

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner
v. MARIAN BROCKAMP, ADMINISTRATOR
OF THE ESTATE OF STANLEY B.
McGILL, DECEASED
CASE NO: 95-1225
PLACE: Washington, D.C.
DATE: Tuesday, December 3, 1996
PAGES: 1-45

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 ~~ORAL ARGUMENT OF~~ - - - - -X

PAGE

3 UNITED STATES, WALLACE, ESQ. : 19

4 On behalf of Petitioner's Petitioner: 3

5 ~~ORAL ARGUMENT OF~~ : No. 95-1225

6 MARIAN BROCKAMP, ADMINISTRATOR :

7 OF THE ESTATE OF STANLEY B. den: 19

8 MCGILL, DECEASED OF :

9 ~~LAWRENCE G. WALLACE, ESQ.~~ - - - -X

10 On behalf of the Petitioner Washington, D.C. 43

11 Tuesday, December 3, 1996

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:03 a.m.

15 APPEARANCES:

16 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor

17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Petitioner.

19 ROBERT F. KLUEGER, ESQ., Encino, California; on behalf of
20 the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-1225, United States v. Marian Brockamp.

5 Mr. Wallace.

6 ORAL ARGUMENT OF LAWRENCE G. WALLACE

7 ON BEHALF OF THE PETITIONER

8 MR. WALLACE: Mr. Chief Justice, and may it
9 please the Court:

10 In these companion cases a divided panel of the
11 court of appeals held that equitable tolling may be
12 applied to enlarge or suspend the statutory periods that
13 limit the time for filings and the amount of recovery that
14 may be had on tax refund claims.

15 As we recount in our brief, recent decisions of
16 the First, Fourth, Tenth, and Eleventh Circuits have held
17 to the contrary. Our submission is that those four
18 circuits reach a result that is required by the text of
19 the interrelated statutory provisions that govern here,
20 and I would like to turn to the statutory text now, which
21 is set out at pages 2 to 4 of the Government's brief.

22 And we start with the last of the provisions
23 that set out section 7422(a) of the Internal Revenue Code,
24 which the term before last in United States v. Williams
25 this Court referred to as a provision that requires

1 administrative exhaustion.

2 QUESTION: This is found on page 4?

3 MR. WALLACE: On page 4 of the Government's
4 brief, in the gray covers, and it says that no suit or
5 proceeding shall be maintained in any courts, skipping
6 down, until -- for a refund, until a claim for refund or
7 credit has been duly filed with the Secretary according to
8 the provisions of law in that regard.

9 And the controlling provisions in our view are
10 those set forth on the preceding two pages, the various
11 provisions of section 6511 of the Internal Revenue Code,
12 and -- and that section starts off in subsection (a) with
13 a statement of a period of limitation on filing a refund
14 claim with the Internal Revenue Service.

15 For present purposes, since a tax return is
16 required for an income tax, the claim must be filed within
17 3 years from the time the return was filed, or 2 years
18 from the time the tax was paid.

19 QUESTION: May I ask what might be an irrelevant
20 question on that point, but would help with my
21 understanding of the statute?

22 Apparently, in their brief on page 18 it did say
23 as first enacted it said it's within 3 years from the time
24 the return was required to be filed, and when you read the
25 statute -- the same thing came up I think last year, you

1 know, in a different case.

2 MR. WALLACE: Yes.

3 QUESTION: And I've never been able to
4 understand the statute for that reason.

5 MR. WALLACE: In the Mundy case.

6 QUESTION: And it left those words, was
7 required, out, and then it seems as if you could file a
8 return like, 82 years later, and 82 years later, now, it's
9 not too late, and they start the statute running, but the
10 grab-back only goes back 2 or 3 years. Now, what was --

11 QUESTION: Why don't you get these things
12 amended for us, Mr. Wallace, so they can make some sense?

13 (Laughter.)

14 MR. WALLACE: Well, that's not part of the
15 duties that I have --

16 (Laughter.)

17 QUESTION: -- but the Government is looking into
18 the possibility of statutory amendment. The question is,
19 the tolls --

20 QUESTION: Well, didn't -- wasn't there a
21 provision offered for amending this very section?

22 MR. WALLACE: There hasn't actually been a
23 provision offered. There was an announcement that a
24 provision was being prepared --

25 QUESTION: Oh.

1 MR. WALLACE: -- for offering, but it still has
2 not been offered.

3 QUESTION: Is it still being prepared, though?

4 MR. WALLACE: Well, there are -- it's under
5 study. I'm not privy to the discussions. There are
6 inherent difficulties in addressing this question because
7 of the massive number of returns that are filed every
8 year, difficulties that we've referred to in this --

9 QUESTION: Was it just an accident they left out
10 the words, were required, or was required, or is some
11 purpose going on that I can't understand?

12 MR. WALLACE: Well, we don't really have an
13 answer to that. There was, so far as I am aware, no
14 explanation of why this change occurred in the text.

15 This is a question that in the Mundy case last
16 term the Court found no occasion to reach, and it seldom
17 makes a difference, because it can make a difference only
18 if the -- in a 1-year period, because either you can --
19 you can go back 3 years from when the return was filed to
20 see -- to ask for refunds of taxes paid during those 3
21 years, or else 2 years after the tax was paid, and usually
22 with a really late-filed return no taxes were paid within
23 the 3 years or the 2 years, and it makes no difference, as
24 it makes no difference in either of the cases before us.

25 In any event, let me proceed now to the next

1 provision, and for our purposes the more important
2 provision, subsection (b), which appears on page 3 of the
3 Government's brief, and it starts off with a subsection
4 (1), which states quite unequivocally the consequences if
5 the claim is not filed within the prescribed period. No
6 credit or refund shall be allowed.

7 Now, that -- it's hard to see that that
8 provision has much purpose other than to emphasize the
9 strictness of the filing requirements and, as we point out
10 on page 20 of our brief, this point is reemphasized in
11 another provision of the code, section 6514(a)(1), which
12 states that any credit or refund which the Service
13 actually gives on a claim that is filed after the
14 expiration of the statutory periods of limitation is
15 "erroneous" and "considered void."

