To: Judges and Advisory Council, United States Court of Federal Claims

From: Prof. Gregory Sisk

Re: Proposed Reform of Statute of Limitations for Claims Against the Federal Government, Including Tucker Act Claims

Date: April 25, 2016

Memorandum

I. Introduction

In recent years, the Supreme Court has been steadily moving away from a parsimonious judicial attitude toward statutory waivers of federal sovereign immunity. The Government should not be granted two layers of presumptive protection, *both* on whether a waiver of sovereign immunity exists *and* on what terms, conditions, limitations, and procedures apply to that waiver. When there is a clear and unequivocal statutory waiver of sovereign immunity, the Government has shed the cloak of immunity and should generally be subject to the same procedural rules, including interpretation of time limitations, that apply to private civil litigants.

Nonetheless, for reasons of *stare decisis*, the Supreme Court has read the particular statute of limitations for actions in the United States Court of Federal Claims, 28 U.S.C. § 2501 to be jurisdictional in nature. Being a result that the Court itself acknowledged is "anomalous," this jurisdictional reading leaves Section 2501 nearly alone among the timing procedures established by Congress for claims against the Federal Government and imposes greater burdens on the court and parties, as well as the injustice of precluding waiver, forfeiture, and tolling.

At this point, the only solution is a legislative one. Fortunately, that correction can be accomplished by simple language stating: "The periods of limitation stated in this section are affirmative defenses subject to tolling."

II. Statutes of Limitations for Claims Against the Federal Government: Background and Interpretation

A. The Statute of Limitations as an Affirmative Defense and the Drastic Consequences of an Alternative Jurisdictional Reading of a Limitation Period

Since the common law era, a statute setting a time period within which a particular legal claim may be brought in court has been regarded as a procedural defense, not a jurisdictional prerequisite or a substantive constraint. *Sun Oil Co. v.*

Wortman, 486 U.S. 717, 725-26 (1988) (explaining that, under American common law, statutes of limitation traditionally have been understood to be "procedural restrictions" rather than "substantive provisions."). In American law, a statute of limitations defense has been a classic example of an affirmative defense left to the defendant to raise and prove and subject to waiver, forfeiture, and tolling. *See* Fed. R. Civ. P. 8(c) (listing "statute of limitations" as among the "affirmative defenses" that a defendant "shall set forth affirmatively"); *Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*."); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (stating that, rather than being "a jurisdictional prerequisite . . . a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Accordingly, a statute of limitations may be voluntarily waived by a defendant, forfeited by a defendant who fails to plead it in an answer to a complaint, or tolled for the plaintiff for compelling equitable reasons.

Rather than imposing a jurisdictional obstacle or articulating a condition on the substantive right, the primary purpose of a statute of limitations is fairness to the defendant in avoiding obsolete claims and stale evidence and efficiency of the litigation process. *See Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944); Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950). Given that possible waiver of a limitations period is well-recognized in the common law and the availability of equitable tolling is "hornbook law," "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) (stating also "that [federal] statutes of limitations must be read against the embedded practice of equitable tolling").

A jurisdictional imperative for a statute of limitations would have "drastic" consequences because "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections may be resurrected at any point in the litigation," and courts are obligated to consider jurisdictional requirements *sua sponte*. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). The parties then could not agree that the claim was timely filed, but instead must be prepared to research, brief, and argue sometimes complicated questions of accrual and application, which in turn may raise disputed questions of fact. The plaintiff and defendant could not agree to postpone the statute of limitations while other matters are resolved or while settlement negotiations proceed. The plaintiff would suffer the injustice of not being able to rely upon decisions by defense litigators to waive or concede defenses and would be denied equitable accommodations common to civil litigation. If the defendant had engaged in fraud to entice the plaintiff not to timely file—one of the traditional equitable bases for tolling—a jurisdictional limit cannot be set aside. And even when the parties have tried a case all the way through to a judgment on the merits, a jurisdictional objection could still be raised on appeal (or even on a remand after appeal).

The courts likewise are obliged to consider jurisdictional issues *sua sponte*. A jurisdictional time limit that the parties did not dispute had been satisfied could still

result in dismissal on appeal after the parties and the trial court had invested substantial time and resources. In a jurisdictional limitations regime, the courts thus must devote judicial attention to evaluate whether the claim is time barred, even if the parties are content that the claim was filed within the accrual period or have chosen not to devote litigation resources to that question.

