Georgia State University Law Review

Volume 29
Issue 2 *Winter 2013*

Article 7

April 2013

Under John R. Sand & Gravel Co., May Lower Courts Apply Their Own Precedent in Determining Whether a Statute Waiving Sovereign Immunity Is Jurisdictional?

Max Compton

UNDER *JOHN R. SAND & GRAVEL CO.*, MAY LOWER COURTS APPLY THEIR OWN PRECEDENT IN DETERMINING WHETHER A STATUTE WAIVING SOVEREIGN IMMUNITY IS JURISDICTIONAL?

Max Compton*

INTRODUCTION

On the morning of August 29, 2005, Hurricane Katrina made landfall on the southeastern tip of Louisiana. By the end of its wave of destruction, more than 1,800 people were dead and an untold number of homes, well into the thousands, were destroyed.[1] The federal government, through its Federal Emergency Management Agency (FEMA), offered relief by providing $2.7 billion worth of emergency housing units (EHUs or trailers) to those in need of shelter,[2] including New Orleans resident Alana Alexander and her son Christopher Cooper.[3] In May of 2006, Alexander and Cooper moved into a FEMA trailer.[4] Upon moving into the EHU, Alexander noticed a "chemical smell" and "experienced eye and throat irritation."[5] At the time, an unidentified FEMA representative or contractor told Alexander that there was "nothing to worry about."[6] Relying on this statement, Alexander took no action regarding her concerns over the trailer's safety until December 2007 when she

* J.D. Candidate, 2013, Georgia State University College of Law.

1. RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT HURRICANE KATRINA: 23–30 AUGUST 2005 11–12 (2011) ("The extent, magnitude, and impacts of the damage caused by Katrina are staggering . . . .").

2. Bruce Watson, *The Awful Odyssey of FEMA's Hurricane Katrina Trailers*, DAILY FIN. (Sept. 28, 2010, 10:15 AM), http://www.dailyfinance.com/2010/08/28/the-awful-odyssey-of-femas-hurricane-katrina-trailers.

3. *In re* FEMA Trailer Formaldehyde Prod. Liab. Litig., 646 F.3d 185, 188 (5th Cir. 2011) (per curiam).

4. *Id.*

5. Original Brief for Appellant at 4 *FEMA Trailer Litig.*, 646 F.3d 185 (No. 10–30451), 2010 WL 7540365 at *4.

6. *Id.* at 4–5. *But see* Brief for Appellee at 37 *FEMA Trailer Litig.*, 646 F.3d 185 (No. 10–30451), 2010 WL 4619550 at *37 (challenging the assertion that the unidentified individual actually worked for the United States).

learned, via news reports, of the link between FEMA trailers and formaldehyde contamination.[7] Alexander, on behalf of Cooper, subsequently filed an administrative claim with FEMA as required under the Federal Tort Claims Act (FTCA).[8] After waiting seven months and receiving no response to her administrative claim, she filed an action against the United States in the District Court for the Eastern District of Louisiana.[9]

The district court dismissed Alexander's claim for lack of subject-matter jurisdiction, holding that Alexander failed to file her administrative claim with FEMA within the two-year statute of limitations prescribed by the FTCA.[10] On appeal Alexander argued, *inter alia*, that the statute of limitations should be equitably tolled because of the false information given to her by the "government representative."[11] The Fifth Circuit denied Alexander's equitable

7. Original Brief for Appellant, *supra* note 5 at 4. For articles revealing the possible contamination of FEMA trailers around December 2007, see David Hammer, *FEMA Trailers to be Tested for Formaldehyde*, NEW ORLEANS TIMES–PICAYUNE, Dec. 13, 2007, http://www.nola.com/news/index.ssf/2007/12/fema_trailers_to_be_tested_for.html; Michael Kunzelman, *Amid Health Concerns, FEMA Bars Workers From Stored Trailers*, SOUTHEAST MISSOURIAN, Nov. 9, 2007, http://www.semissourian.com/story/1289822.html.

8. The statute of limitations for the FTCA requires claimants to first present the claim to the "appropriate Federal agency." 28 U.S.C. § 2675(a) (2006). After denial of the claim by the administrative agency, the claimant has six months in which to present a claim to the appropriate court. *Id.* § 2401(b). If the administrative agency fails to make a decision within six months of the filing by the claimant, the claimant may treat the failure to act as a denial for purposes of filing a claim in the courts. *Id.* § 2675(a). For a case involving the failure to meet the six-month, post-denial deadline see *Hammond v. United States*, 613 F. Supp. 358 (W.D. Pa. 1985).

9. Alexander's complaint alleged that the government acted with gross negligence and deliberate indifference to the health of her son by failing to disclose that the trailer they provided exposed him to high levels of toxic materials. *FEMA Trailer Litig.*, 646 F.3d at 188.

10. 28 U.S.C. § 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues."). A claim arising under the FTCA accrues "when the plaintiff knows or has reason to know of the injury which is the basis of" his claim. Ramming v. United States, 281 F.3d 158, 162 (5th Cir. 2001) (quoting Brown v. Nationsbank Corp., 188 F.3d 579, 589–90 (5th Cir. 1999)). The district court held that Alexander's claim accrued in May 2006 when she moved into the EHU, thus filing her administrative claim in July 2008 was untimely. *In re* FEMA Trailer Formaldehyde Prod. Liab. Litig., No. MDL 07–1873, 2009 WL 2599195, at *3 (E.D. La. Aug. 21, 2009), *aff'd* 646 F.3d 185 (5th Cir. 2011).

11. *FEMA Trailer Litig.*, 646 F.3d at 190; *see* sources cited *supra* note 6. Equitable tolling is a doctrine that allows a court to hear a plaintiff's claim even after the passing of the statute of limitations. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) ("[Statutes of limitation] typically permit courts to toll the limitations period in light of special equitable considerations." (citing Rotella v. Wood, 528 U.S. 549, 560–61 (2000); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–53 (7th Cir. 1990))); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 223 (2d Cir. 2002) ("Equitable tolling is a doctrine that permits courts

tolling argument on the grounds that statutes waiving sovereign immunity, such as the FTCA, are to be strictly construed and a court sitting in equity cannot "extend the waiver beyond that which Congress intended."[12] Unfortunately, if an opportunity existed for Alexander to bring her claim in another circuit, it is possible that, applying *the same federal law*[13]—the FTCA statute of limitations—that court would have adopted her equitable tolling argument and reached the merits of her case.[14]

Among the circuits that have considered equitably tolling the statute of limitations under the FTCA, the Third and Eighth Circuits have allowed the statute to be tolled, whereas the Ninth and Fifth Circuits have not.[15] This split stems from the Supreme Court's inconsistent application of equitable tolling to waivers of sovereign immunity generally.[16] This Note focuses on equitable tolling of the FTCA statute of limitations specifically, while acknowledging that the doctrine applies to all waivers of sovereign immunity alike. Part I discusses a line of Supreme Court cases addressing tolling statutes of limitations for various causes of action against the government.[17] As

---

to extend a statute of limitations on a case-by-case basis to prevent inequity." (quoting Warren v. Garvin, 219 F.3d 111, 113 (2d Cir. 2000))); *see also* Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998) (defining equitable tolling as a "doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances").

12. *FEMA Trailer Litig.*, 646 F.3d at 190 (quoting *Ramming*, 281 F.3d at 165).

13. Gould v. U.S. Dep't. of Health & Human Servs., 905 F.2d 738, 742 (4th Cir. 1990) ("Although FTCA liability is determined 'in accordance with the law of the place where the act or omission occurred,' 28 U.S.C. § 1346(b), *federal law* determines when a claim accrues." (emphasis added) (quoting Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980))).

14. *See* Santos *ex rel.* Beato v. United States, 559 F.3d 189, 196 (3d Cir. 2009) ("[E]quitable tolling is possible under the FTCA . . . ."); *see also* T.L. *ex rel.* Ingram v. United States, 443 F.3d 956, 961 (8th Cir. 2006) ("[E]quitable tolling applies in FTCA cases only because Congress intended it to apply." (citing United States v. Brockamp, 519 U.S. 347, 353–54 (1997))).

15. *Compare Santos*, 559 F.3d at 194–97, *and Ingram*, 443 F.3d at 963, *with* Marley v. United States, 548 F.3d 1286, 1288–93 (9th Cir. 2008), *and Ramming*, 281 F.3d at 163–66.