16 And it's interesting that in the implementing
17 regulation for that provision, section 6514, the Service,
18 after tracking the language of the statute, then has a
19 cross-reference to the provisions authorized in suit by
20 the Government to recover erroneous refunds.

21 But the next subsection seems to us to be what I
22 might refer to as the clincher, the most dispositive
23 obstacle to the respondents and the Ninth Circuit's
24 position in this case, and that is subsection (2) of
25 subsection (b), which is captioned, Limit on the amount of

1 credit or refund that can be given, and I cannot emphasize
2 too strongly that these caps on the disbursement that can
3 be made from the Federal Treasury have their own express
4 limitation.

5 While there is a cross-reference to the claims
6 limitation period for purpose of separating categories of
7 claims, there is no cross-reference to the claims
8 limitation for purpose of defining the cap itself.

9 It says in subsection (A), for example, the
10 amount of credit or refund shall not exceed the portion of
11 the tax paid within a period defined right in this
12 provision equal to 3 years plus the period of any
13 extension of time for filing the return, and in subsection
14 (B) it's the same thing, that the amount of credit or
15 refund shall not exceed the portion of the tax paid during
16 the 2 years immediately preceding the filing of the claim.

17 These are substantive limitations on
18 disbursements from the Treasury that are authorized.

19 QUESTION: Mr. Wallace, can I ask you a
20 general -- assume we agree with every -- all of your
21 arguments, and that it's too late to file a claim and the
22 taxpayer, or this person, he's not really a taxpayer, I
23 guess, has no right to get the money back, is there
24 anything in the code that would allow the Internal Revenue
25 Service when presented with facts as extreme as they are

1 in this case to say, we're not entitled to this \$7,000, we
2 want to give it back? Is there anything that allows the
3 Government to give back money they know they're not
4 entitled to?

5 MR. WALLACE: There is not, Justice Stevens.
6 The Government can decide not to oppose a private bill in
7 Congress --

8 QUESTION: I understand, yes.

9 MR. WALLACE: -- if the facts warrant it, which
10 might more --

11 QUESTION: Which they probably would in this
12 case, yes.

13 MR. WALLACE: Well, it depends on which case
14 you're talking about.

15 QUESTION: In one of these cases --

16 MR. WALLACE: We have two cases here.

17 QUESTION: Yes.

18 MR. WALLACE: And I'll get into the facts a
19 little but more. Perhaps the Webb case, which is being
20 held on petition from the Fourth Circuit, is one where
21 there is more clearly been a finding in the State courts
22 in related litigation about precisely what happened, so
23 that there is less room for questioning the factual
24 accuracy of a look back at the date, that about what
25 someone's --

1 QUESTION: No, I'm just assuming a case where
2 you really didn't dispute the facts, but you still would
3 have no authority to give the money back?

4 MR. WALLACE: Well, looking right now at the
5 provision which seems to preclude authority in the IRS --

6 QUESTION: It only speaks in terms of claims.
7 It speaks in terms of claims. I'm assuming a fact
8 situation in which there's no "claim" within the meaning
9 of the statute.

10 MR. WALLACE: Well --

11 QUESTION: Just a discovery that we've got
12 \$7,000 that obviously doesn't belong to us.

13 MR. WALLACE: That, if we turn to the top of
14 page 4, that is subsection (C) of the same provision,
15 limited no claim filed, and that says that you still have
16 to meet the time limits of subsections (A) and (B). It's
17 very hard to see how the Service would feel authorized to
18 make a disbursement of Treasury funds --

19 QUESTION: Mr. Wallace --

20 MR. WALLACE: -- in this situation.

21 QUESTION: -- may I ask, if this was not a
22 problem that was noticed by the administration, at least
23 there was a press release at the very time that your cert
24 petition was filed.

25 MR. WALLACE: That is correct.

1 QUESTION: In which I believe the President
2 announced that the law must be followed, but this is a
3 very hard situation for people to be in, that they
4 overpaid and they can't get it back, so wasn't it proposed
5 that there be a study of what legislative solution there
6 might be to help people out in this bind?

7 MR. WALLACE: And that is under study --

8 QUESTION: Where?

9 MR. WALLACE: -- just in the Treasury
10 Department.

11 QUESTION: Well, would you recommend -- assuming
12 the facts are as the petitioner states, or as the
13 respondent states them in Brockamp, the case of the
14 elderly man, would you recommend that a private bill be
15 passed?

16 MR. WALLACE: Well, I can't -- would I
17 personally --

18 QUESTION: Would the Justice Department?

19 MR. WALLACE: Well, I can't say that we've faced
20 up to that. What -- all we have --

21 QUESTION: Because I've noticed you've had two
22 of these bills in 34 years --

23 MR. WALLACE: There have been rather few.

24 QUESTION: -- so apparently you're pretty tough
25 on these.

1 MR. WALLACE: There have been rather few, but
2 these are not instigated by us, after all. They're
3 instigated by the taxpayers if they can get a
4 congressional sponsor.

5 QUESTION: Well, I just wonder what --

6 QUESTION: Well, surely the Justice Department
7 would recommend a private bill in this case, wouldn't it?

8 MR. WALLACE: Well --

9 QUESTION: Well, can you speak for the
10 Department?

11 MR. WALLACE: We don't know the facts. We only
12 know what the administrator's affidavit, the daughter's
13 affidavit said 4 years after -- more than 4-1/2 years
14 after --

15 QUESTION: Well, assume everything's correct --

16 MR. WALLACE: -- after the events occurred
17 here. It's -- there wasn't any contemporaneous finding
18 about whether this man had the capacity or not.

19 The receipt by the IRS was not an unusual one.
20 Oftentimes elderly taxpayers have capital gains or other
21 sudden increases in income, and there was no explanation
22 for it. The check merely accompanied an extension of time
23 request. Obviously, the family was in a better position
24 to be monitoring his financial affairs than the Internal
25 Revenue Service was, and could have looked into his bank

1 accounts if they thought at the time that there was lack
2 of capacity. They're now saying, 4-1/2 years later, that
3 there was lack of capacity at a time when it's difficult
4 to prove it, and this kind of claim can be made in many
5 cases.