For these reasons, over the past several decades, as discussed below, the Supreme Court has regularly clarified that statutes of limitations (most definitely including those that are attached to waivers of federal sovereign immunity) are not jurisdictional and are subject to ordinary rules of waiver and tolling. As the Court held in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015), because of these "harsh consequences" of embedding a procedure rule into jurisdictional stone, the Court sets a "high bar" before reading procedural rules to be jurisdictional.

B. Interpretation of Statutory Waivers of Sovereign Immunity in the Supreme Court

Since the dawn of the twenty-first century, the Supreme Court has moved ever more deliberately toward an interpretive approach to statutes allowing suit against the Federal Government that reserves jurisdictional analysis, strict construction, and presumptions in favor of the Government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (stating that the demand for an "unequivocally expressed" waiver of sovereign immunity extends to "*scope* of that waiver"); *see generally* Gregory C. Sisk, *Litigation With the Federal Government* § 2.5 (West Academic Press 2016); Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1300 (2014).

The Federal Government's consent to suit must be expressed through unequivocal statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-37 (1992). In other words, the courts indulge a "strong presumption against the waiver of sovereign immunity." *See Lehman v. Nakshian*, 453 U.S. 156, 162 n.9 (1981); *see also Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927) (saying that "[t]he sovereignty of the United States raises a presumption against its suability, unless it is clearly shown").

For the Federal Government to be amenable to any suit on a particular theory of liability and for a specific type of remedy, an unambiguous waiver by statute must be shown. In short, jurisdiction lies only when there is "a clear statement from the United States waiving sovereign immunity." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003); *see generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 145-50 (2010); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 773-776, 796-98, 806. Thus, as a jurisdictional precondition to adjudicating a claim against the Government, the preliminary question of whether sovereign immunity has been waived must be addressed by the court on its own initiative. Both

the theory of liability asserted in a claim against the United States (that is the cause of action) and the specific remedy requested (damages, injunction, interest, etc.) must be explicitly authorized under the statute.

By contrast, for other terms, definitions, exceptions, limitations, and procedures in a statutory waiver of federal sovereign immunity, ordinary rules of statutory interpretation and typical expectations for civil litigation generally govern. *See Gomez-Perez v. Potter*, 553 U.S, 474, 491 (2008) (holding that when a "statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," other substantive provisions and terms " 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity' "); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (establishing a "rebuttable presumption" that the same rule of equitable tolling of a statute of limitations "applicable to suits against private defendants should also apply to suits against the United States").

In this way, "[a]n early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 521-22 (2008); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 285 (Thomson/West 2012) (characterizing the supposed corollary that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" as having "made sense when suits against the government were disfavored, but not in modern times").

The Supreme Court's course toward a more conventional interpretive approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of litigation (as contrasted with the substantive scope of waiver legislation). In general, and remembering that the statute is a *waiver* of sovereign immunity, the litigation should proceed in a manner consistent with private litigation.

In *Henderson v. United States*, 517 U.S. 654 (1996), the Court held that a prior provision in the Suits in Admiralty Act—that required service of a suit against the Government to be made "forthwith"—was not jurisdictional. The Court explained that this provision fell into the category of statutory provisions that have a " 'procedural' cast" and "deal with case processing, not substantive rights or consent to suit." *Id.* at 667-68.

Similarly, the Court long has embraced practices for federal tort procedure that are consistent with expectations in private tort litigation, thereby upholding the general purpose of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2674-80, to place the United States on equal footing with private parties. In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-83 (1949), the Court rejected the Government's plea for strict construction and held that the United States may be sued under the FTCA by a subrogee just as a private defendant. In *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-56 (1951), the Court again turned away a strict

construction argument and held that the Federal Government may be impleaded as a third-party defendant under the FTCA by another tortfeasor seeking contribution. The Court later explained that it allows recovery under the FTCA in such instances, "despite arguably procedural objections." *Dalehite v. United States*, 346 U.S. 15, 31-32 (1953).

C. Equitable Estoppel of Limitation Periods in Federal Government Cases

As an important illustration of the reservation of jurisdictional or strict scrutiny to the core question of whether sovereign immunity has been waived and the application of ordinary rules of statutory construction to procedural rules, the Supreme Court has regularly turned aside the Government's insistence that statutory time limits should be treated as jurisdictional conditions on the waiver of sovereign immunity.

The line of cases began with *Bowen v. City of New York*, 476 U.S. 467, 478-79 (1986), in which the Court rejected the Government's argument that the statute of limitations for disability benefit claims under the Social Security Act is "jurisdictional." Instead, the Court characterized the provision as "a period of limitations" that may be equitably tolled. *Id.* at 479.

