IN THE SUPREME COURT OF THE UNITED STATES

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JOHN R. SAND & GRAVEL :

COMPANY, :

Petitioner :

v. : No. 06-1164

UNITED STATES. :

- x

Washington, D.C.

Tuesday, November 6, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JEFFREY K. HAYNES, ESQ., Bloomfield Hills, Michigan.; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-1164, John R. Sand & Gravel Company v. the United States.

Mr. Haynes.

ORAL ARGUMENT OF JEFFREY K. HAYNES

ON BEHALF OF THE PETITIONER

MR. HAYNES: Mr. Chief Justice, and may it please the Court:

The plain English reading of section 2501 of Title 28, its phrasing compared to the jurisdictional grants to the Court of Federal Claims, the contemporaneous legal history of its predecessor, and this Court's decisions in Irwin and Franconia Associates compel the conclusion that section 2501 does not limit subject-matter jurisdiction and should be applied to the government as an ordinary, waivable affirmative defense.

The plain text of section 2501, which reads "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within 6 years after it first accrues," assumes subject-matter jurisdiction, and if it assumes subject-matter jurisdiction it cannot logically limit subject-matter jurisdiction. The statute is

phrased in such a way that the jurisdictional inquiry precedes the inquiry as to timeliness.

JUSTICE SCALIA: Did the prior statutes have a different structure?

MR. HAYNES: The --

JUSTICE SCALIA: We've held this thing is jurisdictional for a long time. Did the prior statutes under which we made those holdings have a different structure?

MR. HAYNES: The 1863 statute prior to the Tucker Act amendment to the statute had approximately the same structure, Your Honor, yes. That is --

CHIEF JUSTICE ROBERTS: Are you asking us to, or think we have to, to rule in your favor overrule our decisions in Kendall and Soriano?

MR. HAYNES: Your Honor, we believe that this Court's decision in Irwin effectively overruled Soriano. Irwin held that the Title 7 statute of limitations was subject to equitable tolling, and in Irwin, the Court had to choose between two lines of cases, Soriano and Bowen v. City of New York. And it chose the Bowen line of cases. And so if it repudiated Soriano -- Soriano of course held that section 2501 is jurisdictional.

CHIEF JUSTICE ROBERTS: Of course, Irwin

involved Title 7 and not this 2501. And we hadn't addressed Title 7 before, but we have addressed 2501 before.

MR. HAYNES: That's correct. But certainly in Irwin, the Court uses 2501 as an example of a statute that can be equitably tolled and in --

CHIEF JUSTICE ROBERTS: Well, in, in the more recent case of Kontrick -- I'm looking at footnote 8 of that opinion -- it used 2401 as an example of a jurisdictional bar and 2401 has pretty much the same language as 2501.

MR. HAYNES: Yes, section 2401 in the Federal Tort Claims Act has similar language.

JUSTICE GINSBURG: I think in Kontrick it was used as an example of a so-called built-in statute of limitations, one that is thought to bar the right as well as the remedy.

MR. HAYNES: Well, certainly one could look at the statute of limitations in 2401 that is within the section that waives sovereign immunity and say that it as part of the waiver constitutes a limit on subject-matter jurisdiction. However, section 2501 standing alone in the procedural chapter concerning the Court of Federal Claims is not attached to any particular waiver contained in chapter 91, which

contains the jurisdictional grants to the Court of Federal Claims. So --

CHIEF JUSTICE ROBERTS: Well, just, just to get all the cases out on the table, our more recent decision in Bowles suggested that there may be a difference between statutory and rule limitations and also suggested that the prior history of the interpretation of a provision was highly relevant.

MR. HAYNES: Yes, Bowles does say that, but Bowles can be distinguished, I believe, in several ways. First, Bowles dealt with the notice of claim -- notice of appeal and transferring the jurisdiction from the district court to the court of appeals. That's not at issue here because in the statute of limitations, of course, we aren't dealing with transferring jurisdiction, we're dealing with the initiation, the initiation of the claim and which court that claim belongs in, not transferring jurisdiction from one to another.

Second, Bowles -- Bowles was very careful in not mentioning statutes of limitations in, in the majority opinion. It doesn't mention it at all and I think that is, that is purposeful. Third --

JUSTICE GINSBURG: It said determining when and under what conditions Federal courts can hear cases

falls within the court's adjudicatory authority -- or that are within the adjudicatory authority are jurisdictional, when and under what conditions Federal courts hear cases. That would be very broad, but it did say that.

MR. HAYNES: Yes, but -- in this instance, Bowles I think, since it deals with a transfer of jurisdiction from court to court, and not the initiation of the claim, particularly considering the text of 2501 and its placement in the U.S. Code, it applies to almost all of the jurisdictional grants in the Court of Federal Claims, found in chapter 91, which are reproduced in the appendix to our brief. Those statutes that waive sovereign immunity, almost each -- almost all of them say the Court of Federal Claims "shall have jurisdiction" or the Court of Federal Claims "shall not have jurisdiction."

So those are specific jurisdictional grants that section 2501 applies to across the board. So -- and I don't think the ruling in Bowles relating to transferring jurisdiction from the district court to the court of appeals would have any bearing on -- could not interrupt -- could not interfere with the plain-text reading of 2501, which assumes --

JUSTICE ALITO: What kind of language would

we have to find in 2501 in order to conclude that it's jurisdictional? Would it be necessary for the statute to say that there is no jurisdiction unless the -- the claim is filed within a certain period of time?

MR. HAYNES: I think if Congress said that -- if Congress specifically said that this section, this statute of limitations, is jurisdictional, that would end the issue. And as this case -- as this Court said in the Arbaugh case, if Congress plainly establishes a statute as jurisdictional, then the Court's --

JUSTICE ALITO: Is that necessary? Is there anything short of that that would be sufficient?

