Federal district courts, pursuant to 28 U.S.C. 1442 (a), cases of this type which are instituted in State or municipal courts. See *Sarner V. Mason*, 228 F. 2d 176 (C.A. 3), cert. denied, 351 U.S. 924. Note that a removal must be effected within 30 days (28 U.S.C. 1446 (b)). When time permits, the U.S. Attorney should obtain the approval of the Civil Division before effecting a removal; but if time does not permit, the U.S. Attorney may effect the removal and promptly send the Civil Division two copies of the removal papers filed.

It is also the Department's policy to afford counsel and representation to Government employees and servicemen who are sued civilly or charged with violation of local or State criminal laws as a result of the performance of their official duties. See *Johnson v. Maryland*, 254 U.S. 51; *Colorado v. Symes*, 286 U.S. 510; *City of Norfolk v. McFarland*, 143 F. Supp. 587, 145 F. Supp. 258 (E.D. Va.). This shall apply wherever property damage, personal injury or death has resulted, or where a substantial Federal interest is involved. (Policy with respect to representing Government drivers who are sued civilly and are entitled to representation pursuant to 28 U.S.C. 2679, as amended by P.L. 87-258, 75 Stat. 539, will be discussed under the Tort Section *infra*). Otherwise, except where unusual circumstances exist, the U.S. Attorneys shall decline (such as in minor traffic violations) to make court appearances on behalf of employees or servicemen, unless specific-

TITLE 3: CIVIL DIVISION

ally requested to do so by the Civil Division. Representation should also be declined when the employee or serviceman is adequately protected by his own liability insurance, in which case the U.S. Attorney should assist in getting the insurer to afford proper representation. Whenever pursuant to this policy representation is afforded, U.S. Attorneys are authorized, on the same basis as in other cases, to incur litigation expenses which are necessary to protect the Government's interests.

The potential liability of the United States makes it important to ascertain as early as possible the basic facts, extent of injury or damage, and the names of witnesses in every case, civil or criminal, based upon the alleged dereliction of Government employees or servicemen. For the same reason, pleas of guilty should be entered in criminal cases only after careful consideration of all factors involved. It is generally advisable to remove such cases from State courts to U.S. District Courts (see 28 U.S.C. 1442-1449).

General Jurisdiction Principles

As to immunity of Government officers from personal liability for acts done under color of office, see *Parr v. Matteo*, 360 U.S. 564; *Howard v. Lyons*, 360 U.S. 595; *Spalding v. Vilas*, 161 U.S. 483; *Gregoire v. Biddle*, 177 F. 2d 379 (C.A. 2), cert. denied, 339 U.S. 949. Suits to enjoin enforcement of an allegedly unconstitutional act of Congress may be heard only by a 3-judge District Court. 28 U.S.C. 2282; *Jarvis & Co. v. Morgenthau*, 307 U.S. 171; *International Ladies Garment Worker's Union v. Donnelly Garment Co.*, 304 U.S. 243, *California Water Service Co. v. City of Redding*, 304 U.S. 252.

The former rule that courts outside the District of Columbia had no jurisdiction over officers of the Government stationed in Washington (*Blackmar v. Guerre*, 342 U.S. 512) was changed by the addition of subsection (e) to 28 U.S.C. 1391 (P.L. 87-748) to provide that suits exclusively against Federal defendants may be brought in districts where a defendant resides, the cause of action arose, real property involved is situated or where plaintiff resides if no real property is involved. In such cases it is essential to advise the Department promptly and to keep the Department fully informed of developments, particularly motions for an injunction or mandamus.

In a suit brought against a subordinate officer, the head of the department or other superior officer is an indispensable party

TITLE 3: CIVIL DIVISION

where the relief sought would require the superior officer to take action, either directly or through a subordinate. See *Williams v. Fanning*, 332 U.S. 490; *Hynes v. Grimes Packing Co.*, 337 U.S. 86.

Where the defendant officer leaves office pending suit, his successor is automatically substituted. Amendment to Rule 25(d), F.R.C.P., effective July 19, 1961; 368 U.S. A9.

A suit for specific relief against a Government officer is an unconsented suit against the United States and is beyond the district court's jurisdiction where the relief sought, although nominally against the officer, would actually be against the Government, e.g., by affecting the Government's property rights or functions. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371; *Malone v. Bowdoin*, 369 U.S. 643. The jurisdiction of the district courts over such suits is limited to cases alleging that the officer's action is unauthorized by law or that he is proceeding under an unconstitutional statute. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682.

The former rule that district courts outside the District of Columbia had no jurisdiction to issue writs of mandamus or their equivalent (*Marshall v. Scotty*, 185 F. 2d 622 (C.A. 1); *McIntire v. Wood*, 7 Cranch 504) was changed by the addition to Title 28, United States Code, of Section 1361 (P.L. 87-748) so that such suits may now be brought in any district having original venue authority under 28 U.S.C. 1391(e).

The district courts' jurisdiction over suits by Government employees for alleged wrongful discharge is limited to determining whether the employee received the protection of prescribed administrative procedure. The courts may not review the merits of the administrative determination. *Bailey v. Richardson*, 182 F. 2d 46 (C.A.D.C.); *Carter v. Forrestal*, 175 F. 2d 364 (C.A.D.C.).

Miscellaneous Litigation Matters

Advice as to Papers Filed in Litigation

Two copies of all papers filed by any party or by the court including subsequent pleadings, orders, proposed findings, judgments, opinions, or other papers of record, briefs, memorandums, and offers in compromise must be forwarded promptly to the Civil Division, and such papers as are filed in court should bear on their face a notation of the date of filing. When circumstances permit, copies of any of the foregoing instruments which are to be filed on

TITLE 3: CIVIL DIVISION

behalf of the Government should be submitted to the Civil Division before filing the originals. These provisions do not apply to cases coming within the delegation of authority to U.S. Attorneys set forth at pages 26-30, of this Title.

Privileged Character of Government Documents

In civil litigation in which the Government or one of its officers may be a party, the adverse litigant may issue a subpoena *duces tecum* or move for the production of Government documents which the agency in possession thereof considers confidential. A privilege against the compulsory disclosure of such documents is recognized under certain circumstances. *United States v. Reynolds*, 345 U.S. 1; *Touhy v. Ragen*, 340 U.S. 462; *Saunders v. Great Western Sugar Co.*, 369 F. 2d 794 (C.A. 10); see also *Bowman Dairy Co. v. United States*, 341 U.S. 214; *Jencks v. United States*, 353 U.S. 657; *Palermo v. United States*, 360 U.S. 343; *Rosenberg v. United States*, 360 U.S. 367; *Kaiser Aluminum Corp. v. United States*, 157 F. Supp. 939 (Ct. Cls.). With respect to the procedure to be followed when a subpoena is directed to an employee of the Department of Justice, see 28 C.F.R., Chapter I, Part 16.

In the event any question arises as to the production of such documents, it should be submitted immediately to the Civil Division for determination. U.S. Attorneys should not (except where a court denies a request for an extension of time to communicate) assert the Government's privilege against production of documents in any case without prior approval of the Civil Division.

Assistance By Other Attorneys

U.S. Attorneys shall conduct and direct all cases except as otherwise provided, *i.e.*, court of claims cases, admiralty and shipping cases, or other cases which the Department has advised the U.S. Attorney will be handled specially. There is no objection to U.S. Attorneys receiving assistance from attorneys connected with other offices of the Government in the preparation and trial of cases, but it should be understood that such attorneys assist only, and do not conduct, direct, or control cases in which they may be interested. (28 U.S.C. 509, 516, and 547.) The situation is the same in those cases (involving Government corporations and the operations of the Maritime Administration) where the Government enjoys the benefit of insurance, and underwriters nominate trial counsel to assist the U.S. Attorney with the case. Such trial attorneys are only "of counsel" to the U.S. Attorney. They do not control or direct

TITLE 3: CIVIL DIVISION

the conduct of cases in which they are interested, and they may not sign pleadings or briefs on behalf of the Government or its officers, employees, or agents.

Assistance to Civil Division Attorneys

From time to time, attorneys from the Civil Division, involved in the handling of U.S. Court of Claims, patent, and other cases which are not the responsibility of U.S. Attorneys, are required to perform their duties at places within various judicial districts. U.S. Attorneys are requested to assist such attorneys in obtaining office space, stenographic facilities, and similar accommodations wherever it is feasible.

Advice as to Constitutional and Other Questions

The Civil Division must be informed promptly and its attention specifically called to the pleadings raising constitutional questions or disputing in any way the right of the United States to maintain a proceeding.

Stipulations

In no case should a U.S. Attorney enter into an agreed statement of facts, a stipulation to abide the result in another case, a stipulation concluding the substantive rights of the United States, or consent to entry of judgment in favor of the adverse party without specific authority from the Civil Division, except that the U.S. Attorney may stipulate to any fact required to be proved by the Government, or to the authenticity of Government records.

Care should be taken in phrasing pretrial agreements under Rule 16, F.R.C.P., to avoid definition of issues in such manner that they may have the same effect as unauthorized stipulations of fact; as, for example, an agreement in a tort action that the issue is whether or not "the United States" was negligent, thereby ostensibly obviating the need for evidence establishing vicarious liability. (See Federal Tort Claims Practice Manual, Sec. 225 *et seq.*)

Disbarment Proceedings

U.S. Attorneys must give serious consideration to the institution of disbarment proceedings in the Federal courts in all appropriate cases, including the following: (1) Where a practitioner in the Federal courts has been convicted of a criminal offense in any court; (2) where a practitioner in the Federal courts has been disbarred

TITLE 3: CIVIL DIVISION

by a State court; (3) where a practitioner in the Federal courts, in the conduct of Federal litigation, has employed unethical tactics justifying disbarment. See *Theard v. United States*, 354 U.S. 278.

Duties Under Bankruptcy Act

The Bankruptcy Act (11 U.S.C. 32) imposes certain duties on U.S. Attorneys with regard to applications for discharge in bankruptcy. The U.S. Attorneys will cooperate with the courts in the administration of these provisions as far as practicable and will render to the courts with respect thereto every possible assistance.

Duty To Assist Court With Deposited Funds

In connection with the distribution of funds deposited in court, the U. S. Attorney is required to assist the court actively, as *amicus curiae*. In the case of petitions under 46 U.S.C. 626-628 for the return of funds of deceased or deserting seamen, copies of the petition and all supporting papers must be served upon the U.S. Attorney, the Attorney General, and the U.S. Shipping Commissioner. The U.S. Attorney in all such cases must appear as attorney for the United States as another claimant to the funds. Information for use in asserting the Government's claim is ordinarily provided by the Shipping Commissioner.

Proposed Findings and Conclusions

In all actions in the Federal courts, tried upon the merits without a jury, care should be taken to have proper findings of fact and conclusions of law entered by the court as provided by Rule 52(a), F.R.C.P. When possible two copies of the requests for findings should be transmitted to the Civil Division for comment and discussion before filing.

Prior Review of Proposed Judgments

In complex cases involving unusual legal situations, proposed judgments should be submitted to the Civil Division for comment as far in advance of the time for submission or entry as is possible.

COLLECTIONS

A major responsibility of the U.S. Attorneys and of the Civil Division is that of collecting sums which are owed the United States. An effective collection operation requires prompt action and persistent follow-up in accordance with standardized instructions.

June 1, 1970

TITLE 3: CIVIL DIVISION

Every office should maintain an effective review or "tickler" system for its collection cases to the end that demand, suit, judgment, and related steps in the collection process are accomplished within specified time limits. If the volume of collection work is small, a less sophisticated system will suffice, such as a monthly review of all collection files supplemented by special attention to matters involving shorter deadlines. The following procedures are to be followed in both delegated cases and in those which remain under the direct supervision of the Civil Division. (Special instructions on the collection of fines and forfeited bail bonds are contained in Title 2.)

Referral of Claims From Other Agencies to the Department

The Federal Claims Collection Act of 1966, 31 U.S.C. 951-953, and the joint regulations promulgated pursuant thereto, 4 CFR, Parts 101.1-105.7, require the various agencies to take administrative collection action prior to referral of cases to the Department. The statute also empowers the agencies to compromise and close claims up to \$20,000, exclusive of interest.

The Department is anxious that the various agencies take collection action prior to referrals, that they make realistic efforts to compromise claims on which full collection cannot be enforced within a reasonable time, and that they terminate collection action and close files on their own authority when further litigation action is not warranted. 4 CFR 105.4 permits the return of claims of a referring agency when one or more of the collection steps required by the regulations have not been taken by the agency and there is insufficient justification for omission of such steps. In reviewing new referrals not submitted through the Civil Division for compliance with the regulations, please check the following items:

1. Appropriate demands should have been made in accordance with 4 CFR 102.2.
2. A reasonable check should have been made to determine whether collection could be accomplished by offset. 4 CFR 102.3.
3. A personal interview should have been conducted with the debtor, if this was feasible. 4 CFR 102.4.
4. The agency should have explored the possibility of compromise with the debtor on claims of \$20,000 or less, exclusive of interest, if the debtor's financial ability will not permit payment of the claim in full, or the litigative risks or the costs of litigation dictate such action. 4 CFR 102.9.

TITLE 3: CIVIL DIVISION

5. The referral must be accompanied by the current address of the debtor or the data required by 4 CFR 105.2.

6. Referrals must be accompanied by reasonably current credit data indicating that there is a reasonable prospect of effecting enforced collections from the debtor, having regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government. See 4 CFR 105.3 for the circumstances in which credit data may be omitted.

7. If a loan indebtedness is secured by collateral which can be liquidated by the agency through nonjudicial foreclosure proceedings, this should have been accomplished prior to referral of the claim unless the cost of disposing of the collateral is disproportionate to its value or special circumstances require judicial foreclosure. 4 CFR 102.7.

8. If the debtor is employed in any capacity with the Federal Government, the reference should show that every effort has been made to obtain payments by contact with the debtor's employing agency. See 4 CFR 102.5.

9. Claims of less than \$250 are to be referred only under the unusual circumstances set forth in 4 CFR 105.6.

If an agency has not complied with the regulations with respect to a claim directly referred, the claim should be returned to the agency pursuant to 4 CFR 105.4.

Pre Judgment Collection Efforts

1. *Demand.* Prompt demand should be made in every case, no matter how unpromising, unless (1) the debtor may abscond before service of process if demand is made, (2) there is danger the debtor will dispose of assets, (3) a foreclosure action is contemplated (see par. 12, p. 18 of this Title), or (4) special instructions are given to the contrary. Some of the least promising claims will be paid if appropriate demand is made. If the debtor responds to the demand with a claim of inability to pay, (1) arrange for a personal interview with him to discuss the matter, and/or (2) obtain a sworn personal financial statement from him on Form DJ-35. For the amount of interest which should be demanded, see paragraph 11, page 17 of this Title. If your demand produces no suitable response, suit should be filed promptly.

2. *Personal interviews.* Better results can often be obtained if the debtor is confronted in person by the assistant attempting collection. Personal appearances by debtors can be accomplished by

TITLE 3: CIVIL DIVISION

(a) telephone request, (b) notices to the debtor to come in for discussions, (c) similar advice from the Marshal when process is served, (d) advice by the FBI to see the U.S. Attorney, if the debtor is interviewed by a special agent.

3. *Inability to find debtor.* If the demand letter is returned undelivered and postal authorities cannot supply a better address, check local telephone and city directories or with utility companies. If this proves unavailing, return direct reference claims of \$1,500 or less to the referring agency with the advice that collection efforts will be resumed if the agency can furnish the correct location of the debtor. FHA will furnish skip-locator services on Title I improvement loan claims. Form USA-36 should be used for this service. GAO's Claims Division will furnish a similar service on claims it refers and Form DJ-81 should be used. When the debtor's new address indicates the probability that he has changed employment, the referring agency should furnish a current credit report on the debtor at his new address.

Larger claims merit utilization of additional procedures, such as a check with local taxing authorities, contact with the custodian of drivers' license records, or utilization of the FBI. (While the FBI will attempt to locate debtor in claims over \$1,500, it is preferable that the referring agencies be utilized for this purpose in the manner set forth in the preceding paragraph.) If these attempts are unsuccessful, claims within the supervision of the Civil Division should be returned to that Division with a statement of the steps taken to locate the debtor. Other claims should be returned to the referring agencies with the same information.

If it is determined that the debtor has removed to another judicial district, the claim file should be forwarded to the appropriate U.S. Attorney. A carbon copy of your transmittal letter should be sent to the Civil Division, if the claim is one within its supervision, or to the referring agency, if the claim is within your delegated authority.

4. *Credit information.* Each claim referred to you should be accompanied by credit data, provided by the referring agency, sufficient to permit an informed judgment as to the prospects for collection. If the credit information furnished with the referral of a delegated case does not comply with the regulations promulgated pursuant to the Federal Claims Collection Act (see pp. 11-12 of this Title), return the claim to the agency for a current credit report. You may be able to secure additional credit information by asking individual debtors to execute Standard Form DJ-35

June 1, 1970

TITLE 3: CIVIL DIVISION

financial statements. Suit should not be deferred pending receipt of more adequate credit data, unless all indications are that the claim is uncollectible and, because of its size or other considerations, it should be closed without suit (if more adequate credit data substantiates the information then available). For standards to be applied in determining uncollectibility, see page 38 of this Title. Suit should proceed without regard to the debtor's financial standing if a first mortgage is to be foreclosed.

5. *Collection by offset.* The United States as a creditor has the same right to apply money in its hands belonging to a debtor in extinguishment of debts due it that any other creditor has. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239; cf. 31 U.S.C. 227. Accordingly, no opportunity to collect by offset should be overlooked. When a debt due the United States is the result of an erroneous payment to a Government employee, it may be collected from his pay by offset, if the debtor is still employed by the over-paying agency. 5 U.S.C. 5514.

6. *Installment payments or compromise.* If the debtor is unable to pay his indebtedness at once, installment payment may be accepted, although lump sum payments are always preferable. The size and frequency of such payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. If satisfactory credit information is not in hand, insist upon the debtor's execution of a personal financial statement on Form DJ-35. If possible the installment payments should be sufficient in size and frequency to liquidate the Government's claim in not more than 3 years. Installments of less than \$10 should be accepted only in the most unusual circumstances. (Installment proposals, under which judgments including interests and costs, will be paid over a period of more than 3 years, must be acted on as offers in compromise.) The amount and number of monthly installments necessary to complete payment of the sum due, with interest at varying rates, can be determined readily by referring to part I of Lake's Monthly Installment and Interest Tables (5th ed., 1954), a copy of which is available in your office. Whenever possible the payment of future installments should be secured in the manner set forth in paragraph 7.

If installment payments necessarily average less than \$10 per month or an inordinate amount of time will be consumed in collecting by periodic payments, consider settlement to effect earlier disposition and avoid the cost entailed in collecting over a long period of time. Utilize the tables on pages 552-555 of the Federal

TITLE 3: CIVIL DIVISION

Tort Claims Practice Manual to determine the present value of a claim, which otherwise would be liquidated by installment payments of a fixed amount over a stated period of time, and ask the debtor to borrow this amount to effect a settlement. See page 35 of this Title for other bases for settlement.

It is generally preferable to effect settlement for a single lump sum payment. However, there are cases in which settlement upon another basis is appropriate and insistence upon a lump sum settlement offer will result in the collection of substantially less than would be possible if the compromise were payable by installments. In such cases demand security for the deferred payments in accordance with paragraph 7, below.

If it appears that payment of the full amount or a lesser sum can be obtained in one sum, but only at a time several years in the future, use the tables on pages 230-231 of *Lake's Monthly Payment and Interest Tables* (5th ed., 1954) to determine present value and seek a lump sum settlement offer in this amount.

