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Case Comment

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CASE COMMENT

ANTITRUST—PATENTS—ATTACKING VALIDITY—GOVERNMENT HAS AUTHORITY TO CHALLENGE THE VALIDITY OF PATENTS THAT ARE INVOLVED IN ANTITRUST VIOLATIONS.—On April 26, 1960, Industrial Chemical Industries Limited (ICI) and Glaxo Group Limited (Glaxo), British drug companies, entered into a formal agreement pooling their griseofulvin[1] patents. Glaxo possessed bulk-form maufacturing patents of the drug while ICI possessed patents on the drug's dosage form. Pursuant to the agreement, ICI acquired the right to manufacture bulk-form griseofulvin under Glaxo's patents, to sell bulk-form griseofulvin, and to sublicense under Glaxo's patents. Glaxo was authorized to manufacture dosage-form griseofulvin and to sublicense under ICI's patents. Included in this agreement was a covenant that "ICI undertakes not to sell and to use its best endeavors to prevent its Subsidiaries and Associate from selling any griseofulvin in bulk to any Independent Third Party without GLAXO's express consent in writing."[2]

On October 4, 1962, ICI entered into an agreement with American Home Products Corporation (AMHO) its exclusive United States pharmaceutical distributor to sell griseofulvin to AMHO in bulk form. The sale purported to be subject to the conditions of the Glaxo-ICI agreement of 1960; in regard to bulk sales the agreement stated: "You [AMHO] will not, without first obtaining our [ICI's] consent, resell, or re-deliver in bulk supplies of griseofulvin."[3]

On March 4, 1968, the United States filed in the United States District Court of the District of Columbia a civil antitrust suit against ICI and Glaxo,[4] pursuant to § 4 of the Sherman Act,[5] seeking declaratory and injunctive relief for alleged violations of § 1 of the Sherman Act.[6] The Government's complaint alleged that the Glaxo-ICI patent interchange was an illegal horizontal combination to pool patents and that the licensing restrictions on the sale and resale of bulk-form griseofulvin were unreasonable restraints of trade. The Government also challenged the validity of ICI's dosage-form patent by alleging that the patent was invalid under 35 U.S.C. §§ 100, 101, and 112.[7] The United States

1 Bulk form griseofulvin is an antibiotic compound which may be cut with inert ingredients and administered orally in the form of capsules or tablets to humans or animals for the treatment of external fungus infections. There is no substitute for dosage form griseofulvin in combatting certain infections. The Glaxo and ICI patents purport to relate to this dosage form. Common bulk form griseofulvin is not the subject of any United States patent.
United States v. Glaxo Group Ltd., 302 F. Supp. 1, 4 (D.D.C. 1969).

2 *Id.* at 5.

3 *Id.*

4 Since both defendants are British corporations, service was effectuated under the long-arm section of the Patent Act. 35 U.S.C. § 293 (1970).

5 Section 4 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1970), provides in pertinent part: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [this Act]. . . ."

6 Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1970), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

7 The Government contended that the "method" portion of the patent did not disclose how to practice the invention in that it failed to specify what is an "effective amount" of the drug. See Patent Act, 35 U.S.C. § 112 (1970). The Government also argued that ICI

moved for a partial summary judgment declaring the ICI-AMHO bulk sale restrictions to be a per se violation of the Sherman Act under the rule of *United States v. Arnold, Schwinn & Co.*[8] District Judge Gasch, finding that the ICI-AMHO agreement was within the prohibition established by *Schwinn,* granted the partial summary judgment motion.[9] With respect to the Government's attempt to challenge the validity of ICI's patent, ICI moved under Federal Rule of Civil Procedure 12(c) for a judgment that the court did not have jurisdiction to determine and/or that the United States did not have standing to challenge the validity of the ICI patent. Because ICI had filed an affidavit disclaiming any desire to rely on its patent in defense of the antitrust claims, the district court struck the claims of patent invalidity from the Government's complaint, ruling that the Government could not challenge ICI's patent when it was not relied upon as a defense to the antitrust claims.[10]

The Government, pursuant to § 2 of the Expediting Act,[11] appealed directly to the Supreme Court on the issue of whether the United States may challenge the validity of a patent involved in an antitrust case.[12] In a 6-3 decision the Supreme Court reversed, *holding*: Where patents are directly involved in antitrust violations and the Government presents a substantial case for relief in the form of restrictions on the patents, the Government may challenge the validity of the patents regardless of whether the owner relies on the patents in defending the antitrust action. *United States v. Glaxo Group Ltd.,* 93 S. Ct. 861 (1973).