6 I might, as a matter of fact, since we're into
7 the facts, talk a little bit about the facts in the Scott
8 case, where there was actually a bench trial, and --

9 QUESTION: Mr. Wallace, may I ask before you do
10 if you can just clarify for me what would be within the
11 universe of possible responses beside a private bill? I
12 suppose what the administration was looking for was not a
13 private bill, but something maybe akin to the mitigation
14 rules.

15 MR. WALLACE: There could be something of that
16 sort. It could be temporally limited. They could expand
17 the time periods upon a showing of certain kinds of
18 incapacity, but they could expand them for only a limited
19 time, because each year you expand it you're adding
20 another 200 million tax returns that possibly could be
21 reopened at a time when there's talk about downsizing the
22 Internal Revenue Service, and at a time when there are
23 budget constraints.

24 And in order for legislation of this kind to be
25 adopted, Congress needs help in preparing a revenue impact

1 assessment of it, rather hard to do, since we don't know
2 easily how to estimate how many additional out of time
3 refund claims might be stimulated once there were a
4 provision that allowed consideration of the individual
5 circumstances of taxpayers.

6 The Service has estimated that it now turns down
7 about 250,000 refund claims a year in whole, without
8 examining whether the refund was warranted or not because
9 they're out of time, but most tax counsel who wouldn't
10 file an out-of-time refund claim today on behalf of a
11 client, might -- that figure might increase a great deal.

12 So another possible legislative response to this
13 would be simply to increase the limitations periods in the
14 hope that more situations such as the alleged situation of
15 Mr. McGill would be caught without having to examine the
16 individual circumstances of individual taxpayers, just to
17 give their guardians or relatives more time in which to
18 ferret out examples of this kind, which would be much less
19 administratively burden -- there are all kinds of
20 possibilities, but to date nothing has been proposed by
21 the administration to the Congress, nor am I -- we'll of
22 course inform the Court if any action is taken either on
23 the Hill or by the administration.

24 In the meantime, it must be recognized that the
25 press release that was issued was issued on the premise

1 that the existing law bars such claims, as we think these
2 caps on the refund do, and there's no point in saying that
3 the claim can be allowed for a longer period if you can't
4 get any payment as a result of filing the claim.

5 So read as a whole, the provision is
6 inconsistent with equitable tolling, as the Court
7 concluded the applicable provisions in the Lampf case
8 were, and I do want to emphasize that with respect to an
9 express cap on disbursements from the Treasury there is no
10 more fitting example of where the traditional rules about
11 waivers of sovereign immunity should be applied.

12 When Congress has explicitly capped the
13 disbursement that is authorized to be made, that cannot be
14 enlarged beyond what the language requires. As the Court
15 has said about waivers of sovereign immunity, a court is
16 not in a position to enlarge it on equitable grounds.
17 It's quite different from just a statute of limitations on
18 the filing of the claim itself.

19 QUESTION: As far as the equity is concerned, do
20 you need to go -- say anything more than the Court did in
21 its decision in the Dalm case?

22 MR. WALLACE: Well, the Dalm case really
23 addresses everything that's at issue here.

24 What was asked for in Dalm, an expansion of the
25 doctrine of equitable recoupment, was an equitable claim

1 very similar to a tolling claim, and some would refer to
2 it as a tolling claim.

3 It's a form of claim for avoidance of the
4 limitations period that isn't as precisely defined a
5 deferral of the limitations period as the ordinary tolling
6 claim, but it's very similar, and we think the Dalm
7 decision does have a controlling analysis here, and in
8 particular its holding that these provisions concerning
9 tax refund suits must be read in conformity with one
10 another and with all the cross-referencing that's involved
11 here.

12 Let me just talk very briefly about the facts of
13 the Scott case to show what kind of thing we're concerned
14 with here, and in Scott we proceeded all the way to a
15 bench trial with findings, and some of those findings
16 which are set forth on pages 44a and 45a of the appendix
17 to our petition are rather telling here. For one thing --

18 QUESTION: But the only case we have before us
19 is the Brockamp case, Mr. Wallace.

20 MR. WALLACE: No, what -- we have both of them
21 together, Mr. Chief Justice. They were decided as
22 companion cases and we petitioned in the two cases.

23 QUESTION: I see.

24 MR. WALLACE: The court of appeals decided to
25 put the Brockamp case forward --

1 QUESTION: Go ahead. Go ahead, then.

2 MR. WALLACE: -- as one where perhaps the
3 Service's problems were not quite as apparent as they
4 would be in the Scott case from our standpoint.

5 The companion case in Scott involved his 1984
6 tax liability. What the Service knew was that he himself,
7 even though the claim now is incapacity because of
8 alcoholism, he himself had filed in January of 1985 his
9 estimated tax return and payment. His father had done
10 that with his prior installments of estimated tax for
11 1984.

12 And then through the bench trial proceedings we
13 were able to find out some facts which we -- which the
14 district court has listed on page 44a and 45a, that in
15 1984 Scott executed a partnership agreement to operate a
16 retail wine shop. In 1985, he entered into an agreement
17 dissolving the partnership so that he could operate the
18 shop on his own.

19 During the time he operated, he filed his State
20 sales tax, and he obtained an attorney to represent him on
21 driving under the influence charges in '87 and '88. He
22 opened and closed his retail business every day and paid
23 his utilities and rent.

24 So even on the basis of what we were able to
25 learn through a trial there was considerable doubt. The

1 district court itself said without the expert testimony in
2 this case, and I'm reading from finding 21, the court
3 might otherwise find the United States' argument somewhat
4 persuasive.

5 Of course, expert testimony is something that
6 doesn't occur until the trial itself.

7 QUESTION: What was the expert testimony about?

8 MR. WALLACE: It was about how alcoholism can be
9 incapacitating, but -- and there were two doctors, one for
10 the Government and one for the defense, but obviously the
11 Service would have to be very wary, the more a claim of
12 incapacity seems specific only to the capacity to comply
13 with the Internal Revenue laws and leaves the person able
14 to comply with many other laws.