7. *Security for deferred payments.* Whenever full payment of a claim or compromise is deferred for any reason the debtor should be required to give security for the deferred payments. In pre-judgment cases a confess judgment note (Form USA-70a) for the full amount of the claim, with interest, less payments actually made, should be obtained from the debtor. The signature of the debtor's spouse should be obtained on the confess judgment note whenever possible. If the obligation is a joint one on the part of husband and wife, the signatures of both spouses should be required. When the debtor has failed to make an agreed installment payment for a period of more than 10 days, a confession or judgment (Form USA-70b) should be executed. Debtors should be given *prompt* reminders of missed installments. Telephone calls are effective reminders. The confession, a complaint (Form USA-70c) with the confess judgment note attached, and the proposed judgment (Form USA-70d) should then be submitted to the court for approval and signature of the judgment. The judgment (Form USA-70d) contains a direction to the Clerk of the court to file these executed forms without issuance or service of process. Cf. *National Equipment Rentals, Ltd. v. Szukhent*, 375 U.S. 311. However, the debtor should always be given prompt written notice of the entry of judgment. See *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311.

If the U.S. District Court has established specific requirements for the utilization of confessions of judgment, these should, of

TITLE 3: CIVIL DIVISION

course, be followed. If the court has not promulgated such rules, and local State practice permits confessions of judgment through power of attorney, you may follow the procedures and forms acceptable locally. However, many States restrict or entirely forbid this device. Such restrictions are not binding on the Government in Federal court and should not discourage use of the confess judgment procedure. See *Bowles v. J.J. Schmidt Co.*, 170 F. 2d 617 (C.A. 2), cited with approval in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311; 6 MOORE, FEDERAL PRACTICE, Par. 58.09 (2d ed.).

When other security is accepted, such as mortgages on present or after-acquired assets, commercial surety bonds, assignments of accounts, and the like, the U.S. Attorney should take all necessary steps (recording, filing, notice, etc.) to insure maintenance of the Government's security position.

8. *Suit.* Suit should be filed within 30 days of demand, if no response is received thereto. (No statutory authority is necessary to sustain a suit for public funds which have been erroneously, wrongfully or illegally disbursed. *United States v. Wurts*, 303 U.S. 414. 28 U.S.C. 1345 provides the jurisdictional basis for suit.) If a response to the demand is received, no more than 20 days should be allowed from the date of your reply thereto for full payment, the submission of the initial payment on a satisfactory installment plan, or a good-faith compromise offer (accompanied by a completed individual financial statement on Form DJ-35) before suit is filed. When credit data shows that a claim is clearly uncollectible for all time (see page 38 of this Title for standards) and voluntary payments cannot be obtained, the claim may be closed without suit (but only with the approval of the Civil Division in cases supervised by it). If the debtor's response casts serious doubt upon the validity of the Government's claim, suit may be deferred a reasonable time to permit verification or refutation of the debtor's challenge to its validity. Otherwise suit should be filed forthwith. If suit produces an acceptable offer which contemplates deferred payments, insist upon the execution of a confession of judgment as provided in paragraph 7 above and dismiss the suit.

Default judgments should be obtained in all uncontested cases at the earliest possible date. Motions for summary judgment should be filed in all cases in which such motions are appropriate in order to expedite the disposition of collection litigation. If there is a default in the payment of installments and a confession of judgment is in hand (see par. 7 on p. 15), obtain the entry of judgment

TITLE 3: CIVIL DIVISION

for the unpaid balance, with interest and costs, as soon as possible.

9. *Cooperation of the Marshal.* Arrangements can usually be made with the U.S. Marshal to obtain information concerning the debtor at the same time service of process is effected. With the aid of a suitable form the Marshal can often record such information as he is able to ascertain concerning the employment of the debtor, the type of living quarters occupied, whether his living quarters are owned or rented and whether an affidavit that the debtor is not in the military service is appropriate for purposes of the Soldiers' and Sailors' Civil Relief Act. The Marshal may also be asked to have the debtor contact your office, in person if possible.

10. *Utilization of provisional remedies.* Provisional remedies such as attachment, garnishment, and replevin may be utilized upon the commencement and during the pendency of suit in the manner provided by the law of the State but any existing statute of the United States governs to the extent that it is applicable. Rule 64, F.R.C.P. A bond is not required when such remedies are sought by the United States. 28 U.S.C. 2408. The attachment of property and legal and equitable rights of a defaulting or delinquent postmaster, contractor or other officer, agent or employee of the Post Office Department and his sureties are governed by 28 U.S.C. 2710. Debtors of a corporate defendant may be garnished and summoned for questioning in an action by the Government against the corporation for recovery on a bill, note or other security in the manner provided in 28 U.S.C. 2405. Jurisdiction *in rem* is authorized to the extent set forth in Rule 4 (e), F.R.C.P., as revised.

11. *Interest.* Interest should be demanded in every case in which the collection of interest is appropriate. When interest is provided for by note or contract the complaint should pray for pre-judgment interest at that rate. When money is paid out or property is delivered as a result of fraud or deceit, interest should be demanded from the date the debtor received the benefit of the funds or property. See pages 397-399 of the Civil Frauds Practice Manual. In other cases interest should be collected from the date of notice of the overpayment or the first demand for repayment, as the case may be. *Butte A. & P. Ry. Co. v. United States*, 61 F. 2d 587 (C.A. 9); *R.F.C. v. Service Pipe Line Co.*, 206 F 2d 814 (C.A. 10). General Accounting certificates of indebtedness reflect the date of first demand for repayment. In suits for balances due the Post Office Department interest may be recovered at the rate of 6 percent per annum from time of default. 28 U.S.C. 2718.

Post-judgment interest should be affirmatively and specifically

TITLE 3: CIVIL DIVISION

provided for in the judgment at the rate allowed by State law. However, civil judgments carry such interest as is allowed by State law, whether or not provided for in the judgment. See 28 U.S.C. 1961.

Interest will be computed by the referring agencies upon request. See Department Memo 207 as revised and supplemented. However, care should be taken to provide the agency with sufficient information so that it can make an accurate computation. Once a judgment has been taken, the agency should be advised of the rate of interest and the date from which interest runs by sending it a copy of the judgment affirmatively reflecting this information. It is also important that duplicate receipt forms (Form USA-200) transmitted to the referring agency be accurately and fully executed. (The Department of Justice file number should always be included on Form USA-200 in cases under the supervision of the Civil Division.)

Interest may be approximated for purposes of effecting compromises of cases within the delegated authority of the U.S. Attorneys. A more precise computation can be made by the use of Lake's Monthly Payment and Interest Tables (5th ed., 1954) available in your office. In the absence of agency practice to the contrary, installment payments should be credited to interest and then principal, after first satisfying costs, in accordance with the so-called "U.S. Rule."

12. *Judicial foreclosures.* Foreclosure actions should be given priority treatment. Suit should be filed immediately in the name of the United States without further demand. Judgment should be taken at the earliest possible date, and sales should be held as soon as they can be scheduled. Deficiency judgments should be obtained promptly in *all* cases except those in which the interested agency indicates it does not desire such action. (If a deficiency judgment is not desired either in the pending foreclosure suit or by a separate suit in another State against the mortgagors, assumptors, or guarantors, and if good title can be gotten, prompt action should be taken to obtain a deed in lieu of foreclosure, as this will greatly expedite acquisition of title and possession.)

If some action in addition to suit is required to establish *lis pendens* (see 28 U.S.C. 1964), such action should be taken simultaneously with the filing of suit. The title search on real property should be updated after suit is filed to permit the amendment of the complaint and the joinder of such additional defendants as may be necessary for the conveyance of merchantable title at the

TITLE 3: CIVIL DIVISION

foreclosure sale. (This expense will be borne by the interested agency, in the case of FHA, SBA, CSC, VA and the Farmers Home Administration, and the invoice, therefore, should be forwarded directly to the agency for payment in such cases.) Copies of the published notice of sale should be forwarded directly to the interested agency and to the Civil Division (in cases under its supervision) at the earliest possible date following advertisement, in order that appropriate bidding instructions may be issued.

It is imperative that there be no delay of any kind in the pursuit of apartment project foreclosure cases and the appointment of receivers therein. Suits should be filed immediately and without further demand. No delays or continuances should be allowed for consideration of offers for disposition short of foreclosure, unless the express approval of the Civil Division is obtained in advance. Delays in the handling of foreclosures may be minimized by keeping a tight suspense on these cases at every stage of the foreclosure proceedings, including requests for title information, information from client agencies such as statements of account, the delivery of Marshals' deeds, etc. Motion for summary judgment will frequently result in entry of decrees of foreclosure at a much earlier time in contested cases. Early hearings should be sought on all motions and close liaison with the court will obviate delays in securing signatures on orders and decrees.

Reinstatement of mortgages on single family dwellings should be considered only if the interested agency is agreeable thereto. In such cases consideration should be given to having the mortgagors execute a deed in lieu of foreclosure to be held in escrow for entry in the event of a future default in mortgage payments if the agency is willing to forego a deficiency judgment.

The right to a deficiency judgment is controlled by Federal rather than state law. *Herlong-Sierra Homes, Inc. v. United States*, 358 F. 2d 300 (C.A. 9); *United States v. Walker Park Realty, Inc.*, 383 F. 2d 732 (C.A. 2); *United States v. Wells*, 403 F. 2d 596 (C.A. 5); cf. *McKnight v. United States*, 259 F. 2d 540 (C.A. 9). The fact mortgaged property may be depressed in value at the time of public sale will not relieve defendants of liability for the deficiency. *United States v. Houff*, 202 F. Supp. 471, 479 (W.D. Va.), *aff'd.*, 312 F. 2d 6 (C.A. 4). The amount of the Government's loss is fixed at the time of the sale and a subsequent loss or gain on resale of the property by the successful bidder will not increase or reduce the amount of the defendant's liability. *McKnight v. United States*, 259 F. 2d 540, 544 (C.A. 9); *United*

TITLE 3: CIVIL DIVISION

States v. Jones, 155 F. Supp. 52 (M.D. Ga.). Federal law also controls the question of redemption rights; no right of redemption exists under Federal law. *United States v. Heasley*, 283 F. 2d 422 (C.A. 8); *United States v. Forest Glen Senior Residence*, 278 F. Supp. 343 (D. Ore.); *United States v. West Willow Apts*, 245 F. Supp. 755, 758 (E.D. Mich.). Accordingly, the foreclosure decree or order of sale should provide that a right of redemption is not available after sale, unless the mortgage being foreclosed is expressly referable to State law. Mortgagors and claimants who cannot be served within the State should be proceeded against in accordance with 28 U.S.C. 1655. If the address of the mortgagor residing in another State is known and a deficiency judgment is desired, forward the file to the appropriate U.S. Attorney for suit upon completion of foreclosure action in your district, with a carbon copy of your letter to the Civil Division. (When a VA mortgage is involved, the VA should be advised as to the reason for not taking a deficiency judgment and it will handle future reference of such claims after further compliance with the joint regulations implementing the Federal Claims Collection Act.)

Post-Judgment Collection Efforts

1. *Demand.* Demand for payment should be renewed promptly upon the entry of judgment in favor of the United States. The debtor may pay without the necessity of enforced collection procedures.

2. *Judgment as a lien.* Prompt action should be taken to perfect the Government's judgment as a lien by registering, recording, docketing or indexing it as required by State law. See 28 U.S.C. 1962. While there may be no immediate prospect of enforced collection from a judgment debtor, establishing a judgment lien against his property will usually result in a compromise offer at such time as the debtor seeks to sell his property or add a mortgage. If the property owner is advanced in years, collection can usually be made from his estate, even though a forced sale may not be profitable prior to his death. Establishment of a lien should be accomplished in the jurisdiction in which the debtor resides and in all other jurisdictions in which property may be found. See 28 U.S.C. 1963 concerning the recordation of the judgment in other jurisdictions.

3. *Personal interviews.* Greater success will be experienced in effecting collections if debtors can be personally interviewed by

TITLE 3: CIVIL DIVISION

the assistant attempting collection. Personal confrontations can be arranged by (a) telephoning the debtor, (b) notices to the judgment debtor to appear for discussions, (c) advice by the FBI to see the U.S. Attorneys, if the debtor is interviewed by a special agent, or (d) the conduct of supplementary proceedings.

4. *Inability to find debtor.* See paragraph 3 on page 13 of this Title for a discussion of the use of agency and other sources in locating missing debtors.

5. *Credit information.* If you do not already have up-to-date credit information from the interested agency or a current financial statement executed by the debtor (see par. 4 on p. 13 of this Title), obtain an executed DJ-35 during a personal interview or otherwise, or ask the interested agency to furnish current credit data. If you cannot obtain satisfactory credit information by these means, if a more penetrating examination into the debtor's circumstances and property disposition is required, or if it is believed that there has been an attempt to secrete or transfer assets, examine the debtor in supplementary proceedings, using Form USA-46 as an aid or guide in your interrogation. The debtor may be interrogated orally, or he can be required to answer written interrogatories. Rules 69(a), 26-37, and 45(d), F.R.C.P. Answers to form interrogatories such as USA-46 can be compelled (*U.S. v. McWhirter*, 376 F. 2d 102 (C.A. 5)), thus making this procedure a speedy, inexpensive and effective one, for obtaining sworn financial information. While other sources of credit information will often be sufficient, the FBI is available to investigate the financial ability of debtors who owe the Government \$1,500 or more. The FBI will also assist when less than \$1,500 is involved if it appears that there may have been a fraudulent transfer of assets by the debtor or if other special circumstances make such an investigation desirable. If copies of income tax returns are needed and are not available through the debtor, they may be obtained from the Internal Revenue Service by following the procedures set forth in Department Memo 354, dated August 29, 1963.

When corporate debtors are involved, obtain audited financial statements whenever possible, and utilize the services of the FBI. Financial data on corporate judgment-debtors may also be obtained from State authorities.

6. *Appeal by the debtor.* Appropriate action should be taken to collect notwithstanding a judgment-debtor's appeal, unless he submits to and obtains approval from either the district court or the court of appeals of a proper supersedeas bond, pursuant

TITLE 3: CIVIL DIVISION

to Rules 62(d), (g), F.R.C.P. and Rules 7 and 8 F.R.App. P. *Slade v. Dickinson*, 82 F. Supp. 416 (W.D. Mich.); *Gullet v. Gullet*, 174 F. 2d 531 (C.A.D.C.); *Blackwelder v Crooks*, 151 F. Supp. 26 (D.C. D.C.); *United States v. Jenkins*, 153 F. Supp. 636, 638 (S.D. Ga.). If a supersedeas bond is submitted, it should be examined carefully to see that it adequately protects the interests of the United States. Cf. former Rule 73(d), F.R.C.P. If the bond does not adequately protect the interests of the United States, objections should be filed with the court. Liability of the surety can be enforced by motion without the necessity of an independent legal action. Rule 8(b) F.R. App. P.; *Christmas v. Buckley*, 45 F. Supp. 673 (D. Md.). If a surety company fails to pay in accordance with its obligation under the bond within 30 days, advise the Civil Division and the Treasury Department will be notified so that it may invoke the sanctions provided in 6 U.S.C. 11.

7. *Execution and sale.* If sale upon levy of execution is feasible, and there is no further property subject to sale pursuant to a mortgage obligation, action to levy and sell should be initiated immediately upon the expiration of 10 days after entry judgment. See Rule 62(a) F.R.C.P. Reference should be made to the exemption statutes applicable in the State where the judgment-debtor's property is located to ascertain the feasibility of execution and sale. See Rule 69(a), F.R.C.P. If the interested agency has no money with which to bid at an execution sale, it is generally unwise to attempt sale, unless arrangements can be made to have potential purchasers on hand to bid. The Farmers Home Administration, SBA, CSC, FFA, and VA usually have money with which to bid. GAO, the military departments and most other agencies do not have money with which to bid. Sale should not be attempted absent exact information concerning the value of the property and the existence and value of prior liens and encumbrances.

A writ of execution may be served anywhere within the territorial limits of the State. Rule 4(f), F.R.C.P. (28 U.S.C. 2413 provides for execution to run into any State, territory, or the District of Columbia.) Enforcement of a judgment in one district does not preclude enforcement action to effect collection of the unpaid balance in another district or even in a State court. *Edmonston v. Sisk*, 156 F. 2d 300 (C.A. 10). State law governs the appraisal of property for sale under levy of execution. 28 U.S.C. 2005. Consult the Civil Division with respect to collecting judgments from states and other governmental bodies.

8. *Installment payments or compromise.* Prompt payment of

TITLE 3: CIVIL DIVISION

a judgment in full is to be preferred in every case in which a lump sum payment can be obtained or enforced. If a lump sum payment cannot be arranged, periodic payments or a compromise may be the only satisfactory means of satisfying the Government's judgment. For the standards to be applied in determining the size and frequency of periodic payments, and the amount of settlements predicated upon the expense of collection over a longer period of time, see paragraph 6 on page 14 of this Title. For the bases for the compromise of judgment obligations, see page 35 of this Title.

9. *Security for deferred installments.* Whenever possible the debtor should be required to furnish additional security for the prompt payment of deferred installments. When additional security, such as mortgages on current or after-acquired assets, commercial surety bonds, assignments of accounts, and the like, is obtained, the U.S. Attorney should take all necessary steps (recording, filing, notice, etc.) to insure maintenance of the Government's security position.

10. *Garnishment of wages or other sums owed the debtor.* If the judgment-debtor can afford to make reasonable payments but has refused to do so, the garnishment of his wages should be considered provided garnishment is feasible under the restrictions imposed by (1) applicable State exemption statutes and (2) 15 U.S.C. 1673. Garnishment should also be used to obtain payment of significant sums due the debtor from other sources. While the wages of Federal employees cannot be garnished, they are obligated to pay their just debts. (Sec. 206 of Executive Order 11222, 30 F.R. 6469.) Accordingly, the judgment-debtor's supervisor should be asked to have the employee make suitable arrangements for the liquidation of our claim. If cooperation is not obtained from this source, the matter should be brought to the attention of the Civil Division.

11. *Other sources of recovery.* Judgments may be collectible by offset. See paragraph 5 on page 14 of this Title. When a judgment debtor has disposed of property under circumstances indicating that such action was taken to defeat collection by the Government, an FBI investigation or supplementary proceedings should be used to discover such property and permit its pursuit into the hands of subsequent owners. *Pierce v. United States*, 255 U.S. 398. If the judgment debtor is a corporation, do not overlook the possibility of recovering from officers, stockholders, fiduciaries or affiliated companies on account of corporate resources

TITLE 3: CIVIL DIVISION

siphoned off in contravention of the corporate charter, State law or in violation of the priorities established by 31 U.S.C. 191 and 192 with respect to insolvent debtors. The FBI should be asked to audit the corporate books and records, if corporate assets are insufficient to satisfy the judgment without the recovery of such diversions. Close liaison should be maintained with the Civil Division in all such cases. In some instances recovery may be had against another company or person on the *alter ego* theory. See *Consolidated Products Co. v. DuBois*, 312 U.S. 510; 13 Am. Jur., "Corporations," sec. 1382.

12. *Future review of judgments for renewal of liens and collection.* Some judgments may be identifiable at once as absolutely uncollectible for all time, as when the Government's nonfraud claim has been discharged in bankruptcy and no further dividends can be realized, or where a deceased debtor's estate is without assets. In such cases there is no point in perpetuating a judgment lien or undertaking further collection action. A memorandum recommending the placing of the file in a closed status should be forwarded to the Civil Division for approval, unless the judgment is covered by a delegation of authority. In the latter event, a memorandum containing a description of the claim and a full statement of the reasons for closing it must be included in the file. The Debtor Index and Payment Record Card, Form USA-117, should be noted and filed accordingly. See pages 38-39 of this Title with respect to standards for closing.

Judgments which have not been processed sufficiently to permit a determination that they are presently uncollectible should be maintained in a pending or open status, and action should be taken thereon in accordance with the instructions in paragraphs 1 through 11 on pages 20-24 of this Title. These judgment files should be reviewed no less often than quarterly to see that appropriate action is being taken on a current basis in accordance with these instructions. If installment payments or other action requiring a shorter deadline are involved, these files should be marked accordingly. The Debtor Index and Payment Record Card, Form USA-117, should also be maintained in a "pending" status in accordance with the U.S. Attorneys' Docket and Reporting System Manual, page 25.