MR. HAYNES: If section -- if the language in section 2501 were attached to the waiver of sovereign immunity in 1491(a)(1) for this case, that might allow the Court to find that it's jurisdictional and --

JUSTICE GINSBURG: Then there would be a built-in limitation, and usually that's not considered jurisdictional. It would be under the heading of "failure to state a claim"; that is, your claim has been extinguished, so you have no claim to state, as opposed to the ordinary operation of the statute of limitations which bars only the remedy, not the right.

MR. HAYNES: Yes, Justice Ginsburg. But certainly the example -- as the Chief Justice's example

suggested, in 2401, the Federal Tort Claims Act, and also the statute that's found in the Quiet Title Act as this Court interpreted in the Block case, Block v. North Dakota, those statutes of limitations are attached to the jurisdictional grant in some closer fashion than 2501 is, and so they would more likely be read to be a limit on jurisdiction. I think --

JUSTICE SCALIA: It seems to me all of those factors are a lot more subtle than the mere fact that we have said that this is jurisdictional for years and years, it and its predecessor. Why -- why isn't that at least as persuasive as the -- as the fragile attachments you're -- you're discussing here or even as the -- as the, you know, the -- even if the statute said that it's jurisdictional, we've said in our opinions that to say it's jurisdictional doesn't mean that it's jurisdictional necessarily. So I suppose we could say the same about the statute, couldn't we?

MR. HAYNES: Justice Scalia, I believe that the Irwin case answers that question because Irwin certainly undercut Soriano and Soriano relied on the Kendall-Finn line of cases. Irwin made a choice, and it chose to say that the statute of limitations in Title 7 and generally other statutes of limitation are presumed to be equitably tollable, and if they are equitably

tollable, they cannot be jurisdictional. 2501 was used --

JUSTICE SCALIA: It didn't say that. You're saying that.

MR. HAYNES: Yes, we are saying that. We think that there is a logic --

JUSTICE GINSBURG: Bowles said that.

JUSTICE SCALIA: Yes.

JUSTICE GINSBURG: Bowles said if it's equitably tolled, it's not jurisdictional. If it -- a provision that is jurisdictional cannot be equitably tolled.

MR. HAYNES: That's correct. And if it -- if the statute can be equitably tolled, it's not jurisdictional, and therefore it can be waived and -- and it does not have to be raised sua sponte by a court, as was done here by the Federal Circuit.

JUSTICE GINSBURG: One member of the court did think that Irvin -- Irwin overruled Soriano, but only one member.

MR. HAYNES: Yes, but I think a -- a fair reading of Irwin, combined with this Court's decision in Franconia Associates, which construed section 2501 to say that it doesn't have a special accrual rule for the government and that this Court -- or that courts should

apply statutes of limitations against the government as against private parties --

CHIEF JUSTICE ROBERTS: It's a pretty risky business, though, to rely on a dissent in determining whether a majority overruled a prior precedent or not, isn't it?

MR. HAYNES: It would be, Your Honor. I'm not sure which case you're referring to.

CHIEF JUSTICE ROBERTS: Irwin. I thought that was the one Justice Ginsburg posed to you --

MR. HAYNES: Yes.

CHIEF JUSTICE ROBERTS: -- where Justice White in dissent said that Irwin overruled Soriano. But the majority certainly didn't say that.

MR. HAYNES: No, but -- it did not say that specifically, but I think if you look at Irwin in the totality, there is -- I don't think there is a way that you could look at Irwin and say that it did not overrule Soriano. At a minimum -- at a minimum, it took out the theoretical underpinnings for the Soriano line of cases. Because --

JUSTICE BREYER: How do you suggest we write the opinion? If you were writing it and then a dissent, say, or someone or we read in the briefs that here is an absolute holding of the Supreme Court right on point,

totally clear, says just exactly what the government says here, and it was codified in 1948, and now we say the reason, despite that, you win is?

MR. HAYNES: The reason is because, unless Congress clearly establishes a statute of limitations as jurisdictional, unless there is a clear statement, then statutes of limitations against the government are to be read --

JUSTICE BREYER: And if somebody says, well, the Court couldn't have been clearer as to what the statute meant, and Congress reenacted it in codifying it. So what do you want?

MR. HAYNES: Well --

JUSTICE BREYER: I mean, what could be clearer? Are they supposed to actually -- in the recodification in 19 -- or is it that the recodification changed things or what?

MR. HAYNES: No, Justice Breyer, I don't think the recodification changed the substance of the statute. However, certainly that argument that Congress's recodification of this Court's ruling in the Kendall-Finn line of cases cuts both ways because following Irwin, issued in -- when the opinion was issued in 1990, the Congress has had 17 years to look at that and say no, section 2501 should not be equitably

tolled. And Congress certainly could say that.

CHIEF JUSTICE ROBERTS: But it hasn't recodified 2501 in the past 17 years, has it?

MR. HAYNES: That's correct, Mr. Chief Justice. However, I think the recodification argument really -- really is not a telling argument because the Kendall-Finn line of cases, under Irwin at least, were wrongly decided when they were decided. So --

CHIEF JUSTICE ROBERTS: So you think we do have to overrule Kendall and Soriano?

MR. HAYNES: I think in order to --

CHIEF JUSTICE ROBERTS: Or at least say that we already did in Irwin?

MR. HAYNES: Yes, Your Honor. We believe that.

JUSTICE GINSBURG: Is it just Irwin or a whole line of cases? There was a time when the jurisdictional label was used rather frequently. There is a more recent case that says "jurisdiction" is a word of many meanings, too many meanings. And I think the Court has been trying to cut down on the too many meanings.