15 The administrative finding of -- in such a case
16 would not be one where the Service could easily decide
17 that it was an appropriate occasion for tolling. These
18 are very difficult matters to handle. They're not the
19 kind of green eyeshade investigations of a tax return that
20 Service personnel are ordinarily engaged in, nor are the
21 facts easily assembled.

22 We're dealing here with a very difficult
23 administrative question, and one that both the
24 administration and Congress may give appropriate
25 consideration to, but they obviously have to tread with

1 caution, considering the magnitude of the task that is
2 assigned to the Service.

3 If I may, I'd like to reserve the balance of my
4 time.

5 QUESTION: Very well, Mr. Wallace.

6 Mr. Klueger, we'll hear from you.

7 ORAL ARGUMENT OF ROBERT F. KLUEGER

8 ON BEHALF OF THE RESPONDENT

9 MR. KLUEGER: Mr. Chief Justice, and may it
10 please the Court:

11 The Government would have us believe that where
12 a disabled taxpayer erroneously overpays his taxes and
13 later, through some miracle, determines that he has
14 overpaid and then seeks his redress, the Government would
15 have us believe that Congress intended that that disabled
16 taxpayer should have no redress, even in a case such as
17 this, the Brockamp case, where the erroneous overpayment
18 was a direct result of the taxpayer's disability.

19 QUESTION: Well, he has redress for 3 years. I
20 mean, there's just a time limit on it, right?

21 MR. KLUEGER: He has no redress because he was
22 disabled throughout the statutory period. That is the
23 facts of this case. He would certainly have the direct --
24 a redress if he were like the rest of us, a competent
25 taxpayer. But throughout the statutory period in 6511, he

1 was disabled.

2 Only through some miracle his daughter
3 discovered the overpayment following the taxpayer's death,
4 and the Government would have us believe that in this
5 circumstance not only is there an unfairness, but that I
6 think the unfairness is perhaps beside the point.

7 The point --

8 QUESTION: Why should we be tugged by the
9 equities here, and undoubtedly these are hard cases,
10 tugged more by these equities than the Court was in the
11 Dalm case, which was also a very sympathetic situation?

12 MR. KLUEGER: I am not ask -- specifically, Your
13 Honor, I am not asking the Court to be tugged by the
14 equities. I am specifically saying, the point being that
15 Congress did not intend, could not intend that this be the
16 result.

17 QUESTION: Well, we have a rather elaborate
18 Internal Revenue Code where presumably Congress has
19 revealed its intent in the sections that are dealt with in
20 the briefs.

21 MR. KLUEGER: Yes, that is true. I believe that
22 Congress' intent is revealed, albeit darkly, in section
23 6511 itself, in the structure of section 6511. It is
24 best, I think, to turn to the operation of this statute.

25 This is a statute of limitations which is not

1 unique but rare, in that the clock that starts the statute
2 of limitations may only begin to run but for some
3 predicate act that is performed by the taxpayer, whether
4 it is the filing of the return or, in the case of Mr.
5 McGill, cutting a check. Until one of those acts
6 eventuates, the clock never starts to run.

7 Now, it doesn't seem to be that much of an
8 intellectual stretch to assume that if this is a statute
9 of limitations that can only begin to run but for the
10 taxpayer's act, that the taxpayer's act not be the result
11 of his fantasies or his delusions, but be the act of a
12 rational, competent taxpayer, and if I might, to
13 illustrate this point, a -- because the counsel for the
14 Government has discussed the possibility of holding
15 hundreds of millions of tax returns open perhaps
16 indefinitely if equitable tolling applies. This section
17 6511(a), I submit, contemplates that.

18 If we have someone who does not perform any of
19 these two predicate acts, let us assume he didn't in 1962,
20 and let 30 years go by without paying his tax and without
21 filing his return, and then one day he walks in and files
22 his return and pays the tax, and then a year later figures
23 that he overpaid and files a refund claim, that is a
24 perfectly timely refund claim under anyone's
25 interpretation of 6511.

1 Even though the Government will have had to wait
2 31 years for the return and the check, even though the
3 litigation to follow, all the facts and circumstances that
4 underlay the tax, occurred 31 years ago, that is the way
5 section 6511 operates.

6 QUESTION: Would you explain how your
7 interpretation of 6511 apply to the particular facts of
8 your case so as to allow your client to prevail?

9 MR. KLUEGER: My client --

10 QUESTION: Yes. You say 6511 you say is the
11 key.

12 MR. KLUEGER: Well, the point I'm making is that
13 the question that I was addressing in answer to Justice
14 Ginsburg's question is what is there in this statute that
15 leads me to believe that equitable tolling, that this is
16 the type of statute in which equitable tolling might
17 apply, and my answer is that the way that 6511 operates,
18 the statute of limitations, which is what 6511(a) is, it
19 is a statute of limitations, it can only begin to run
20 after the taxpayer acts.

21 QUESTION: So would you apply this to the facts
22 of your case?

23 MR. KLUEGER: In our specific case, the statute
24 of limitations on the underlying tax never began to run
25 against Stanley McGill throughout his entire life.

1 The Government would have us believe that the
2 statute of limitations on refund claims per 6511 ran out,
3 even though the underlying period of limitations against
4 the Commissioner to assess a tax never began. We submit
5 that --

6 QUESTION: Well, I guess the Government takes
7 the position that the money that was paid was payment of
8 the tax.

9 MR. KLUEGER: The Government --

10 QUESTION: Isn't that the position the
11 Government takes?

12 MR. KLUEGER: If the Government had been --

13 QUESTION: A payment was made.

14 MR. KLUEGER: Yes. Yes --

15 QUESTION: By the taxpayer.

16 MR. KLUEGER: If the Government was consistent
17 in that position, the Government would have assessed the
18 tax. In direct answer to your question, Your Honor, I
19 don't believe that that is the position the Government
20 takes.

21 QUESTION: Well, didn't they put the check in an
22 overpayment fund?

23 MR. KLUEGER: That's correct. They in fact did
24 not assess -- I don't think that fact is necessarily
25 relevant to the question --

1 QUESTION: But you still have a statute that
2 says no matter what it was --

3 MR. KLUEGER: I'm sorry?

4 QUESTION: No matter what it was, the payment
5 was, the statute addresses refund, and what you want is a
6 refund, so whatever the character of the payment was, the
7 Treasury has it, and you want it back, and so you are
8 suing for a refund.