If a judgment cannot properly be closed as uncollectible for all time, and it has been processed sufficiently to permit a determination that voluntary collection cannot be effected and that it is presently uncollectible, insofar as recovery by legal process is

TITLE 3: CIVIL DIVISION

concerned, you should request authority from the Civil Division to place it in an inactive or suspense category. In a delegated case, a memorandum justifying transfer to inactive or suspense status should be placed in the file. See page 37 of this Title with respect to standards for transfer to the inactive or suspense category. These memoranda should state the actions which are to be taken in the future, if a specific course is recommended, such as renewed demand, reexamination in supplementary proceedings, etc., and the times at which such actions should be taken. Debtor Index and Payment Record Cards, Form USA-117, on such judgments should be marked accordingly and placed in the inactive or suspense section of the card file.

Unless it has been determined that collection activity should be discontinued for a longer period of time, judgments maintained in the inactive or suspense file should be reviewed at least annually for purpose of written demand on the judgment-debtor and to assure that the judgment liens do not expire. (Execution must issue within the time required by State law. *Custer v. McCutcheon*, 283 U.S. 514.) While judgments in favor of the United States do not expire, liens resultant therefrom may. 28 U.S.C. 1962. Accordingly, a motion should be filed or such other action should be taken as is required pursuant to the law of the State where the judgment is recorded, to renew the judgment lien before its expiration. (Consideration should be given, at the time action for renewal of a judgment lien is required, to the question of whether the judgment should be moved to the closed file as uncollectible for all time or if it should be retained in the "inactive" or "suspense" file.) If a judgment lien has become dormant, due to the lapse of time, a new suit may be brought on the old judgment to reestablish the judgment lien. *Miller v. United States*, 160 F. 2d 608 (C.A. 9); *Schodde v. United States*, 69 F. 2d 866 (C.A. 9); *United States v. Jenkins*, 141 F. Supp. 499, 503-504 (S.D. Ga.). The resulting judgment is a new judgment and should be recorded or indexed as required by State law in order to perfect the judgment lien. In no event should a debtor ever be advised, directly or indirectly, that a claim or judgment against him has been closed or inactivated. There is always the possibility that some unpredictable circumstances will produce a voluntary payment.

Up-to-date credit information (see par. 4 on p. 13 of this Title) should be obtained on judgments maintained in the inactive or suspense file at least once each 5 years to determine their

TITLE 3: CIVIL DIVISION

potential collectibility. Steps should be taken to enforce collection in accordance with the instructions contained in paragraphs 1 through 11 on pages 12-18 of this Title, as the facts, disclosed by current credit data, indicate.

Disposition of Sums Collected

Sums received as a result of collection efforts should be disposed of as provided in Department Memo 207 as revised and supplemented. Pursuant to 40 U.S.C. 301, *et seq.*, as amended, the General Services Administration should be notified of any real or other property accepted in partial or full payment of an obligation, except an obligation arising under the Internal Revenue laws.

Liaison With Civil Division

While for the most part the U.S. Attorneys will correspond directly with the referring agencies on cases which fall within their delegated authority, the Civil Division stands ready to advise and assist in such cases upon request. Matters of policy, precedent, and difference of views with client agencies should be brought to the attention of the Civil Division regardless of the amounts involved.

In the cases which are supervised directly by the Civil Division, because they do not fall within the delegation of authority contained in Department Memo 374, dated June 3, 1964, it is important that the Civil Division be kept *currently* advised. Sending copies of pleadings, briefs, orders, etc., to the Civil Division routinely on the same day they are filed will obviate the necessity for explanatory memorandums in a great many instances and expedite prompt communication from the field. These items will be sufficiently identified and adequately directed if the Department of Justice file number and its file reference are written on one corner thereof (or on an attached routing slip) and the materials are inserted in an envelope addressed to the Department of Justice.

DELEGATION OF AUTHORITY TO THE U. S. ATTORNEYS

1. *Scope of authority*

Department Memo 374, dated June 3, 1964, which appears as June 1, 1970

TITLE 3: CIVIL DIVISION

an appendix to Subpart W of 28 CFR, provides for the delegation of authority with respect to civil claims by and against the Government which are under the jurisdiction of the Assistant Attorney General for the Civil Division. U.S. Attorneys are authorized to take all necessary steps, with regard to the claims described in paragraph 3 below, to protect the interests of the United States, including the institution, conduct, compromise, and termination of appropriate legal proceedings, without prior approval of the Civil Division, but subject to the limitations and conditions set forth herein and in special instructions and manuals. Except as provided in 28 CFR 0.131, the authority delegated is not to be redelegated by the U.S. Attorneys other than in the case of their protracted absence from office or in other unusual circumstances.

2. *Responsibility*

The Assistant Attorney General for the Civil Division remains responsible for the proper handling and administration of all civil litigation (except specialized civil litigation assigned to other divisions—see 28 CFR, Part O) involving the United States, its departments and agencies, including the President of the United States, the heads of Executive Departments and Agencies, and other officers and employees of the Government. Each U.S. Attorney shall be immediately responsible for the proper handling of each claim involving an exercise of any authority delegated to him. The Civil Division will provide the U.S. Attorneys with advice and assistance on delegated cases upon request. The delegation with respect to any particular case, or part thereof, or any particular category of cases may be withdrawn at any time.

3. *Claims covered*

A. *Admiralty and Shipping Section matters.* Claims for civil penalties and forfeitures not exceeding \$5,000, exclusive of interest and costs, for violation of the laws relating to inspection and documentation of vessels and to obstruction and pollution of navigable waters, interference with or damage to aids to navigation, and all similar matters but not including any claim for injunctive or declaratory relief. (Referred by local offices of the Coast Guard, the Bureau of Customs, and the Army Engineers.) (Special instructions for the handling of these claims are contained in Department Memo 376 dated June 3, 1964.)

B. *Fraud Section matters.* Civil claims arising from fraud

June 1, 1970

TITLE 3: CIVIL DIVISION

on the Government (other than fraud matters referred by the Antitrust, Lands, and Tax Divisions), including claims under the False Claims Act, the Surplus Property Act, the Anti-Kickback Act, the Contract Settlement Act, and common law fraud whenever the amount of single damages claimed (exclusive of double damages, forfeitures, interest, and costs) does not exceed \$5,000. (Special instructions for handling these claims are contained in the Civil Frauds Practice Manual.)

C. *General Claims Section matters.* Claims by and against the Government whenever the amount claimed does not exceed \$5,000, exclusive of interest and costs, as follows:

1. Claims for conversion of Government property other than ships, cargoes, or other maritime property.
2. Claims by the Department of Agriculture for the recovery of civil penalties for violations of the provisions of the Agricultural Adjustment Act of 1938; 7 U.S.C. 1314, 1340, 1346, 1356, 1359, 1376 and 1380n.
3. Claims by the Department of Agriculture for the recovery of civil penalties for violations of the Packers and Stockyards Act; 7 U.S.C. 203, 215.
4. Claims by the Department of Agriculture for the recovery of civil penalties for violations of contracts entered into and under the Soil Bank Act; 7 U.S.C. 1311.
5. Claims by the Federal Communications Commission for recovery of forfeitures under the Communications Act of 1934, as amended; 47 U.S.C. 510.
6. Claims by the Interstate Commerce Commission for the recovery of civil penalties for the violation of car service orders under the Interstate Commerce Act, as amended; 49 U.S.C.1(12), 1(15), 1(17) (a).
7. Claims by the Federal Crop Insurance Corporation (Department of Agriculture) under the Federal Crop Insurance Act; 7 U.S.C. 1508, *et seq.*
8. Claims by the Farmers Home Administration of the Department of Agriculture under the Farmers Home Administration Act Charter Act; 15 U.S.C. 714, *et seq.*
9. Claims by the Commodity Credit Corporation of the Department of Agriculture under the Commodity Credit Corporation of 1946; 7 U.S.C. 1921, *et seq.*
10. Claims by the Department of Agriculture arising under the Soil Conservation and Allotment Act; 16 U.S.C. 590a, *et seq.*, and other conservation practice programs.

TITLE 3: CIVIL DIVISION

11. Claims by the Army and Air Force Exchange Services sounding in contract or quasi-contract.

12. Claims by the Civil Service Commission based upon notes assigned to it by employee insurance companies.

13. Claims by the Federal Housing Administration on account of loans made or insured by that agency.

14. Claims referred upon General Accounting Office certificates of indebtedness or proofs of claim, including Veterans' Administration and military overpayments, except those involving carriage of goods by water.

15. Claims by the Small Business Administration arising out of the lending activities of that agency, except loans on the security of vessels.

16. Claims by the Department of the Treasury for the collection of customs duties and recoveries on bonds provided by importers.

17. Claims by the Veterans' Administration for the escheat of funds pursuant to 38 U.S.C. 3202 (e) and for the vesting of personal estates pursuant to 38 U.S.C. 5220-5228. (Special instructions for the handling of these claims are contained in the Veterans' Affairs Practice Manual.)

18. Claims by the Veterans' Administration on account of farm, business, and home loans, made, guaranteed, or insured by that agency. (Special instructions for the handling of these claims are contained in the Veterans' Affairs Practice Manual.)

19. Suits in which the United States has been made a party defendant pursuant to 28 U.S.C. 2410, except liens on vessels or other maritime property.

D. *General Litigation Section matters.* Claims seeking specific relief, as follows:

1. Suits to enjoin violations of, and collect penalties up to \$5,000 under, the Agricultural Adjustment Act of 1938; 7 U.S.C. 1376.

2. Suits to enjoin violations of, and collect penalties up to \$5,000 under, the Packers and Stockyards Act; 7 U.S.C. 203, 216.

3. Suits to enjoin violations of, and collect penalties up to \$5,000 under the Perishable Agricultural Commodities Act; 7 U.S.C. 499c(a), 499h(d).

E. *Tort Section matters.* 1. Claims for damage to Government property, other than ships, cargoes, or other maritime property, whenever the amount claimed does not exceed \$5,000, exclusive of interest and costs.

TITLE 3: CIVIL DIVISION

2. Federal Tort Claims suits.

(a) Suits under the Federal Tort Claims Act, 28 U.S.C. 1346 (b), whenever all claims for damages arising out of one incident do not exceed \$5,000. (Special instructions for the handling of these claims are contained in the Federal Tort Claims Practice Manual and at pages 69-84 of this Title. Settlement should not be effected for more than the amount of a prior administrative claim nor while an administrative claim is pending. See §§ 280, 376, and 403 of the Federal Tort Claims Practice Manual.)

(b) In all suits under the Federal Tort Claims Act, regardless of amount claimed, the U.S. Attorney may compromise all claims arising out of one incident for an aggregate amount of \$5,000 or less without prior approval of the Assistant Attorney General unless previously instructed to the contrary.

F. *Civil Division judgments.* Final civil judgments in favor of the United States in cases in which the judgment amount does not exceed \$5,000 exclusive of interest and costs.

4. *Exceptions to special delegation of authority*

Notwithstanding any other instruction contained herein, U.S. Attorneys shall not compromise or close any claim described in paragraph 3 above in any case in which (1) there is a divergence of views between the U.S. Attorney and the agency or department originating the claim as to the action to be taken, when the views of such agency are required to be obtained (see par. 5 below); or (2) the claim involves a new point of law (or otherwise may constitute a significant precedent); or (3) in the opinion of the U.S. Attorney, or of the Assistant Attorney General, a question of policy is, or may be, involved. In such cases, a compromise or closing memorandum must be submitted to the Civil Division for approval.

5. *Obtaining agency views*

The circumstances under which agency views with respect to compromise, closing or inactivation are to be obtained by the U.S. Attorneys may be restated as follows:

A. Agency views need not be obtained if (1) the amount of the claim or judgment is such that the proposal action must be submitted to the Department for action in any event, (2) the case has been reserved from or withdrawn from the delegation of authority to U.S. Attorneys, or (3) reference must be made to the Civil Division because legal or policy issues require such action. The Civil Division will obtain agency views as appropriate in such cases. (If agency views are known or are reflected in

TITLE 3: CIVIL DIVISION

the file, by all means submit this information to the Department with your own recommendation.)

B. Agency views need not be obtained when the sole issue is that of the collectibility of a claim and the agency has not asked that it be consulted. (If agency views are known or are reflected in the file, consideration should be given thereto in determining collectibility for purposes of compromise, transfer to inactive status, or closing.)

C. Agency views should be obtained when the agency has specifically asked that it be consulted.

D. Agency views should be obtained when agency policy is or may be involved.

E. Agency views should be obtained when a question of enforcement policy is or may be involved, as in the case of civil penalties and forfeitures.

F. Agency views should be obtained when the action contemplated is based upon lack of legal or factual merit.

6. *Appeals*

All judicial decisions adverse to the Government involving delegated claims must be reported promptly to the Civil Division. See Title 6 of this Manual.

7. *Correspondence on delegated claims.*

Agency litigation reports on claims filed under the Federal Tort Claims Act should be requested directly from the interested agency in delegated cases covered by paragraph 3E2 on page 30. A certified copy of settlement stipulations in Federal Tort Claims Act cases when settlements are effected pursuant to the authority delegated by paragraph 3E2 on page 30, should be sent directly to the interested agency for payment on delegated cases only.

General regulations concerning correspondence with the General Accounting Office and the Federal Housing Administration on delegated cases are contained in Department Memo 256, and supplements thereto. Correspondence regarding claims originating in the Federal Housing Administration should be addressed to the Federal Housing Administration, Washington, D.C. 20411, Attention: General Counsel; except that payments on such claims should be addressed—Attention: Agent Cashier, and Forms USA-35 and USA-36 should be used, insofar as possible, in correspondence regarding Title I claims (sample in Appendix).

Requests for documentary evidence and other factual data with respect to claims against veterans or their dependents and bene-

TITLE 3: CIVIL DIVISION

ficiaries should be addressed to the chief attorney of the nearest Veterans' Administration regional office giving the veteran's claim number or service serial number in the file reference; provided, that when a VA or any other claim has been referred by the General Accounting Office, requests for affidavits of merit, certified copies of certificates of indebtedness, current addresses, and credit reports should be addressed to the Claims Division of the General Accounting Office, Washington, D.C. 20548. Form No. DJ-81, Request and Notice Sheet for GAO Matters, should be used to make such requests if possible (sample in Appendix).

Correspondence regarding delegated claims which originate in the Department of Agriculture should be addressed (a) where the claim was referred to the U.S. Attorney by an attorney in charge, Department of Agriculture, to such Attorney in Charge, or (b) in all other instances to the Office of the General Counsel, Department of Agriculture, Washington, D.C. 20250.

Other correspondence with respect to delegated claims should be directed to the agency which has referred the particular claim to the U.S. Attorney, except that substantial questions of law and policy should always be referred to the Civil Division. When this is done the U.S. Attorney should forward with his letter copies of all pertinent correspondence, pleadings, and other documents, since the Civil Division does not maintain files on direct reference claims.

When the U.S. Attorney closes a direct reference case in which the concurrence of the Civil Division is not required, a report should be made to the agency involved. The closing notice to the General Accounting Office should be made on Form No. DJ-80, and to the Federal Housing Administration on Form No. USA-35 (samples in Appendix).

Correspondence regarding the disposition of delegated judgment matters should be directed to the agency originating the claim.

Compromise, Transfer to Inactive Status and Closing of Cases

1. Scope of instructions

The following instructions apply to any case or claim by or against the Government within the broad general jurisdiction of the Civil Division, whether the claim is one which is referred directly to the U.S. Attorney by the interested agency or is submitted and directly supervised by the Civil Division. These in-

June 1, 1970

TITLE 3: CIVIL DIVISION

structions supplement those found in paragraphs 6 and 8 on pages 14 and 22 respectively, and in paragraph 12 on page 24 of this Title.

2. *Authority to compromise or close without suit*

The Attorney General possesses plenary authority with respect to the handling of litigation, except insofar as this may be qualified by statute, and he may authorize the compromise and closing of claims and suits within the jurisdiction of the Department of Justice upon such terms as he considers proper. See Section 400 of the Federal Tort Claims Practice Manual for a full discussion of his inherent authority to compromise and close. Subordinate officials of the Department possess only such authority as has been delegated to them. Thus, unless a case or claim falls within the ambit of the "Delegation of Authority" to the U.S. Attorneys above, compromise, transfer to inactive status, or closing will require the approval of the Department of Justice. The cases in which authority must be obtained from the Department to compromise, transfer to inactive status, or close are as follows:

A. The amount involved exceeds \$5,000, exclusive of double damages, forfeitures, interest and costs;

B. The case or claim is one which does not fall within the enumeration of types of cases which are delegated, set forth under the heading "Delegation of Authority" to the U.S. Attorneys above, or the Civil Division has expressly withdrawn delegated authority;

C. Agency views are required to be obtained (see par. 5 on p. 30) and there is a divergence of views between the U.S. Attorney and the interested agency;

D. A new point of law has been raised or a decision on the point of law involved may constitute a significant precedent (this includes cases in which it is desired to compromise or close in order to utilize another case as a better vehicle for testing an open issue of law); or

E. A question of policy is or may be involved.

3. *Compromise with a going business*

If compromise with a going business concern requires the acceptance of installment payments, adequate security for the deferred payments should be obtained in accordance with paragraph 7 on page 15 of this Title. A debtor corporation's stock should not be accepted in settlement (or for that matter in pay-

TITLE 3: CIVIL DIVISION

ment) of a claim or judgment of the United States except in the most unusual circumstances and then only with the prior approval of the Civil Division. Managing such stock holdings places unusual burdens on the Government. In any event, the Government should not be placed in the position where it may be awarding contracts to a corporation in which it holds a proprietary interest.

A percentage of net profits should not be accepted in settlement or partial settlement of a claim or judgment. Such arrangements are speculative at best; there are too many ways in which the affairs of the debtor concern can be manipulated to avoid, minimize, or postpone realization of a net profit; and, obtaining a net profit agreement is difficult.

When compromises are offered by going business concerns it is generally advisable to require a waiver of any and all claims against the United States, including the firms' rights under the net operating loss carry forward and carry back provisions of the Internal Revenue Code, at least insofar as these rights are affected by the compromise proposal. In some instances it will be wise to obtain permission for Government representatives to audit the books and records of the offeror company. Consideration should also be given to having the offeror agree to have an independent appraisal of business assets at "forced sale" and "fair market" values conducted, at the offeror's expense, by an appraiser whose selection is subject to the approval of the United States.

4. *Compromise offers*

No particular form of offer is required, but the offer must be in writing, definite in terms and signed by the offeror. Normally when a debtor, as distinguished from a claimant, makes an offer he must submit a certified or cashier's check or money order drawn or endorsed unconditionally to the order of the Treasurer of the United States, for the amount offered. If the offer contemplates deferred payments it should state what security is offered for the deferred installments. Generally, acceptance should be conditioned upon an appropriate acceleration provision so that the full amount of the original claim, with interest, but less such payments as have been made, will become due and owing upon default in the payment of any installment. See paragraph 7, p. 15, with regard to the use of consent judgments as security for deferred installments.

5. *Ascertaining facts as to collectibility*

When compromise, transfer to inactive status, or closing is

TITLE 3: CIVIL DIVISION

being considered on the basis of the debtor's inability to pay the full amount claimed, the U.S. Attorney should insist upon adequate financial data as a basis for his own action or his recommendation to the Department, as the case may be. See paragraph 4 on page 13 and paragraph 5 on page 21 of this Title. If an offer is submitted by a debtor, he should be required to execute a personal financial statement on Form DJ-35 and produce such further data, including copies of tax returns, as may be necessary for a proper evaluation of his offer.