16. *Compare* Irwin v. Dep't. of Veterans Affairs, 498 U.S. 89, 95–96 (1990) ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."), *with Sand & Gravel*, 552 U.S. at 137 (holding that when the Court has already prescribed a definitive interpretation of a certain statute of limitations, that interpretation is binding regardless of equitable principles); *see also Santos*, 559 F.3d at 196 (finding the Supreme Court's holding in *Sand & Gravel* "might call into question whether equitable tolling is available in FTCA claims").

17. *See* discussion *infra* Part I.

Part I illustrates, the Court eventually found that lower courts should presume that they may equitably toll waivers of sovereign immunity,[18] allowing them to rebut the presumption if precedent establishes that the statutory time period in question is a restriction on the court's jurisdiction.[19] Part II uses the FTCA as a model for analyzing the problem of applying precedent to rebut the presumption—namely, which courts' precedent to apply.[20] Finally, Part III proposes that the Supreme Court limit the grounds for rebutting the presumption of equitable tolling to the express language of the statute or a prior definitive determination of the statute as jurisdictional by the Court.[21]

I. TOLLING CLAIMS AGAINST THE GOVERNMENT

A. The Traditional Approach To Equitably Tolling Waivers Of Sovereign Immunity

The United States Supreme Court first addressed equitably extending a statute of limitations for a claim against the government in *Kendall v. United States*.[22] In *Kendall*, the plaintiff brought suit against the government in the Court of Claims.[23] The Court of Claims is forever barred from hearing claims filed six years from their date of accrual, save in cases when a person is disabled or "beyond the seas."[24] Even though his claim accrued in December 1865 and he

18. *Id.*; *Irwin*, 498 U.S. at 95.

19. *Sand & Gravel*, 552 U.S. at 138.

20. *See* discussion *infra* Part II. The FTCA serves as an excellent model for highlighting the current doctrinal problem because circuits are applying their own precedent to define the FTCA's statute of limitations, leading to inconsistent application of the FTCA. *Compare Santos*, 559 F.3d 189, *and Ingram*, 443 F.3d 956, *with Marley*, 548 F.3d 1286, *and Ramming*, 281 F.3d 158.

21. *See* discussion *infra* Part III.

22. Kendall v. United States, 107 U.S. 123 (1883).

23. *Kendall*, 107 U.S. at 124. The United States Court of Federal Claims has jurisdiction over claims arising under the Constitution, laws of the United States, or express or implied contracts with the United States, brought against the federal government. 28 U.S.C. § 1491(a)(1) (2006).

24. 28 U.S.C. § 2501. To qualify for a legal disability under the Court of Claims statute of limitations a plaintiff must show that he had either a mental or physical condition that rendered him "incapable of caring for his property . . . of understanding the nature and effect of his acts, and of comprehending his legal rights and liabilities." Waldorf v. United States, 8 Cl. Ct. 321, 324 (Cl. Ct. 1985) (quoting Goewey v. United States, 612 F.2d 539, 544–45 (Ct. Cl. 1979)); *see also Sand & Gravel*, 552 U.S. at 135–36 (discussing the relatively minor language changes from the original Court of Claims

filed suit nearly seven years later in November 1872, the plaintiff in *Kendall*—who had been a member of the Confederate Army—argued that the limitations period should be extended because he could not invoke the court's jurisdiction until the amnesty proclamation of December 25, 1868.[25] The Court rejected this contention.[26]

Beginning from the premise that a citizen cannot sue the sovereign unless the same has consented to the suit,[27] the Court reasoned that the government could circumscribe its consent.[28] The Court then found that, just like Congress limited the Court of Claims' jurisdiction to the types of claims enumerated in the statute, Congress also limited the Court of Claims' jurisdiction to claims filed within six years of their accrual date.[29] The Court thus could not extend the time period for bringing a claim in the Court of Claims—just as it could not add substantive claims to the Court of Claims' jurisdiction—without circumventing the express will of Congress, something it was clearly not willing to do.[30]

---

legislation to the current legislation and concluding that the changes are insignificant).

25. *Kendall*, 107 U.S. at 124–25. The amnesty proclamation of December 25, 1868 grants: "To all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States . . . with restoration of all rights, privileges, and immunities." Presidential Proclamation, Full Pardon and Amnesty Granted to all Persons Engaged in the Late-Rebellion, 15 Stat. 711 (1869).

26. *Kendall*, 107 U.S. at 125.

27. The Supreme Court of the United States adopted the doctrine of sovereign immunity early in its jurisprudence. *See* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . ."). The Supreme Court also established early on that Congress alone had the power to waive the sovereign immunity of the United States. United States v. Clarke, 33 U.S. (8 Pet.) 436, 443 (1834) ("As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of [C]ongress, or the court cannot exercise jurisdiction."). These principles are alive and well today. *See generally* Dolan v. U.S. Postal Serv., 546 U.S. 481 (2006); Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983). Moreover, the Court traditionally expressed that the government's consent to be sued must be unambiguous and may not be implied. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. King, 395 U.S. 1, 4 (1969).

28. *Kendall*, 107 U.S. at 125 ("[The government] may restrict the jurisdiction of the [C]ourt of [C]laims to certain classes of demands.").

29. *Id.* ("The [Court of Claims enacting statute] contain[s] restrictions which that court may not disregard. . . . To that class may be referred claims which are declared barred if not asserted within the time limited by the statute.").

30. *Id.* at 125–26.

The Supreme Court analyzed this jurisdictional principle again in *Finn v. United States*.[31] In *Finn*, the Court recognized the Court of Claims' power to raise the limitations issue *sua sponte*.[32] The Court distinguished between an ordinary limitations argument, which "does not operate by its own force," and congressionally-defined limitations on the boundaries of sovereign liability.[33] Relying on the consensual nature of claims against the government, the Court again found the Court of Claims powerless to adjudicate when a petitioner filed a claim more than six years after it accrued.[34]

Taken together, *Kendall* and *Finn* frame the statutes of limitation on claims against the government as jurisdictional in nature.[35] The ruling in *Soriano v. United States* carried this approach into the twentieth century.[36] In *Soriano*, the Court considered whether a breach of contract claim in the Court of Claims could be equitably tolled due to Japanese occupation of the Philippines in World War II.[37] The Court strictly adhered to precedent[38] and found that it was

31. *Finn* dealt with a contract claim asserted against the United States and thus invoked the jurisdiction of the Court of Claims once again. Finn v. United States, 123 U.S. 227 (1887).

32. *Id.* at 232–33.

33. For non-government defendants, the statute of limitations is an affirmative defense that will be waived if not raised in the pleadings. *See* FED. R. CIV. P. 8(c)(1). The government's liability, however, arises solely from an act of Congress, and a court cannot alter or ignore the congressional enactment, including the statute of limitations. *Finn*, 123 U.S. at 232. Thus, a court should raise the statute of limitations issue on its own in any case involving government liability. *Id.* at 232–33.

34. *Finn*, 123 U.S. at 232–33.

35. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134–36 (2008) (discussing how *Kendall* and *Finn* established the view that the statute of limitations for claims in the Court of Claims is jurisdictional); Blueport Co., L.L.P. v. United States, 76 Fed. Cl. 702, 715 (Fed. Cl. 2007) ("This strict rule that conditions (or as the *Kendall* Court termed it, 'restrictions') to waivers of sovereign immunity are limitations on jurisdiction was the law for the remainder of the Nineteenth Century, and indeed for almost all of the Twentieth." (citing United States v. Wardwell, 172 U.S. 48 (1898))), *aff'd sub nom.* Blueport Co., L.L.C. v. United States, 533 F.3d 1374 (Fed. Cir. 2008); Hardin v. City Title & Escrow Co., 797 F.2d 1037, 1040 (D.C. Cir.1986) (citing *Finn* for the rule that "[j]urisdictional provisions in federal statutes are to be strictly construed").

36. Soriano v. United States, 352 U.S. 270, 274 (1957). *Cf.* Honda v. Clark, 386 U.S. 484, 495–98 (1967) (finding that the text of the Trading with the Enemy Act evinced congressional intent to allow the tolling of the sixty-day statute of limitations for claims brought against the government under said Act). 50 U.S.C. app. §§ 1–44 (2006).