9 MR. KLUEGER: That is correct.

10 QUESTION: And this is a rather dense statute,
11 is it not?

12 MR. KLUEGER: This is a -- Your Honor, if I
13 might answer that question at perhaps a little bit of
14 length, this is an extremely dense, dark statute.

15 QUESTION: But it's part of a dense code that
16 does have -- does have some provisions for equitable
17 litigation.

18 MR. KLUEGER: Yes.

19 QUESTION: And those provisions themselves are
20 remarkably dense, so why would one, given the density of
21 the code, given the density of the mitigation provisions,
22 say, but the court, because in other areas there's
23 equitable tolling, ought to apply it here as well?

24 MR. KLUEGER: Your Honor, this is a dense,
25 integrated regime of refund claims, that is true. I feel,

1 however, it is no less dense and integrated than title VII
2 of the Civil Rights Act, which was the grounds for
3 applying equitable tolling in the Irwin decision.

4 In the Irwin decision, we had a procedure for
5 recouping -- procedure for suing on a title VII case that
6 is really very similar to what we have where -- in the
7 statutory regime for refund claims.

8 We had a situation where an individual goes to
9 his particular agency under the Civil Rights Act. If that
10 claim is denied, he goes to the EEOC, at which point there
11 is a 30-day letter that is sent to the individual. If
12 that is denied, he has the opportunity to sue in Federal
13 court, a very similar statutory regime.

14 QUESTION: It didn't have a substantive
15 limitation, as this does, and how do you handle the
16 substantive limitation here? It's not a matter of just
17 getting around it or ignoring it.

18 MR. KLUEGER: No --

19 QUESTION: You have to rewrite it.

20 MR. KLUEGER: No, I don't believe so, Your
21 Honor. I don't --

22 QUESTION: Tell me how your case comes in under
23 (b)(2). How do you qualify under (b)(2)?

24 MR. KLUEGER: The direct answer, Your Honor, the
25 way we read (b)(2) is that it is not a substantive

1 limitation. To the extent that amounts are limited in
2 (b) (2), it is as a function of the limitation in time.
3 There are plenty of substantive limitations that exist in
4 the Internal Revenue Code. This isn't one of them.

5 For example, the Internal Revenue Code says --
6 provides a limitation on the credit you can get against
7 the State taxes. The code says, it's limited, \$192,800.
8 That is a substantive limitation that is contained in the
9 tax court -- in the tax code, and no court can change it
10 to \$193,000.

11 That's not what we have here. To the extent
12 that it affects the limitation, it is a limitation that is
13 a function of time, and that time in (b) (2) refers back to
14 the time limitations in 6511(a).

15 QUESTION: Fine, but how do you apply (b) (2)?
16 If it was filed by the taxpayer during the 3-year period
17 prescribed in subsection (A), and it wasn't, right, so
18 you're not in (b) (2) (A), right?

19 MR. KLUEGER: We are not in (b) (2) (A). There
20 was no return filed.

21 QUESTION: Okay. So you must be in (b) (2) (B),
22 limit where claim not filed within 3-year period. If the
23 claim was not filed within such 3-year period, the amount
24 of the credit shall not exceed the portion of the tax paid
25 during the 2 years immediately preceding the filing of the

1 claim. Now, when was your claim filed?

2 MR. KLUEGER: I'm sorry, Your Honor?

3 QUESTION: When was your claim filed?

4 MR. KLUEGER: The claim was filed -- I can give
5 you the exact date, Your Honor.

6 QUESTION: It doesn't --

7 MR. KLUEGER: The claim was filed in 1991.

8 QUESTION: There were no taxes paid during the 2
9 years immediately preceding --

10 MR. KLUEGER: Oh, of course not. Of course not.

11 QUESTION: So I don't understand what you do
12 with (B), then. You --

13 MR. KLUEGER: Well --

14 QUESTION: (b) (2) (B) says you get no money.

15 MR. KLUEGER: But the --

16 QUESTION: And yet you say you ignore it.

17 MR. KLUEGER: I don't wish to ignore it. I
18 suggest that it is amenable to equitable tolling.

19 QUESTION: You mean, you just read right into
20 the very specific provisions of (b) (2) (B) some kind of
21 equity principle?

22 MR. KLUEGER: Oh, absolutely. In the same way,
23 we --

24 QUESTION: Dalm, I mean, Dalm refused to do that
25 in a similar situation. Dalm was decided just about the

1 same time as Irwin was, which suggests that perhaps you
2 don't go into equitable tolling when you're dealing with
3 something as complicated as the Internal Revenue Code.

4 MR. KLUEGER: Well, I believe that Dalm is
5 distinguishable in that the issue of a taxpayer's
6 disability did not arise, number 1, and Dalm limited the
7 application of an equitable principle. It didn't
8 eliminate the amenability of the tax code to an equitable
9 principle. It limited it.

10 Quite frankly, in the Dalm case the litigant had
11 the ability to litigate the second tax in the tax court
12 and slept on her rights.

13 QUESTION: But wasn't there some -- some not
14 entirely honorable conduct on the Government side in that
15 case in tripping or trapping her?

16 MR. KLUEGER: I don't believe so. I -- as I --

17 QUESTION: Wasn't there some line in an opinion
18 about how badly the Government had behaved?

19 MR. KLUEGER: In the Dalm case I don't recall
20 that at all, Your Honor.

21 QUESTION: But Mr. Klueger, that was in any
22 event not the basis on which we decided the case. We
23 didn't decide there is no equity here. We decided there
24 is no equitable tolling here, equity or not.

25 MR. KLUEGER: No, Your Honor. The Dalm case was

1 decided not on equitable tolling but on equitable
2 recoupment, a different doctrine.

3 QUESTION: The -- okay.

4 MR. KLUEGER: Equitable tolling did not come
5 into that case at all.

6 QUESTION: No equitable alteration of the terms
7 of the code.

8 MR. KLUEGER: Well --

9 QUESTION: Not that there was no equity in the
10 case. I mean, that wasn't the basis for the decision.

11 MR. KLUEGER: Your Honor, after the Dalm
12 decision, as I read it, I read that the Dalm decision
13 limited this Court's prior decision in Bull but did not
14 overrule it.