6. *Data to be forwarded to the Civil Division*

Settlement offers which are submitted to the Department in claims arising under the Federal Tort Claims Act should be substantiated as set forth in §404 of the Federal Tort Claims Practice Manual and pages 79-81 of this Title. All recommendations for settlement, transfer to inactive status, or closing which are submitted for the consideration of the Department should be accompanied by a fair statement of the reasons supporting the recommendation of the U.S. Attorney. When financial inability is a basis for the proposed action, a copy of all financial data not already in the possession of the Civil Division should be submitted with the recommendations of the U.S. Attorney. In the case of settlement offers it is helpful to know whether the offer is the result of serious negotiations or is merely the first proposal submitted by opposing counsel.

The U.S. Attorney may reject an offer to settle a claim on behalf of the Government, on his own authority, in any case where the offer is patently insufficient and the amount of the offer is below \$5,000 or below an amount previously indicated by the Civil Division to be an acceptable minimum. Certified checks and other payments tendered with compromise offers, which require Department approval, should be retained by the U.S. Attorney pending advice as to the action taken by the Department. See Department Memo 207 as revised and supplemented.

7. *Bases for compromise*

The following guidelines for determining when compromise may be authorized are set forth below as an aid in evaluating cases for settlement pursuant to delegated authority and in recommending settlements to the Department.

A. Bases for compromise common to claims, suits and judgments.

TITLE 3: CIVIL DIVISION

(Note: These are the exclusive bases for compromising judgments.)

1. That the Department cannot enforce collection of the full amount owed due to the debtor's financial inability, having due regard for debtor's future financial status. Department memo 374, dated June 3, 1964.

(a) There must be a real doubt as to the Government's ability to collect the claim or judgment in full. 12 Ops. Atty's Gen. 543; 16 Ops. Atty's Gen. 248; 16 Ops. Atty's Gen. 259; 36 Ops. Atty's Gen. 40.

(b) Uncertainty as to the price which property will bring upon sale may properly be treated as an uncertainty as to collection. 38 Ops. Atty's Gen. 194.

(c) The Department cannot voluntarily relinquish a valid and provable debt owed by a person or corporation against whom collection can be enforced. 16 Ops. Atty's Gen. 248; 21 Ops. Atty's Gen. 50; 36 Ops. Atty's Gen. 40.

(1) Compromise requires some mutuality of concession. There must be room for the play of give and take. 16 Ops. Atty's Gen. 248; 23 Ops. Atty's Gen. 18; 36 Ops. Atty's Gen. 40; 38 Ops. Atty's Gen. 94. The adequacy of the concession is to be determined by the exercise of sound discretion. 38 Ops. Atty's Gen. 98.

(2) Hardship, which does not involve inability to pay, is not a proper basis for settlement. 23 Ops. Atty's Gen. 18; 38 Ops. Atty's Gen. 94.

2. That the cost of collecting the claim in full does not justify enforced collection of the entire amount.

3. That compromise is necessary to prevent a flagrant injustice. See 38 Ops. Atty's Gen. 98. This requires more than mere hardship. 23 Ops. Atty's Gen. 18; 38 Ops. Atty's Gen. 94. (Such cases should be referred to the Department for consideration, unless settlement can be justified equally well on other grounds.)

4. That any enforcement policy which is involved (as in the case of civil penalties or forfeitures) will be adequately served, in terms of punishment, deterrence, and securing compliance, by the acceptance of less than the full amount. (See par. 5, p. 30 with respect to consultation with the interested agency.) However, mere accidental or technical violations of a statute intended for willful violations may be dealt with less harshly. Cf. 17 Ops. Atty's Gen. 213; 29 Ops. Atty's Gen. 217; 31 Ops. Atty's Gen. 459; as restricted by 21 Ops. Atty's Gen. 264 and 36 Ops. Atty's Gen. 40.

June 1, 1970

TITLE 3: CIVIL DIVISION

B. Bases for compromise in cases not involving final judgments.

1. That there is a real doubt as to the legal validity of the claim. 16 Ops. Atty's Gen. 248; 23 Ops. Atty's Gen. 631; 38 Ops. Atty's Gen. 98. The amount accepted in compromise should fairly reflect the probability of prevailing on the legal question presented, having due regard for the forum in which the case will be tried, the attractiveness of the case as a vehicle for testing the issue, and related pragmatic considerations.

2. That there is a *bona fide* dispute as to the facts and the Government's ability to prove its case. 16 Ops. Atty's Gen. 259; 23 Ops. Atty's Gen. 631; 38 Ops. Atty's Gen. 98. The amount accepted in compromise shall fairly reflect the probability of obtaining a verdict upon the facts as they will be presented, having due regard for the witnesses who will be used, the documentary proof available, the forum, and related pragmatic considerations.

3. That it is important for a better vehicle to be chosen to test an open issue of law. (Compromise should be accomplished upon this basis only after consultation with the Civil Division.)

8. *Bases for transfer of judgments to "inactive" or "suspense" status*

Judgments which cannot properly be closed as uncollectible for all time, under the criteria set forth in paragraph 9 following, may be transferred to an "inactive" or "suspense" status under the circumstances indicated below. These judgments should be reviewed and further collection action should be taken at the times and in the manner outlined in paragraph 12 on page 24. (Do not overlook the possibility of compromising these judgments under the standards set forth in paragraph 6 on page 14 and in paragraph 7A on page 35 of this Title.)

A. Judgments which are clearly uncollectible at the present time by enforced collection procedures available, and for which repeated efforts to induce voluntary payments or a satisfactory compromise offer have proved unavailing, may be transferred to the "inactive" or "suspense" category. The following examples of this basis for transfer are illustrative but they are not all-inclusive.

(a) The debtor owns real or personal property subject to our judgment lien which cannot be sold advantageously at the present time because of the existence of prior liens or the application of State laws exempting the property from sale on levy of execution, but the debtor holds or will acquire a sufficient equity in the

TITLE 3: CIVIL DIVISION

property to justify perpetuation of a judgment lien for future action.

(b) The debtor's age and future earning capacity are such that, while present efforts to effect collection are unavailing, he may be able to pay the judgment in the future or acquire property against which enforced collection action can be taken.

(c) While present collection efforts are unavailing, the debtor's age and circumstances are such that he may inherit money or property which can be reached in satisfaction of the Government's judgment.

(d) The debtor cannot be located in the district but our judgment is a lien on property of the debtor within the district which is subject to a substantial prior lien.

(e) The debtor is incarcerated and without property but his earning capacity is such that we may be able to collect from his earnings within a reasonable time after his release from prison.

(f) The debtor is currently paying the maximum that he can be compelled to pay on a judgment having priority over that of the Government but we can expect to start making collections upon the satisfaction of the prior judgment.

(g) Forced liquidation of the debtor corporation would yield nothing, but the corporation's future prospects are such that a substantial recovery can be expected in a few years.

B. Judgments on which any substantial recovery from the debtor would work a gross hardship but which can be collected in a few years without imposing a gross hardship may be transferred to the "inactive" or "suspense" category. The following example is illustrative but it does not represent the exclusive circumstances under which transfer to the inactive or suspense category may be had on this ground.

(a) Sale of home of aged debtors without income would work a gross hardship but judgment can be collected from their estates following death.

3. *Bases for closing, aside from payment in full or compromise*
Prior approval should be obtained from the Civil Division in the circumstances outlined in paragraph 4 on page 30. A memorandum of the action taken should be placed in the file and the debtor index payment card, Form USA-117, should be transferred in accordance with the instructions contained in paragraph 12 on page 24.

A. *Bases for closing common to claims, suits and judgments*
(Note: These are the exclusive bases for closing judgments.)

TITLE 3: CIVIL DIVISION

1. That the Department cannot collect or enforce collection of any significant sum from the debtor, having due regard to the debtor's future financial prospects. See Department Memo 374, dated June 3, 1964. The following circumstances illustrate uncollectibility on this basis. However, these are not the only circumstances in which a claim or judgment may be uncollectible upon this basis.

(a) The balance due is uncollectible because of the death or incompetency of the debtor without an estate.

(b) The Government's nonfraud claim has been discharged in bankruptcy without payment in full and there are no guarantors or co-obligors against whom collection can be enforced.

(c) The debtor cannot be located after diligent search and there is no property against which an *in rem* action will lie.

(d) There are no assets available to pay the Government's claim in an insolvency or estate proceeding of which we have timely notice.

2. That the cost of collecting the claim or judgment will substantially exceed the amount recoverable. Department memo 374, dated June 3, 1964.

B. *Additional bases for closing nonjudgment cases.*

1. That the claim is without legal merit.

2. That the Department cannot prove the Government's claim factually.

(a) The facts do not sustain the claim.

(b) The requisite evidence has been lost or the necessary witnesses are unavailable.

3. That it is important that a better vehicle be chosen to test a significant open issue of law. (Closing should be accomplished upon this basis only with the approval of the Civil Division.)

10. *Additional suggestions with respect to determining collectibility*

A. *Collecting from the property of debtors.* 1. The separate property of one spouse cannot be reached by process and sold to satisfy the debt owed by the other.

2. Community property cannot be reached in community property States for the satisfaction of the separate debts owed by one of the spouses, e.g., debts incurred before marriage or during a prior marriage. Similarly, the separate property of one of the spouses in a community property State generally cannot be reached for the satisfaction of a debt owed by the community.

3. Property encumbered with a dower interest, when the debt

TITLE 3: CIVIL DIVISION

is not a joint one, and the debtor's homestead cannot be levied upon and sold profitably in most instances.

4. If a debtor's property is heavily encumbered, sale on levy of execution to collect our judgment is generally not desirable. Prices at forced sales are greatly depressed. The debtor must have a substantial equity in the property before sale on levy of execution should be attempted.

B. *Collecting from the income and earnings of debtors.*

1. Because of the applicable exemptions statutes the wages of debtors are exempt from garnishment in some States, such as Florida and Texas. Where this is true settlement may have to be effected on less favorable terms that would otherwise be true and a higher percentage of cases may have to be inactivated or closed.

2. The debts of an unemployed housewife who owns no property are generally uncollectible. However, it is wise to ascertain her prospects for an inheritance.

3. Recovery efforts against sharecroppers, tenant farmers, migratory and seasonal workers, old age pensioners are usually unsuccessful.

4. If there are other outstanding judgments against a debtor, he has a prison record, or he is otherwise reported to be a poor credit risk by a reputable commercial credit reporter, the prospects for collection must be rated poor.

C. *Other practical suggestions.*

1. The cost of collection (see paragraph A2 on page 36 and paragraph A2 at the middle of page 39) may be a significant factor in determining the collectibility of small claims. This factor carries little weight in determining the collectibility of large claims and judgments.

2. Inactivation or closing should be accomplished much more reluctantly and compromise should be effected for a larger percentage of the total indebtedness when the debtor's unjust enrichment is the result of fraud or deceit.

3. A claim should not be compromised or closed and a judgment should not be compromised, inactivated, or closed because of the principal debtor's inability to pay, if recovery can be had against a solvent surety (*e.g.*, claims for customs duties) or against a guarantor. However, if the principal obligor, the surety, and all guarantors are unable to pay the claim in full, compromise is appropriate. 12 Ops. Atty's Gen. 543. If compromise is effected

TITLE 3: CIVIL DIVISION

as to one or more of the debtors, care should be taken not to release the Government's claim against the remaining debtors.

11. *Consummating the compromise of claims on behalf of the Government*

After acceptance of a compromise proposal and the receipt of the amount agreed upon, no further action is required to effectuate the compromise of a claim when suit has not been filed. If a letter acknowledging payment is requested by the debtor, the letter should be specifically limited to the subject matter of the Government's claim. If suit has been filed, the dismissal of suit with prejudice is called for. Where formal proof of settlement is required, a stipulation and order of settlement containing appropriate recitals may be executed but these documents should be specifically limited to the claim in suit. If the Government's claim has been reduced to judgment and settlement is intended by both parties to discharge the entire judgment obligation, a satisfaction of judgment should be filed of record.

In no case should a general release be executed, since it is impossible to determine whether the Government has other valid claims against the debtor in other departments and agencies. In many cases an offer in compromise is made for the purpose of clearing title to specific property. In such cases care should be taken to see that the release executed is limited to the release of the judgment liens as to that particular property only. No release of lien should be executed without appropriate consideration therefor, even if the Government's claim is nebulous at best.

Real or other property can be accepted in partial or complete payment of a compromise obligation in appropriate cases (37 Ops. Att'y's Gen. 298). But see paragraph 3 on page 33 as to stock in the debtor corporation or a percentage of net profits therein. For the disposition of property accepted in connection with the compromise of a claim, see page 26.

12. *Consummating the compromise of claims against the Government.*

The manner of consummating a compromise of a claim against the Government will vary according to the type of claim, the jurisdictional act under which suit is brought and the agency involved. Where authority resides in the Civil Division, the staff attorney forwarding approval of a compromise will usually specify the method to be adopted.

Compromises of suits under the Federal Tort Claims Act are to

TITLE 3: CIVIL DIVISION

be consummated in the manner set forth in §406 of the Federal Tort Claims Practice Manual and pages 79–81 of this Title. In delegated Tort Claims Act cases only, a certified copy of the stipulation and order should be forwarded directly to the interested agency for payment. Compromise of suits against the Government under the Tucker Act (28 U.S.C. 1346(a)(2)) and the Admiralty Claims Act (46 U.S.C. 741, *et seq.*; 46 U.S.C. 781, *et seq.*) can only be consummated by entry of a decree or judgment on consent, except in the unusual case where the agency involved has appropriated funds available for payment of the compromise.

It is preferable that compromises of claims arising out of the operations of certain Government corporations and the shipping operations of the Maritime Administration be handled in the same way as claims in favor of the Government. See paragraph 11 above. Should circumstances warrant such actions, these claims may be compromised by the entry of an order approving the compromise.

**PAYMENT AND SATISFACTION OF JUDGMENTS
AGAINST THE UNITED STATES**

To prevent difficulties in payment, due to irregularities of form, the U.S. Attorney should regularly prepare the form of judgments and decrees against the United States and should not leave the preparation to opposing counsel. In this way, the U.S. Attorney may insure that the judgment or decree provisions respecting interest, costs, and attorneys' fees are in accordance with the applicable statutes. Interest may not be awarded against the United States except when expressly provided for by statute or contract. *United States v. New York Rayon Co.*, 329 U.S. 654; *United States v. Thayer-West Point Hotel*, 329 U.S. 585. See 28 U.S.C. 2411. Interest is recoverable on Tucker Act and Federal Tort Claims Act judgments, which are payable from the permanent indefinite appropriation established by the Automatic Payment of Judgments Act, Section 1302 of the Act of July 27, 1956, 70 Stat. 678, 694 (31 U.S.C. 724a) only in the event of an unsuccessful appeal by the United States and then only from the date of the filing of the transcript of judgment in the General Accounting Office to the date of the mandate of affirmance. In cases reviewed by the Supreme Court interest is not allowable under the cited Act beyond the term of the court at which the judgment was affirmed. Effective with judgments entered in actions filed after July 18, 1966, costs, as enumerated in 28 U.S.C. 1920, but not including the fees and ex-

TITLE 3: CIVIL DIVISION

penses of attorneys, may be awarded to the prevailing party in any action by or against the United States or any agency or official of the United States acting in his official capacity, except as otherwise specifically provided by statute, 28 U.S.C. 2412 as amended by Public Law 89-507, 80 Stat. 306. Costs against the Government are limited to reimbursing the prevailing party in whole or in part for costs incurred in the litigation. Attorneys fees may never be allowed against the Government, except as specifically authorized by statute. For example, fees may be allowed by the court not to exceed 10 percent of the amount recovered and to be paid pursuant to judgments recovered in actions under contracts of U.S. Government Life and National Service Life Insurance. They may be paid out of such proceeds but not in addition thereto. See pages 203 and 365 of the Veterans Affairs Practice Manual. In judgments and decrees under the other jurisdictional statutes, a similar provision may be inserted if directed by the court but is not required by the statutes.

Except where Government corporations or insured claims are involved, payment of judgments against the United States is made only pursuant to "certificates of settlement" stated by the General Accounting Office by checks issued by the Treasury Department, Division of Disbursement. Judgments not in excess of \$100,000, the payment of which is not otherwise provided for, may now be paid from the permanent indefinite appropriation established by Section 1302 of the Act of July 27, 1956, 70 Stat. 678, 694 (31 U.S.C. 724a) without substantial delay. Judgments in excess of \$100,000 cannot be paid, in most cases, until Congress has appropriated funds for that purpose. Effective January 18, 1967, compromises of claims and suits under the Federal Tort Claims Act effected by the Department of Justice in amounts in excess of \$2,500 are payable in the same manner in which final judgments are payable, 28 U.S.C. 2672 as amended by Public Law 89-506, 80 Stat. 306.

Since the decision in *United States v. Aetna Casualty Co.*, 338 U.S. 366, holding that the Government is not protected from partial subrogation and similar assignments and liens by operation of law, it is imperative that U.S. Attorneys make certain that any lien or partial assignment which the claimants' attorneys or compensation or other insurance carriers may have upon the judgment or decree is fully satisfied. For similar reasons, it is important that the judgment or decree is marked satisfied of record. For this purpose, it is essential that the funds for payment of the judgment or decree pass through the hands of the U.S. Attorney in order that

TITLE 3: CIVIL DIVISION

he may deliver them only in exchange for a proper satisfaction of the judgment or decree and proper releases of any liens.

U.S. Attorneys should furnish the Civil Division with a certified and two uncertified copies of each judgment or decree, and of the opinion and the findings of fact and conclusions of law. Two certified and two uncertified copies should be furnished if the judgment or decree in excess of \$100,000 in amount. Upon the receipt of these copies and the determination that no appeal or further review will be sought, the Civil Division will arrange with the General Accounting Office for the issuance for a certificate of settlement calling for payment to the judgment creditor "in care of" the appropriate U.S. Attorney. Thereafter, pursuant to the settlement stated by the General Accounting Office, the Treasury Department will mail the check in satisfaction of the judgment to the U.S. Attorney. The check can then be delivered to counsel for the judgment creditor in return for proper release of any lien or other claims and the entry of satisfaction of the judgment.

SPECIAL INSTRUCTIONS

The work conducted by the Court of Claims, Customs, and Patent Sections normally does not become the responsibility of U.S. Attorneys, except as they may be asked to assist. Information and instructions relative to the Appellate Section appear in Title 6, *infra*.

The following pages include, under appropriate section and unit headings, information and instructions which are relevant to particular types of cases with which the offices of the U.S. Attorneys are normally concerned.

Admiralty and Shipping Section

The Admiralty and Shipping Section has general supervision over the defense and prosecution of all claims by or against the Government, its officers and agents, arising out of shipping and maritime matters, including both contract (*e.g.*, water transportation of cargoes or passengers, dredging, vessel mortgages, vessel repairs, wharfage, seamen's wages, etc.) and tort (accidents occurring or consummated upon navigable waters). In addition, the Section handles all litigation in any way involving workmen's compensation, whether under Federal or State law.

Most of the shipping and maritime cases handled by the Section

TITLE 3: CIVIL DIVISION

are correctly brought under the Admiralty Claims Acts (46 U.S.C. 741-752; 46 U.S.C. 781-790). However, occasionally plaintiffs mistakenly allege jurisdiction under the Tucker or Federal Tort Claims Acts. In regard to shipping and maritime cases, the instructions in this Title relating to the handling of other civil litigation by and against the Government, and to the representation of Government officers, employees, agents and cost-plus contractors equally apply.

Certain categories of cases involving civil penalties and forfeitures for violation of laws relating to inspection and registration of vessels and to obstruction and pollution of navigable waters, interference or damage to aids to navigation, and many similar matters are referred directly to U.S. Attorneys by the local offices of the Coast Guard, the Bureau of Customs and the Army Engineers. The procedure for handling these direct reference cases corresponds generally to that prescribed for the direct reference cases handled by the General Litigation Section.