I. Introduction

This comment will examine the significance of *Glaxo* for its expansion of the scope of judicial review over the decisions of the Patent Office. Also included

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product claims were invalid because the dosage-form which they covered did not specify an "effective amount" of the drug, did not specify the diseases which could be cured, and claimed a patent monopoly over a substance long in the public domain.

8 The *Schwinn* doctrine, articulated in the case of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) holds:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

Id. at 382.

9 302 F. Supp. at 11.

10 The district court, in examining the significant cases in the area (United States v. American Bell Tel. Co., 167 U.S. 224 (1897) and United States v. United States Gypsum Co., 333 U.S. 364 (1948), both discussed in Part II of this comment) held: "The present state of the most apposite case law strictly interpreted indicates that the Government may only sue to cancel a patent when 'fraud or deceit' is alleged." *Id.* at 13.

11 The Expediting Act, 15 U.S.C. § 29 (1970) provides: "In every civil action brought in any district court of the United States under any of the said acts [the antitrust laws], wherein the United States is a complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

12 Also involved on appeal was the Government's contention that the district court's remedy for the antitrust violation was insufficient. The district court enjoined future use of the bulk sales restrictions, but refused the Government's request to order mandatory, nondiscriminatory sales of the bulk-form of the drug and reasonable-royalty licensing of the ICI and Glaxo patents as part of the relief. Although this issue will not be discussed in the body of this comment, the Supreme Court agreed with the Government, holding: "Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies. [citations omitted] The District Court should have ordered those remedies in this case." United States v. Glaxo Group Ltd., 93 S. Ct. 861, 868 (1973).

is an analysis and criticism of *Glaxo* as being inconsistent with: (1) prior Supreme Court rulings concerning judicial review of Patent Office decisions; (2) the scope of judicial review established by the Patent Act; and (3) the scope of judicial review in the analogous areas of land patent proceedings and government contract proceedings. No attempt will be made to discuss the nexus; that is, when is a patent "sufficiently involved" with the antitrust violation so as to give the courts jurisdiction to review the validity of the patent. Such a question can only be decided by the courts on a case-by-case, ad hoc basis.

II. Scope of Judicial Review Prior to the *Glaxo* Decision

A. *The Government Has Authority to Sue for Cancellation of a Patent Where There Is Fraud in Its Procurement*

United States v. American Bell Telephone Co.[13] espouses the proposition that the Government has authority to sue for the cancellation of a patent where there is fraud in its procurement. It was a suit brought by the Government against the American Bell Telephone Company, assignee of a patented transmitter, and Emile Berliner, patentee-assignor of the invention, for wrongful issuance of the patent. The complaint alleged that the thirteen-year delay of the application while in the Patent Office was due to the unlawful and fraudulent acts of the defendants.[14] The complaint also alleged that the patent was void as being identical with a receiver used for the same purpose and covered by a previous patent issued to Berliner eleven years earlier.[15] The circuit court ruled that the complainant had made out the case and entered a decree "that the patent in question is void, and shall be delivered up to be cancelled."[16] On appeal, the United States Court of Appeals for the First Circuit reversed and directed the lower court to dismiss the complaint.[17] The United States then appealed to the Supreme Court. A motion was made to dismiss the appeal for want of jurisdiction but it was denied.[18]

The Supreme Court, with respect to the allegation of fraud, held that the Government failed to sustain its burden of proof. After examining the case law pertaining to Government suits seeking to set aside a patent of land because of fraud—something quite different from a patent for an invention[19]—the Court concluded that the burden was upon the Government to prove fraud by clear, unequivocal, and convincing evidence, not upon the defendants to prove an absence of fraud in their procurement of the patent. In addressing itself to the allegation that the Patent Office erred in giving Berliner a second patent, the Court stated:

13 167 U.S. 224 (1897).
14 United States v. American Bell Tel. Co., 65 F. 86, 87 (C.C.D. Mass. 1894).
15 *Id.*
16 *Id.* at 91.
17 68 F. 542 (1st Cir. 1895).
18 159 U.S. 548 (1895).
19 Mr. Justice Brewer, writing the decision of the Court, said the Government may have "higher rights in a suit to set aside a patent for land than it has in a suit to set aside a patent for an invention" because the patent for land is a "conveyance to an individual of that

> We agree with the Court of Appeals that it is unnecessary to determine whether there are two separate inventions in the transmitter and the receiver, or whether the patent of 1891 is for an invention which is covered by the patent of 1880. The judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit.[20]

The Court proceeded to declare that the United States had no right or standing to bring suit to attack the validity of a patent in the absence of fraud or deceit. The mere allegation of "error of judgment on the part of the patent officials" does not confer upon the Court power to review the patent because "[t]hat would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred."[21] *Bell Telephone* expressly limits governmental authority to instances where there is fraud in the procurement of the patent. When such an allegation is nonexistent, the patent is free from attack—the decision of the Patent Office being final and conclusive.