15 As I read the Dalm decision, we still have a
16 doctrine of equitable recoupment, and the doctrine of
17 equitable recoupment does allow the taxpayer to go and
18 have a setoff against taxes where the period of
19 limitations against that tax did run out.

20 QUESTION: But why? Why? That is -- if I can
21 get -- I mean, I'll help you, I think. Maybe I won't.
22 You might not need my help. But the language and
23 complexity doesn't bother me. It says, the claim for
24 refund shall be filed 2 years from the time the tax was
25 paid.

1 Two years, you say, means 2 years minus time
2 when he's disabled. That's what you're saying, right?
3 Two years not counting time when he was disabled. Isn't
4 that your argument? If you don't want to take that
5 argument, you don't have to, but I --

6 MR. KLUEGER: I'm not so sure I understand your
7 question.

8 QUESTION: I thought the tolling principle, you
9 have a statute of limitation that says file within 3
10 years. Tolling means file within 3 years not counting
11 disability time.

12 MR. KLUEGER: Correct, Your Honor.

13 QUESTION: All right, and you want to read those
14 words in (A) the same.

15 MR. KLUEGER: Yes, Your Honor.

16 QUESTION: And you want to read the words 2
17 years in (B) shall not exceed the portion of the tax paid
18 during the 2 years immediately preceding to read, 2 years
19 not counting disability time. Isn't that what you're
20 saying?

21 MR. KLUEGER: That is correct.

22 QUESTION: All right, but you started out saying
23 the language is okay, and you started out saying the
24 complexity doesn't matter. It just happens that Congress
25 said the same thing twice and not once, so I'm with you so

1 far.

2 You said the Government wants us to read that
3 language not to have tolling.

4 MR. KLUEGER: Correct.

5 QUESTION: And you're right, but their reason is
6 that they think it would create a total nightmare, and
7 therefore Congress couldn't have intended this and,
8 indeed, it's the Internal Revenue Code, not noted for its
9 charity perhaps, but not -- and you know, it's the
10 Government. It's not two private people, and they don't
11 have these green eyeshades when they try to investigate
12 whether a person was drunk or not drunk, or disabled or
13 not disabled, so it couldn't be that Congress intended
14 that.

15 I thought you were going to address that
16 argument when you started, and therefore I wanted to give
17 you a chance to address it.

18 MR. KLUEGER: We are certainly not saying, Your
19 Honor, that a disabled taxpayer is exempt from the
20 statutory provisions that are contained in 6511. We only
21 say that those statutory provisions be deferred until such
22 time as the taxpayer, by whatever means, regains his
23 competency.

24 QUESTION: Yes, but what if he died. In this
25 case didn't he die without regaining the competency?

1 MR. KLUEGER: That's correct.

2 QUESTION: And how much -- how many years -- how
3 long after his death was the claim filed?

4 MR. KLUEGER: I -- the claim was -- he died in
5 1989, and I believe it was filed in 1991. It was -- the
6 claim was timely filed.

7 QUESTION: Within 2 years from his death?

8 MR. KLUEGER: Your Honor, I apologize --

9 QUESTION: Well, that's crucial, because you
10 could not answer Justice Breyer's question yes, as you
11 did, making a reading -- reading (b) (2) (B) to say 2 years,
12 you know, not including disability time. You'd have to
13 say not including disability time and also not including
14 any time after death. You'd have to say, right, at least
15 his heirs have to do it within 2 years.

16 MR. KLUEGER: Oh, absolutely, Your Honor. That
17 is absolutely true.

18 QUESTION: Well, you said he did it within 2
19 years here. I thought you said you didn't know.

20 MR. KLUEGER: His -- I am confident that his
21 competent heirs did file a timely claim.

22 QUESTION: Within 2 years after his death?

23 QUESTION: Well, by what standard do you
24 conclude it was timely? I'm not sure I'm following you.

25 MR. KLUEGER: My memory fails me as to the exact

1 date, Your Honor, but I do recall, and I can represent to
2 the Court that that was the case.

3 QUESTION: But see, it could be within 2 years
4 of the time that the heirs discovered that the money had
5 been mistakenly paid. Would that be enough?

6 I suppose that -- I don't know why the death is
7 the critical point. It seems to me in most of these
8 doctrines it's when the claimant discovers the cause of
9 action, that if you say, he's -- you know, there's an
10 excusable failure to get the facts sooner, so I don't know
11 why the death is critical. It seems to me the --

12 QUESTION: It's only critical because of the way
13 Justice Breyer put the question. You would have to say
14 no, Justice Breyer, not just disability, but disability --

15 QUESTION: -- or other excusable reason.

16 QUESTION: Or anything --

17 QUESTION: Yes, anything else that justifies the
18 failure to file.

19 QUESTION: Which makes it a little harder.

20 QUESTION: Which is lack of discovery.

21 QUESTION: It's getting to be a pretty long
22 provision that we're writing here.

23 (Laughter.)

24 QUESTION: Well, that's right, but that's
25 you're -- I think that's your -- I'm not sure, is your

1 theory one of just disability, or is it inability to
2 discover? I --

3 MR. KLUEGER: No. We believe that, consistent
4 with a self-assessment type of tax regime, that the
5 disability with respect to tolling should be that
6 disability on the part of the taxpayer that inhibits the
7 taxpayer from filing a return.

8 QUESTION: Yes, but why isn't the -- if the
9 heir, I mean, the administrator of the estate, or whoever
10 it is, doesn't find the records for 2 or 3 years, the
11 administrator was equally disabled. It's not because of a
12 mental disability. It's just because she didn't have the
13 facts.

14 I mean, I just am not sure that you've got a
15 principle here unless you extend it beyond the period
16 you're relying on.