37. *Soriano*, 352 U.S. at 270–71. Soriano brought a takings claim for foodstuffs and other supplies that he furnished to Philippine guerilla forces during the Japanese occupation of the Philippines during World War II. *Id.* The Court stated that the merit of his claim depended on the ability to classify the Philippine guerilla forces as "a unit operating in the service of the United States." *Id.* at 271.The Court never reached that issue, however, due to the statute of limitations problem. *Id.*

38. The Court began by thoroughly discussing *Kendall* and quoting from it the proposition that

not permitted to equitably toll the Court of Claims statute of limitations.[39] The Court relied on two propositions to come to this conclusion. First, statutes of limitations covering waivers of sovereign immunity are absolute; meaning courts may not expand the limitation period beyond that established by Congress.[40] Second, the Court found that the express language of the Court of Claims statute, in particular, did not authorize extension of the limitation.[41] The Court thus reinforced the notion that courts must "strictly observe" the language of any statute waiving sovereign immunity.[42]

In 1967, the Supreme Court notably departed from its usual approach of dismissing tolling arguments when it found that the language of a certain statute *implicitly* allowed for claims against the government even after the expiration of the statute's limitations period.[43] The statute at issue in *Honda v. Clark* was a sixty-day filing deadline for persons claiming an interest in property held by the Alien Property Custodian pursuant to the Trading with the Enemy Act (TWEA) of 1917.[44] Petitioners were a class of Asian Americans whose assets the United States seized after the commencement of WWII.[45] The TWEA provided the government with a mechanism for returning Petitioner's assets after the war ceased.[46] Congress based the procedure almost entirely on the system used in the Bankruptcy

---

"'[t]he court cannot superadd to [the statutorily enumerated circumstances in which tolling the limitation is proper]' . . . *having* '*no more authority* to ingraft (another) disability arising upon the statute . . . which might prevent a claimant from suing within the time prescribed.'" *Id.* at 273–74 (emphasis added).

39. *Id.* at 275–77.

40. *Id.* at 276 ("Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." (citing United States v. Sherwood, 312 U.S. 584, 590–91 (1941))).

41. *Id.* at 276 ("Congress was entitled to assume that the limitation period [set forth in the Court of Claims statute] . . . meant just that period and no more."). The Court of Claims statute of limitations states in its entirety, save a few enumerated exceptions, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2006).

42. *Soriano*, 352 U.S. at 276.

43. Honda v. Clark, 386 U.S. 484 (1967).

44. Trading With the Enemy Act (TWEA) of 1917, 50 U.S.C. app. § 1 (2006). The filing deadline requires claimants to file a petition with the district court within sixty days of denial of their administrative claim. *Id.* § 9(a).

45. *Honda*, 386 U.S. at 486–87.

46. 50 U.S.C. app. § 9.

Act for the distribution of assets to creditors.[47] Drawing on bankruptcy case law, the Court determined that Congress included the sixty-day limitation in order to provide for fair and timely distribution of assets, and not for the purpose of protecting the government.[48] Tolling the limitation, therefore, provided substantial benefits and minimal harm while maintaining the intent of Congress.[49] Thus, the Court found that the limitation could be tolled even though nothing in the TWEA statute expressly granted that power to the courts.[50]

Twenty years later in *Bowen v. City of New York*,[51] the Court considered tolling the Social Security Act's[52] sixty-day limitation for filing claims after receiving notice of final administrative denial.[53] The language of the statute controlled the Court's analysis.[54] Like the *Honda* Court, the *Bowen* Court noted the importance of not abating the waiver of sovereign immunity that Congress intended.[55] Two years prior the Court defined the Social Security Act as "unusually

47. *Honda*, 386 U.S. at 495 & n.11.

48. Congress's deriving the TWEA re-distribution process from the Bankruptcy Act heavily persuaded the Court and a 1938 amendment that granted creditors an avenue of relief even though their claims were tardy carried particular weight. Chandler Act (Bankruptcy Revision) of June 22, 1938, ch. 575, 52 Stat.840 (repealed 1979). The Court noted how this amendment merely codified the equitable principle that statutes of limitations are for the benefit of the creditors, not the debtors, which bankruptcy courts previously applied regardless of statutory authorization. *Honda*, 386 U.S. at 496–98. Accordingly, the principles that allowed a statute of limitations to be tolled in a bankruptcy case "applied to the [TWEA statute of limitations] with equal force." *Id.* at 498.

49. *Honda*, 386 U.S. at 497–500.

50. After *Honda*, the Court placed itself in the position of having to analyze each particular statute waiving sovereign immunity in order to determine if Congress intended to allow tolling of the limitations period. *Id.* at 484; 50 U.S.C. app. § 9.

51. The issue presented in *Bowen* was whether, in certifying a class claiming a violation of § 405(g) of the Social Security Act, the district court properly included members who failed to file their claims within sixty days of a final decision from the Secretary. Bowen v. City of New York, 476 U.S. 467 (1986).

52. Social Security Act (Old Age Pension Act), 42 U.S.C. §§ 301 to 434 (2006).

53. *Id.* § 405(g).

54. The *Bowen* Court expressly stated that the case turned on whether Congress intended to allow tolling of the administrative filing deadline when it enacted the Social Security Act. *Bowen*, 476 U.S. at 480.

55. *Id.* at 479. The Court again acknowledged that there may be statutes waiving sovereign immunity where Congress implicitly intended to allow the statute to be tolled and, by applying a per se denial of equitable tolling in such situations, courts might erroneously contravene congressional intent. *Id.*

protective"[56] of claimants based on the thorough administrative procedure provided under the Act.[57] Moreover, the Act empowers the Secretary of Health, Education, and Welfare[58] to toll any limitations on administrative claims.[59] This express language and policy of the Act, the Court concluded, revealed that persuasive equitable circumstances may arise where judicial tolling of the limitations period would stay within the overall congressional purpose of the statute.[60] Unlike the TWEA statute in *Honda*, the Social Security Act expressly provided for tolling of the limitation—albeit by the Secretary and not the courts. The Court felt more comfortable exercising its equitable power; nevertheless, it once again tolled a statute of limitations waiving sovereign immunity without the express authority of Congress.[61]

B. The Presumption Of Equitable Tolling Under Irwin v. Department Of Veteran Affairs

In *Irwin v. Department of Veteran Affairs*, the Court abandoned the traditional approach of waiving statutes of limitations in suits against the government based solely on statutory construction and created a presumption in favor of applying equitable tolling to waivers of sovereign immunity.[62] The *Irwin* Court considered a

56. Heckler v. Day, 467 U.S. 104, 106 (1984).

57. The administrative remedies under the Social Security Act consist of a preliminary decision on an applicant's claim by a state agency followed by a de novo review of that decision by a different unit of that same state agency or the Commissioner of Social Security. 42 U.S.C. § 405(b)(2)(C). Thereafter, if still dissatisfied, the applicant is permitted a full evidentiary hearing and de novo review before an administrative law judge. *Id.* § (c)(7). Finally, one must file a petition with the Appeals Council of Health and Human Services and receive denial to exhaust his administrative options. *Id.* § (c)(9); *Heckler*, 467 U.S. at 107.

58. This position is now known as the Secretary of Health and Human Services. Times Topics, *Health and Human Services Department*, N.Y. TIMES, http://topics.nytimes.com/top/reference/times topics/organizations/h/health_and_human_services_department/index.html (last visited Sept. 20, 2012).

59. *See* Good Cause for Missing the Deadline to Request Review, 20 C.F.R. §§ 404.911, 416.1411 (2012).

60. *Bowen*, 476 U.S. at 480.

61. *Bowen* was a product of the ad hoc approach set up by the Court after *Honda*. *See id.* at 479–80.

62. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990). "The Court . . . holds that . . . limitations periods for suits against the Government will now *presumptively* be subject to equitable tolling." *Id.* at 97 (White, J., concurring in part and concurring in the judgment). "[This] holding . . . reverses at least one of this Court's prior decisions and is in tension with several others." *Id.* at 97.

private right-to-action deadline in the Civil Rights Act of 1964.[63] At the time, the Civil Rights Act required federal employees to file a petition for judicial review of their administrative complaint within thirty days of notice of final action taken by the Equal Employment Opportunity Commission (EEOC).[64] Petitioner claimed that even though he filed his petition forty-four days after receiving notice, his claim should nonetheless be heard.[65] He argued the administrative deadline could be equitably tolled because his attorney was out of the country when the Court deemed him to have received notice.[66] The Supreme Court granted certiorari to address inconsistencies in the applicability of equitable tolling to waivers of sovereign immunity.[67]

The *Irwin* Court held that equitably tolling a statute of limitations on suits against the government does not extend the waiver of sovereign immunity beyond the intention of Congress.[68] The Court thereby extended "the same rebuttable presumption of equitable tolling applicable to suits against private defendants" to suits against the government.[69] Surprisingly, the Court made this decision without expressly overturning any precedent, such as *Soriano*.[70] Furthermore,

63. *Irwin*, 498 U.S. at 91–92; Civil Rights Act of 1964, 42 U.S.C. §§ 1975 to 1975f, 1981 to 2000h-6 (2006). The complaint in *Irwin* alleged race and physical disability discrimination on the part of the Department of Veterans Affairs when it terminated Shirley Irwin. *Irwin*, 498 U.S. at 90–91.

64. 42 U.S.C. § 2000e–16(c) (1988) (amended 1991); Current law allows for ninety days within which to file a petition. 42 U.S.C. § 2000e–16(c) (2006).

65. *Irwin*, 498 U.S. at 91.

66. The Fifth Circuit found that notice served to the administrative petitioner's attorney and acknowledged by someone in that office, not necessarily the attorney personally, sufficed as proper notice to the petitioner. Irwin v. Veterans Admin., 874 F.2d 1092 (5th Cir. 1989), *aff'd sub nom.* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990). The Supreme Court accepted as valid the Fifth Circuit's holding in this respect. *Irwin*, 498 U.S. at 93–94 ("To read the term 'receipt' to mean only 'actual receipt by the claimant' would render the practice of notification through counsel a meaningless exercise. If Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly.") (citation omitted).

67. *Irwin*, 498 U.S. at 91 ("We granted certiorari to . . . resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred.").

68. *Id.* at 95 ("Once Congress has [waived its sovereign immunity], 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, broadening of the congressional waiver.").

69. *Id.* at 95–96. The Court felt that treating the government like a private defendant more realistically portrayed Congress's intent regarding tolling statutes of limitations. *Id.* at 96. The Court also believed that applying this presumption to private and government defendants alike created a more practically workable standard. *Id.*

70. Even though the Court rejected the ad hoc approach to interpreting congressional intent regarding tolling, the Court failed to expressly overrule *Soriano*. *Id.* at 96–97. Justice White focused on

unlike in *Honda* and *Bowen*, where the Court limited its holding to the particular statutes at issue, the Court in *Irwin* held that all waivers of sovereign immunity implicitly allow equitable tolling.[71]

C. John R. Sand & Gravel v. United States

In *John R. Sand & Gravel v. United States* (*Sand & Gravel*), the Court once again faced interpreting the statute of limitations set forth in the Court of Claims legislation.[72] Although the Court established a trend of applying equitable tolling to claims against the government in *Bowen* and *Irwin*, the *Sand & Gravel* Court did not follow that trend, instead deferring to the *Soriano* rule that the Court of Claims' time limitation is jurisdictional and cannot be extended by equitable considerations.[73] In coming to this conclusion, the Court distinguished between statutes of limitations that were traditionally jurisdictional bars and those established for protecting case-specific parties from stale claims.[74] The Court placed a burden on the petitioner to show that the precedent in *Soriano* was no longer good law.[75]

---

this contradiction in his concurrence. *Id.* at 97–100 (White, J., concurring in part and concurring in the judgment). While the Court does not extend a full discussion to *Soriano*, it implied that because the Court based its decision on congressional intent—albeit finding an intent to apply equitable tolling to all waivers of sovereign immunity, an interpretation new to the Court—it followed the holding in *Soriano*, and thus, no need existed to overturn it. *Id.* at 94–96 (majority opinion). By not overruling *Soriano* and its predecessors, however, the Court left open the question of whether the presumption of equitable tolling applied to those statues that the Court previously defined as jurisdictional. *See id.* at 94.

71. *Compare* Bowen v. City of New York, 476 U.S. 467, 480 (1986) (concluding that application of equitable tolling to the limitation requirement found in the Social Security Act is consistent with congressional intent), *with Irwin*, 498 U.S. at 96–97 (holding that the doctrine of equitable tolling as applicable to *suits against the Government* is consistent with congressional intent).

72. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008). The statute of limitations for the Court of Claims was also the statute at issue in *Kendall*, *Finn*, and *Soriano*. Soriano v. United States, 352 U.S. 270 (1957); Finn v. United States, 123 U.S. 227 (1887); Kendall v. United States, 107 U.S. 123 (1883).

73. The Court recognized *Irwin* in stating, "it is true . . . we adopted 'a more general rule' to replace our prior ad hoc approach." *Sand & Gravel*, 552 U.S. at 137 (quoting *Irwin*, 498 U.S. at 95). Nevertheless, the Court stuck to its holdings in *Soriano* and its predecessors regarding the Court of Claims statute specifically. *Id.* at 137–38.

74. The Court sets up this dichotomy to distinguish the present case from *Irwin*. *Id.* at 136–39. In *Irwin*, however, the Court stated that the rebuttable presumption of equitable tolling should apply to all suits against the government and never mentioned prior interpretations or characterizations of the statute. *Irwin*, 498 U.S. at 95–96.

75. The burden placed on the petitioner was to show that after *Irwin* the Court of Claims limitation

Petitioner appropriately argued that *Irwin* overruled *Soriano*.[76] The Court disagreed.[77] Rather than deciding that *Irwin* overturned *Soriano*, the Court found that the *Irwin* presumption would be overcome for statutes where the Court previously interpreted the statute at issue as a jurisdictional bar.[78] Thus, the definition of the Court of Claims' statute as jurisdictional, established by *Kendall* and its progeny, rebutted the *Irwin* presumption of equitable tolling.[79]

D. Summary Of Current Doctrine

When deciding whether to equitably toll a statute of limitations in a suit against the government, lower courts apply the *Irwin* presumption allowing equitable tolling, but may rebut that presumption if precedent defines the statute of limitations at issue as jurisdictional.[80] Problems arise in the analysis of specific waivers of sovereign immunity when Supreme Court precedent is imprecise[81]

---

was no longer a jurisdictional bar. *Sand & Gravel*, 552 U.S. at 136.

76. Petitioner argued that *Irwin* required the Court to consider the equitable benefits of treating the government like a private defendant rather than adhering to traditional notions of waivers of sovereign immunity. *Id.* at 138.

77. *Id.* at 137.

78. *Id.* at 137–38. The Court reasoned that if statutory language could rebut the presumption of equitable tolling, so too could a "definitive earlier interpretation of the statute, finding a similar congressional intent." *Id.* at 138.

79. *Id.* at 139. The Court emphasized that it was only ruling on the Court of Claims statute of limitations and heavily relied on stare decisis principles to maintain the definition of that statute as jurisdictional. *Id.*

80. Before *Irwin*, when a court considered tolling a waiver of sovereign immunity the conclusion turned on the ability of the court to extrapolate a congressional intention to allow tolling of the specific statute. *See* Honda v. Clark, 386 U.S. 484, 500–01 (1967). The analysis was consequently ad hoc. *See id.* at 501. The Court in *Irwin* sought to abolish the ad hoc approach by applying the rebuttable presumption of equitable tolling to all statutes of limitations. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). In *Sand & Gravel* the Court re-introduced the ad hoc approach by finding that statues that the Court previously found to not show congressional intent to allow tolling are to be treated as such regardless of the holding in *Irwin*. *Sand & Gravel*, 552 U.S. 130. Thus, when applying the *Irwin* presumption, courts must again examine each statute to determine if it was traditionally defined as barring equitable considerations. *See id.* at 133–34.

81. In *United States v. Kubrick*, the Court addressed the issue of when a claim accrues under the FTCA. *Kubrick*, 444 U.S. 111, 117–18 (1979). The Court stated that it should make sure to neither "extend the waiver beyond that which Congress intended," nor "narrow the waiver that Congress intended." *Id.* at 118. Courts interpreting the FTCA use this language from *Kubrick* to support both claims that the FTCA limitation is a jurisdictional bar and claims that the statute is susceptible to equitable tolling. Santos *ex rel.* Beato v. United States, 559 F.3d 189, 197 (3d Cir. 2009); Marley v. United States, 567 F.3d 1030, 1034 (9th Cir. 2008).

and circuits apply their own precedent defining the particular statute.[82] Consequently, the same federal statute of limitations can lead to opposite results depending on the circuit in which the claim is brought.