B. *When a Defendant Relies Upon a Patent as a Defense to Alleged Antitrust Violations the Government May Challenge Its Validity*

In *United States v. United States Gypsum Co.*,[22] the Government filed an antitrust suit seeking to restrain alleged violations of the Sherman Act. The complaint charged that the defendants had violated §§ 1 and 2 of the Act by an unlawful agreement to stabilize the price of their patented products. The defendants "admit[ted] that in the absence of whatever protection is afforded by valid patents the licensing arrangements . . . would be in violation of the Sherman Act"[23] and, accordingly, the Government sought to amend its complaint to allege the invalidity of the patents.[24] The trial court, believing *United States v. Bell Telephone Co.* was controlling on this issue, held that "the government was estopped to attack the validity of the patents" because "such attack would constitute a review of action by the Commissioner of Patents, which was not authorized by statute."[25]

Although the issue of patent validity was not essential to the disposition of the case inasmuch as the restrictive practices in question were illegal irrespective of any valid patent, the Court felt it inadvisable to leave the issue irresolute. Mr. Justice Reed examined previous decisions permitting a licensee to attack the

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which is the absolute property of the government and to which, but for the conveyance, the individual would have no right or title." The patent for invention is not a conveyance of something which the Government owned. "The Government part[s] with nothing by the patent. It los[es] no property." The sole effect of the patent is to restrain others, for a limited period of years, from manufacturing and using that which another has invented. United States v. American Bell Tel. Co., 167 U.S. 224, 238-39 (1897).

20 *Id.* at 264.
21 *Id.* at 269.
22 333 U.S. 364 (1948).
23 *Id.* at 386.
24 *Id.* at 387.
25 *Id.*

validity of the patent under which he is licensed even though the licensee had agreed as a condition to receive the license not to dispute the patent's validity.[26] In these cases, the licensors used their patents as the basis for their suits to recover royalty payments from their licensees. The licensees defended by alleging the patents were invalid and by denying any contractual liability under the licensing agreement. In each of the decisions, the Court allowed the licensees to dispute the validity of the patents in issue—the patents being a necessary predicate for recovery of royalties under the licensing agreement.[27]

In *United States Gypsum* the defendants interposed their patents as a defense to the alleged illegal activities hoping to immunize themselves from conviction under the antitrust laws. The Court, in analogizing to the license suits, concluded that where a defendant relies upon a patent to justify its anticompetitive activities, the Government should be entitled to attack the patent's validity. "In a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the same opportunity to show that the asserted shield of patentability does not exist."[28] Thus, when a defendant relies upon a patent as a defense to alleged antitrust violations the Government may challenge its validity.

III. The *Glaxo* Decision Greatly Expands the Scope of Judicial Review over Decisions of the Patent Office

Mr. Justice White, speaking for the majority in *Glaxo*, propounded:

> . . . the district courts have jurisdiction to entertain and decide antitrust suits brought by the Government and, where a violation is found, to fashion effective relief. This often involves a substantial question as to whether it is necessary to limit the bundle of rights normally vested in the owner of a patent . . . .[29]

In applying this principle to the instant case, the court stated:

> In this context, where the court would necessarily be dealing with the future enforceability of the patents we think it would have been appropriate, if it apeared that the Government's claims for further relief were substantial, for the court to have also entertained the Government's challenge to the validity of those patents.[30]

The essence of *Glaxo* is that when licensing activity is violative of antitrust laws, not only may the Government enjoin such activity to prevent future recurrence but also this violation confers upon the Government the right to attack the subject matter of the licensing agreement—the patent. The broad standard

26 *See* Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947); MacGregor v. Westinghouse Elec. & Mfg. Co., 329 U.S. 402 (1947).
27 317 U.S. at 177; 329 U.S. at 400; 329 U.S. at 407.
28 333 U.S. at 388.
29 93 S. Ct. at 866.
30 *Id.*

adopted by the Court is that "if the economic power of the patent has enabled the patentee to impose the illegal restraints found, the patent is sufficiently 'involved' with the antitrust violation to be subject to challenge in the government antitrust suit."[31] No longer is the Government restricted in challenging patent validity to instances where there is an allegation of fraud in the procurement of the patent or to instances where the defendant relies upon the patent as an affirmative defense. If a nexus exists between the patent and the alleged antitrust violations, the patent is now in issue under this new "sufficiently involved" criterion.