MR. HAYNES: Yes, Justice Ginsburg, I agree, and those cases start with the Kontrick v. Ryan case and continue through -- and even in the Bowles case, that's

-- that's a species of appellate jurisdiction which --

JUSTICE BREYER: But even all those cases which you're going back to, what you're talking about, I think, in those cases is general statements in the case. The cases themselves, except possibly for that Franconia, which has a different problem because it was about accrual, the cases themselves don't involve this statute. It's simply general statements. I thought, and I'd like your response, that in this Court's opinion as in statutes, as in life. When people make general statements, they don't mean every possible situation in the universe; rather, there are always circumstances to which the statement doesn't apply. And so why don't we just read those statements as incorporating a prior explicit holding of the Court as inapplicable to that prior explicit holding? I mean, that's what you'd normally do with a sentence like that, isn't it?

MR. HAYNES: Perhaps, Justice Breyer. I think that the rule that we are proposing here is that once Congress has waived sovereign immunity, absent a clear statement of Congress to the contrary, a statute of limitations is not -- does not limit subject-matter jurisdiction. So I think the Court has to look at the plain language of section 2501, compared to the jurisdictional grant here in 1491(a)(1).

JUSTICE KENNEDY: Was the rule or the presumption that you just quoted in effect when Congress last revised the statute?

MR. HAYNES: No, Justice Kennedy. I think the presumption was -- was established certainly in Irwin, which said: We want to cut through these ad hoc decisions that we have been going through on this question of equitable tolling. We want to -- we want to create a general rule that statutes of limitations generally are presumed to be equitably tolled.

JUSTICE KENNEDY: But you can -- was Congress aware of that general rule when it last revised the statute?

MR. HAYNES: I don't see how that could happen, Justice Kennedy.

JUSTICE KENNEDY: I don't either, and that's why, when you say, well, it's a general rule, your argument tends to lose force because of the fact that Congress acts against the background of what this Court has stated.

MR. HAYNES: That may be. However, I don't think that that general codification or -- or, rather, the rule of statutory construction that says that the Congress's codification of the law will then incorporate this Court's prior decisions, I don't think that can

trump the plain language reading of the statute.

JUSTICE SCALIA: Mr. Haynes, isn't it less radical and, indeed, more in accord with the language of Irwin to -- to say that what Irwin overruled was not the whole principle that this statute of limitation is -- is -- and others that relate to sovereign immunity, is jurisdictional, but rather the much more limited rule that -- that statutes of limitations which are jurisdictional are not subject to equitable tolling?

That's a much more limited point, and -- and the language of Irwin is a waiver of sovereign immunity must be unequivocally expressed "once Congress has made such a" -- "once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits amounts to little, if any" -- little, if any -- "broadening of the congressional waiver."

I don't think one can say that if you expand the principle to cover the whole -- the whole matter of whether it's jurisdictional. So why not read Irwin more moderately to -- to -- if we have to overrule one of two things, the whole doctrine of the jurisdictional nature of statutes of limitations in sovereign immunity cases and the other is simply, oh, yes, there is sovereign

immunity, but can there be equitable tolling, why shouldn't we adopt the more limited one?

MR. HAYNES: Well, I think, Justice Scalia, that this Court can adopt a more limited ruling based upon the rule that I've advanced, and that is if Congress specifically says that a statute of limitations shall count as jurisdictional.

And the example I would give, Justice Scalia, is in the Indian Tucker Act, which is found on page 9a of the appendix to the blue brief. The Indian Tucker Act, section 1505 -- excuse me -- 1505, says that claims that accrue to Indians after August 13, 1946, go to the Court of Federal Claims. The Court of Federal Claims has jurisdiction over those claims.

That is -- and before that date, such Indian claims went to the Indian Claims Commission. So in 1505 Congress said before a date certain a particular forum had jurisdiction; and after a date certain another forum has jurisdiction. That's -- that's a jurisdictional kind of date that I think is -- is appropriate to look at here, because once -- once you put an -- you put accrual language in a statute of limitations, that by its nature suggests that there may be equitable tolling or some kind of tolling if you're talking about a claim accruing, because there may be estoppel, there may be

waivers, there may be discovery issues. So the text of the statute itself suggests that there is a form of tolling allowed in the statute.

And if Congress wanted to say that this statute of limitations goes to the subject-matter jurisdiction of the court, it very well could have said that. It didn't, however; and so I think Irwin fits comfortably within the rule that we are suggesting.

CHIEF JUSTICE ROBERTS: Well, that's exactly what I think we said in -- in Arbaugh; and that, certainly, going forward from that point on, Congress has more or less to specify that it's jurisdictional, or we're not going to read it that way. But I'm not sure that was the rule in Irwin and I'm pretty sure it wasn't the rule in Soriano and Kendall.

MR. HAYNES: Mr. Chief Justice, it certainly was not the rule in Soriano and Kendall. But our position is that in Kendall the Court ignored the legislative history which said, this statute of limitations that we are inserting into the 1863 Court of Claims Act should be treated -- should be applied to the government just as to private parties.

That's precisely the ruling in Franconia Associates: That once sovereign immunity has been waived, once -- once there is a waiver of sovereign

immunity, the government is treated like any other defendant.

CHIEF JUSTICE ROBERTS: No, I know, but it seems to me you're arguing that if Kendall came up today, it would be decided differently, and maybe that's right.

But the point is it came up 100 years ago and it was decided, and the question is whether we should overturn that decision.

MR. HAYNES: I understand. Again, I suggest that Irwin erased the theoretical underpinnings of the Kendall-Finn line of cases by saying that a statute formerly -- in which this Court formerly said was jurisdictional can be subject to equitable tolling, and if it is subject to equitable tolling it cannot be jurisdictional because the hallmarks of "jurisdictional" are strict construction, it can't be waived and forfeited, and it has to be raised sua sponte. And so if you take out one of those legs of the statute, I don't see how it can be held to be jurisdictional.

JUSTICE GINSBURG: It did say statutory time limits -- this is Irwin -- applicable to lawsuits -- well, the sentence about the suits: "The rule of equitable tolling applicable to suits against the government." The rule that was announced is applicable

to the government, the same as with respect to a private party.