II. THE FEDERAL TORT CLAIMS ACT AS A MODEL FOR ANALYSIS

A. Supreme Court Interpretation Of The FTCA Statute Of Limitations

The statute of limitations for the FTCA reads in its entirety:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.[83]

The Supreme Court has yet to rule on the ability to equitably toll this statute. In *United States v. Kubrick*, the Court faced the issue of when an FTCA claim accrues.[84] In discussing that issue the Court shed light on its understanding of the FTCA statute of limitations, § 2401(b).[85] The *Kubrick* Court stated that the "obvious purpose" of

---

82. The Ninth Circuit, using the reasoning from *Sand & Gravel*, applied its *own* precedent to determine that the FTCA statute of limitations is jurisdictional. *Marley*, 567 F.3d at 1035–36. This may or may not be an appropriate reading of *Sand & Gravel*. *See* discussion *infra* Part III. The Eighth Circuit takes an interesting approach; it recently found that the FTCA statute is jurisdictional, yet may be equitably tolled. T.L. *ex rel.* Ingram v. United States, 443 F.3d 956, 961 (8th Cir. 2006). This also may or may not be appropriate adherence to Supreme Court precedent. *See* discussion *infra* Part III.

83. 28 U.S.C. § 2401(b) (2006).

84. *Kubrick*, 444 U.S. at 116–17. The Court ultimately announced the "discovery rule" for claim accrual under the FTCA statute, which provides that a claim does not accrue until a plaintiff discovers he is injured as opposed to the traditional approach that the statute begins to run on the date of the injury. *Id.* at 122–25. The plaintiff argued that his claim should not accrue until he knew his doctor performed the procedure negligently. *Id.* at 119–20. The Court found this unpersuasive because the plaintiff was armed with the fact that he suffered an injury and should, therefore, have inquired into the negligence of his doctor. *Id.* at 122–25. The Court found that a two-year period to make such inquires sufficiently protected the plaintiff and to alter the accrual date any further would "undermine the purpose of the limitations statute." *Id.* at 119–25.

85. The Court stated that "§ 2401(b) . . . is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose,

§ 2401(b) was to promote prompt presentation of claims.[86] Furthermore, because the FTCA waives sovereign immunity, the Court cautioned that it must not extend or narrow the extent of the limitation.[87] Circuit courts cite to *Kubrick* to support both arguments for and against tolling § 2401(b).[88] Due to the circuits' split on *Kubrick*'s application to the issue of equitably tolling the FTCA limitation, and the Supreme Court's failure to make an express ruling on the issue, circuits have taken various approaches to tolling § 2401(b).

B. Circuit Court Analysis Of § 2401(B)

*1. Pre-*Irwin *Interpretations*

Prior to Irwin, every circuit faced with the issue of equitably tolling claims under the FTCA considered the statute of limitations in § 2401(b) a jurisdictional bar.[89] For example, in *Gonzalez-Bernal v. United States*, the First Circuit strictly applied § 2401(b).[90] The plaintiffs, a widow and her three children, filed an administrative claim for wrongful death with the Customs Service after their husband and father died, apparently while in the custody of two Customs agents.[91] Plaintiffs filed an administrative claim after a federal grand jury indicted two customs agents on charges of murder

---

which is to encourage the prompt presentation of claims." *Id.* at 117. This statement suggests that the FTCA statute of limitations is not a jurisdictional bar, but rather, like those in *Honda* and *Bowen*, was enacted merely to protect case-specific defendants from stale claims and thus is subject to equitable tolling. *See* discussion *supra* Part I.A; *see also Sand & Gravel*, 552 U.S. at 134–37 (distinguishing between statutes of limitations that are primarily for the protection of the defendant against "unduly delayed claims" and those that act as jurisdictional bars in order to achieve broader goals such as limiting a waiver of sovereign immunity).

86. *Kubrick*, 444 U.S. at 117.

87. *Id.* at 118.

88. *Compare* Marley v. United States, 567 F.3d 1030, 1034 (9th Cir. 2008) (citing directly to *Kubrick* for the proposition that courts should not extend § 2401(b) beyond congressional intent and holding that § 2401(b) is not susceptible to equitable tolling), *with* Santos *ex rel.* Beato v. United States 559 F.3d 189, 197 (3d Cir. 2009) (holding that a per se denial of equitable tolling of § 2401(b) would contravene *Kubrick*'s mandate not to narrow the waiver established by Congress).

89. Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, MIL. L. REV., Winter 1992, at 1, 8 & n.47 (collecting cases).

90. Gonzalez-Bernal v. United States, 907 F.2d 246, 251 (1st Cir. 1990).

91. *Id.* at 247–48.

of the deceased.[92] The Customs Service denied the claim on the grounds that it was not filed within two years of the date of accrual.[93] Regardless of the fact that the two Customs agents were convicted in federal court for the murder of the deceased—and thus were clearly liable as tortfeasors—the First Circuit found no basis in the language of § 2401(b) to extend or waive the limitations period.[94] The court recognized the harshness of its holding—enforcing the limitations period even though the injured parties waited for the conclusion of a federal investigation of the matter—but nevertheless held that § 2401(b) compelled it to strictly enforce the two-year limitation on filing administrative claims.[95]

Furthermore, when specifically analyzing the legislative history of the FTCA limitation, courts routinely found no evidence of an intent to allow it to be equitably tolled.[96] In the 1956 case of *United States v. Glenn,*[97] the Ninth Circuit undertook a close examination of § 2401(b) to determine whether its language allowed for equitable tolling.[98] The trial court had held that the disabilities exceptions in § 2401(a) applied to § 2401(b) and therefore the two-year limitation in § 2401(b) could be equitably tolled.[99] The Ninth Circuit held an

92. *Id.* at 248.

93. *Id.*

94. *Id.* The court simply stated that it was "well settled law" that a claim must be dismissed if not filed with the administrative agency within two years of accrual. *Id.*

95. *Id.* at 251 ("Although the district court's decision seems harsh, it comports fully with the law and we hereby affirm.").

96. *See, e.g.*, United States v. Glenn *ex rel.* Glenn, 231 F.2d 884, 886 (9th Cir. 1956), *cert. denied*, 352 U.S. 926 (1956).

97. *Id.* Michael Glenn was born December 5, 1949, in the Naval Air Station Hospital in Seattle, Washington. *Id.* at 885. At the time of his birth "[s]omeone was careless"; someone dropped Michael and he suffered head injuries that would persist for the rest of his life. *Id.* Four years later, Michael's mother sued the United States, under the FTCA, on Michael's behalf. *Id.* Due to lack of evidence on either side, the parties stipulated to a $7,500 settlement if the plaintiff could overcome the government's statute of limitations defense. *Id.*

98. *Id.* at 885–86. The court's analysis was in the vein of *Bowen* and *Honda*. *See id.* In other words, the court sought to determine whether the language of the FTCA evinced a congressional intent to allow tolling of the limitations period. *Id.*

99. 28 U.S.C. § 2401(a) is the statute of limitations for "every civil action commenced against the United States." 28 U.S.C. § 2401(a) (2006). The last sentence of 28 U.S.C. § 2401(a) allows those suffering from a disability to file a claim within three years after the disability ceases. *Id.* Section 2401(b) is an exception to § 2401(a) that creates a different limitations period for "tort claim[s] against the United States." *Id.* § 2401(b). The district court in *Glenn* found that the division of § 2401 into subsections was merely a convenience for the reader and that the two subsections should be read

opposite opinion and reversed.[100] The circuit court held that the arrangement of the statute, contrary to the district court holding, made it unclear whether the disability exception in subsection (a) applied to subsection (b); thus, a congressional intent inquiry was necessary and would control.[101] The court found that the absence of any discussion by Congress on the applicability of the disability exception to subsection (b), coupled with a general lack of evidence of congressional intent to apply tolling doctrines to the FTCA, showed that Congress did not intend subsection (a)'s exception to apply to subsection (b).[102] Thus, the court found—unlike the Supreme Court in *Honda* and *Bowen* did with the TWEA and Social Security Act, respectively—that the language of the FTCA did not allow for tolling of the limitations period.[103]

The significance of *Glenn* lies in its relation to *Honda* and *Bowen*. All three courts considered tolling limitations in statutes waiving sovereign immunity.[104] Furthermore, all three cases were decided under the traditional standard of strictly observing the language of the statute to discern whether to toll the limitations period.[105] *Glenn*—while not a Supreme Court decision—found compelling evidence of § 2401(b) as a jurisdictional bar, as opposed to a limitation for the protection of case-specific parties such as the limitations at issue in *Honda* and *Bowen*.[106] Of course, *Glenn*'s relevance would

together. Glenn *ex rel.* Glenn v. United States, 129 F. Supp. 914, 919 (S.D. Cal. 1955), *rev'd*, 231 F.2d 884 (9th Cir. 1956). Furthermore, the court said that "the tolling provision [found in § 2401(a)] is by its terms unlimited in its application." *Id.* Thus, the "equitable considerations" applicable to claims governed by § 2401(a) were also applicable to § 2401(b). *Id.* at 918–19.