This expansion of judicial review will have a pronounced effect upon the courts' involvement with patent validity. In recent years, the Antitrust Division of the Department of Justice has increased its attack against numerous licensing arrangements such as grant-back requirements, field restrictions, sales restrictions, and price-fixing arrangements.[32] With the standard created by *Glaxo,* the Government, in seeking to eliminate unlawful restrictions in licensing agreements, may also challenge the validity of the patent itself by alleging that the patent is "sufficiently involved" with the unlawful restrictions.[33] If the Government can prove the invalidity of the patent, the issue of the legality of the licensing arrangement is resolved—no licensing arrangement can stem from an invalid patent.

IV. Analysis and Criticism of the Court's Decision

The decision was not without a vehement dissent. Mr. Justice Rehnquist, joined by Mr. Justice Stewart and Mr. Justice Blackmun, accused the Court of usurping the function of Congress and of ignoring the true import of the *Bell Telephone* and *Gypsum* doctrines. In alienating himself from the majority, Mr. Justice Rehnquist averred:

> The Court has undertaken to substitute its judgment for that of Congress in the initiation of novel procedures for the determination of patent validity, and in so doing has blandly disregarded the procedural history of this case.
>
> . . . .
>
> There is neither statutory nor case authority for the existence of a general right of either private individuals or the Government to collaterally challenge the validity of the issued patents.[34]

A. *The Court's Holding Is a Blur of Two Separate and Distinct Grants of Authority*

In arriving at its decision, the Court examined the significant cases in the area of governmental authority to challenge the validity of patents, namely, *Bell Telephone* and *Gypsum,* previously discussed. From an analysis of these

31 Reply Brief for Appellant at 5, United States v. Glaxo Group Ltd., 93 S. Ct. 861 (1973).

32 Address by Richard W. McLaren, Assistant Attorney General, "Patent Licenses and Antitrust Considerations." 5 TRADE REG. REP. ¶ 50,106 (1973).

33 *Id.* at 55,123.

34 93 S. Ct. at 868-69 (Rehnquist, J., dissenting).

cases, it can be seen that the extrapolation the Court engaged in was the synthesis of two separate and distinct grants of authority with the resultant authority applicable to circumstances not within the rationale of either of the precedent cases.

> The *Bell* cases enunciate the range of the Government's authority, quite independent of any other litigation it may have with a patentee, to attack a governmental grant from the Patent Office obtained by the sort of fraud or mistake there described. The *Gypsum* doctrine, on the other hand, sprang from the right of the Government as a civil plaintiff under the antitrust laws to assert the invalidity of a patent grant set up as a defense to its civil complaint. Since a private licensee may attack the validity of a patent which is made the basis of an action against him for royalties, the Government should equally have the right to attack a patent which is set up as a defense by the patentee in the Government's action.[35]

As previously stated, *Bell Telephone* expressly denied any right of the Government to collaterally attack the decisions of the Patent Office in the absence of an allegation of fraud or deceit. Although not enunciated, it would appear that *Glaxo* has overruled *Bell Telephone* by implication. With regard to *Gypsum*, the district court declared the decision "inapposite" because the defendants in *Glaxo* did not rely on their patents as a defense to the antitrust violations.[36] How the Supreme Court arrived at its opinion that "the principle of these cases is sufficient authority for permitting the Government to raise and litigate the validity of the ICI-Glaxo patents in this antitrust case"[37] is perplexing. As best, it would seem that the synergistic effect of the combination of the *Bell Telephone* doctrine with the *Gypsum* doctrine accedes to the Government its aggrandized authority.