In the landmark decision of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 91-92, 94-95 (1990), the Court reversed the lower court's ruling that the statutory filing deadline for Title VII employment discrimination claims against the Federal Government "operates as an absolute jurisdictional limit." Even while recognizing that the limitations period for Title VII suits is a "condition to the waiver of sovereign immunity," the Court held that "the rule of equitable tolling [is] applicable to suits against the Government, in the same way that is applicable to private suits." *Id.* at 95.

Importantly, *Irwin* did not merely resolve a specific question for a particular statute of limitations, but rather adopted "a more general rule" to supersede the "ad hoc" approach that had produced "continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95-96. The Court ruled "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."

Subsequent to *Irwin*, the Court held that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412—but that did not contain the statutorily-required allegation that the Government's position was not "substantially justified"—could be amended to cure this defect after the 30-day filing period had expired. *Scarborough v. Principi*, 541 U.S. 401, 420-421 (2004). In *Scarborough*, the Court reiterated that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts

to little, if any, broadening of the congressional waiver.' " *Id.* at 421 (quoting *Irwin*, 498 U.S. at 95).

The statute of limitations for the Federal Tort Claims Act, although using the superficially emphatic language that a claim "shall be forever barred" unless filed within two years, 28 U.S.C. § 2401(b) is also subject to equitable tolling. In *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015),[1] the Supreme Court held that this language borrowed from other statutes of limitations (in particular, from that applicable to the Court of Federal Claims) is "mundane in nature" and imposes "time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds."

On occasion, with an exceptional statute of limitations in a statutory waiver of federal sovereign immunity, the Supreme Court has found the *Irwin* presumption in favor of equitable tolling to be rebutted. In *United States v. Brockamp*, 519 U.S. 347, 352 (1997), the Court found that the statutory limitations period on filing claims for tax refunds could not be equitably tolled due to the tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions." In *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998), the Court held that equitable tolling is not available in a suit against the United States under the Quiet Title Act, which provides an "unusually generous" twelve-year limitations period. However, the Court reached these conclusions based on distinct and exceptional characteristics of these particular statutory time limits—not by characterizing a statute of limitations as a jurisdictional requirement or by reciting a formulaic commitment to strict construction.

The narrow exception to this general pattern of treating limitations periods as non-jurisdictional is *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008),[2] where the Court held that the statute of limitations for money claims in the Court of Federal Claims, 28 U.S.C. § 2501, is jurisdictional in nature and not subject to exceptions. Importantly, rather than discarding *Irwin* or questioning the rebuttable presumption for equitable tolling of limitations periods for suits against the Government, the *John R. Sand* Court invoked *stare decisis* to adhere to nineteenth century cases which had declared this particular statute of limitations to be jurisdictional. *John R. Sand & Gravel*, 552 U.S. at 134-39; *see also* Sisk, *supra*, 50 Wm. & Mary L. Rev. at 525 (characterizing *John R. Sand & Gravel* as a "*stare decisis*-justified detour").

That the arc of federal sovereign immunity jurisprudence is away from strict construction of statutory waivers was confirmed in the Court's decision in *United States v. Kwai Fun Wong*, cited above. In holding that the statute of limitations for the Federal Tort Claims Act is not jurisdictional and may be tolled, the Court reaffirmed *Irwin* as "set[ting] out the framework" by establishing a presumption in

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1 The author of this memorandum filed an amicus brief in support of the FTCA claimant in the case before the Supreme Court.

2 The author of this memorandum was co-counsel for the petitioner John R. Sand & Gravel Co. in the case before the Supreme Court.

favor of equitable tolling. The Court majority said that the reason for *John R. Sand*'s jurisdictional ruling "came down to two words: *stare decisis*." *Kwai Fun Wong*, 135 S. Ct. at 1636. The Court explained *Irwin* as a change from that "earlier era when this Court often attached jurisdictional consequence to conditions on waivers of sovereign immunity." *Id.* at 1637.

D. The Statutes of Limitations for Tucker Act Claims

Under Section 2501 of Title 28 of the United States Code, "[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." Most prominent among those causes of action subject to this six-year limitations period is the Tucker Act. 28 U.S.C. § 1491(a). Section 2401(a) of Title 28 similarly establishes a general six-year limitations period for claims against the United States, which would encompass claims under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), for which the District Courts have concurrent jurisdiction.