So it's hard to think of what territory Irwin would cover if it doesn't -- because in all suits, at least for money against the government, there has to be a waiver of sovereign immunity.

MR. HAYNES: That's true, Justice Ginsburg. And -- and Congress has specifically waived sovereign immunity for the kind of claim involved in this case, which is, of course, a takings claim.

Once the waiver is accomplished, the government is treated like any other defendant. That's certainly what Franconia Associates says, and I think it is inescapable to say, to -- to conclude other than to say that Irwin and Franconia have -- have eviscerated the Kendall-Finn line of cases.

CHIEF JUSTICE ROBERTS: Well, I think your argument is more strongly supported by Irwin than Franconia. Franconia simply involved an accrual rule, which doesn't go to what the jurisdictional effect of a bar on commencing a case is.

The government there was overreaching and arguing for a special accrual rule, and the Court said no. That's different than saying whether the actual time for commencing litigation is jurisdictional or not.

MR. HAYNES: Yes, Mr. Chief Justice, that's correct. That's what Franconia ruled. However, Franconia reiterated the Irwin rule, which is that once sovereign immunity is waived the statute of limitations applies to the government.

The government in Franconia, as you say, was pressing a very novel interpretation of the first-accrued language, and the Court said the government doesn't get any advantage from that just because it's the government.

So just because the -- the government is the defendant doesn't mean that it has that special advantage once sovereign immunity is waived, as it has been here.

JUSTICE GINSBURG: Even if -- even if you're right, couldn't the Federal Circuit say: Well, that's all very interesting but Day against McDonough told us that if we want to raise it on our own -- we don't have to if it's not jurisdictional; but if we want to, we can.

MR. HAYNES: Justice Ginsburg, I think Day v. McDonough does not help the government here. Day v. McDonough said that, yes, in the habeas situation the district court might raise sua sponte the timeliness of the claim. What the Court was -- the majority was clear

on this, and the three-member dissent was also crystal clear on this: That if the government waives the statute of limitations, the Court would not have -- it would be an abuse of discretion for the Court to override that waiver.

So, Day v. McDonough actually helps our position. Because not only was there a waiver here as -- but there was, for lack of a better word, a super waiver, because the government, having raised the statute of limitations in its pleadings, having moved to dismiss on the basis of the statute of limitations, then in special briefing asked by the trial judge here agreed that the claim was filed timely and conceded that in the Federal Circuit. They not only waived it, they agreed that the claim was filed timely.

So, Day v. McDonough, I think, helps our position and not the government's position. And that was made emphatically clear by at least eight members of this Court in Day v. McDonough, the majority and the three-member dissent.

One other point I'd like to make, and that is that if this Court holds that the statute of -- that 2501 is jurisdictional, then the judges in the Court of Federal Claims for every case filed in front of them on their general jurisdiction docket have to -- will have

to scrutinize the allegations in every complaint to determine if the complaint is -- has been timely filed.

JUSTICE KENNEDY: Well, that -- that assumes that the government has waived in every case. If it hasn't waived, I have to do it anyway.

MR. HAYNES: That's correct, Justice Kennedy. However --

JUSTICE SCALIA: You can usually count on the government to file the canned sovereign immunity brief.

(Laughter.)

MR. HAYNES: I think that's correct, Justice Scalia. You can count on the government to file a canned affirmative defense of statute of limitations, too.

But that's true, Justice Kennedy, if the government has, has waived it then the court doesn't have to, wouldn't have to do that. If they -- excuse me, if they raise it, the government doesn't have to -- I'm sorry. If the government raises --

JUSTICE KENNEDY: If they, if they raise the defense --

MR. HAYNES: Right.

JUSTICE KENNEDY: -- then you're going to have to determine it anyway, subject to clearly

erroneous findings of fact, as to when the person entered the property and so forth.

MR. HAYNES: That's correct.

But even if, even if the government were to agree that the claim was timely filed, the judges would have to consider it sua sponte in every case.

CHIEF JUSTICE ROBERTS: Well, but that's like saying in every diversity case, theoretically, the court has to scrutinize whether someone who alleges they are a citizen of Pennsylvania really is. And that's just not the way it really happens. The question usually, if not raised by the party, comes up under some other situation, such as in this case the amicus raised it.

MR. HAYNES: That's correct. But even if it's not raised, we think that if the statute is held jurisdictional, then the courts have to address it sua sponte.

Unless the Court has further questions, I reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Haynes.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENT

MR. STEWART: Mr. Chief Justice, and may it please the Court:

In a consistent line of decisions beginning in 1883, this Court has repeatedly construed the 6-year filing requirement contained in section 2501 and its predecessors as a nonwaivable jurisdictional limit on the Court of Claim's authority to enter money judgments against the United States. Congress has recodified the statute on various occasions and has modified its language in minor respects. But it has made no change that could call into question --

JUSTICE STEVENS: Mr. Stewart, can I ask you this question: Do you think the defense of equitable tolling would be available under this statute?

MR. STEWART: We don't, Your Honor. In fact, the Court has held both in Kendall and in Soriano that equitable tolling is not available.

JUSTICE STEVENS: You don't think Irwin even changed the equitable tolling rule?

MR. STEWART: We don't. Irwin read -- in the way we would read it -- established that at least with respect to statutes that provided for private suits against both governmental and private defendants, and perhaps with respect to suits against the government generally, that there is a presumption of equitable

tolling. But the Court in Irwin recognized that that presumption could be rebutted. And in both Kendall and Soriano, the Court had relied on, inter alia, the fact that the statute listed specific instances in which the 6-year period could be tolled as evidence that there was no general authority to toll the statutory time limit.

CHIEF JUSTICE ROBERTS: Is that when you're beyond the seas or something?

MR. STEWART: Beyond the seas or subject to a legal disability. The original 1863 version of the statute specified particular disabilities such as infancy, et cetera.