B. *The* Glaxo *Decision Is Inconsistent with the Scope of Judicial Review Established by the Patent Act*

The decision in *Glaxo* is contrary to the congressional intent embodied in the Patent Act.[38] The present Patent Act, which became effective January 1, 1953, represents a complete revision of the patent statutes for the first time since 1870.[39] As the title of the Act indicates, it is "An Act to revise and codify the laws relating to patents and the Patent Office, and to enact into law title 35 of the United States Code entitled 'Patents.' "[40] Beginning in 1949 the subcommittee of the Committee on the Judiciary having jurisdiction over the patent laws undertook a complete examination of the patent laws. The subcommittee began an exhaustive and systematic investigation of data relating to the law of patents in an effort to codify the collected information into a preliminary draft.[41] The re-

35 *Id.* at 870.
36 302 F. Supp. at 12.
37 93 S. Ct. at 865.
38 35 U.S.C. §§ 1-293 (1970).
39 Address by P.J. Federico, Examiner-In-Chief, United States Patent Office, "Commentary on the New Patent Act," 35 U.S.C.A. at 2-5 (1954).
40 66 Stat. 792 (1952).
41 Address by P.J. Federico, *supra* note 39, at 7.

visioners of the Patent Act, aware that *Bell Telephone* and *Gypsum* established very narrow circumstances for judicial review of Patent Office decisions, did not choose to expand beyond these circumstances. It would appear that Congress agreed *sub silentio* with the holding of these cases. An analysis of the provisions of the Patent Act reaffirms this conclusion.

The patent application proceedings with the Patent Office are *ex parte*.[42] The patentee files an application with the Commissioner,[43] whereupon the Commissioner examines the application and the alleged new invention. If after examination the Commissioner is of the opinion that the applicant is entitled to a patent under the standards established by the Act, the Commissioner issues the patent.[44] The patent is issued in the name of the United States of America,[45] thus, for the purpose of issuance, the Commissioner *is* the United States—his role is not that of a subaltern.

Chapter 13 of the Patent Act, Sections 141 to 146, delineates the procedural mechanisms for judicial review of Patent Office decisions relating to patent issuance. Upon examination of this chapter it is readily apparent that review exists only for the patent applicant in instances where the Commissioner has refused to grant a patent. Each section specifically refers to the "applicant['s]" right to appeal and nowhere is there granted a right to appeal by the Government on the basis of "error as to judgment"[46] by the Commissioner.

In summary, the decision of the Patent Office is final and conclusive. There exists no statutory authorization for collateral attack by the Government of decisions of the Patent Office. *Glaxo* authorizes that which is statutorily denied. It is an act of judicial legislation by the Court.

C. *The* Glaxo *Decision Is Inconsistent with the Scope of Judicial Review of Land Patents and Government Contracts*

1. Judicial Review of Land Patents

In land grant cases to which the United States has been a party, the Supreme Court has consistently ruled that the courts are without jurisdiction to review the decisions of the officials of the land department in the absence of an allegation of fraud. In *United States v. Marshall Silver Mining Co.*[47] the Court, referring to the officials of the land department, stated:

> If the officers of that department of the government have acted within the general scope of their power, and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law

42 P. Areeda, Antitrust Analysis 329 (1967).
43 35 U.S.C. § 111 (1970).
44 *Id.* § 131.
45 *Id.* § 153.
46 In *Glaxo,* it was the Government's contention that the Patent Office erred in granting the patent, there was no allegation of fraud in its procurement. See note 7 *supra.*
47 129 U.S. 579 (1889).

> which confers their authority, as to demand a cancellation of the instrument.[48]

In *United States v. California & Oregon Land Co.*[49] the Court fully reaffirmed this statement of the law.[50] In *Catholic Bishop of Nesqually v. Gibbon*[51] the Court finally laid down the broad rule that "in the administration of the public lands, the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable in the courts."[52]

The doctrine promulgated by the Court in *Marshall Silver Mining* remains the law. In the light of the "higher rights"[53] possessed by the Government in conveying its land by patent, it is difficult to understand why the Government has authority to challenge the validity of a patent of invention. If no such right exists when the Government had a property interest in the res precedent to its conveyance under the land patent, it seems illogical that such a right exists under a patent of invention where the Government does not possess a property interest in the res. In addition, the land patent bestows upon the patentee absolute title unlimited in duration. The beneficiary of a patent of invention receives substantially fewer rights. Congress, by legislation made pursuant to the Constitution,[54] has guaranteed to the patentee an exclusive right to the invention for a statutorily determined limited period of time (seventeen years).[55] The purpose of the patent is to protect him from having other people copy his invention and use it without his permission. The patent does not give him a use which he did not have before, as in the case of the land patent, but it allows him the exclusive use of his invention—a reward for his labor.