When Congress began in the late-nineteenth century to craft federal statutes of limitations for the new category of claims against the Federal Government, it unremarkably adapted language from ordinary state statutes of limitations of the period, which often recited that a claim is "forever barred" when not timely filed after accrual. *See* Joseph K. Angell, *A Treatise on the Limitation of Actions at Law and Suits in Equity and Admiralty* xxxiii to clxi (Little Brown & Co., 4th ed., 1861) (setting out state statutes of limitations); *see, e.g.*, *Proprietors of White School House v. Post*, 31 Conn. 240 (Conn. 1862); *Ferrall v. Irvine*, 12 Iowa 52 (Iowa 1861); *Stone v. Sanders*, 38 Tenn. 248 (Tenn. 1858); *Allen v. Keith*, 26 Miss. 232 (Miss. 1853); *Bohannan v. Chapman*, 13 Ala. 641 (Ala. 1848); *Miller v. Trustees of Jefferson College*, 13 Miss. 651 (Miss. 1846). In *Sanger v. Nightingale*, 122 U.S. 176 (1887), a diversity of citizenship case, the Supreme Court considered a Georgia statute providing that actions upon a debt which accrued during the Civil War had to be filed by "by first January, 1870, or both the right and right of action to enforce it shall be forever barred." *Id.* at 184 (quoting Georgia statute). In response to the argument that this supposedly peremptory language "in effect destroys" an untimely claim, the Court cited to Georgia court rulings that this was "an ordinary statute of limitations" that still had to be pleaded as an affirmative defense. *Id.* at 184-95.

Among those federal statutes of limitations borrowing the "forever barred" language from state statues was the predecessor to 28 U.S.C. § 2501, enacted by Congress in 1863. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765, 767 (providing that claims against the United States in the Court of Claims "shall be forever barred" unless filed within six years after accrual). When limitations language common to state litigation is incorporated into federal statutes, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed.*

Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991). Indeed, when enacting the statute of limitations for the then-Court of Claims in 1863 with the familiar "forever barred" phrasing, a leading senator stated: "As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals." Cong. Globe, 37th Cong., 3rd Sess. 414 (1863) (Sen. Sherman).

Beginning during this same period, the Supreme Court recognized that "the weight of judicial authority, both in this country and in England," favored the rule tolling a statute of limitations, both in law and equity, when a claim had been fraudulently concealed by the defendant. *Bailey v. Glover*, 88 U.S. 342, 347-49 (1874); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine [tolling the statute of limitations when the plaintiff has been injured by fraud] is read into every federal statute of limitations.").

Subsequently, Congress integrated the "forever barred" phrase into many other statutes of limitations that have been understood to be subject to equitable tolling. *See, e.g.*, *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 311 (10th Cir. 1963) (rejecting argument that the Clayton Act statute of limitations, 69 Stat. 283 (1955), providing that antitrust cause of action "shall be forever barred" unless commenced within four years is "absolute" and holding that it is tolled by fraudulent concealment); *Partlow v. Jewish Orphans' Home of Southern California,* 645 F.2d 757, 760-61 (9th Cir. 1981) (applying equitable tolling to the Fair Labor Standards Act statute of limitations, 61 Stat. 84, 88 (1947), that provides a claim is "forever barred" if not filed within two years). Most recently, in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015), the Supreme Court recognized the availability of equitable tolling for the Federal Tort Claims Act statute of limitations, which was modeled on the limitations period for the Tucker Act and which contained the "forever barred" language found in the predecessor to Section 2501.

For most purposes, the statute of limitations for actions in the Court of Federal Claims has been read and applied consistently with expectations for private litigation. In *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002), the Supreme Court rejected the argument that the "first accrues" words in Section 2501 conveys the message that claims should be regarded as accruing at the earliest possible point. The Court ruled instead that Section 2501 does not "create[] a special accrual rule for suits against the United States." *Id.* Thus, limitations principles under Section 2501, at least for the purposes of determining the date of accrual of a claim, apply to the federal government in the same manner as to private parties.

However, for purposes of waiver and tolling, the Supreme Court has decided to adhere to nineteenth century decisions characterizing Section 2501 as jurisdictional in nature. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132-39 (2008), the Supreme Court held that Section 2501 is jurisdictional and thus cannot be waived or tolled.

As discussed earlier, the Court's decision in *John R. Sand* was premised squarely on the principle of *stare decisis*, adhering to nineteenth century decisions that had declared this particular statute of limitations to be jurisdictional. A series of Supreme Court decisions from the late nineteenth century had given jurisdictional force to the 1863 predecessor statute of limitations for cases in the then-Court of Claims. *See, e.g., Finn v. United States*, 123 U.S. 227, 232-33 (1887); *Kendall v. United States*, 107 U.S. 123, 125 (1883). These decisions failed to analyze the plain directive of the text, ignored the legislative history, and neglected the ubiquitous legal understanding then (and now) of a statute of limitations as a waivable affirmative defense. Instead, this line of cases imported jurisdictional concepts into this statute of limitations contrary to the legal norms of the period and without any indication of legislative intent to contravene the common legal understanding. Indeed, the Court in *John R. Sand* recognized these cases had departed from "the ordinary legal principle that 'limitation . . . is a defence [that a defendant] must plead.' " *John R. Sand & Gravel*, 552 U.S. at 138.