17 MR. KLUEGER: In fairness to the Government, I
18 think that equitable tolling, the grounds on which the
19 Court should apply equitable tolling, the disabilities
20 that should qualify is a narrow one, because the
21 Government does have a legitimate need to --

22 QUESTION: But not so narrow that it wouldn't
23 include at least alcoholics and people who are senile,
24 right?

25 MR. KLUEGER: Your Honor, if it's an alcoholic,

1 if it is someone who's senile, it should be, the standard
2 should be, what was -- was there a disability throughout
3 the statutory period that inhibited the taxpayer from
4 having --

5 QUESTION: And then you'd have a trial in each
6 case because --

7 MR. KLUEGER: Absolutely.

8 QUESTION: -- as we see in the case of an
9 alcoholic, some of them can carry on a business and
10 function all right, others can't function so well.

11 MR. KLUEGER: That is absolutely correct.

12 QUESTION: And somebody who's betwixt and
13 between, say in the first stages of a debilitating
14 disease, there'll be a great variety of -- much room for
15 trials, right?

16 MR. KLUEGER: I don't think so, Your Honor, for
17 this reason. Mr. Wallace has raised the specter, and they
18 certainly do on their brief, of hundreds of thousands,
19 perhaps millions of tax returns that might remain open if
20 this doctrine were permitted in this area.

21 We think that's an exaggeration, to say the
22 least, for this reason. We feel that since 1990, when
23 this Court decided the Irwin case, that in fact the
24 floodgates were opened, that --

25 QUESTION: But did --

1 QUESTION: Yes, but the numbers --

2 QUESTION: -- get down so quickly? I mean, they
3 were very close in time, weren't they?

4 MR. KLUEGER: I'm sorry, Your Honor.

5 QUESTION: The Dalm case and the Irwin case --

6 MR. KLUEGER: Yes.

7 QUESTION: -- were within a year of each other.

8 MR. KLUEGER: Yes, Your Honor.

9 QUESTION: And so you think that there was such
10 rethinking a light dawned in Irwin that led to a -- to the
11 Court in Dalm having seen the error of its ways, so if
12 it -- that case had come up and the opportunity for
13 equitable tolling had presented itself, they would have
14 been inconsistent with what they --

15 MR. KLUEGER: I don't think that Dalm and Irwin
16 are inconsistent with each other. I think they don't have
17 anything to do with each other. They deal with different
18 doctrines.

19 The Irwin decision dealt with equitable tolling.
20 The Dalm decision dealt with equitable recoupment, and did
21 not --

22 QUESTION: Wasn't the --

23 QUESTION: No, but there's another distinction
24 that you can make. You can take the position that Justice
25 Scalia did and say, let's bring everything under the

1 umbrella of equitable adjustment.

2 And then there are still distinctions between
3 the cases, and the one is, title VII case was dealing with
4 a situation in which the Government is often in the
5 position of a private individual who normally gets the
6 benefit of equitable tolling, whereas in the revenue
7 situation, the Government is in a position peculiar unto
8 itself, so those would be good reasons to say that there's
9 no reason to think that the -- that there would be a
10 spillover of equitable considerations from a title VII
11 case to a revenue case, and that seems to me to make more
12 sense of the fact that these two cases came down in the
13 same term, in which it would be very odd to think that one
14 was being undercut by the other so soon.

15 MR. KLUEGER: Well, I don't think that one
16 undercut another. The Irwin decision did not mention the
17 Dalm case, nor do I expect that it would, but any Irwin
18 decision, from what I have read, the briefs in that case
19 and the argument in that case did not mention Dalm. I
20 have to presume that --

21 QUESTION: Dalm was decided after Irwin, wasn't
22 it?

23 MR. KLUEGER: No, the --

24 QUESTION: Irwin after, few months after, I
25 think.

1 MR. KLUEGER: Correct. I think the -- I assume
2 that the reason the Irwin decision does not mention Dalm
3 or that the briefs in that decision don't mention Dalm, or
4 that it -- that Dalm was not argued in Irwin, was that the
5 two cases just don't have anything to do with each other.
6 They're on different principles.

7 QUESTION: The different principles being
8 equitable tolling versus equitable --

9 MR. KLUEGER: Equitable recoupment.

10 QUESTION: Yes.

11 MR. KLUEGER: Exactly.

12 QUESTION: But if we don't accept that
13 distinction, doesn't the remaining distinction -- in other
14 words, if we generalize equity, then aren't you faced with
15 the fact that the title VII considerations would not
16 normally be applicable to a revenue case?

17 MR. KLUEGER: Correct.

18 Your Honor, if this Court decides that Dalm
19 applies in equitable tolling to the same extent it applies
20 to equitable recoupment, I have a problem. That certainly
21 is true.

22 QUESTION: In fact, isn't it true that in the
23 Dalm case that was -- at least some of us thought that the
24 Government was guilty of inequitable conduct, and here you
25 don't have any claim of inequitable conduct against the

1 Government, do you, so in a sense the Government's case is
2 perhaps stronger here than it was in Dalm.

3 MR. KLUEGER: I don't -- I will admit, Your
4 Honor, I did not read the Dalm decision.

5 QUESTION: You probably didn't read the dissent,
6 then, I guess.

7 (Laughter.)

8 MR. KLUEGER: Indeed I did, Your Honor, and I
9 noted that the dissenter in that case indicated that this
10 was a case that would have very narrow applicability. I'm
11 surprised that -- I was surprised that the Government
12 would seek to pump up Dalm into something that --

13 QUESTION: Well, do you think the Government is
14 bound by the dissent's view of the opinion in Dalm?

15 (Laughter.)

16 MR. KLUEGER: No, of course not. Of course not.
17 My point is that Dalm should not apply, because
18 it applies to a different doctrine.

19 QUESTION: But I am correct, am I not, that you
20 are not accusing the Government of inequitable conduct in
21 this case?

22 MR. KLUEGER: Oh, absolutely not, no. In the
23 brief time remaining --

24 QUESTION: May I --

25 MR. KLUEGER: Of course.

1 QUESTION: I think that the -- in the mitigation
2 rules there is some element of the Government having taken
3 an inconsistent position and it seems to be that you have
4 to have that much.