The majority of all shipping and maritime cases, except such direct reference cases, are tried by trial attorneys of the Admiralty and Shipping Section. For this purpose, the Section maintains trial offices at 450 Golden Gate Avenue (Box 36028), San Francisco, Calif. 94102, for the handling of matters in California, Oregon, Washington, Alaska, and Hawaii, and at Suite 4048, 26 Federal Plaza, New York, N.Y. 10007, for the handling of matters in the Southern and Eastern Districts of New York and the District of New Jersey. The U.S. Attorney will be notified in every case whether the trial of the case or the briefing and argument of the appeal will be handled by the Civil Division or by him. If the case is to be handled by the U.S. Attorney, he will be furnished with detailed instructions.

In order to expedite the handling of correspondence, all communications in shipping and maritime matters should include in the caption of the letter the name of the vessel or vessels involved and the nature and date of the occurrence giving rise to the claim. In West Coast cases, U.S. Attorneys should also send to the San Francisco admiralty office copies of all letters addressed to the Civil Division, and, to the Civil Division, copies of all letters addressed to the San Francisco admiralty office. As far as possible a copy of all complaints and other pleadings should also be sent to the San Francisco admiralty office.

Pursuant to the provisions of Section 2 of the Act of August 18, 1942 (P.L. No. 704, 77th Congress) the following judicial dis-

June 1, 1970

TITLE 3: CIVIL DIVISION

tricts have been selected, for the convenience of the United States, for the institution of proceedings under the Act:

(a) As to prizes captured on the Atlantic or Arctic Oceans or the connecting waters of either, the Southern District of New York.

(b) As to prizes captured on the Pacific or Indian Oceans or the connecting waters of either, the Northern District of California.

Foreign Litigation Unit

The principal responsibility of the Foreign Litigation Unit is the handling of all civil proceedings in foreign tribunals brought against the United States, its agencies and instrumentalities (excluding extradition matters), and the defense of all civil suits in foreign tribunals against U.S. diplomatic and consular agents, as well as U.S. civilian and military personnel stationed abroad who are sued on acts performed in the course of their official duties. As regards proceedings in the United States, the Foreign Litigation Unit handles the assertion of sovereign immunity in suits against foreign governments or their representatives in American domestic courts, in instances where the Department of State recognizes and allows such immunity.

In addition, the unit processes requests for judicial assistance from foreign and international tribunals — variously referred to as “letters rogatory”; “letters of request”; “commission rogatoire” (French); or “carta rogatoria” (Spanish). Concerning the two domestic matters, the Unit frequently seeks the assistance of the U.S. Attorneys. Instructions for the processing of such referrals are furnished by the Foreign Litigation Unit. Title 28, U.S.C. 1782 furnishes the authority for honoring requests from foreign and international tribunals for obtaining testimony or tangible evidence. Title 28, U.S.C. 1696 furnishes the authority for serving process from foreign courts generally. Beginning sometime in early 1969, requests for service of process emanating from certain foreign courts will be governed by the “Convention of the Service Abroad of Judicial and Extrajudicial Documents,” which was ratified by the United States in April, 1968. This multilateral treaty provides for a standard form certificate of service which will be executed by the Marshals.

Requests for the filing of suggestions of immunity or for international judicial assistance received directly by the U.S. Attorneys should be cleared with the Foreign Litigation Unit before any action is taken thereon.

June 1, 1970

TITLE 3: CIVIL DIVISION

The Foreign Litigation Unit is often able to render assistance to U.S. Attorneys in preparation for trials of cases with international aspects or with regard to questions of foreign law. To the extent possible, the U.S. Attorneys should request such assistance well in advance of scheduled trial dates.

Frauds Section**Fraud Cases**

U.S. Attorneys should refer to the revised edition of the Civil Frauds Practice Manual for advice on overall policies and procedures for the handling of civil frauds cases. The Manual contains a comprehensive discussion of the substantive law and citations of authorities.

The principal responsibility of the Frauds Section is the enforcement of the heavy civil sanctions provided by the False Claims Act (31 U.S.C. 231-235). Certain other statutes, notably the Contract Settlement Act of 1944, as amended (41 U.S.C. 119), and the Surplus Property Act of 1944 (50 U.S.C. App. 1635(b)), repealed and reenacted as the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 489(b)) contain special provisions regarding frauds against the Government. U.S. Attorneys should become familiar with the double damage and forfeiture provisions of these Acts, and the useful alternative remedies they provide. In addition to these statutory remedies, complaints under appropriate circumstances may also include counts for common law fraud, unjust enrichment, or payment by mistake.

U.S. Attorneys are urged to be vigorous in enforcement of both the criminal and the civil sanctions against fraud. It should be kept in mind that both kinds of sanctions are supported by important Government interests. Expedient enforcement of the civil sanctions serves the purpose not only of making the Government whole for losses it has suffered, but of providing—as do the criminal sanctions—a strong deterrent to fraudulent conduct in similar situations, and an impetus to the establishment and maintenance of the highest ethical standards among those in the business community who have dealings with the Federal Government. While in most situations criminal proceedings will take precedence over civil actions, U.S. Attorneys may prosecute both types of cases simultaneously when satisfied that pursuit of the civil claim will not jeopardize the outcome of the companion criminal case, subject

June 1, 1970

TITLE 3: CIVIL DIVISION

to approval of the Criminal Division. In any event, civil fraud complaints should be filed at the earliest practicable moment and should pray generally for statutory double damages and the forfeitures allowable by law or some comparable general language. In no case should a specific number of forfeitures be sought, no matter how many forfeitures are potentially involved.

In many cases the facts which support criminal convictions under 18 U.S.C. 287 and 1001 and similar statutes will also support civil liability for fraud, the chief difference between the two classes of cases being the measure of the burden of proof; beyond a reasonable doubt in criminal cases, and by a preponderance of the evidence in civil cases. Whenever the criminal case is tried first and results in conviction, U.S. Attorneys are urged to use the criminal record, under the doctrine of *res judicata*, as the basis for a motion for summary judgment in the civil case, thus reducing to a minimum the burden and costs of litigating the civil case.

Efficient economical use of the investigative facilities of the FBI indicates the desirability of concurrent investigation of issues common to both the criminal and civil trials. Except where urgent compulsions require concentration on preparation of criminal cases, U.S. Attorneys should avoid piecemeal investigation by the FBI by directing full investigation at the outset into all issues, including those issues which are of principal importance in the civil case, such as the extent of damage to the Government.

Statutes of Limitations

Suits under the False Claims Act must be brought within 6 years after the presentation of the false claim to the United States. 31 U.S.C. 235. The fraudulent act may antedate the presentation of the claim which it taints. Where the tortfeasor is not the person who presented the claim, he is liable for causing another person (such as a prime contractor) to present the claim for payment.

28 U.S.C. 2415(b) established a 3-year period of limitations for actions by the United States for damages "founded upon a tort". This statute limits the time for bringing actions for common law fraud, for civil actions where the gravamen of the offense is bribery, conflict of interest, and violations of statutes which have no period of limitations, *i.e.*, The Anti-Kickback Act (41 U.S.C. 51), and the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 489(b)).

June 1, 1970

TITLE 3: CIVIL DIVISION

This new period of limitations will require greater expedition in analyzing the civil phase of all fraud and related matters in order to insure that suit is timely filed in appropriate cases. In most instances, it will no longer be practical nor prudent to defer a determination as to the advisability of a civil fraud action pending disposition of the criminal aspects. It is foreseeable that situations will more frequently arise in which it will be necessary to consider the institution of a civil fraud action before a decision as to criminal prosecution is reached, or during the pendency of criminal proceedings. When circumstances of this nature come to your attention, please advise the Frauds Section of the Civil Division and submit your recommendation as to the advisability of bringing a civil action before disposition of the criminal phase. A copy of your referral should be addressed to the Criminal Division.

In those instances in which civil actions are instituted prior to the conclusion of the criminal phase, it will remain for determination whether the civil action should be pursued to trial and disposition. It is probable that a stay of proceedings will be sought in such civil actions pending the completion of criminal prosecution. Certainly, the question of whether a settlement of the civil claims should be consummated will be referred to the Criminal Division in each such instance.

It is suggested that the following measures be taken in order to implement the foregoing. Hereafter, the statute of limitations date on new civil fraud files will be calculated for purposes of the Department's records in terms of Sections 2415 and 2416, unless only False Claims Act liability is indicated. This means that as to the majority of such new files a 3-year limitations period will be assigned either from the time of the occurrence of the event giving rise to a cause of action or from the earliest time the United States had knowledge of facts material to the right of action, provided that as to potential claims which arose before July 18, 1966, the earliest limitations date will be July 17, 1969. Similar limitations date entries should be made in your records upon referral of such matters to your office.

Second, in those offices in which the handling of the criminal and civil aspects is segregated, the Unit responsible for civil proceedings should initiate steps whereby:

(1) The Civil Unit will be notified promptly by the Criminal Unit of the referral to the U.S. Attorney's office of matters in which a civil fraud or related claim may be present;

June 1, 1970

TITLE 3: CIVIL DIVISION

- (2) A separate file will be established for the Civil Unit; and
- (3) Correspondence to that office relative to the civil aspects will be referred to the Assistant U.S. Attorney handling that phase rather than to the Assistant handling the criminal aspects.

GENERAL CLAIMS SECTION

In general this Section handles the Government's claims for money which are referred to this Department for collection, except as or when such claims are incidental to matters otherwise assigned. In two instances, however, actions in which the United States is a party defendant, come under the General Claims Section. These are suits involving property on which the Government claims a lien, brought pursuant to 28 U.S.C. 2410, and suits on veterans insurance policies, both discussed below. The Section may continue to handle also a case in which a claim against the Government is set up as a matter of defense, *e.g.*, setoff, but such a case may be transferred to another Section if the new matter becomes its dominant or most important aspect.

In addition to the principles mentioned under the general instructions, *supra*, the following may frequently be invoked: The Government's contract rights are controlled by Federal, not State law. *Clearfield Trust Co. v. United States*, 318 U.S. 363; *United States v. Allegheny County*, 352 U.S. 174. The Government, unlike private litigants, is not bound by apparent authority of its agents. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380. In a suit brought by the Government, it is the Department's position that the courts have no jurisdiction to enter an affirmative judgment against the Government on a counterclaim, *United States v. Shaw*, 309 U.S. 495; but there is conflict as to a counterclaim that could have been asserted as an independent suit in the same court (see *United States v. Springfield*, 276 F. 2d 798, 803-804). The defendant may not prove a credit or offset against the Government's claim unless he first proves that such credit or offset has been submitted to and disallowed by the General Accounting Office, 28 U.S.C. 2406.

Statutes of Limitation

The Government is not bound by State statutes of limitation or subject to the defense of laches. *United States v. Verdier*, 164 U.S. 213, 219; *United States v. Summerlin*, 310 U.S. 414, 418.

June 1, 1970

TITLE 3: CIVIL DIVISION

Federal statutes which impose time restrictions upon the assertion of Government claims include the following:

1. Suits against the surety for a disbursing or accountable officer—5 years after the statement of the official's account by the accounting officer, 6 U.S.C. 5. The statute runs from the date of the final statement of account. *United States v. Standard Accident Insurance Co.*, 280 F. 2d 445 (C.A. 1).

2. Suits against endorsers, transferors, etc., of forged checks, etc.—6 years unless written notice of a claim is given to endorsee or transferor, etc., within that period, 31 U.S.C. 129. Suit may be brought within 2 years after discovery of fraudulent concealment of cause of action. 31 U.S.C. 131.

3. Suits against sureties on bonds of postmasters—3 years after settlement of accounts, 39 U.S.C. 2406.

4. Commodity Credit Corporation claim.—6 years. 15 U.S.C. 714b(c).

5. Suits under Walsh-Healey Act (overtime and child labor violations referred by Labor)—2 years from the date of each violation, not from conclusion of the administrative proceedings. 41 U.S.C. 35, *et seq.*, per 29 U.S.C. 255; *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59.

6. Suits for the recovery of penalties and forfeitures—5 years. 28 U.S.C. 2462.

7. Except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact—6 years after the right of action accrues or within 1 year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. 28 U.S.C. 2415, as added by Public Law 89-505, 80 Stat. 304. The 6-year period of limitations runs from July 18, 1966, if the right of action accrued prior to that date. 28 U.S.C. 2415(g). A right of action is deemed to accrue again at the time of each partial payment or written acknowledgment of debt. 28 U.S.C. 2416. See 28 U.S.C. 2416 for periods of time excluded in computing the running of this statute of limitations.

8. Claims in bankruptcy—6 months from the first date set for the first meeting of creditors. 11 U.S.C. 98(n).

TITLE 3: CIVIL DIVISION

9. In veterans' reemployment rights suits, brought in the names of the veterans, state statutes of limitation are applicable to suits for damages, and laches may bar suits to compel reinstatement. Veterans Affairs Practice Manual, page 510, *et seq.*

10. See page 83 with respect to tort claims asserted by the Government.

Bankruptcy and Insolvency Matters

Claims of the United States are entitled to priority in any insolvency proceeding, if they are owned by the United States at the time bankruptcy or insolvency occurs. Proofs of claim are generally prepared and signed by an official of the agency which has the claim, his signature being an attestation of the facts set forth in the proof of claim. The U.S. Attorney should add his signature as counsel for the claimant. In bankruptcy cases the Government's priority is determined by 11 U.S.C. 104(a) (3), and 31 U.S.C. 191 and 192. In insolvency proceedings the priorities set forth in 31 U.S.C. 191 and 192 should be asserted. State statutes of limitation are inapplicable to the claims of the United States in these cases. *United States v. Summerlin*, 310 U.S. 414.

The priorities established by 11 U.S.C. 104 do not apply in Chapter X (corporate reorganization) proceedings. 11 U.S.C. 502. However, the petition for reorganization must state that the corporation is insolvent or unable to meet its debts as they mature. 11 U.S.C. 530. Accordingly, in such cases, reliance should be placed upon the priorities established by 31 U.S.C. 191. See 6 Collier on Bankruptcy (14th ed.), §9.13(2). If claims for customs duties or taxes are involved in such a proceeding, see 11 U.S.C. 599.

In arrangement proceedings under Chapter XI the debtor must deposit sufficient funds to pay all debts which have priority, unless priority creditors waive their claims for such a deposit or consent to any provision of the arrangement otherwise dealing with their claims. 11 U.S.C. 737(2) and 762(2); 8 Collier on Bankruptcy (14th ed.), §9.05.

In case of a secured priority claim, the deposit should represent the excess of the amount of the claim over the value of the security. See 11 U.S.C. 92(b), 93(e). The security is to be valued in accordance with 11 U.S.C. 93(h).

In the absence of instructions to the contrary from the Civil Division, objection should be made to any reorganization plan under

TITLE 3: CIVIL DIVISION

Chapter X or arrangement under Chapter XI which does not provide for payment in full of the Government's claim. The Civil Division should be advised immediately in the event of failure to allow such an objection.

The United States is also entitled to priority in Chapter XIII (wage earner) proceedings, 11 U.S.C. 1059(6); *In re Belkin*, 358 F. 2d 378 (C.A. 6). (*In re Bailey*, 188 F. Supp. 47 (N.D. Ala.), to the contrary was appealed and mooted when the Government's claim was paid in full.) A wage earner plan which does not provide for the payment of a secured creditor in accordance with the instrument creating the debt cannot be confirmed unless written acceptance is obtained from the secured creditor. 11 U.S.C. 1052; *In re Pappas*, 216 F. Supp. 819 (S.D. Ohio).

The defense of discharge in bankruptcy is not available to a debtor, as against the United States, on claims arising out of loan defaults when the bankrupt lists the debt due a private lending institution but not that due the Government by virtue of its guaranty or insurance of the loan, and the interested Government agency has not had actual notice or knowledge of the proceedings. *United States v. Kassan*, 208 F. Supp. 858 (S. D. Calif.).

Proofs of claim in bankruptcy must be filed within 6 months of the first date set for the first meeting of creditors. 11 U.S.C. 93(n). In Chapter XI arrangement proceedings the proof of claim may be filed at any time before confirmation of the plan, except that (1) if the Government's claim is scheduled by the debtor, the proof of claim may be filed within 30 days after the mailing of the notice of confirmation of the plan to creditors (but may not be allowed for more than the amount scheduled), and (2) a claim arising from a rejection of an executory contract may be filed within such time as the court may direct. 11 U.S.C. 755, as amended in 1967; 9 Collier on Bankruptcy 114-115 (14th ed.) §7.25, pages 114-115.

In Chapter X (corporate reorganization) proceedings the time limit for filing is determined by an order of court, fixing the time and prescribing the manner of filing and allowing claims, entered pursuant to 11 U.S.C. 596. When a Chapter XI arrangement proceeding is replaced by a corporate reorganization under Chapter X of the Bankruptcy Act, the Government's claims should be refiled. *Avery v. Fischer*, 360 F. 2d 719 (C.A. 5).

The U.S. Attorney should attempt to arrange with the referee in bankruptcy for prompt notification of developments in the bankruptcy cases in which Government claims have been filed. A sus-

TITLE 3: CIVIL DIVISION

pense arrangement whereby these cases are checked at the conclusion of the 6 months' claim period will permit the early closing of those matters in which the assets available will not exceed administration expenses.

If a claim is disallowed in whole or in part, the adverse ruling should be immediately reported to the Civil Division. A petition for review of an adverse ruling by a referee in bankruptcy must be filed within 10 days after entry thereof or within such extended time as the court may allow upon petition filed within the 10-day period, 11 U.S.C. 67(c). A protective petition for review should be filed or an appropriate extension obtained within the 10-day period unless the Civil Division has advised that no review should be sought. However, neither the review of a referee's order nor an appeal should be prosecuted without authorization from the Civil Division. On appeals generally, see Title 6 of this Manual.

While the United States is not bound by time limits imposed in state insolvency statutes (*United States v. Summerlin*, 310 U.S. 414), the U.S. Attorney should prepare and file a preliminary proof of claim within time, if such a proof of claim has not been received from the General Accounting Office or the interested agency.

Claims Against Decedents' Estates

Proofs of claim will ordinarily be prepared by the General Accounting Office or the interested agency. Although the United States is not bound by state statutes limiting the time within which creditors must file claims (*United States v. Summerlin*, 310 U.S. 414; *Swanson v. United States*, 171 F. 2d 718, 721 (C.A. 8); *United States v. Anderson*, 66 F. Supp. 870 (D. Minn.)), it is the Department's policy whenever possible, to file such claims with the executor or administrator or the probate court having jurisdiction of the decedent's estate within the time limited by state law. The Government's priority of payment is determined by 31 U.S.C. 191. Personal liability is imposed upon the executor, administrator, assignee, or other person who fails to observe that priority. 31 U.S.C. 192; *Viles v. Commissioner of Internal Revenue*, 233 F. 2d 376, 380 (C.A. 6). When an inordinate amount of time elapses and no action is taken to file a final accounting and pay just obligations, you should file a petition to compel a final accounting. In the event of an adverse ruling on the Government's claim, the Civil Division should be notified promptly with advice as to the time limits for appeal. As to appeals generally, see Title 6 of this Manual.

TITLE 3: CIVIL DIVISION

Claims of Nonappropriated Fund Instrumentalities

Post exchanges and other nonappropriated fund activities are instrumentalities of the United States. *Standard Oil Co. v. Johnson*, 316 U.S. 481. (For background thereon see §235 of the Federal Tort Claims Practice Manual.) Accordingly suit should be brought in the name of the United States. However, checks for application on these claims should be made payable to the Army and Air Force Exchange Service or, if one of its facilities is not involved, to the particular club or instrumentality involved.

Check Reclamation Proceedings

Requests will be made from time to time for reclamation proceedings on Treasury checks. Suit should be brought against the presenting bank, which is liable on its warranty of prior endorsements. *National Metropolitan Bank v. United States*, 323 U.S. 454; *Clearfield Trust Co. v. United States*, 318 U.S. 363; *United States v. National Exchange Bank*, 214 U.S. 302. Treasury Department regulations provide that a bank presenting a check for payment is deemed to have guaranteed prior endorsements. 31 C.F.R. 202.27 and 360.2.