100. *Glenn*, 231 F.2d at 886–87. The court felt that it had "no license" to take the exception of § 2401(a) and apply it to § 2401(b). *Id.* at 886. Accordingly, it reversed the decision of the lower court. *Id.* at 887.

101. *Id.* at 886.

102. *Id.* The court believed that it was unable to comingle the subsections without evidence of such an intention from Congress. *Id.* Because Congress was silent on the issue, the court felt that the subsections must remain mutually exclusive. *Id.*

103. *Id.* at 887.

104. Bowen v. City of New York, 476 U.S. 467, 480 (1986); Honda v. Clark, 386 U.S. 484, 500 (1967); *Glenn*, 231 F.2d at 885.

105. *Bowen*, 476 U.S. at 480; *Honda*, 386 U.S. at 501; *Glenn*, 231 F.2d at 886–87.

106. The Ninth Circuit applied the same analysis to the FTCA that the Supreme Court employed in the analysis of the TWEA and Social Security Act. *Compare Bowen*, 476 U.S. at 479–82, *and Honda*, 386 U.S. at 495–99, *with Glenn*, 231 F.2d at 885–87. The Ninth Circuit found that no congressional intent existed to hold that the FTCA limitation could be equitably tolled. *Glenn*, 231 F.2d at 886–87.

significantly decrease if a presumption in favor of tolling § 2401(b) existed that placed the burden on the defendant to show that Congress did not intend for courts to toll § 2401(b).[107]

2. The Problem: Applying the Irwin *Presumption and* Sand & Gravel *to § 2401(b)*

Schmidt v. United States is an excellent example of the fundamental effect *Irwin* had on a circuit court's approach to statutes of limitations waiving sovereign immunity.[108] The issue in *Schmidt* was whether the FTCA's six-month limitation on administratively denied claims expired prior to the Schmidts filing their claim in the District Court for the District of Nebraska.[109] The case turned on the plaintiff's ability to prove the date on which the Federal Aviation Administration sent its letter of denial to the Schmidts—the date the statute of limitations began to run.[110] Neither party could definitively prove when the FAA sent the letter.[111] The district court held that § 2401(b) was a jurisdictional bar to the court's subject-matter jurisdiction; therefore, the burden rested on the plaintiffs to show that they filed their claim within the requisite time period.[112] Because they could not do so, the court dismissed their claim for lack of subject-matter jurisdiction.[113]

On appeal, the Eighth Circuit affirmed the holding of the district court.[114] Subsequently the Supreme Court decided *Irwin*, and the

---

Thus, when given the chance to align the FTCA with the TWEA and Social Security Act, the Ninth Circuit failed to do so. *See id.* The Supreme Court's denial of certiorari supplements the weight of the Ninth Circuit's holding. Glenn *ex rel.* Glenn v. United States, 352 U.S. 926 (1956) (denying certiorari).

107. The *Irwin* presumption of the applicability of equitable tolling to statutes waiving sovereign immunity places the burden on the government to rebut the presumption. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137–38 (2008) ("[T]he word 'rebuttable' means that the presumption is not conclusive.").

108. Schmidt v. United States, 901 F.2d 680, 682 (8th Cir. 1990), *vacated*, 498 U.S. 1077 (1991), *remanded to* 933 F.2d 639 (8th Cir. 1991).

109. *See id.* Section 2401(b) requires the claimant to file a judicial claim within six months of the date on which the administrative agency mailed, by registered mail, the letter denying the administrative claim. 28 U.S.C. § 2401(b) (2006).

110. *See Schmidt*, 901 F.2d at 683.

111. *Id.* at 682.

112. *Id.* at 683.

113. *Id.* at 682.

114. *Id.* at 683.

Schmidts applied to the Supreme Court for certiorari.[115] Rather than grant certiorari, the Court vacated the decision of the Eighth Circuit and remanded the case back to the circuit court for consideration in light of the holding in *Irwin*.[116]

On remand, the Eighth Circuit outlined the implications the *Irwin* holding had on the FTCA statute of limitations.[117] The court reasoned that because every statute waiving sovereign immunity was now presumptively subject to equitable tolling, and courts could never toll a limitation that was a restriction on their subject-matter jurisdiction, no statute waiving sovereign immunity was a jurisdictional bar.[118] If the statute of limitations was not jurisdictional, it was merely an affirmative defense to be raised by the government-defendant.[119] The Eighth Circuit thus abolished its definition of the FTCA statute of limitations as jurisdictional solely based on the *Irwin* presumption.[120] For the parties in *Schmidt*, the burden of proving the date on which the FAA sent the denial letter shifted to the FAA.[121] The Third

115. Schmidt v. United States 498 U.S. 1077, 1077 (1991) (vacating the decision of the Eighth Circuit and remanding the case for consideration in light of the holding in *Irwin*).

116. *Id.*

117. Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991). The major implication of *Irwin*, the court believed, was that statutes waiving sovereign immunity could in no case remain jurisdictional because of their susceptibility to equitable tolling. *Id.*

118. *Id.* Note that the Supreme Court does not follow this reasoning. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137–38 (2008). The Supreme Court has held that a statute of limitations on a waiver of sovereign immunity may still be jurisdictional if the *Irwin* presumption is overcome by a prior definitive determination that the statute at issue is jurisdictional. *Id.*

119. *Schmidt*, 933 F.2d at 640. The statute of limitations for private defendants is an affirmative defense that the defendant must raise. FED. R. CIV. P. 8(c). In cases against the government, if the statute of limitations does not serve as a jurisdictional bar, it operates the same as it does for private defendants. *Schmidt*, 933 F.2d at 640.

120. *See Schmidt*, 933 F.2d at 640. The problem manifests itself when this holding is taken in conjunction with *Sand & Gravel*. *Sand & Gravel* holds that the *Irwin* presumption may be overcome by precedent defining the statute as jurisdictional. *Sand & Gravel*, 552 U.S. at 137–38. The Eighth Circuit now has precedent that defines the FTCA statute of limitations as an affirmative defense, whereas other circuits have precedent defining the same federal statute as jurisdictional. *Compare Schmidt*, 933 F.2d at 640, *with* McGraw v. United States, 281 F.3d 997, 1003 (9th Cir. 2002) (holding that § 2401(b) is a threshold jurisdictional issue), *amended on denial of reh'g*, 298 F.3d 754 (9th Cir. 2002), *and* Ramming v. United States, 281 F.3d 158, 165 (5th Cir. 2001). Consequently, the Eighth Circuit will allow equitable arguments for tolling the FTCA limitations while other circuits will not. The genesis of the problem, therefore, is that in the absence of Supreme Court precedent defining the FTCA limitations, courts, in the spirit of *Sand & Gravel*, apply their own conflicting precedents to the same federal statute.

121. *Schmidt*, 933 F.2d at 640.