JUSTICE STEVENS: Mr. Stewart, what do you do with Justice Rehnquist's sentence: "We think this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government"? Is there an implied exception for Soriano there?

MR. STEWART: I think there are two bases on which we would distinguish that language. The first is by its terms Chief Justice Rehnquist's sentence was addressed to equitable tolling, not to waivibility. And it's true that the Court in Bowles has linked the two, but it doesn't appear that the Court in Irwin made that equation. That is, in the Irwin opinion the Court

recited the fact that both the district court and the court of appeals had ordered the case dismissed for lack of jurisdiction, because the filing requirement had not been met. And the Court said, we think that the statute is subject to --

JUSTICE STEVENS: I understand, I think I understand what you're saying, but I thought that the government's distinction of Soriano was that was the general rule for equitable tolling, so it doesn't apply here, which I think is certainly understandable. But you're saying it wasn't even a general rule for equitable tolling?

MR. STEWART: It was at least a general rule for equitable tolling with respect to statutes like Title 7 that authorize suit against both the government and against private defendants. And there has been some back and forth in the Court since then as to whether the Irwin language extends more broadly. In Brockamp, the Court suggested that some private analog is necessary before the Irwin presumption applies. In Scarborough v. Principi, the Court seemed to tilt in the opposite direction.

But part of our point is, even if the Irwin presumption of equitable tolling extends categorically to all suits against the government, equitable tolling

is not the same thing as jurisdictionality or waivibility. The Court in Bowles did link the two, but in Irwin itself the Court recited the fact that the lower courts had dismissed for lack of jurisdiction.

And then when the Court concluded that Irwin had not satisfied the prerequisites for equitable tolling, the Court simply said: Affirmed.

Now, if the Court had intended in Irwin to establish not simply that equitable tolling was potentially available, but that the time limit was not a jurisdictional bar to begin with, it seems likely the Court would at least have referred to the idea that the dismissal should have been for failure --

CHIEF JUSTICE ROBERTS: You know, I don't -- it's -- we've found it difficult enough to figure out which statutes are jurisdictional and which are not. And now you want us to say, well, even if it's jurisdictional, the consequences may be different for jurisdiction and for equitable tolling and for waivibility. I mean, it seems to me that's a very difficult argument.

MR. STEWART: Well, the Court has said both with respect to section 2501 and its predecessors and with respect to statutory time limits for suing the government generally, that the terms of Congress's

consent to suit define the jurisdiction of the reviewing court and a time limit for commencing suit is one of those terms. And I would direct the Court's attention in particular to United States v. Dalm, which is cited in our brief on page 23. It was decided less than nine months before Irwin was decided. And the opinion in Dalm is suffused with references to the jurisdictional character of the time limit for commencing suit against the government.

JUSTICE GINSBURG: But you certainly would be mixing categories terribly if you suggested that something that goes to the court's authority to proceed in the case can be waived if it's equitable to waive it. I mean, those two notions are at odds with each other.

MR. STEWART: Obviously, the government was on the other side in Irwin, so in a sense I'm not the best person to defend the Court's reasoning. But as between the reading of Irwin that would create this anomaly, that there could potentially be a jurisdictional limit that was nevertheless subject to equitable tolling, and the argument on the other side that Irwin sub silentio swept away numerous decisions of this Court that had recited that the terms of the government's consent to suit are jurisdictional limits and a time limit is one of those terms.

JUSTICE GINSBURG: Well, what would, what would Irwin and Franconia that made statements -- when it's a question of a time limit, they operate against the government just like they operate against private parties, to what kind of case would that apply? I mean, it's been pointed out that 2501 covers a whole slew of cases, not just takings cases.

MR. STEWART: Well, certainly the kind of case that the Court was specifically dealing with in Irwin itself, and it's not an uncommon type of case now, is one in which Congress has passed a statute that imposes obligations on private parties and then imposes like obligations on the government. And the gestalt of Title 7, once it was amended to add the Federal Government as a potential defendant and to impose the substantive obligations on the government, was that the government was to be dealt with with respect to matters of employment discrimination in the same way that a private employer would be in like circumstances, and --

CHIEF JUSTICE ROBERTS: I suppose Franconia would be a case where the Irwin logic not only would but did apply.

MR. STEWART: Well, in Franconia, the Court was dealing with a different question. It was what do the words "first accrues" mean? And it held that the --

it essentially treated the phrase "first accrues" as a term of art, as one that had appeared in prior statutes governing suits against other defendants. And so it saw no reason to believe that Congress intended those words to mean anything different in section 2501 than they meant in other statutes of limitations.

And I guess the other point that I would make both about Franconia and Irwin is, even if you read Irwin at its broadest, even if you construe it to mean that there is a presumption that time limits for suing the government are nonjurisdictional as well as subject to tolling, the Court in Irwin still made clear that the presumption could be rebutted. The presumption is not a limit on Congress's authority. It's simply an aid to construction in situations where other tools of interpretation don't produce a clear result. And here we would say --

JUSTICE STEVENS: May I ask this question, Mr. Stewart? Supposing we didn't have any precedent at all, just the whole -- this is the first time this issue had arisen, and we have the plain language of this statute. Would you not read this statute, without any background, supporting your opponent?

MR. STEWART: We wouldn't read it to -- if all we had was the text of the statute, we would not

read it to permit waiver. And I should explain why. The statute is reproduced in pertinent part at page 2 of the government's brief. And the statute provides: "Every claim of which the United States" -- "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within 6 years after such claim first accrues."

And looking only at the text of the statute, the language is categorical. It says every claim that is filed more than 6 years after accrual shall be barred. The statute by its terms makes no exception for cases in which the government fails to raise --

JUSTICE KENNEDY: Statute of limitations are generally more equivocal than that?