The rights and duties of the United States on the commercial paper which it issues are governed by Federal rather than local law. *Clearfield Trust Co. v. United States*, 318 U.S. 363. Negligence in the issuance of checks is not a defense in a suit for breach of the bank's warranty of prior endorsements. *National Metropolitan Bank v. United States*, 323 U.S. 454; *United States v. National Exchange Bank*, 214 U.S. 302.

Suit must be filed or the bank must be given written notice of the forgery within 6 years after presentation of the check, except in the case of fraudulent concealment of the forgery. 31 U.S.C. 129. Suit may be commenced at any time within 2 years of the discovery of a cause of action if there has been such a fraudulent concealment. 31 U.S.C. 131. Mere delay in giving notice of a forged endorsement will not preclude recovery. Rather the presenting bank must make a clear showing of damage due to such delay. *Clearfield Trust Co. v. United States*, 318 U.S. 363.

Any attempt by the defendant bank to invoke the so-called imposter rule (Cf. *United States v. Continental-American Bank and Trust Co.*, 175 F. 2d 271 (C.A. 5, 1949), *cert. denied*, 338 U.S. 770) should be brought to the attention of the Civil Division at once.

June 1, 1970

TITLE 3: CIVIL DIVISION

Claims for Civil Penalties

The General Claims Section supervises all litigation to collect civil penalties and forfeitures with the exception of certain types of claims specifically assigned to other sections or divisions of the Department. See pages 45 and 65 of this Title and 28 C.F.R. 0.40 (a), 0.41 (a), 0.41 (b), 0.55 (d), 0.61 (h), and 0.70 (a) for these exceptions. Agency views should be sought before compromising or closing such claims pursuant to delegated authority. While suit may be brought any time within 5 years, 28 U.S.C. 2462, prompt demand and suit are required if the enforcement policy of the interested agency is to be properly vindicated.

The General Claims Section also supervises litigation to collect treble damages for rebates in violation of the Antitrust Act. 49 U.S.C. 41 (3).

Customs Duties

Suits for the recovery of customs duties, that have become final for failure of the principal to file a protest pursuant to 19 U.S.C. 1514, should be filed against the surety on its bond guaranteeing the payment of all duties incurred under the importation. No claims for customs duties should be compromised without first obtaining the views of the General Counsel, Treasury Department.

Planning Advances

The Community Facilities Administration of the Housing and Home Finance Agency, now absorbed in the Department of Housing and Urban Development, has advanced money, pursuant to 40 U.S.C. 462 and prior legislation, to counties, cities, school districts, and other local governmental bodies to be used in obtaining plans for public works. A body receiving such a planning advance is required to sign an agreement that it will repay the advance when construction is undertaken or started on the public work so planned. It is no defense to a suit upon that undertaking to claim that the plans obtained with the advance were not used. *City of Greeley, Kansas v. United States*, 335 F. 2d 896 (C.A. 10); *United States v. Board of Education of City of Bismarck*, 126 F. Supp. 338 (D. N. Dak.); *United States v. City of Wendell, Idaho*, 237 F. 2d 51 (C.A. 9), cert. denied, 352 U.S. 1005; *United States v. City of Charleston*, 149 F. Supp. 866 (S.D. W. Va.); *United States v. City of Willis*, 164 F. Supp. 324 (S.D. Tex.), aff'd per curiam, 264 F. 2d 672.

June 1, 1970

TITLE 3: CIVIL DIVISION

If the local body agreeing to reimburse the United States has ceased to exist, liability may be imposed upon the body exercising authority in the same geographical area. *Mount Pleasant v. Beckwith*, 100 U.S. 514; *Mobile v. Watson*, 116 U.S. 289; *Graham v. Folsom*, 200 U.S. 248. Nor can the local body refuse repayment on the ground that its officials lacked authority to obligate it. *United States v. Independent School District No. 1*, 209 F. 2d 518 (C.A. 10); *United States v. San Diego County*, 75 F. Supp. 619 (S.D. Calif.). The Housing and Home Finance Agency will make an engineer available to serve as technical adviser and witness, if given sufficient advance notice.

Small Business Administration Claims

Small Business claims most frequently involve the foreclosure of mortgages, the filing of reclamation petitions in bankruptcy to permit the sale of mortgaged chattels free of those proceedings and the recovery of money judgments against guarantors. Guarantors should be joined as party defendants in foreclosure actions when they can be personally served in the district, unless SBA has failed to refer the claim as to them for failure to comply with the joint regulations implementing the Federal Claims Collection Act or for other reasons. However, liquidation of collateral is not required prior to suit on an unconditional guaranty. *Austad v. United States*, 386 F. 2d 147 (C.A. 9); *United States v. Newton Livestock Market, Inc.*, 336 F. 2d 673, 677 (C.A. 10); *United States v. Vine*, 270 F. Supp. 591 (E.D. La.), *aff'd*, 394 F. 2d 462 (C.A. 5), *cert. den.*, 393 U.S. 827; *United States v. Houff*, 202 F. Supp. 471 (W.D. Va.), *aff'd*, 312 F. 2d 6 (C.A. 4). The Small Business Administration has funds with which it can bid at foreclosure, and arrangements should be made with regional counsel to have a representative of SBA present to bid. SBA liens are specifically subordinated to liens for State taxes, if the latter have priority under State law. 15 U.S.C. 646. This statute does not give priority to interest and penalties on such States taxes (*United States v. Consumers Scrap Iron Corp.*, 384 F. 2d 62 (C.A. 6); *United States v. Christensen*, 218 F. Supp. 722 (D. Mont.)) nor to taxes which are not *ad valorem* taxes on the property involved. *In re Lehigh Valley Mills, Inc.*, 341 F. 2d 398 (C.A. 3); *United States v. Clover Spinning Mills Co.*, 373 F. 2d 274 (C.A. 4); *Director of Revenue, State of Colo. v. United States*, 392 F. 2d 207 (C.A. 10). However, claims of SBA are claims of the United

TITLE 3: CIVIL DIVISION

States which are entitled to priority under 31 U.S.C. 191 and 192. *Small Business Administration v. McClellan*, 364 U.S. 446.

Walsh-Healey Act Claims

Claims for liquidated damages for the underpayment of wages, employment of child labor, etc., contrary to the provisions of Government contracts inserted pursuant to the Walsh-Healey Act (41 U.S.C. 35-45), are often submitted for suit prior to the completion of administrative hearings. Suit should be filed *at once*, since the applicable 2-year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. 255, runs from the date of the violation and not from the conclusion of the administrative proceedings. *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59. If the administrative proceedings have not been concluded when suit is filed, a motion should be made to stay the legal action pending their completion. Cf. *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59. The Government's legal action may not be dismissed as premature under such circumstances. *United States v. Winegar*, 254 F. 2d 693 (C.A. 10).

Suit should be filed in the name of the United States, 41 U.S.C. 36. Liability can usually be determined upon motion for summary judgment based upon the entire administrative record, since the administrative finding is final if supported by the preponderance of the evidence. 41 U.S.C. 59. Cases involving alleged violations on the part of the contractor's suppliers should be brought to the attention of the Civil Division.

Conversion of Mortgaged Property

Frequently auction companies and other convert property mortgaged to the Government by selling or purchasing the same notwithstanding the recordation of the Government's lien. The liability of such "converters" is to be determined by Federal rather than State law. *United States v. Sommerville*, 324 F. 2d 712 (C.A. 3), *cert. den.*, 376 U.S. 909; *United States v. Mathews*, 244 F. 2d 626 (C.A. 9); *Cassidy Commission Co. v. United States*, 387 F. 2d 875 (C.A. 10). As to the liability of such converters see also *United States v. Union Livestock Sales Co.*, 298 F. 2d 755 (C.A. 4), and *United States v. Kramel*, 234 F. 2d 577 (C.A. 8); *United States v. McClesky Mills, Inc.*, 409 F. 2d 1216 (C.A. 5).

TITLE 3: CIVIL DIVISION

Gifts and Bequests

The U.S. Attorneys may be asked to represent the Government's interests in State probate proceedings because of a devise or bequest to the United States or one of its agencies or instrumentalities. It is well established that the United States may receive both testamentary and non-testamentary gifts which are unconditional. *United States v. Burnison*, 339 U.S. 87. Departments, agencies, and instrumentalities of the United States may or may not have the authority to receive such gifts depending upon their statutory authorization. The General Claims Section will maintain close liaison with the U.S. Attorneys and the affected agencies on such cases and notices of devise or bequest in a decedent's will should be brought to the attention of that Section. The devise or bequest to the Government may be taxed by State law (*United States v. Perkins*, 163 U.S. 625; *Snyder v. Bettman*, 190 U.S. 249), but the statute by which a State seeks to impose the tax must clearly encompass a devise or bequest to the Federal Government.

Recovery of Money Paid Out Under Mistake

The Government may recover in quasi-contract for unjust enrichment from one who has been paid Government money under mistake. *United States v. Bentley*, 107 F. 2d 382 (C.A. 2); *United States v. Independent School District No. 1*, 209 F. 2d 578 (C.A. 10); *Kingman Water Co. v. United States*, 253 F. 2d 588 (C.A. 9); *United States v. Gudewicz*, 45 F. Supp. 787 (E.D. N.Y.). No statutory authority is necessary to sustain a suit for public funds which have been erroneously, wrongfully, or illegally disbursed. *United States v. Wurtz*, 303 U.S. 414, 415. Overpayments of pay may be subject to waiver per 5 U.S.C. 5584, as interpreted in 4 C.F.R. 201.1, *et seq.* However, a waiver statute giving waiver authority to administrative personnel does not authorize the courts to deny recovery on the same grounds. Cf. *United States v. Kelley*, 192 F. Supp. 511, 513 (D. Mass.).

Veterans' Matters

The General Claims Section also handles a variety of matters pertaining to veterans, including:

1. Suits on behalf of veterans against private employers to enforce re-employment rights, 50 U.S.C. App. 459(b), (d). *Fish-*

TITLE 3: CIVIL DIVISION

gold v. Sullivan Corp., 328 U.S. 275; *Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278; *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265; *Accardi v. Pa. R. Co.*, 383 U.S. 225. See Veterans' Affairs Practice Manual, page 452, *et seq.*

2. Vesting of personal estates of veterans who die intestate in Government hospitals while being furnished care and treatment by the Veterans' Administration if without heirs or next of kin. 38 U.S.C. 5220-5228; *United States v. Oregon*, 366 U.S. 643. See Veterans' Affairs Practice Manual, page 21, *et seq.*

3. Escheat of funds in the hands of a guardian for an incompetent veteran if derived from Veterans' Administration benefit payments, the veteran dies intestate, and under the laws of the State where he died, resident funds would otherwise escheat to the State. 38 U.S.C. 3202(e). *In re Lindquist's Estate*, 25 Cal. 2d 697, 154 P. 2d 879, *cert. denied*, 325 U.S. 869; *In re Hammond's Estate*, 154 N.Y.S. 2d 820, *aff'd* 3 N.Y. 2d 567, 147 N.E. 2d 777. See Veterans' Affairs Practice Manual, page 36, *et seq.*

4. Veteran who defaults on VA insured or guaranteed loans remains liable for any deficiency after foreclosure by the lending institution per VA indemnity regulation notwithstanding State antideficiency judgment statutes. *United States v. Shimer*, 367 U.S. 374. Veteran's wife is not liable under the indemnity regulation though she may be liable on the theory of subrogation.

5. Person knowingly charging veteran more than the appraised value of property acquired with the proceeds of a loan guaranteed or insured by the VA may be held liable for treble damages. 38 U.S.C. 1922; *United States v. Kallas*, 169 F. Supp. 201 (E.D. N.Y.)

Suits on Veterans Insurance Policies

The Veterans' Affairs Practice Manual, which has been distributed to all U.S. Attorneys, contains a detailed discussion of the law and procedure applicable to these suits. 38 U.S.C. 784 authorizes suits on National Service Life Insurance (38 U.S.C. 701-724) and on U.S. Government Life Insurance (38 U.S.C. 740-760) policies, including interpleader suits by the Government.

Trial by jury is authorized. *Galloway v. United States*, 319 U.S. 372; *United States v. Pfitsch*, 256 U.S. 547. The statute of limitations is 6 years. 38 U.S.C. 784(b). *United States v. Towery*, 306 U.S. 324. 38 U.S.C. 108 provides a presumption of death from

TITLE 3: CIVIL DIVISION

7 years unexplained absence from home and family. *Peak v. United States*, 353 U.S. 43. With the court's permission a witness may be subpoenaed even though he resides more than 100 miles from the court. 38 U.S.C. 784(c).

The portions of a Veterans' Administration file which may be made available for inspection by counsel for the plaintiff or other claimants are set forth on pages 154-155 of the Veterans' Affairs Practice Manual. Great care should be taken to prevent the loss or alteration of any record in the Veterans' Administration file, inasmuch as the grant of pensions and other gratuitous benefits, which are often of great importance to the claimants, depends upon the integrity of the contents of that file.

Judgments in favor of claimants should be couched in general terms, leaving the exact computation of the amounts payable thereunder to the Veterans' Administration. All facts essential to the computation should be stated in the findings of fact or the judgment as, *e.g.*, (a) the date of the occurrence of death or total disability, as the case may be, (b) the date of submission of due proof, in a case involving the payment of total disability benefits, (c) dates determinative of the apportionment of benefits among several claimants, such as the date of death of a particular beneficiary, and (d) the percentage of the recovery allowed as an attorney's fee. In any case in which the court insists upon a judgment containing exact computations showing the amounts payable, the Veterans' Administration file should be forwarded promptly to this Section for use in obtaining the computations.

If judgment is rendered for the claimant, the court is to allow a fee to the claimant's attorney not in excess of 10 percent of the amount of the judgment, to be paid by the Veterans' Administration out of the payments to be made pursuant to the judgment and not in addition thereto, 38 U.S.C. 784(g).

Suits to Quiet Title or for the Foreclosure of Liens on Property on Which the Government Claims a Lien

The United States is frequently named as a party defendant in foreclosure and quiet title actions pursuant to 28 U.S.C. 2410 because it holds a judgment or other lien on the property involved. Under this statute, the United States has 60 days within which to plead. However, should removal of such action from State to Federal court be desirable, this must be accomplished within 30 days of proper service in accordance with 28 U.S.C. 1444 and

TITLE 3: CIVIL DIVISION

1446. Dismissal should be sought if (1) the complaint fails to set forth the interest of the United States with sufficient particularity, (2) service is not completed in accordance with 28 U.S.C. 2410 (b) (cf. *Messenger v. United States*, 231 F. 2d 328 (C.A. 2)), or (3) a nonsuable agent of the United States is named as defendant rather than the United States, provided plaintiff is given an opportunity to correct the deficiency and fails to do so in a reasonable time.

Necessary data for preparing an answer may be obtained from the area office of the agency affected by the action. The Civil Division will obtain such data from agency headquarters upon request. The answer of the United States should assert the interest of the United States and its entitlement in accordance with the Federal Rule of priority, viz., "first in time, first in right." See Memo 309, dated January 11, 1962. This rule gives the lien of the United States priority over subsequently accruing State or local tax liens even though State law classifies the latter as expenses of foreclosure. *United States v. Buffalo Savings Bank*, 371 U.S. 228. The same is true as to fees of counsel in a foreclosure action. See *United States v. Pioneer American Insurance Co.*, 374 U.S. 84; *United States v. Bond*, 279 F. 2d 837 (C.A. 4), cert. denied, 364 U.S. 895. The Federal Tax Lien Act of 1963, amending 26 U.S.C. 6323, made no change affecting the priority of the Government's nontax liens. *H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank*, 388 F. 2d 156 (C.A. 4), cert. den., 390 U.S. 1025.

Care should be taken to see that any judgment entered affects only the interest of the Government described in the complaint. If the Government's interest is subordinate, steps should be taken to protect its right to any surplus monies in accordance with its proper priority. A disclaimer of interest should not be filed merely because the Government's interest is subordinate. Any disclaimer which is filed should be limited to the interest described in the complaint.

The agency concerned should be informed of the date upon which the property involved will be sold. 28 U.S.C. 2410(c) permits redemption by the United States within 1 year of a sale to satisfy a prior lien. However, redemption is precluded by 12 U.S.C. 1701(k) and 38 U.S.C. 1820(d) of the Government's subordinate interest is derived from a loan insured under the National Housing Act or a loan guaranteed or insured by the Veterans' Administration. Notwithstanding these provisions, a release of the Government's right of redemption should not be executed in

TITLE 3: CIVIL DIVISION

any case without monetary consideration or without first obtaining the views of the department or agency concerned.

When the Government's lien or interest exceeds \$5,000 in amount, exclusive of interest and costs, a request for release of lien, the entry of a satisfaction of judgment, or release of the right of redemption upon the payment of consideration therefor should be referred to the Department with the recommendation of the U.S. Attorney as in the case of any offer in compromise. If the Government's lien or interest does not exceed \$5,000, exclusive of interest and costs, or the property involved is worth less than this amount, authority is delegated to the U.S. Attorneys to act on settlement proposals. See paragraph 3 C 19 on page 29. However, any release executed should be expressly limited to the specific property involved. When the complaint does not show the amount of the Government lien or interest on its face, it is requested that this information be ascertained from opposing counsel and communicated to the Civil Division as soon as possible.

GENERAL LITIGATION SECTION

Tucker Act Cases

The district courts have no jurisdiction of suits against the United States where the claim exceeds \$10,000 (28 U.S.C. 1346 (a) (2)); the claim is for pension (28 U.S.C. 1346 (d)); cf. *Bruner v. United States*, 345 U.S. 112; another defendant is joined (*United States v. Snerwood*, 312 U.S. 584); the remedy provided by statute is administrative only (*United States v. Babcock*, 250 U.S. 328); or the claim is founded on a contract implied in law (quasi-contract), as distinguished from a contract implied in fact (*B. & O.R.R. Co. v. United States*, 261 U.S. 592; *United States v. Minnesota Mut. Invest. Co.*, 271 U.S. 212).

As to the conclusive character of provisions in Government contracts for determination of disputes by the contracting department, see 41 U.S.C. 321, 322, which modify the rule of *United States v. Wunderlich*, 342 U.S. 98, and *United States v. Moorman*, 338 U.S. 457. The district court is limited to consideration of the administrative record. *United States v. Bianchi*, 373 U.S. 709.

Suits To Enforce Governmental Functions

The district courts have jurisdiction of such actions. 28 U.S.C. 1345. Such actions may be specifically provided for by statute, such

June 1, 1970

TITLE 3: CIVIL DIVISION

as injunctions under the Taft-Hartley Act (29 U.S.C. 178; *United Steel Workers of America v. United States*, 361 U.S. 39) or they may be maintained to enforce statutes which do not specifically provide for such remedy, *In re Debs*, 158 U.S. 564; *United States v. United Mine Workers*, 330 U.S. 258.

Renegotiation Cases

There are two major contract renegotiations acts: The Act of April 28, 1942, as amended (called "the Renegotiation Act" and cited as 50 U.S.C. App. 1191), and the Act of March 23, 1951, as amended (called "the Renegotiation Act of 1951" and cited as 50 U.S.C., App. 1211-1233). The 1942 Act has different provisions relating to fiscal years ending before or on June 30, 1945, and those ending after. (See 50 U.S.C., App. 1191(1) for citations to Statutes at Large, and see discussion of this point in *Lichter et al. v. United States*, 334 U.S. 742.) The 1951 Act, as amended, applies to the amounts received or accrued by contractors and subcontractors during fiscal years after January 1, 1951 (50 U.S.C. App. 1211; 73 Stat. 210).

Claims arising under the acts are of two types: those based upon agreements between contractors or subcontractors and Secretaries of the Departments or the War Contracts Price Adjustment Board or the Renegotiation Board, and those based upon unilateral determinations or orders which were issued by those agencies if a contractor or subcontractor did not execute an agreement.

Agreements are final and conclusive and, except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, may not be annulled, modified, set aside or disregarded by any court or Government agency. Unilateral determinations may be reviewed only by the United States Tax Court. However, the filing of a petition in the Tax Court for review does not operate to stay a collection suit. Hence, there are no *bona fide* defenses to a collection suit, except as to the amount of any payments, and after an answer is filed a motion for summary judgment or for judgment on the pleadings is indicated. (See *Lichter, et al. v. United States*, 334 U.S. 742.)