Circuit followed the same path as the Eighth Circuit in concluding that it may toll the FTCA statute of limitations.[122]

Conversely, some circuits hold that the FTCA limitations period is jurisdictional regardless of the holding in *Irwin*.[123] In *Ramming v. United States*, the Fifth Circuit decided whether a bankruptcy court's order "tolling all limitations periods for all other claims under applicable law" could toll plaintiff's claim against the government under the FTCA.[124] Rather than discussing *Irwin*'s presumption in favor of tolling such claims, the court simply applied its own precedent defining § 2401(b) as jurisdictional.[125] The court held that because § 2401(b) was a jurisdictional bar, not even the bankruptcy court order could extend its limitations.[126] *Ramming* could simply be bad law, insofar as it failed to apply *Irwin*; however, the Fifth Circuit recently cited it approvingly for the proposition that the FTCA limitations period is jurisdictional.[127]

Having binding precedent that defines the FTCA statute of limitations as jurisdictional, while other circuits define the same statute as an affirmative defense, underscores the problem *Sand & Gravel* created. Lacking a definitive Supreme Court determination of the nature of the FTCA limitations periods, courts purporting to follow the holding in *Sand & Gravel* apply their own precedent and define the statute to either confirm or rebut the *Irwin* presumption.[128] Thus, depending on the precedent of the particular circuit, the

122. Santos *ex rel.* Beato v. United States, 559 F.3d 189, 194–97 (3d Cir. 2009). In *Santos*, the Third Circuit recognized that it traditionally considered the FTCA limitations as jurisdictional. *Id.* at 194. After *Irwin*, the court reasoned, no federal statutes of limitations were jurisdictional because they were subject to "the same rebuttable presumption of equitable tolling applicable to suits against private defendants." *Id.* (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990)). Thus, applying *Irwin*, the Third Circuit found that the FTCA limitations period was not jurisdictional. *Id.* at 194–95.

123. *McGraw*, 281 F.3d at 1001 (holding that § 2401(b) is a threshold jurisdictional issue); *Ramming*, 281 F.3d at 165.

124. *Ramming*, 281 F.3d at 165.

125. *Id.*

126. *Id.*

127. *In re* FEMA Trailer Formaldehyde Prod. Liab. Litig., 646 F.3d 185, 190 (5th Cir. 2011).

128. Santos *ex rel.* Beato v. United States, 559 F.3d 189, 194 (3d Cir. 2009). *But see* Marley v. United States, 567 F.3d 1030, 1035 (9th Cir. 2008).

limitations period for the FTCA is jurisdictional in one instance and not in another.[129]

III. CLARIFYING *SAND & GRAVEL* TO ENSURE COURTS APPLY WAIVERS OF SOVEREIGN IMMUNITY AND THEIR STATUTES OF LIMITATIONS UNIFORMLY

It is highly unlikely that the Supreme Court intended for circuits to apply statutes of limitations for federal waivers of sovereign immunity according to their own precedents. The Court would not intentionally have the same federal law applied inconsistently throughout the nation.[130] Furthermore, because the Court could easily ascertain that, at the time it ruled on *Sand & Gravel*, circuits split on the nature of certain statutes of limitations,[131] it must be the case that the Court did not intend the "prior definitive interpretation" language of *Sand & Gravel* to apply to mere circuit precedent. Support for this proposition comes directly from the language of the Court's opinion in *Sand & Gravel*.[132] When discussing the difference between the EEOC statute of limitations at issue in *Irwin* and the Court of Claims statute at issue in *Sand & Gravel*, the Court stated, "[The EEOC statute] is unlike the [the Court of Claims statute] in the key respect that *the Court* had not previously provided a definitive interpretation."[133] Of course, when Justice Breyer says "the Court," he means the Supreme Court of the United States.[134]

Nonetheless, some circuit courts take *Sand & Gravel* to mean that they may apply their own interpretations of statutes to rebut the *Irwin* presumption in favor of equitable tolling.[135] The most glaring

129. *Compare Marley*, 567 F.3d at 1035, *and FEMA Trailer Litig.*, 646 F.3d at 190, *with Santos*, 559 F.3d at 194.

130. Even the Court in *Sand & Gravel* recognized that at times it is more important to have the law settled than settled correctly. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

131. *Compare Marley*, 567 F.3d at 1035–36, *with Santos*, 559 F.3d at 196–97.

132. *Sand & Gravel*, 552 U.S. at 137.

133. *Id.* (emphasis added).

134. *Id.*

135. *See, e.g.*, *Santos*, 559 F.3d at 197 ("We think that *our* holding in *Hughes* that there can be equitable tolling in suits under the FTCA remains good law . . . .") (emphasis added); *Marley*, 567 F.3d

example of a circuit court applying its own precedent under the guise of *Sand & Gravel* is the Ninth Circuit decision in *Marley v. United States*.[136] In *Marley*, the court properly stated that the *Sand & Gravel* Court rejected the contention that the *Irwin* presumption would last notwithstanding a prior definitive interpretation by the Court.[137] Without first explaining how this holding applied to circuit court precedent as well, however, the *Marley* court then stated, "[w]e, too, can find the answer *in our own precedent*. *We have long held* that § 2401(b) is jurisdictional."[138] Of course, other circuits have long held that § 2401(b) is not jurisdictional.[139] So, how might the Supreme Court act so as to achieve standardized application of federal waivers of sovereign immunity? Three plausible contingencies exist.

A. Options Available To The Supreme Court

1. Reversal of Sand & Gravel

If a case arises where a plaintiff seeks to toll the limitations period for a statute previously defined by the Supreme Court as jurisdictional, the Court could take the opportunity to reverse *Sand & Gravel Co.* by explicitly holding that a prior definitive interpretation of a statute may not rebut the presumption of equitable tolling.[140] In

at 1035.

136. *Marley*, 567 F.3d at 1035.

137. *Id.* The Ninth Circuit summarized *Sand & Gravel* by stating that the Supreme Court rejected the *Sand & Gravel* plaintiff's argument, and "that [*Irwin*] . . . applied when the Court's past cases already had established a rule dealing with the particular statute at hand." *Id.* (citing *Sand & Gravel*, 552 U.S. at 135–37).

138. *Id.* (emphasis added).

139. Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991).

140. An argument for reversing *Sand & Gravel* is more likely to be successful if presented in terms of the Court misconstruing Acts of Congress. Canada Packers, Ltd. v. Atchison, Topeka and Santa Fe Ry. Co., 385 U.S. 182, 185–86 & n.2 (1966) ("We have not been reluctant to reverse our own erroneous interpretation of an Act of Congress."). The argument would be that, insofar as *Sand & Gravel* treats some statues of limitations as jurisdictional and others as affirmative defenses, the case misapplies the implicit intent of Congress to have the limitations act as affirmative defenses in all waivers of sovereign immunity.

so doing, the Court would reinstate the *Irwin* presumption in favor of equitable tolling for all waivers sovereign immunity.[141]

Even though overruling *Sand & Gravel* is possible, it is not a perfect solution. Even if *Sand & Gravel* were overruled and the *Irwin* presumption applied to a given statute, the determination of whether equitable tolling applied to a particular waiver of sovereign immunity would continue to be ad hoc.[142] A presumption in favor of equitable tolling necessarily means that the government has the opportunity to rebut that presumption.[143] The government could simply argue that the plain language and legislative history of the particular statute evince congressional intent not to toll the limitations period.[144] Such a theory would require the Court to analyze the statute to determine if congressional intent rebuts the presumption of equitable tolling.[145] Thus, courts would be faced with determining, in each instance, if the particular statute's language and history rebut the *Irwin* presumption. Freeing the courts from such ad hoc analysis was the main driving force in the *Irwin* holding.[146]

2. Clarification of Sand & Gravel

Another solution might be for the Supreme Court to clarify *Sand & Gravel* so that circuits understand it to mean that Supreme Court

141. If the Court chose to simply reverse *Sand & Gravel*, it would merely hold that the Government could not rebut the *Irwin* presumption with a definitive earlier interpretation of the statute by the Supreme Court. Such a holding, however, leaves available other opportunities for rebutting the presumption.

142. *See infra* p. 62 and note 153.

143. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137 (2008) ("[T]he word 'rebuttable' means that the presumption is not conclusive.").

144. For example, in *United States v. Brockamp* the Court faced the issue of determining whether it may toll the statutory time period for filing tax refund claims in accordance with § 6511 of the Internal Revenue Code of 1986. *Brockamp*, 519 U.S. 347, 348 (1997). The Government apparently argued that although the *Irwin* presumption applied to all waivers of sovereign immunity, the language of § 6511 rebutted that presumption. *See id.* at 350–51.