MR. STEWART: No. I think often statutes of limitations are written like that. But my point is in the end Petitioner's argument really is not a plain language argument. Petitioner's argument --

JUSTICE STEVENS: When you read the plain language, you left out the words, "of which the United States Court of Claims has jurisdiction."

MR. STEWART: I can understand that if you were looking only at the language of the statute, you would say -- you might say this is not a jurisdictional bar because it presumes jurisdiction.

JUSTICE STEVENS: Right.

MR. STEWART: But with respect to the substantive question presented, namely whether the United States' failure to make the argument in a timely way causes it to be waived, the statute doesn't support Petitioner's position as to that. It is categorical. It doesn't by its terms carve out an exception for cases in which the United States fails to raise a defense.

JUSTICE GINSBURG: What about -- what about the rules of the Court of Federal Claims? Rule 8(c) states that the statute of limitations is an affirmative defense. And that's in suits against the government because that's all the Court of Federal Claims deals with. So to what would that rule 8(c) apply?

MR. STEWART: Rule 8(c) says the following affirmative defenses shall be pled in the responsive pleading, and it lists statutes of limitations. I think it could certainly -- it obviously couldn't supersede the decisions of this Court or even of the Federal Circuit --

JUSTICE GINSBURG: But all those statutes of limitations would be statutes of limitations operating against the government.

MR. STEWART: I think the rule basically tracks, although not precisely tracks, the language of

the -- the parallel Federal Rule of Civil Procedure, and we would read it simply to mean to the extent this is an affirmative defense, it should be pleaded initially. It doesn't say that the defense is waived if not pleaded.

But to return to the point that I was making earlier, in the end Petitioner's argument is not a plain language argument. Petitioner's argument is that, notwithstanding the absence on the face of the statute of an exception for cases in which the United States fails to plead the timeliness defense, this Court should read section 2501 against the backdrop of a large body of law holding that statutes of limitations are generally waivable, and should assume that Congress intended to incorporate that understanding --

JUSTICE BREYER: No, that isn't -- I don't think it's quite -- I think putting the argument as I understand it, you would say let's look at Irwin, and we read it, so it's in your mind. Now think of that set of statute of limitations, the Federal ones, the government ones, that are either just as ambiguous as Irwin or even more ambiguous. Think of that set.

Now, in Irwin the Court says in the absence of special circumstances that whole set is going to be interpreted as nonjurisdictional. That's what it says. So you say, well, what Irwin didn't talk about is

suppose there's a member of that set where previously the Court had held it was jurisdictional. It doesn't tell us what to do. Shall we read it as an exception or shall we not?

And so what they are saying is, don't read it as an exception. There's no need to do so. Congress probably never really thought about any of this stuff. Read it, Irwin, as including that one, too.

So what do you think of that point, whether it's theirs or not, leaving aside the argument about whether this particular statute does or does not fall within that set? Assume it does.

MR. STEWART: Well, I think -- I think this essentially relates to the point that I was making that, even if there is a presumption of nonjurisdictionality announced in Irwin, it's rebuttable and the presumption is simply an aid to construction.

JUSTICE BREYER: Absolutely right, and then the question is does the simple fact that we previously held to the contrary count as a rebuttal? Does Irwin mean to -- see that's the same question I had before, so what do you think about that?

MR. STEWART: In our view, yes, it does. That is --

JUSTICE BREYER: Because?

MR. STEWART: It's a little artificial to talk about what language Congress might or should have used in light of Irwin to make clear its intent that this be treated as jurisdictional, when Congress in the 1948 Judicial Code chose to recodify essentially the same language that had previously been construed to impose a jurisdictional limit. And the point I was making before about Petitioner's argument as to imputed congressional intent, in the end Petitioner's position depends on the inference that because there was a body of law out there saying that statutes of limitations are ordinarily waivable, Congress should be assumed to have intended to incorporate that body of law.

And our point is if you're trying to impute Congress's intent, it makes much more sense to assume that Congress intended to recodify the same reading that this Court had attached to this particular provision, not that Congress intended to incorporate a meaning that the Court had attached to other statutes of limitations that the Court had specifically distinguished from this one.

And it's worth emphasizing that the decisions in Kendall and Finn and De Arnaud can't be accused of the sort of loose or less than meticulous use of jurisdictional language that this Court has recently

--

JUSTICE GINSBURG: Would you say that Franconia did use loose language, because although it dealt with accrual -- when does the claim accrue, and not when is it cut off -- but it did say, it called 2501 specifically "an unexceptional statute of limitations."

MR. STEWART: It said that it was unexceptional and it said that many other statutes of limitations used this language, namely the phrase "first accrues." But one of the other points that the Court in Franconia attached significance to was the fact that the Court of Claims had never given that phrase a broader reading in section 2501. That is, the Court cited that as additional evidence that the phrase had not been understood in this particular statute to bear a meaning other than it would have in other statutes of limitations.

JUSTICE GINSBURG: And if we looked at the Court of Federal Claims decisions now, I think they're spelled out in the opinion. They go both directions. That is, some say 2501 is jurisdictional, some say it's not.

MR. STEWART: I think the principal line of authority in the Federal Circuit says it's jurisdictional, but what can't be disputed is that this

Court has said over and over that it's jurisdictional, and the Court has again not used those -- that term in passing.

JUSTICE STEVENS: Yes, of course it said it in a case -- the issue in the case was whether Franconia was overruled -- I mean, Soriano was overruled. And Justice White thought it was. He said so in so many words. And it's interesting that Justice Rehnquist in the majority didn't disagree with that. Rather, he cited Justice White's dissent as part of his description of why some statutes are different from others, then comes to the points that we want to adopt a general rule that applies to all statutes. So it seems to me that the implicit -- in his opinion he did not disagree with Justice White's characterization.

MR. STEWART: Well, I think it would be -- again, given the fact in particular that the Court in Irwin didn't speak explicitly to the question of jurisdictionality one way or the other, I think it is not uncommon for a -- a dissenting opinion to make assertions about the reach of a majority opinion, and the majority opinion sometimes does and sometimes does not respond to those.