Collection suits should be brought in the name of the United States. Interest on those based upon the Act of 1942 should be demanded from the date of the original demand for payment at the rate of 6 percent per annum (see *United States v. Philmac Mfg.*

June 1, 1970

TITLE 3: CIVIL DIVISION

Co. et al., 192 F. 2d 517; cf. *United States v. Abrams, et al.*, 197 F (2d) 803, *cert. denied*, 344 U.S. 855) and on those arising under the Act of 1951 at the rate of 4 percent per annum. (See 50 U.S.C. App. 1212(b) (2).) Form complaints are forwarded with each renegotiation claim or, if omitted, will be furnished upon request.

Civil Enforcement of Interstate Commerce Act

The following enforcement proceedings are within the jurisdiction and supervision of the General Litigation Section: injunction proceedings to require a carrier to obey any order of the Interstate Commerce Commission other than for the payment of money (49 U.S.C. 16(12)), and mandamus proceedings by the Attorney General, at the request of the Interstate Commerce Commission, to compel compliance with provisions of the Interstate Commerce Act. (49 U.S.C. 19(a) (1) and 20(9)). Actions to enjoin or annul orders of the Interstate Commerce Commission pursuant to 28 U.S.C. 2321 are supervised by the General Litigation Section only when the Government is involved as a shipper; otherwise such actions are supervised by the Antitrust Division.

Direct Reference I.C.C. Matters. Orders requiring compliance with subpoenas issued by the Interstate Commerce Commission to compel testimony before the Commission (49 U.S.C. 12(3)) will ordinarily be referred directly to the appropriate U.S. Attorneys since the necessity for such an order will frequently occur during or immediately prior to a hearing scheduled by the Commission and prompt action is necessary to avoid delaying the hearing.

Proceedings to enforce obedience to rules, regulations, or orders issued by the Commission under Part II of the Interstate Commerce Act (49 U.S.C. 322(b)) will also be referred directly to the appropriate U.S. Attorneys.

Department of Agriculture Matters

Civil actions by the United States to enjoin violations of the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, respectively (7 U.S.C. 203, 216 and 7 U.S.C. 499c(a), 499h(d)) will be referred for action by the Civil Division. The Department provides representation to review committees in suits brought by farmers against such committees to obtain review of their determination of farm marketing quotas (7 U.S.C. 1365).

June 1, 1970

TITLE 3: CIVIL DIVISION

Representation is also provided the Secretary of Agriculture against suits to review rulings made by him on petitions of handlers aggrieved by marketing orders issued by the Secretary under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(15) (B)).

Suits to set aside or enjoin orders issued by the Secretary of Agriculture under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, respectively, must be heard by a three-judge district court and the United States must be named as a defendant (7 U.S.C. 217 and 499j, k; 28 U.S.C. 2322, 2325). In such actions the United States is also represented by the Department.

Direct Reference Department of Agriculture Matters. The Regional Attorneys of the Department of Agriculture will make requests for the institution of actions to enjoin violations of orders or regulations issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 and the Agricultural Adjustment Act of 1938, respectively (7 U.S.C. 608a(7) and 7 U.S.C. 1376) directly to the appropriate U.S. Attorneys.

Defense of Suits Against Federal Agencies and Officers

Certain basic jurisdictional principles applicable to suits against Government officers are set forth on page 6 above. Other principles are: The plaintiff may not obtain judicial relief if he has not exhausted his administrative remedy. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535; *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752. The plaintiff has no standing to sue unless he alleges an invasion of some legal right; a mere threat of economic loss as a result of Government action is not sufficient. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125; *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 137; *Massachusetts v. Mellon*, 262 U.S. 447, cf. *Flast v. Cohen*, 392 U.S. 83; *Hardin v. Kentucky Utilities*, 390 U.S. 1; *Barlow v. Collins*, 397 U.S. 159. Neither the Declaratory Judgment Act (28 U.S.C. 2201) nor the Administrative Procedure Act (5 U.S.C. 551, 701-706), in themselves confer jurisdiction upon the Federal district courts; and even though the plaintiff seeks relief under those statutes, his complaint is subject to dismissal unless it alleges a claim within the district court's jurisdiction under 28 U.S.C. 1331-1360 or other jurisdictional statutes. *Schilling v. Rogers*, 363 U.S. 666, 670, 677; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671; *Longshoremen's Union v. Boyd*, 347 U.S.

TITLE 3: CIVIL DIVISION

222; *Public Service Commission v. Wycoff Co.*, 344 U.S. 237; *Blackmar v. Guerre*, 342 U.S. 512, 515; *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (C.A.D.C.), *cert. denied*, 350 U.S. 884. *Ove Gustavsson Contracting Co. v. Floete*, 278 F. 2d 912 (C.A. 2), *cert. den.*, 364 U.S. 894; but see *Abbott Laboratories v. Gardner*, 387 U.S. 136; and *Gardner v. Toilet Goods Association*, 387 U.S. 167. And see Rule 8(a), F.R.C.P., as to the requirement of pleading the ground upon which the court's jurisdiction depends.

The General Litigation Section is responsible for the defense of civil actions and State or local criminal proceedings against Federal employees arising out of the performance of their official duties (in accordance with the Department policy set forth at page 5 above) except such actions or proceedings as involve death, personal injuries, or property damage, the defense of which is the responsibility of the Tort Claims Section. See page 67 below.

In suits to review decisions by the Secretary of Health, Education, and Welfare on claims for social security benefits the district court is limited to a review of the administrative record. 42 U.S.C. 405(g). Since neither party can introduce new evidence (*Thompson v. Social Security Board*, 154 F. 2d 204 (C.A.D.C.); *Carqueville v. Flemming*, 263 F. 2d 875 (C.A. 5); *Eastman v. Gardner*, 373 F. 2d 481 (C.A. 6)); and the only issue before the court, *i.e.*, whether the administrative record contains substantial evidence to support the agency's decision, is one of law, not fact (see *National Broadcasting Co. v. United States*, 319 U.S. 190, 227), the practice is to file a motion for summary judgment after the answer (to which a copy of the administrative record is attached) is filed. The plaintiff should be encouraged to file a cross-motion for summary judgment. See Memo to U.S. Attorneys No. 278 (June 24, 1960) and Supplement Nos. 1 (October 17, 1960) and 2 (June 28, 1961) for a detailed discussion of the manner of handling social security cases.

Participation in Suits Involving Government "Cost-Plus" Contractors

Frequently the Department of Justice is called on to defend suits against so-called "cost-plus" contractors, particularly those contractors whose contracts with the United States provide for reimbursement to the contractor for recoveries arising out of any suits in connection with the performance of the contract, as well as for reimbursement of the fees and costs of such litigation. In view of this

June 1, 1970

TITLE 3: CIVIL DIVISION

factor of reimbursement, it is in the interest of the Government to furnish legal representation for the contractor upon the request of the interested Government agency (most frequently the Departments of the Army, Navy, or Air Force, or the Atomic Energy Commission). Generally, the request to the U.S. Attorney for representation of the contractor will be made by the agency through the Civil Division, but if it is not so made, U.S. Attorneys should act on behalf of the contractor only when requested to do so by a local officer representing the contracting agency. The Civil Division should be advised immediately when such a request is made.

Since these cases are relatively few in number and generally arise in but few judicial districts, detailed instructions for their handling will be issued as the occasion arises. For the most part, the instructions contained in this Manual will apply, but special outstanding instructions on the handling of representation agreements, compromise, and costs as they affect these suits will be sent to U.S. Attorneys on request. If for any reason the U.S. Attorney feels that representation of the contractor by his office is inappropriate in a particular case, the Civil Division should be informed promptly, so that if the ultimate decision is not to defend the suit, the contractor may have time to make suitable arrangements for representation by private counsel.

Intervention in Actions Questioning the Constitutionality of an Act of Congress

Upon authorization by the Solicitor General, the United States may intervene as a party in any action in a Federal court in which the court certifies to the Attorney General that the constitutionality of an act of Congress affecting the public interest is drawn in question (28 U.S.C. 2403).

Filing of Briefs Amicus Curiae in Cases Affecting Interests of the United States

Where an action in a State or Federal court to which neither the United States nor one of its officers or agencies is a party involves an issue affecting the interests of the United States, such as the interpretation or application of an act of Congress or a departmental regulation, the Department may file a brief *amicus curiae* to inform the court of the Government's position on such issue. When knowledge of the pendency of such cases comes to the U.S. Attorney, he should promptly so inform this Department.

June 1, 1970

TITLE 3: CIVIL DIVISION
JUDGMENT AND COLLECTION UNIT

This Unit is responsible for the collection of judgments arising in connection with cases under the Civil Division's jurisdiction. Pursuant to 28 CFR O.178(b) "Each U.S. Attorney shall designate an Assistant U.S. Attorney, and such other employees as may be necessary, or shall establish an appropriate unit within his office, to be responsible for activities related to the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bail-bond forfeitures)".

The standards prescribed by the Civil Division for judgment enforcement and claims collection activities are set forth in some detail in this Title at pages 20-26 and need not be repeated here. It should be emphasized, however, that, in the absence of unusual circumstances, the U.S. Attorney should not await instructions from the Civil Division, in any class of cases, before making demand, perfecting the lien of the judgment and obtaining information as to the sources from which it may be collected. Unless the U.S. Attorney has reason to believe that either the agency in interest or this Division would desire otherwise, he should also institute action to execute the judgment through attachment or garnishment where, in his opinion, such action should be taken. Except in cases within his delegation of authority, however, he should never make final compromise agreements, and he should not discontinue collection activity on either a permanent or a temporary basis, without the approval of the Civil Division.

Attention is called to the fact that, in some circumstances, the U.S. Attorney may reject a compromise offer below \$5,000 (p. 35) and he may release a lien where the amount of the claim or the value of the property is less than that amount (p. 63). In cases of compromise proposals not coming within his delegated authority, tentative agreement subject to ratification may be made and, in unusual cases requiring immediate action, Civil Division approval or disapproval can usually be obtained through a telephone call to the Attorney assigned to the case or the Chief of the Unit. Each telephonic understanding should, of course, be formalized by an exchange of memorandum.

TORTS SECTION

The Torts Section is responsible for supervising (1) the defense of tort suits against the United States pursuant to the

TITLE 3: CIVIL DIVISION

Federal Tort Claims Act and special acts of Congress, (2) the prosecution of tort claims in favor of the United States, (3) the defense of tort suits against Government cost-plus contractors, and (4) the defense of civil tort actions and State or local criminal proceedings against Federal employees arising out of the performance of their official duties and involving death, personal injuries or property damage. However, the defense of Federal employees against other types of civil tort actions and criminal proceedings, such as libel and slander (including claims of the kind described in 28 U.S.C. 2680 (h), except assault and battery), is the responsibility of the General Litigation Section.

The following discussion sets forth the policies and procedures applicable to the cases within the jurisdiction of the Torts Section, with citations to frequently litigated issues and references to applicable sections of the Federal Tort Claims Practice Manual and Jayson's treatise, "Handling Federal Tort Claims," both of which should be available in your office.

1966 Amendments to Federal Tort Claims Act

On January 18, 1967, the 1966 amendments to the Federal Tort Claims Act became effective. As to tort claims accruing on and after that date, Public Law 85-506, 80 Stat. 306, effects substantial changes in the procedure to be followed for asserting claims, in the manner in which settlements and compromises are to be paid, and in the allowable or permissible attorney fees. Since the amendments encompassed by P.L. 89-506 have application only to claims accruing on and after January 18, 1967, we shall for a period which may extend for several years, in effect, be concerned with two statutes.

In summary, the principal provisions of P.L. 89-506 are as follows. The heads of Federal agencies have authority to consider administratively all tort claims regardless of the amount claimed, and to ascertain, adjust, determine, or compromise any claim, with the proviso that any award, compromise, or settlement in excess of \$25,000 may be effected only with the prior written approval of the Attorney General or his designee. An action under the Federal Tort Claims Act may not be instituted upon a claim accruing on or after January 18, 1967, unless the claimant shall have first presented the claim to the appropriate Federal agency and the claim shall have been finally denied by the agency in writing sent by certified or registered mail. The failure

TITLE 3: CIVIL DIVISION

of an agency to make final disposition of a claim within 6 months after it is filed may, at the option of the claimant at any time thereafter, be deemed a final denial of the claim. Claims which may be asserted under the Federal Rules by third party complaint, cross-claim or counterclaim are not required to be presented administratively.

Settlements on claims accruing on or after January 18, 1967, in excess of \$2,500 made by agency heads under 28 U.S.C. 2672, as amended, and all settlements by the Attorney General, or his designee, under 28 U.S.C. 2677, as amended, become payable out of general appropriations in the Treasury rather than from appropriations available to the agency whose action gave rise to the claims. Settlements and judgments in excess of \$100,000 continue to require special appropriation by the Congress. Settlements effected in cases in litigation no longer require District Court approval if the claim accrued on or after January 18, 1967.

Attorney's fees become a matter of agreement between the attorney and client subject to a statutory limit of 20 per centum of awards, compromises and settlements effected administratively and 25 per centum of judgments under 28 U.S.C. 1346(b) and settlements effected after the commencement of litigation.

The 2-year statute of limitation prescribed in 28 U.S.C. 2401(b), as amended, remains intact except that where there has been a final denial of a claim accruing on or after January 18, 1967, by an agency, an action under 28 U.S.C. 1346(b) must be commenced within 6 months after the date of mailing, by certified or registered mail, of the agency's notice of final denial.

The requirement that a claim be asserted administratively (28 U.S.C. 2675, as amended) is jurisdictional and a properly framed complaint (Rule 8(a), F.R.C.P.), should allege that an administrative claim was asserted and was either denied or that after a period of 6 months the agency concerned failed to make final disposition of the claim. Where the facts disclose that an administrative claim has not been filed or finally acted upon, the U.S. Attorney should advise the plaintiff's counsel, in writing, of the jurisdictional defect in the action, request that the plaintiff take a voluntary nonsuit, and advise that unless this is done within 10 days, the United States will be obliged to move to dismiss the action for failure to pursue and exhaust the administrative remedy. In those cases where a voluntary nonsuit would possibly

TITLE 3: CIVIL DIVISION

give rise to a question as to the application of the statute of limitations in 28 U.S.C. 2401(b), the U.S. Attorneys are requested to consult with the Torts Section before taking any action.

A similar procedure should be followed in cases instituted against Government drivers and Veterans' Administration medical personnel, acting within the scope of their Government employment, in which the exclusive remedy provisions of 28 U.S.C. 2679 and 38 U.S.C. 4116 apply. Upon notification by the agency or the Civil Division of the commencement of an action against the driver or against Veterans' Administration medical personnel, as individuals, and where the U.S. Attorney is satisfied that the statutory provisions apply, the plaintiff's counsel should be advised, in writing, that the exclusive remedy of the plaintiff is against the United States under the Federal Tort Claims Act, and that the act requires as a prerequisite to suit that an administrative claim be filed with the Government agency concerned. If, within 10 days, a voluntary nonsuit of the action is not taken, the U.S. Attorney should proceed to effect a removal of the action (if pending in a state court) to the Federal court and, upon removal, move to dismiss the action for failure to comply with the administrative requirement in 28 U.S.C. 2675(a), as amended. Again, where there may be a possible question as to the applicability of 28 U.S.C. 2401(b), it is requested that the Torts Section be consulted before any action is taken.

The authority to compromise all claims arising out of one incident for an aggregate amount of \$5,000 or less without prior approval of the Assistant Attorney General, Civil Division, remains in effect subject to existing qualifications. See Memorandum No. 374, Section 3E2; 28 CFR, Chapter I Appendix. Even though a claim may be settled within this delegated authority, it is requested that the agency concerned be consulted prior to settlement of claims accruing after January 18, 1967, since the agency will, presumably, have previously evaluated the claim and have either denied it or have been unable to effect a satisfactory settlement with the claimant.

Court approval of settlements effected under 28 U.S.C. 2677 will no longer be required with respect to claims accruing on or after January 18, 1967. Compromise of suits involving minors and other persons under legal disability should be approved by the local probate, orphan's, surrogate's or other court of competent jurisdiction where such approval is required by applicable

TITLE 3: CIVIL DIVISION

State law. The U.S. Attorney should continue to follow the form of compromise agreement as it appears in the Federal Tort Claims Practice Manual, pages 480-481, eliminating paragraph 7 therefrom which states that the settlement agreement is made subject to the approval of the court. Settlements pursuant to 28 U.S.C. 2677 become payable in the same manner as judgments in Tort Claims Act cases are presently payable. Three copies of the compromise agreement, one certified, should, therefore, be forwarded to the Civil Division for transmission to the General Accounting Office or the Treasury Department for further processing and payment.

U.S. Attorneys are requested to consult with the Torts Section as problems occur and as questions arise under P.M. 89-506.

Basic Issues Frequently Raised

The Tort Claims Act adopts state substantive law. 28 U.S.C. 1346(b) and 2674. This includes questions of liability, damages, limitations as to recovery and the like. However, the Federal Rules govern as to procedural matters. In a conflicts of law situation, the Tort Claims Act adopts the whole law of the State where the negligent act or omission allegedly occurred. 28 U.S.C. 2674; *Richards v. United States*, 359 U.S. 1.

Certain questions involving the interpretation of the Tort Claims Act are decided as a matter of Federal law, such as determining who is an employee of the Government for the purposes of the Tort Claims Act, *Pattno v. United States*, 311 F. 2d 604 (C.A. 10, 1962); *Fisher v. United States*, 356 F. 2d 706 (C.A. 6, 1966); the interpretation of a Federal contract, *United States v. Allegheny County*, 322 U.S. 174, 183; *United States v. Starks*, 239 F. 2d 544, 547 (C.A. 7, 1957), and the date of accrual of a cause of action. *Hungerford v. United States* 307 F. 2d 99 (C.A. 9, 1962). This is discussed further in the section on the handling of medical malpractice cases below. The United States cannot be made a party to, and cannot be bound by, litigation in a State court without its consent and a vouching in letter in State court litigation is ineffective against the United States. *United States v. City of Pittsburgh*, 359 F. 2d 564 (C.A. 3, 1966).

Evidence questions are governed by both Federal and State law, with the statute or rule, either Federal or State, favoring admissibility of the evidence, controlling (Rule 43(a), F.R.C.P.). While status as a Federal employee is determined by Federal law,

TITLE 3: CIVIL DIVISION

scope of employment is determined by State law, even in such distinctly Federal areas as the transfer of servicemen. *Williams v. United States*, 350 U.S. 857. No punitive damages are recoverable against the United States, but if under State law the only damages recoverable are punitive, compensatory damages will be awarded instead (28 U.S.C. 2674).

The 2-year statute of limitations under the Federal Tort Claims Act is not extended by reason of infancy, *Pittman v. United States*, 341 F. 2d 739 (C.A. 9, 1965), incompetency, *Jackson v. United States*, 234 F. Supp. 586 (S.C., 1964), or any other disability. However, if a party has an action for contribution or indemnity against the United States, the cause of action does not accrue at least until suit is filed against the indemnitee if not until entry of the judgment. *Keleket X-ray Corp. v. United States*, 275 F. 2d 167 (C.A.D.C., 1960).

Under the Tort Claims Act the United States is only liable for negligent or wrongful acts or omissions of an employee of the Government acting within the scope of his office or employment (28 U.S.C. 1346(b)) so that the United States is not liable on any absolute liability theory, *United States v. Dalehite*, 346 U.S. 15, 44-45, and the United States is ordinarily not liable for negligence of an independent contractor under the nondelegable duty theory. 28 U.S.C. 2671, *United States v. Dorman*, 268 F. Supp. 249 (D. Neb., 1967). Neither is the United States liable for negligence on the part of its safety inspectors in failing to discover or stop dangerous activities of an independent contractor. *United States v. Page*, 350 F. 2d 18 (C.A. 10, 1965); *Roberson v. United States*, 382 F. 2d 114 (C.A. 9, 1967).