5 Am I not right that the way the Government
6 describes it in its brief the mitigation provisions apply
7 to problems that exist when the party that asserts the
8 statute of limitations, and the only one who would assert
9 it would be the Government, had prior to the running of
10 the statute taken a position inconsistent with its current
11 position?

12 MR. KLUEGER: That is correct. The Government
13 has an inference from the existence of the mitigation
14 provisions that these provisions should be exclusive, the
15 only -- that the mitigation provisions, which are
16 statutory, are the only --

17 QUESTION: Yes, but maybe what they're saying is
18 that the Government -- that Congress was so strict in
19 allowing any mitigation at all, when the -- so the notion
20 that they meant it when they didn't say it is a little
21 hard to accept.

22 MR. KLUEGER: I'm afraid I don't understand the
23 thrust of your question. The mitigation provisions are --
24 is a statutory provision.

25 QUESTION: Right.

1 MR. KLUEGER: It was from my reading enacted
2 because equitable recoupment, the cases were going all
3 over the place, and so Congress felt that they should
4 bring some order to this doctrine of equitable recoupment,
5 and so they enacted the mitigation provisions. They are
6 very, very narrow provisions. They arise in only the
7 rarest circumstances.

8 But I think the existence of the mitigation
9 provisions, the statutory mitigation provisions, proves
10 one point, which is that if you have a statutory
11 mitigation provision in the tax code it doesn't
12 necessarily mean that you cannot have an equitable
13 overlay, because we still do have an equitable overlay,
14 and that equitable overlay is the doctrine of equitable
15 recoupment, which exists side by side with the mitigation
16 provisions of the tax code.

17 Those provisions --

18 QUESTION: If -- wouldn't it totally eclipse
19 what's in the code if you could just say, I don't want to
20 deal with that dense stuff, it's so narrow and so
21 technical. Give me equitable tolling writ large.

22 MR. KLUEGER: No, Your Honor. Equitable
23 recoupment applies in a very, very narrow area. It
24 certainly is not limited to incompetent taxpayers. You
25 don't have your choice. It's not like a cafeteria. You

1 don't get equitable recoupment or equitable tolling.

2 Equitable recoupment only can arise when two --
3 when the taxpayer is called upon to pay two -- to pay the
4 same tax twice under different theories. That's equitable
5 recoupment.

6 Equitable tolling is a completely different
7 doctrine. It reminds me of what Mark Twain said about
8 fires and fire flies. They may sound alike, but just
9 because they sound alike --

10 QUESTION: Why should we be more responsive to
11 getting back a tax paid once than a tax paid twice?

12 MR. KLUEGER: Again, Your Honor, two different
13 doctrines here. We are responsible --

14 QUESTION: But you are making equity your plea,
15 right?

16 MR. KLUEGER: That's correct.

17 QUESTION: So --

18 MR. KLUEGER: Yes, Your Honor, that's certainly
19 correct.

20 QUESTION: So I'm thinking of different
21 situations where one might be drawn by the equities of the
22 situation, because even in administering a system of
23 equity you have to have a rational basis.

24 MR. KLUEGER: Yes, Your Honor. The equities I
25 submit are stronger in this case than they were, for

1 example, in Dalm. In Dalm, the -- may I complete?

2 QUESTION: Yes. Finish your answer to Justice
3 Ginsburg's --

4 MR. KLUEGER: In Dalm, the taxpayer had the
5 ability to litigate the case. In our case, we never had
6 the ability.

7 Thank you, Your Honor.

8 QUESTION: Thank you, Mr. Klueger.

9 Mr. Wallace, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

11 ON BEHALF OF THE PETITIONER

12 MR. WALLACE: Thank you, Mr. Chief Justice.

13 In Irwin, the Court recognized that waivers of
14 sovereign immunity must be unequivocally expressed, and
15 then said that once Congress had made such a waiver we
16 think the rule of equitable tolling should be applicable
17 to suits against the Government in the same way as to
18 suits against private defendants, and that amounts to
19 little, if any, broadening of the congressional waiver.

20 Those -- that rationale applies to tolling of
21 the limitations for filing suit, or for filing claims. It
22 really is not addressed to the obstacle here, which is a
23 substantive limitation, a cap that Congress has imposed on
24 the amount of the refund that's authorized to be disbursed
25 from the Federal Treasury and, as I pointed out earlier,

1 therefore it would require a broadening of a waiver of
2 sovereign immunity beyond the express terms of the waiver
3 to rule that a court may override this cap in the very
4 sensitive area of disbursements from the Treasury, the
5 area that is most related to the constitutional
6 underpinnings of the doctrine of sovereign immunity
7 itself, including the provision we have pointed to in the
8 Constitution, in Article I, section 9, Clause 7, that no
9 money shall be drawn from the Treasury but in consequence
10 of appropriations made by law.

11 Now, it is the fact that in Webb the Fourth
12 Circuit suggested some ways of reading the rebuttable
13 presumption in Irwin more narrowly, and we have done the
14 same thing in a pending petition and reply brief in a case
15 called United States v. Fagin involving the Quiet Title
16 Act, which we have suggested that the Court hold for the
17 decision in this case.

18 But -- and I think that these suggestions are
19 well worthy of consideration, and the Court in Webb at the
20 conclusion of its opinion pointed out some other areas
21 involving other Federal statutes where various courts have
22 held that the rebuttable presumption has been overcome
23 even if the presumption of Irwin does apply, but in this
24 particular case we're really beyond the area where it's
25 just a limitation on the filing of the claim that's at

1 issue.

2 If the Court has no further --

3 QUESTION: Is a claim filed under this statute
4 when the taxpayer just gives the notice to the Internal
5 Revenue Service, or is a claim filed when there's a refund
6 suit filed? I think it's the former, is it not?

7 MR. WALLACE: It --

8 QUESTION: How do you file a claim for refund?

9 MR. WALLACE: It's the claim to the Service.
10 There's a separate provision involving limitations on
11 filing the suit, and that has to be within 2 years after
12 the disallowance of the claim. That is section 6532(a)(1)
13 of title 26.

14 QUESTION: Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you,
16 Mr. Wallace.

17 The case is submitted.

18 (Whereupon, at 12:02 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL, DECEASED

Case No. 95-1225

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico

(REPORTER)