JUSTICE STEVENS: But the interesting part about this is the discussion of the majority of this

case is part of its development of the fact that we've got cases all over the lot and we want to adopt a clear rule to apply across the board. So it's part of the reasoning of the Court.

MR. STEWART: Well, I -- but I think at most the Court in Irwin was not trying to adopt a clear rule across the board; it was trying to adopt a presumption, while recognizing that Congress could provide in individual statutes for a rule different from the one that the presumption would suggest. And again if -- Congress had already been told that the language it was using would be treated as jurisdictional -- and the Court in the Kendall line of cases had not simply used the label jurisdictional; it had said statutes of limitations governing suits against private parties can be waived if they're not asserted in a timely fashion, but the time limit for filing suit against the United States in the Court of Claims is different. This is a limit on the court's authority and the court is required to notice it whether it's pleaded by the government or not.

So I think Congress had been told that it was already using language that would have the effect of causing this to be jurisdictional and nonwaivable.

JUSTICE GINSBURG: Then Congress would think

that rule 8(c) has no range of application. And -- we have two recent statements saying statutes of limitations against the government are like statutes against private parties. But if 2501, which covers all of the cases over which the Court of Federal Claims has jurisdiction -- if, if it's for jurisdictional, then I don't know what cases there would be in which there's a time limit in a suit against the government that isn't jurisdictional.

MR. STEWART: I mean, I think -- I think you may well be correct, that is perhaps to the extent the drafters of the rule were doing something other than simply incorporating the existing language of the comparable Federal Rule of Civil Procedure. If all they were saying was if there's a statute of limitations out there that would function as an affirmative defense in our cases, in our court, we want it to be pleaded immediately as it would be in a private civil action.

If that's what they're saying, you may well be right that the class of cases to which that would pertain is the null set or something very close to it.

JUSTICE ALITO: Doesn't Mr. Haynes have a point when he suggested at the end of his argument that questions about accrual involve much more complicated factual questions than are usually involved in deciding

whether a court has jurisdiction? So imagine if this case came up today and the government adhered to its prior position -- I don't know whether it's still it's position -- that there had not been a permanent taking until 1998, would the court -- and none of the events that happened before 1998 had been brought to the court's attention -- would the court have to say to the parties: Well, this is fine; we see that there was a fence put up in 1998, but now you have to tell us everything else that's happened on this site going back 10 years to see whether there -- whether the claim might have accrued at some earlier point?

MR. STEWART: Well, I guess we'd have two or three responses to that. The first is, at least before judgment could be entered in favor of the plaintiff, the court would ultimately have to determine not only that there was -- had been a taking, but would have to determine the date on which the taking occurred in order to award compensation, if nothing else. So this seems like the kind of question that would ultimately have to be determined, at least before the plaintiff could be successful.

The second thing is, as was pointed out before, at least in the majority of cases where there is a viable limitations argument, the government is

going to plead it, and so asking the court to look beyond this --

JUSTICE ALITO: But what if you didn't think it was -- it was a good argument. Would you have an obligation to say, we think there was a permanent fence put up in 1998 and we agree that there was a taking as of that point, but we don't think it happened earlier, but you need to know all of these additional facts? Would you have an obligation to present that to the court?

MR. STEWART: It would depend upon the court's rules. That is, if the court required a separate statement as to jurisdiction then probably the advocate would include at least a thumbnail sketch of the relevant facts. If it was -- if the rules of the court were such that the advocate didn't have to address jurisdiction unless he or she was actively contesting it, then no.

But the -- I guess the more fundamental point we would make is the speculation as to disruptive results would carry a lot more force if the government were asking for a rule that was different from what had been done in the past. That is, even Petitioner would concede that, for the great bulk of the country's history, this rule was treated as jurisdictional, and

Petitioner's argument is simply that that line of authority was effectively overruled in Irwin in 1990. And so if in fact treating this limit as a jurisdictional limit would have the effect of disrupting litigation in the CFC, we would expect the Petitioner to have actual evidence to that effect. If we were asking for a different rule than had been enforced in the past, then there would be more --

JUSTICE GINSBURG: But we do know the CFC is at least confused because they have some cases going one way and some cases going the other way. And from the government's point of view, the government can be relied on to raise the statute of limitations, I suppose, but aren't there cases where the government would really like to get the substantive issue settled? So it says, well, the statute of limitations is arguable, but we'll concede that the action was timely.

MR. STEWART: I think that's true even as to cases involving barriers that everyone would concede are jurisdictional. For instance, there are cases in which a litigant sues us, and there is great doubt as to his standing to sue, and it may be an issue that we think is otherwise framed in an appropriate context, and the government might feel that it would be to everyone's benefit to get the issue resolved when -- one way or the

other. But one consequence of treating that as a jurisdictional barrier is simply that the government can't always have its way.

So I don't think -- I would think that you are correct that there might be some instances in which treatment of this limit as a jurisdictional bar would not be in the government's interest. But that's not a basis for holding it to be nonjurisdictional.

Certainly the majority of cases involving both -- I think, involving both 2501 and other provisions that impose time limits for suits against the government, in which the courts have held that the relevant limit is jurisdictional, typically the situation arises where the government decides to make an argument on appeal that it didn't make in the district court. I think a case like this one, where the government doesn't argue the point even on appeal and the court of appeals nevertheless holds that the suit was untimely, those are the rarity. But we certainly agree that the logical implication of treating the time limit as jurisdictional is that the Federal Circuit did the right thing here.

I'd like to say a couple of words about Bowles. I think Bowles doesn't compel a ruling in the government's favor, but it does support our position in

various respects. First, as the Chief Justice alluded to earlier, Bowles emphasized that time limits for filing notices of appeal had historically been treated as jurisdictional limits, and the Court said that, given the choice between calling into question some dicta in our recent opinions and effectively overruling a century worth of practice, we think the former option is the only prudent course.