It seems clear that an inconsistency has evolved. Judicial review is denied in an area where the Government has considerable proprietary interest; judicial review is granted in an area where the Government has no proprietary interest.

2. Judicial Review Under the Disputes Clause of Government Contracts

In the area of government contracts, the courts lack jurisdiction to review the Government's challenge of any administrative decision made pursuant to a disputes clause,[56] in the absence of an allegation of fraud. In 1951, the Supreme

48 *Id.* at 588.
49 148 U.S. 31 (1893).
50 *Id.* at 43.
51 158 U.S. 155 (1895).
52 *Id.* at 166.
53 *See* note 19 *supra.*
54 U.S. Const. art. I, § 8.
55 35 U.S.C. § 154 (1970).
56 The standard "Article 15" Disputes Clause is noted in *United States v. Wunderlich*:

> Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

342 U.S. 98, 99 (1951).

Court held in *United States v. Wunderlich*[57] that a decision of a department head on a question of fact arising under a standard form government contract is final and conclusive on both parties to the contract unless the challenging party sustains the burden of proving that the decision was founded on fraud.[58]

Congress, in disagreement with the narrowness of the Court's decision, enacted the Wunderlich Act.[59] This Act broadened the scope of judicial review of the decisions of the department head: "any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[60] It was believed that the Wunderlich Act allowed both contracting parties (the contractor and the Government) to challenge the decision of the government contracting officers provided one of the five allegations specifically enumerated in the Act were contained in the complaint.[61]

In *S & E Contractors, Inc. v. United States*,[62] however, the Court concluded that the right to judicial review granted by the Wunderlich Act is given only to contractors and is denied to the Government:

> We hold that absent fraud or bad faith the federal agency's settlement under the disputes clause is binding on the Government, that there is not another tier of administrative review, and that, save for fraud or bad faith, the decision of AEC [Atomic Energy Commission] is "final and conclusive," it being for these purposes the Federal Government.[63]

V. Conclusion

An anomaly has been created by the Court in allowing the Government to collaterally attack the decisions of the Patent Office. It cannot be disputed that spurious patents are detrimental to the public; however, Congress has entrusted the Patent Office with the duty of examining patent applications. In granting the Government this authority the Court will transform itself into a "roving commission . . . whereby the Government may request a court to invalidate any patent owned by an antitrust defendant which is in any way related to the factual background of the claimed antitrust violation. . . ."[64]

Although *Glaxo* involved a violation of § 1 of the Sherman Act, a violation of other antitrust provisions, such as § 2 of the Sherman Act, § 5 of the Federal Trade Commission Act, or § 3 of the Clayton Act,[65] could allow the courts to examine the validity of the patent. Where both antitrust violations and an invalid patent are alleged, conceivably the courts could examine the

57 342 U.S. 98 (1951).
58 *Id.* at 100.
59 41 U.S.C. §§ 321-22 (1970).
60 *Id.* § 321.
61 *See* H.R. REP. No. 1380, 83d Cong., 2d Sess. (1954).
62 406 U.S. 1 (1972).
63 *Id.* at 4.
64 93 S. Ct. at 871 (Rehnquist, J., dissenting).
65 Section 2 of the Sherman Act, 15 U.S.C. § 2 (1970), involves monopolization and attempts to monopolize; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), involves unfair methods of competition; Section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), involves illegal conditions imposed on the sale of goods.

validity of the patent prior to its analysis of the antitrust violations. If the patent was found to be invalid, agreements based upon the invalid patent would be violative of antitrust laws. Such judicial inquiry would bestow upon the courts great review power. More likely, however, the Supreme Court will exercise self-restraint and limit its investigation of patent validity to cases where the alleged violations have first been proven—the situation in *Glaxo*.

If the criticism concerning the operation of the Patent Office is well-founded,[66] it would seem that a remedy would be within the province of congressional action, and not by an exercise of judicial legislation. It is unfair to the patentee to subject him to antitrust liabilities for his good faith reliance upon the decisions of the Patent Office. In the words of Mr. Justice Douglas,[67] who, ironically, concurred in the majority opinion of *Glaxo*: ". . . where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it."[68]

Keith J. Kanouse

66 *See* P. AREEDA, ANTITRUST ANALYSIS 324-32 (1967).
67 Mr. Justice Douglas authored the majority opinion in S & E Contractors v. United States, 406 U.S. 1 (1972).
68 *Id.* at 13.