A member of the military acting incident to his military service is limited to his administrative remedy and is precluded from suing the United States under the Federal Tort Claims Act. *Feres v. United States*, 340 U.S. 35. However, a member of the military can sue under the Federal Tort Claims Act if he is on leave or not acting incident to service. *United States v. Brown*, 348 U.S. 110. The incident to service test, although generally comparable to a scope of employment test in other cases, is clearly broader than the scope of employment test. A member of the military is precluded from suing the United States for malpractice committed in a military hospital. An employee of the United States receiving compensation under the Federal Employees Compensation Act is precluded from suing the United States under the Federal Tort Claims Act, 5 U.S.C. 8116(c); *Johansen v. United States*, 343 U.S.

TITLE 3: CIVIL DIVISION

427, and an employee of a nonappropriated fund agency is limited to a claim under the Longshoremen's and Harbor Workers' Compensation Act, *United States v. Forfari*, 268 F. 2d 29 (C.A. 9, 1959). A prisoner is permitted to sue the United States under the Tort Claims Act, *Muniz v. United States*, 374 U.S. 150, but if the injury occurs in the prison industries, the compensation remedy provided is exclusive. *Demko v. United States*, 385 U.S. 149.

National Guard employees, including caretakers and technicians, have been held not to be employees of the United States and the United States is not liable for their torts. *Maryland ex rel Levin v. United States*, 381 U.S. 41. An exception involves National Guardsmen employed by the District of Columbia who are considered Federal employees, *O'Toole v. United States*, 206 F. 2d 912 (C.A. 3, 1953). However, effective January 1, 1969, a technician is a Federal employee (32 U.S.C.A. 709, P.L. 90-486) so that in cases arising on or after January 1, 1969, the United States will be liable for the torts of National Guard technicians only. Technicians are ordinarily full time employees responsible for training or maintaining of supplies and facilities of the Guard. If the National Guard unit has been activated into Federal service, the Guardsmen are also employees of the Federal Government.

National Guardsmen are precluded from suing the United States under the Tort Claims Act under the *Feres* doctrine although their unit has not been federalized. *Layne v. United States*, 295 F. 2d 433 (C.A. 7, 1961). There is also a National Guard Tort Claims Act which grants the military agencies authority to settle tort claims arising from the noncombatant activities of National Guard employees even though the unit has not been federalized. 32 U.S.C. 715. Although there is a limitation of \$5,000 on the recovery, any additional amount which the Secretary of the military department involved thinks justified can be reported to Congress for payment. See Jayson, Section 4.05.

The vast majority of the States apply the collateral source rule whereby recovery is not affected by the fact that the claimant has received benefits as a result of the injury from a different source, *e.g.*, hospitalization insurance. However, certain gratuitous benefits awarded by the Federal Government, such as veterans benefits and military benefits, are not from a collateral source and are ordinarily deductible from any tort claims recovery against the United States. For an annotation as to the applicability of the collateral source rule under the Federal Tort Claims Act, see 12 A.L.R. 3d 1245.

TITLE 3: CIVIL DIVISION

Cases In Which Exceptions to the Tort Claims Act Are Applicable

Particular attention should be paid to any cases in which one of the exceptions to the Tort Claims Act contained in 28 U.S.C. 2680 is, or may be, applicable because of the possible precedent value attaching to the case. The discretionary function exception (28 U.S.C. 2680(a)) should never be raised without prior consultation with the Torts Section, and ordinarily the misrepresentation exception (28 U.S.C. 2680(h)), when it involves negligent misrepresentation, should only be raised after consultation with the Torts Section. The various exceptions to the Tort Claims Act are discussed in Chapter 2 of the Federal Tort Claims Practice Manual and Chapters 12 and 13 of Jayson's treatise.

Representation of Government Drivers Pursuant to Public Law 87-258

Under the provisions of the Government Drivers Act, 28 U.S.C. 2679(b)-(e), Congress has provided for the assumption by the United States of liability for torts committed by Government drivers in the scope of their Federal employment. If suit is filed in State court, upon a determination by the U.S. Attorney that the Government driver was acting within the scope of his employment, the case should be removed to Federal court under the provisions of 28 U.S.C. 2679(d), and the United States should be substituted as party defendant. Forms to be used in a Drivers Act case are set forth on pages 491-494 of the Federal Tort Claims Practice Manual, and a discussion of the procedure under the Drivers Act is contained in section 454 of the manual. It should be noted that under 28 U.S.C. 2679(d) the removal is without bond and can be made at any time prior to trial, so that the 30-day limitation in 28 U.S.C. 1446 is inapplicable. If the case is commenced in Federal court under diversity jurisdiction, it is only necessary to certify scope of employment and substitute the United States as party defendant under the Drivers Act. If the U.S. Attorney has any doubt about the question of scope of employment, consultation with the Torts Section is requested.

The Department now takes the position that the Drivers Act will be invoked any time the driver is acting within the scope of his employment, regardless of whether or not the plaintiff has a remedy under the Federal Tort Claims Act. The principal factual

TITLE 3: CIVIL DIVISION

situations in which this issue has arisen include cases in which the statute of limitations has expired against the United States, but not against the employee due to a longer limitation period under State law, *Hoch v. Carter*, 242 F. Supp. 863 (S.D.N.Y., 1965); *Fancher v. Baker*, 399 S.W. 2d 280 (Ark., 1966), or where the plaintiff is barred from recovery against the United States because the plaintiff is a Federal employee for whom the Federal Employees Compensation Act is the exclusive remedy against the United States, or a member of the military barred from suing the United States under the *Feres* doctrine. *Vantrese v. United States*, 400 F. 2d 853 (C.A. 6, 1968).

If the Government driver has personal insurance which covers the United States as an additional insured in an amount adequate for the injury involved, and the insurance company prefers to assume the defense of the action in State court, we ordinarily have no objection. The main criterion in deciding whether to permit the insurance company to assume the defense in State court is whether or not the interests of the Government driver are fully protected under the circumstances. If your office has any doubt, consultation with the Torts Section is requested.

Federal Medical Care Recovery Act

The Federal Medical Care Recovery Act, 42 U.S.C. 2651-2653, was enacted in 1964 to enable the United States to recover the value of medical care and treatment rendered to persons authorized medical care at Government facilities and expense when they are injured under tortious circumstances.

The constitutionality of the Act was upheld in *United States v. Jones*, 264 F. Supp. 11 (E.D. Va., 1967). The claim of the United States is in the nature of an independent cause of action, *United States v. York*, 398 F. 2d 582 (C.A. 6, 1968), and is therefore not subject to State procedural limitations which might bar an action by the injured party. *United States v. Fort Benning Rifle and Pistol Club*, 387 F. 2d 884 (C.A. 5, 1967). The negligence of a Government employee will not bar a claim for the care of another Government employee. *Maddux v. Cox*, 382 F. 2d 119 (C.A. 8, 1967).

A release given by the injured party to the tortfeasor does not extinguish the Government's cause of action against the tortfeasor or his insurer. *United States v. Greene*, 266 F. Supp. 976 (N.D. Ill., 1967). It is not necessary for the United States to intervene

June 1, 1970

TITLE 3: CIVIL DIVISION

in an action commenced by the injured party. *United States v. York, supra*. Because the Medical Care Recovery Act allows the United States to recover the value of medical care furnished, the United States qualifies as an additional insured as defined in the standard uninsured motorist clause. *GEICO v. United States*, 376 F. 2d 835 (C.A. 4, 1967).

One may not attack the reasonableness of the rates established by the Bureau of the Budget. *Phillips v. Trame*, 252 F. Supp. 948 (E.D. Ill., 1966). However, one may challenge the necessity for the care and treatment rendered. *Murphy v. Smith*, 243 F. Supp. 1006 (S.C., 1965).

Further instructions and forms for the presentation of Federal Medical Care Recovery Act claims may be found in part IX of the Federal Tort Claims Practice Manual, sections 480-7, or by contacting the Torts Section. Once a claim is referred to the Department of Justice all control over the matter, including settlement authority, becomes vested in the Department. The U.S. Attorneys are authorized to compromise all claims not in excess of \$5,000.

Medical Malpractice Cases

The Torts Section has a specialized medical Malpractice Unit, and close liaison should be maintained with the Section throughout all phases of medical malpractice litigation since these cases usually involve complex factual questions requiring the use of expert medical and other scientific witnesses.

Several defenses which are available in other tort cases are either not available or are limited in their application in medical malpractice litigation. This is particularly true of the defense of statute of limitations. In malpractice actions, the courts have held that a claim does not necessarily accrue when the negligence occurs, instead, the limitations period provided in 28 U.S.C. 2401 (b) may not commence until the plaintiff knew or should have known of the alleged malpractice. See *Brown v. United States*, 335 F. 2d 578 (C.A. 9, 1965); *Hungerford v. United States*, 307 F. 2d 99 (C.A. 9, 1962); *Quinton v. United States*, 304 F. 2d 234 (C.A. 5, 1962).

Because of the difficult questions involved in the application of the statute of limitations defense, as well as the discretionary function and negligent misrepresentation defenses, it is requested that these defenses not be asserted in medical malpractice cases without prior consultation with the Torts Section.

TITLE 3: CIVIL DIVISION

Preparation of the defense of a medical malpractice action will ordinarily require the close cooperation and assistance of one or more physicians. It is essential that such physicians be available, both to serve as consultants in preparing the case for trial and to serve as expert witnesses at trial. If practical, Government medical facilities in your area should be considered as sources for assistance and consultation in pretrial preparation. Consultation with such personnel at such facilities might also provide names of potential expert witnesses, either from the Government hospital or from the civilian community. The Torts Section also may be consulted for assistance in securing the services of a physician to serve as a consultant or expert witness.

Aviation Litigation

The Torts Section maintains an Aviation Litigation Unit specializing in the defense of aviation cases arising primarily out of the activities of the Federal Aviation Administration, the Bureau of Environmental Science Services Administration (the Weather Bureau), and the military services. Primary responsibility for the defense of this litigation, including preparation and trial, will generally be retained in the Torts Section if the litigation involves multiple parties and multiple jurisdictions, if questions of broad national import with particular precedential significance are involved, or if the litigation will raise questions concerning the propriety of air traffic control, the certification of aircraft, or the dissemination of weather and in-flight information to operators of commercial and private aircraft. Where primary responsibility for the defense of aviation cases is to be retained by the Torts Section, the U.S. Attorney will be specifically notified promptly upon receipt of factual information sufficient to provide a basis for determining the question of delegation. In all cases, close cooperation between the U.S. Attorney's office and the Aviation Litigation Unit is required.

**Delegation of Settlement Authority to the
U.S. Attorneys**

The U.S. Attorneys are authorized to settle all suits brought against the United States under the Federal Tort Claims Act arising out of a single incident, where settlement can be effected for \$5,000 or less, without prior approval of the Department of

June 1, 1970

TITLE 3: CIVIL DIVISION

Justice, unless such delegation has been withdrawn, and subject to the exceptions contained in Section 4 of Memorandum No. 374, dated June 3, 1964. See Section 403 of the Federal Tort Claims Practice Manual for details as to the proper procedure for the settlement of cases, and see pages 480-482 of the manual for forms to be used in settlement.

In cases where the aggregate ad damnum arising from a single incident does not exceed a total of \$5,000, the U.S. Attorney is authorized to take such action as he believes appropriate in the handling of the case, including settlement, without prior approval of the Civil Division unless previously instructed to the contrary. Department of Justice Memorandum No. 374, dated June 3, 1964. No detailed files are maintained by the Civil Division on cases where the aggregate ad damnum does not exceed \$5,000; accordingly, copies of correspondence, pleadings, and settlement stipulations, etc., should be sent directly to the agency involved only, without copies to the Civil Division. An exception is that any settlement of a case under the 1966 amendments should be sent to the Torts Section for transmission to the General Accounting Office. If the action accrued prior to January 18, 1967, you should assure that the stipulation and order includes a provision for attorney's fees, and that the attorney's fees do not exceed 20 percent of the recovery.

In tort cases compromised under his delegated authority, but where the aggregate ad damnum exceeds \$5,000, the U.S. Attorney should forward to the Department of Justice with the stipulation of settlement and order of approval a concise memorandum signed by the U.S. Attorney personally stating (1) the amount of the settlement; (2) the considerations of fact and law justifying the compromise; and (3) the date of the U.S. Attorney's approval. See Section 403, Federal Tort Claims Practice Manual.

Judgments adverse to the Government in cases where the aggregate ad damnum does not exceed \$5,000 should be promptly reported by forwarding the documents and materials required under Title 6 of this Manual (including one certified and one conformed copy of the judgment papers) directly to the Appellate Section of the Civil Division for appropriate review without copies to the Torts Section.

Settlement Offers Exceeding Your Delegated Authority

When you receive an offer in settlement in an amount in excess of your delegated authority, assuming that time permits, the offer

TITLE 3: CIVIL DIVISION

should be forwarded in writing to the Torts Section along with a detailed memorandum setting forth the facts and applicable law and your recommendation as to settlement value. The offer will then be forwarded to the agency along with your memorandum with a request for the agency's views. For a full discussion of the settlement procedure, see Section 404 of the Federal Tort Claims Practice Manual.

The detail required in the compromise memorandum will vary according to the complexity of the case, whether any issues of importance as a precedent are involved and the amount of money sought in the settlement. If time does not permit following a formal procedure, the information and settlement offer will necessarily have to be conveyed by telephone. However, the task of the Civil Division in evaluating any settlement offer and the ability to do so on short notice will depend on the completeness of the Department file at the time the offer is received. All documents relating to liability and damages should, therefore, be promptly forwarded to the Torts Section as the case progresses.

**Administrative Settlement of Tort Claims
Against the Department of Justice**

The following procedure will apply in all cases which may give rise to claims for administrative settlement by the Department of Justice under the Federal Tort Claims Act (28 U.S.C. 2672). For detailed information as to the use of Standard Forms 91 (motor vehicle or aircraft accidents), 92A (other accidents), and 94 (witness statements), as well as to the handling of the claims in the Department at Washington, D.C., see Memo No. 259, dated April 10, 1959.

Any officer or employee of the Department of Justice involved in an incident resulting in damages to or loss of property, or personal injury or death which may give rise to a claim for money damages shall make an immediate detailed report of the facts to his superior, using the standard forms which are prescribed for that type of accident. The officer or employee should secure the names and addresses of witnesses and submit the same and any other pertinent data with his report.

The case should be thoroughly investigated by the Division or Bureau concerned at the earliest possible time while the facts are fresh. Signed statements of all witnesses should be obtained, if possible. Photographs of the scene should be taken if helpful to

June 1, 1970

TITLE 3: CIVIL DIVISION

show the manner in which the accident occurred, or the damage resulting from it.

In cases of serious personal injury, death or major property damage, the FBI should be notified as soon as possible after the accident and given an opportunity to undertake the required investigation. The U.S. Attorney for the district may be called upon for advice as to the nature and scope of the investigation required in such cases.

The record thus established shall be retained in the files of the Division or Bureau concerned for use if a formal claim is filed within the time limit permitted by the act.

If a claim is filed under 28 U.S.C. 2672 and involves the Bureau of Prisons, the Federal Prison Industries, the Immigration and Naturalization Service, or the Bureau of Narcotics and Dangerous Drugs, the authorized official in each organization will have responsibility for the decision. If the responsible official determines that an amount in excess of \$2,500 should be paid in compromise, the matter will be forwarded to the Civil Division for final determination by the Assistant Attorney General. All claims involving the Federal Bureau of Investigation and all other offices and divisions should be forwarded to the Torts Section for consideration and final determination by the Assistant Attorney General, Civil Division.

Interest

The interest provision applicable to judgments under the Federal Tort Claims Act involve the interplay of two statutes, 28 U.S.C. 2411 (b) and 31 U.S.C. 724 (a). The net effect of these statutory provisions is that interest is payable on tort claims judgments of less than \$100,000 only in cases in which an appeal is taken by the United States, and then interest is payable at the rate of 4 percent only from the date of filing of the transcript of the judgment with the General Accounting Office until the date of the mandate of affirmance by the Court of Appeals. *United States v. Maryland for use of Meyer*, 349 F. 2d 693 (C.A.D.C. 1965). The plaintiff's counsel has the duty of assuring that a transcript of the judgment is filed with General Accounting Office. In addition, interest of 4 percent is payable on judgments in excess of \$100,000 for which special appropriations are required by Congress under present law.

No interest or costs are to be included if the case is settled.

June 1, 1970

TITLE 3: CIVIL DIVISION**Use of FBI in Tort Investigations**

The FBI is responsible for investigating all claims or potential claims in excess of \$1,000, except: (1) Suits brought against Government employees in State or local courts unless they arise out of the operation of a motor vehicle and the provisions of P.L. 87-258 (28 U.S.C. 2679(b), *et seq.*) are applicable, and (2) special investigations for congressional committees which are considering legislation for the relief of the plaintiff. Accordingly, its investigative facilities should be utilized when necessary for the proper defense of suits filed against the Government under the Federal Tort Claims Act. In utilizing such investigative facilities every effort should be made to avoid duplication of effort and reinvestigation of phases of cases when the agency as a result of whose activities the claim has been filed, or the action has been brought, has placed in the U.S. Attorney's hands sufficient information to enable him to properly handle the claim or defend the action. Where only the question of liability is involved, only that aspect of the case should be investigated. Similarly, where only the question of damages, or any other issue, is of concern, any request made by the U.S. Attorney should be for investigative coverage of that phase of the case only.

It should not be implied from the foregoing that a reinvestigation should never be requested in a case of sufficient importance and where the information furnished the U.S. Attorney is inadequate to enable him to properly represent the interests of the Government, he should have a reinvestigation made. Requests for such action, however, should be made only after thorough consideration of the necessity therefor.

Suits on Affirmative Tort Claims

Suits sounding in tort must be brought by the Government within 3 years after the right of action first accrues except that actions for trespass to lands or for conversion of property of the United States may be brought within 6 years. 28 U.S.C. 2415, as added by P.L. 89-505, 80 Stat. 304. See 28 U.S.C. 2416, as added by P.L. 89-505, 80 Stat. 305, for periods of time excluded in computing the running of the statute of limitations. (The 3- and 6-year periods of limitations run from July 18, 1966, if the right of action accrued prior to that date.)

TITLE 3: CIVIL DIVISION

Payment of Judgments and Compromises

Judgments. To obtain payment of adverse judgments the U.S. Attorney should forward to the Torts Section two certified and one conformed copy of the judgment. It is preferable that the judgment specify with particularity the attorneys fees payable out of the judgment (see 28 U.S.C. 2678) as well as the name of the attorney entitled to the fee. Note—As to claims accruing prior to January 18, 1967, attorneys fees are limited to 20 percent of the award. As to claims accruing after January 18, 1967, the permissible limit is 25 percent.

Compromises. Compromise settlements of suits in which the claim accrued prior to January 18, 1967, require court approval and continue to be payable by the agency concerned. Two certified copies of the stipulation and court order of approval (see pp. 480–482, Federal Tort Claims Practice Manual) should be promptly forwarded to the Section. Again it is preferable that the order specify the attorneys fees to be paid from the settlement and the name of the attorney entitled to the fee.

Compromise settlements of claims accruing after January 18, 1967, are payable in the same manner as judgments (see 28 U.S.C. 2672, 2414). Settlement of these claims does not require the approval of the court and need not be filed with the court. To obtain payment of such settlements, the U.S. Attorney should forward to the Section the original of the stipulation for compromise and two conformed copies. The stipulation for compromise should follow the form set out on page 480–481 of the Practice Manual excluding paragraph 7 (at p. 481). Note—If for any reason the original of the stipulation cannot be forwarded and copies in lieu of the original are to be forwarded—the copies should bear a signed certification by the U.S. Attorney or an authorized assistant that the copy is a true and correct copy of the original.