JUSTICE GINSBURG: But, of course, Bowles -- I mean the Court did miss something. Everyone on the Court did, and that is that the period to file your notice of appeal was originally not in any statute. It was in the rule, the FRAP rule. The opinions, both sides, assumed that the statute came first, and the rule was adopted to conform to the statute, but in fact it was just the opposite. It was a rule, a Federal Rule of Civil Procedure, which can't affect jurisdiction. We know that. As Congress says rules of procedure don't affect jurisdiction. So there was the rule, and then the U.S. Judicial Conference said to Congress, when it referred the rule to Congress, you might consider a conforming amendment. And then the statute, after the rule came into effect, conformed to the rule. So what the Court, both sides, thought in Bowles -- we just had it in reverse.

MR. STEWART: I agree that the Court's opinions didn't note that fact, but I don't think that fact would or should have affected the treatment of the statute as jurisdictional. That is, once it was brought to Congress's attention that there was a potential conflict or tension between the language of the jurisdictional statute and the language of the corresponding Federal rule, Congress had the choice to make as to which should govern, and if Congress had wanted a different result from the one that was in the Federal rule, it could have enacted different language. I think it would not -- whatever we might privately think is the level of attention that Congress --

JUSTICE GINSBURG: Well, Congress didn't think about it at all until the U.S. Judicial Conference said do this --

MR. STEWART: But --

JUSTICE GINSBURG: -- and the U.S. Judicial Conference wasn't thinking that thereby it became jurisdictional.

MR. STEWART: But my point is that, once this was brought to Congress's attention, Congress could have chosen to stick with other language, in which case I have no doubt that the corresponding rule would have been amended to fit the statute.

Again, whatever level of attention we might privately think that Congress devoted to this question, the fact is that Congress acted as a body, passed a law, it was signed -- passed statutes in both houses. It was signed into law by the President. And from that point forward, it was a statutory rule and had to be treated as such. So I agree that this aspect of the problem wasn't addressed specifically by the opinions in Bowles, but I don't see any basis --

JUSTICE GINSBURG: It was addressed specifically. It was addressed that the rule -- that the -- that all of this was statute driven. But the rule before -- before there was a conforming statute, you would say, well, then it wasn't jurisdictional, right?

MR. STEWART: I think to treat it as a conforming statute suggests that, in some way, Congress was obligated to do what the advisors told it to do or was obligated to conform section 2107(a) to the terms of the Federal rule, and that's not the case. Congress could have -- once this matter was brought to its attention, Congress could have enacted whatever statute it wanted. It chose to enact a statute that tracked the preexisting language of the rule, but from that time forward, the notice-of-appeal deadline was grounded in

statute, and it was a statutory limit that applied to Bowles's own notice of appeal. So I don't think there is a basis for saying the case would or should have come out differently if the Court had been aware of the history of the statute's development.

JUSTICE KENNEDY: May I go back to the answer you gave Justice Stevens when he asked you to assume that there was no precedent, we're reading this as an original matter. I thought your answer to him, correct me if I'm wrong, was that, well, in any event "shall be barred" means that it can't be waived anyway. But statute -- I looked up other statutes of limitations, and other statutes of limitations: "Shall not be entertained," "may not be commenced," "may not be brought."

MR. STEWART: My point was, if we were reading the statute without reference to any precedent addressing either 2501 itself or statutes of limitations generally, kind of the pure myopic, literal reading of the statute, without reference to the legal context, would suggest that "every" means every, "shall be barred" means shall be barred, and there is no exception for cases in which the government fails to raise the argument in a timely way. And my point is --

JUSTICE KENNEDY: My response was all

statute of limitations say that and all statute of limitations can be waived.

MR. STEWART: And my point is there is no basis for Petitioner's argument that in inferring Congress's intent the Court should look to part of the broader legal context, namely: Decisions of this Court and others that have dealt with the general treatment of statutes of limitations, but should ignore the other part of the legal context, namely: Decisions of this Court that have said, squarely and unequivocally, this particular time limit is different.

This particular time limit is nonwaivable and jurisdictional even though most statutes of limitations can be waived if they are not asserted in a timely way.

JUSTICE STEVENS: One last question: We disagreed on parts of the Irwin opinion, but I take it you would agree with me that the government was particularly well represented in that case, wouldn't you?

(Laughter.)

MR. STEWART: The government could not have been better represented, Your Honor.

(Laughter.)

CHIEF JUSTICE ROBERTS: Hard to

understand how they could have lost if --

(Laughter.)

MR. STEWART: I had the same reaction reading the transcript.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stewart.

Mr. Haynes, you have three minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY K. HAYNES

ON BEHALF OF THE PETITIONER

MR. HAYNES: With respect, I suggest that the government won the battle, but lost the war on Irwin.

This Court over the last few decades has attempted to bring some coherence to both the questions of sovereign immunity and subject-matter jurisdiction.

And I think that the way the Court has framed the issues in Irwin to say that there is a presumption that statutes of limitation are tollable and, therefore, are not jurisdictional in our view, tends to show that the Court wants a clear statement from Congress.

The presumption language says Congress may at any time say otherwise and make a statute of

limitations jurisdictional. Unless it does so, the statute of limitations would not affect subject-matter jurisdiction.

My brother makes the argument that Brockamp rebutted the Irwin presumption, but it's very important to understand that the Brockamp decision did not speak in jurisdictional terms. It spoke in a -- a mere matter of statutory -- not "a mere matter" -- it spoke in terms of statutory interpretation. It did not speak in jurisdictional terms.

So Irwin, standing unassailed since that time, has forced the courts to look at the plain language of the statute, which is precisely what we advocate this Court does. Unless the Court has further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Haynes. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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