145. The *Brockamp* Court ultimately *adopted* the argument that § 6511 was not subject to equitable tolling. *Id.* at 354. Such a finding, however, required the Court to perform an individual statutory analysis of § 6511. *Id.* at 350–54. Thus, even though the *Irwin* presumption applied to the statute, the Court still performed an ad hoc analysis of the statute. *See id.*

146. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Thus a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress.").

precedent alone is the relevant precedent in determining whether the *Irwin* presumption is rebutted.[147] Accordingly, circuit courts could not look to their own definitions of a statute in the absence of a Supreme Court definition, and the *Irwin* presumption would apply uniformly for all those statutes that the Court has yet to interpret. Unfortunately, because the *Irwin* presumption itself is susceptible to case-by-case determinations, this remedy would also result in a return to ad hoc analysis, just like a reversal of *Sand & Gravel* would. In general, the ad hoc problem arises from *Irwin*. There, the Court failed to adequately eliminate the threat of ad hoc analysis when determining whether to equitably toll a particular waiver of sovereign immunity.[148] As discussed above, under *Irwin*, government-defendants will argue that language of a particular statute rebuts the *Irwin* presumption, requiring courts to analyze each statute on a case-by-case basis—a result the *Irwin* Court itself sought to avoid.[149]

3. A Workable Solution: Strengthening Sand & Gravel

To truly extinguish ad hoc analysis of a particular statute's susceptibility to equitable tolling while facilitating consistent application of the law, the Supreme Court should take *Sand & Gravel* one step further by holding that all waivers of sovereign immunity are presumptively subject to equitable tolling and the *only* manner in which the Government may rebut that presumption is by showing either: (1) express language in the statute defining the limitation as jurisdictional; or (2) a prior determination by the Supreme Court to that effect. First and foremost, such a holding ensures continuity among circuits in their approach to equitably tolling federal waivers of sovereign immunity.[150] Under this approach, if the Supreme Court

147. To achieve this end the Court could simply clarify that when it said, "a definitive earlier interpretation of the statute . . . should offer a similarly sufficient rebuttal," *Sand & Gravel*, 552 U.S. at 138, it meant an interpretation of the statute by the Supreme Court alone.

148. The failure of the *Irwin* holding is that it fails to define what suffices to rebut the presumption of equitable tolling. For waivers of sovereign immunity, therefore, the Court still must determine, on a statute-by-statute basis, if the language of the statute rebuts the presumption.

149. *See supra* Part III.A.1.

150. The key to this solution is limiting the grounds for defining a federal waiver of sovereign immunity's statute of limitations as jurisdiction or as an affirmative defense to lawmakers and courts

fails to supply a definitive interpretation of a given statute and Congress likewise is silent in the text of the statute, all circuits would have to find the government powerless to rebut the presumption of equitable tolling. Any particular circuit's own interpretation or analysis of the statute would be irrelevant since equitable tolling absolutely applies to the statute except in situations where the Supreme Court or Congress has expressly deemed otherwise.[151]

Limiting the grounds for rebutting the *Irwin* presumption to Supreme Court precedent and the express language of the statute at issue promotes consistency. When Congress waives the United States' sovereign immunity, that waiver applies throughout the nation. Under the FTCA, for example, the federal government's immunity from tort liability applies, or should apply, the same in all parts of the country. Private parties should feel confident that no matter their location within the United States, the government is liable for the torts it commits against them. Why should that confidence not inhere to the rules governing the period in which a plaintiff may bring a claim under the FTCA? If a presumption of equitable tolling applied to the FTCA uniformly in all circuits and the Government could only rebut that presumption with law that applies to the entire nation—Supreme Court precedent and the federal statute itself—the statute of limitations would operate in exactly the same manner regardless of where a plaintiff brings his claim.[152]

---

that preside over the entire nation, i.e., Congress and the Supreme Court.

151. In fact, there would no longer be circuit court interpretations of federal waivers of sovereign immunity. No reason would exist for the circuit court to interpret the statute. The court would simply look to the express language of the statute or Supreme Court case law. Such a result is necessary to achieve uniform application of federal law.

152. Application of this rule would, for instance, save plaintiffs like Ms. Alexander and her son Christopher Cooper (from the FEMA Trailer Litigation) considerable litigation expenses. With the proposed rule in place, Alexander would have known whether the FTCA statute of limitations could be tolled before ever bringing her claim. Instead, because a circuit split existed as to the ability to toll the FTCA limitations period, Alexander spent time and money arguing the issue before the court. Moreover, with the proposed rule in place, Alexander would likely have reached the merits of her case in the Fifth Circuit. Nothing in the FTCA expressly states that the limitations period is a jurisdictional bar. Further, the Supreme Court has never interpreted the FTCA limitations to be jurisdictional in nature. Therefore, the limitations period would be subject to equitable tolling in any given circuit. Finally, Alexander had a legitimate argument for tolling the FTCA limitations period based on the misleading statement given to her by a "government representative" concerning the safety of the FEMA trailers. *See supra* pp. 2–3 and note 6.

B. A Possible Problem: Statutes Where The Supreme Court Has Yet To Provide A Definitive Interpretation

Under the aforementioned proposal some statutes that manifest a clear, although not express, intent to deny tolling of the limitations period may nonetheless have the limitations period tolled because the Supreme Court never ruled on the nature of the limitation on the particular statute.[153] However, if Congress's intention to deny tolling to a particular waiver of sovereign immunity is so palpable that applying tolling doctrine to the statute would clearly be erroneous, Congress should make that intention explicit. If it chose to do so, then under the proposed solution the *Irwin* presumption would give way to the language of the statute. If Congress fails to act on a particular statute, lack of Supreme Court precedent defining that statute should not give circuits the license to apply their own precedents. Rather, the presumption of equitable tolling should remain intact because no nationally applicable law exists to rebut it.

CONCLUSION

Generally, statutes of limitations for litigants are subject to a presumption of equitable tolling. This is not always the case, however, such as when the defendant is the federal government. More than a century ago, the Supreme Court ruled that statutes of limitations governing waivers of sovereign immunity are not susceptible to equitable considerations.[154] The Court felt that because Congress alone held the power to prescribe the conditions of the government's waiver of sovereign immunity, extending the period in which a plaintiff may bring a claim against the government exceeded the Court's authority.[155] More recently the Court took a different

153. Section 6511 of the Internal Revenue Code of 1986 from *Brockamp v. United States* provides a useful example. *Brockamp*, 519 U.S. 347 (1997). If the rule proposed by this Note had been in place before *Brockamp* reached the Supreme Court, lower courts would have tolled the limitations period of § 6511 because no Supreme Court precedent had yet defined the statute as jurisdictional, and the statute itself does not do so either. *See id.* at 348. The proposed rule mandates this result even though the statute (according to the Court in *Brockamp*) clearly shows that it should not be equitably tolled. *Id.*

154. Kendall v. United States, 107 U.S. 123, 125 (1883).

155. *Id.* at 125–26.

approach, holding that applying a presumption of equitable tolling to waivers of sovereign immunity did not extend the waiver beyond the intent of Congress.[156] The Court reserved the ability for the Government to rebut the presumption, however.[157] In *Sand & Gravel*, the Court held that a "definitive earlier interpretation" of the statute at issue as a jurisdictional bar could rebut the presumption announced in *Irwin*.[158]

Some circuit courts interpret the holding in *Sand & Gravel* as allowing them to apply their own prior definitions of certain waivers of sovereign immunity.[159] As may be expected, circuits have conflicting definitions of some of those statutes of limitations. Thus, certain circuits allow themselves to toll a particular federal statute of limitations while others deny themselves that power over the same statute.

The Supreme Court should clarify and strengthen the holding in *Sand & Gravel* by holding that, in the absence of express language in the statute defining the limitations period as jurisdictional, only a "prior definitive interpretation" by the Supreme Court may rebut the presumption in favor of equitably tolling limitations periods in waivers of sovereign immunity. Under such a regime, all statutes of limitations for waivers of sovereign immunity would apply uniformly throughout the circuits.

156. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990).
157. *Id.* at 95–96.
158. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137–38 (2008).
159. Santos *ex rel.* Beato v. United States, 559 F.3d 189, 197 (3d Cir. 2009); Marley v. United States, 567 F.3d 1030, 1035 (9th Cir. 2009).