Those early jurisdictional rulings are perhaps best understood as the Supreme Court's hesitant and skeptical introduction to what was then a new category of legislation that afforded general judicial remedies against the government for monetary claims based on governmental wrongs. Along those lines, two justices dissented in *John R. Sand*, agreeing both that the jurisdictional rule reaffirmed by the majority had been abandoned in prior decisions and that any ambiguity in the case law "ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago." *John R. Sand*, 552 U.S. at 139-43 (Stevens, J., dissenting); *see also id.* at 143-47 (Ginsburg, J., dissenting).

The Court majority in *John R. Sand & Gravel* did acknowledge there had been "a turn in the course of the law," specifically in the interpretation of statutes of limitations in government cases, which now "place[s] greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds." *Id.* at 138. Older decisions on the particular statute of limitations for the Court of Federal Claims, while preserved in their specific application by *stare decisis*, "have consequently become anomalous." *Id.* Thus, as Justice Stevens said in dissent, the jurisdictional reading of the Court of Federal Claims statutes of limitations persists as "a carveout" from the modern approach. *Id.* at 142 (Stevens, J., dissenting).

Indeed, while Tucker Act claims filed in the Court of Federal Claims are subject to a jurisdictional limitations period, Little Tucker Act claims filed in District Court may not be so restricted. The Courts of Appeals are divided on whether 28 U.S.C. § 2401(a), which sets a six-year limitations period for claims against the government outside of the Court of Federal Claims (including the Little Tucker Act), is jurisdictional. Some circuits have long held Subsection 2401(a) to be a jurisdictional

bar. See, e.g., *Konecny v. United States*, 388 F.2d 59, 61-62 (8th Cir. 1967); *Hopland Band of Pomo Indians v. United States*, 855 F.3d 1573, 1576-77 (Fed. Cir. 1988). However, following the line of Supreme Court decisions holding that statutes of limitations in Federal Government cases are subject to equitable tolling, culminating in the *Kwai Fun Wong* ruling on the Federal Tort Claims Act, the Sixth Circuit in *Herr v. U.S. Forest Service*, 803 F.3d 809, 813-18 (6th Cir. 2015), ruled that Subsection 2401(a) is an ordinary statute of limitations and is not jurisdictional.

Moreover, In *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-21 (Fed. Cir. 2014), the Federal Circuit held that the Contract Disputes Act statute of limitations, 41 U.S.C. § 7103(a)(4), is not jurisdictional. Accordingly, the six-year limitations period for the CDA is waivable and subject to equitable tolling. Because the parties may choose to waive this non-jurisdictional limitations period, "the government and contractors [may] enter into tolling agreements that might give the parties more time to resolve, mediate, or negotiate disputes," without losing the right to pursue a claim before the Court of Federal Claims or a Board of Contract Appeals. Kyle R. Jefcoat, *The Federal Circuit's 2014 Government Contract Decisions*, 64 Am. U. L. Rev. 807, 853 (2015).

In sum, 28 U.S.C. § 2501, the statute of limitations for the Court of Federal Claims, now stands nearly alone in being given jurisdictional force and excluding tolling for equitable reasons. Congress should consider whether to regularize the standards for limitations periods for all statutory waivers of sovereign immunity by declaring that they are affirmative defenses subject to forfeiture, waiver, and tolling.

III. Proposed Legislative Reform: Clarifying That the Statutes of Limitations in 28 U.S.C. §§ 2401 and 2501 are Affirmative Defenses

The proposed legislative revision set out below would clarify that the limitations periods set out in 28 U.S.C. §§ 2401 and 2501 are affirmative defenses (which may be waived or forfeited) and are subject to tolling. While the Supreme Court has already determined that the limitations period for the Federal Tort Claims Act in Section 2401(b) is subject to equitable tolling, a failure to adopt the same language for all provisions in Section 2401 might be interpreted as a deliberate decision otherwise. For consistency, then, the same language would be made applicable to all limitations periods in both statutes. The underlined language is the proposed addition:

28 United States Code § 2401

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(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 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.

(c) The periods of limitation stated in this section are affirmative defenses subject to tolling.

28 United States Code § 2501

Every 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.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

The periods of limitation stated in this section are affirmative defenses subject to tolling.