No. 13-1074

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the six-month time limit for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Petitioner was the defendant in the district court and the appellee in the court of appeals. The following individuals were also defendants in the district court: David V. Beebe, Jerry F. Garcia, Jack O'Brien, and Douglas Glover. Those defendants are no longer parties to the case and are not petitioners here.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Kwai Fun Wong. The Wu Wei Tien Tao Association and Chong Hua Shen Mu Gong were also plaintiffs in the district court but are no longer parties to the case.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-102a) is reported at 732 F.3d 1030. The opinion and order of the district court granting reconsideration (Pet. App. 103a-105a) is unreported. An order of the district court (Pet. App. 106a-107a), adopting the magistrate judge's findings and recommendation (Pet. App. 108a-127a), is unreported but is available at 2006 WL 977746. A prior order of the district court (Pet. App. 128a-129a), adopting the magistrate judge's findings and recommendation (Pet. App. 130a-186a), is unreported, but the findings and recommendations are available at 2002 WL 31548486. A prior memorandum opinion of the court of appeals (Pet. App. 187a-189a) is not published in the *Federal Reporter* but is reprinted at 381 Fed. Appx. 715. An earlier opinion of the court of appeals (Pet. App. 190a-238a) is

reported at 373 F.3d 952. An earlier order of the district court (Pet. App. 239a-241a), adopting the magistrate judge's findings and recommendations on summary judgment (Pet. App. 242a-306a), is unreported but is available at 2007 WL 1170621.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2013. On December 27, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 6, 2014. On January 24, 2014, Justice Kennedy further extended the time to March 8, 2014, and the petition was filed on March 7, 2014. The petition was granted on June 30, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

This case and *United States* v. *June*, No. 13-1075, involve whether the time limits set forth in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), may be equitably tolled by a court. Here, respondent filed an FTCA claim against the United States in district court more than seven months after the Immigration and Naturalization Service (INS) denied her administrative claim for relief. The district court concluded that Section 2401(b)'s six-month time limit for filing suit after an administrative denial is a jurisdictional requirement, and it dismissed respondent's claim as untimely. The en banc court of appeals rejected that jurisdictional holding and tolled the time limit.

A. The Legal Background

1. Under established principles of sovereign immunity, federal courts generally lack jurisdiction to hear claims against the United States. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). Congress enacted the FTCA in 1946 to "waive[] the United States' sovereign immunity for claims" for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). As a "condition" of that waiver, Congress required plaintiffs to sue on such claims within a specified period of time. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). It further specified that any claims not satisfying that requirement "shall be forever barred." 28 U.S.C. 2401(b).

As subsequently amended and recodified, the FTCA time-limit provision now provides:

> 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.

28 U.S.C. 2401(b). This case involves Section 2401(b)'s six-month deadline for filing a claim that has been denied by a federal agency.

2. a. Traditionally, in the absence of a waiver of sovereign immunity, "the only recourse available to private claimants" for damages caused by the government was "to petition Congress for relief" in the form of private bills. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). In 1855, Congress estab-

lished the Court of Claims to hear claims, report its findings to Congress, and provide drafts of private bills where the court's decision was favorable to the claimant. See Act of Feb. 24, 1855 (1855 Act), ch. 122, §§ 1, 7, 10 Stat. 612, 613; *Mitchell*, 463 U.S. at 212-213. The court's jurisdiction covered only contract claims, claims founded on federal statutes or regulations, and claims referred to the court by either House of Congress. 1855 Act § 1, 10 Stat. 612.

In 1863, Congress vested the Court of Claims with authority to enter binding judgments appealable to this Court. Act of Mar. 3, 1863 (1863 Act), ch. 92, §§ 3, 5, 7, 12 Stat. 765, 766 (Rev. Stat. §§ 707-708, 1061, 1089-1093 (1878)). The 1863 Act also provided that "every claim against the United States, cognizable by the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of th[e] act within six years after the claim first accrues." *Id.* § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) (emphasis added). The 1863 Act provided an exception to the time bar for claims accruing to married women, minors, the mentally disabled, and persons beyond the seas, requiring such claims to be brought within three years after the disability ceased. *Ibid.* This Court subsequently construed the 1863 Act's time limitation as a restriction of the Court of Claims' jurisdiction, not subject to waiver or equitable tolling. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-135 (2008) (discussing cases); pp. 22-23, *infra*.

In 1887, Congress enacted the Tucker Act, ch. 359, 24 Stat. 505, which extended the Court of Claims' jurisdiction to additional types of cases and granted

the district courts and circuit courts concurrent jurisdiction in cases involving specified amounts in controversy. *Id.* § 2, 24 Stat. 505. This Court continued to treat the six-year filing requirement in the 1863 Act as a non-waivable jurisdictional constraint on the Court of Claims' authority. *John R. Sand & Gravel*, 552 U.S. at 135 (citing cases); pp. 23-24, *infra*. When Congress revised the laws relating to the Judiciary in 1911, it maintained the directive that any claim otherwise cognizable by the Court of Claims "shall be forever barred" unless filed within six years of accrual. Judicial Code (1911 Act), ch. 231, § 156, 36 Stat. 1139.[1]

b. Neither the Tucker Act nor its predecessors created any general right of action with respect to *tort* claims against the United States. See *United States* v. *Tohono O'dham Nation*, 131 S. Ct. 1723, 1729 (2011).[2] In the early twentieth century, however, Congress enacted several statutes creating such remedies in various circumstances, including for claims alleging (1) patent infringement, see Act of June 25, 1910, ch. 423, 36 Stat. 851 (1910 Act); (2) damage caused by United States merchant vessels or those of its wholly owned corporations, see Suits in Admiralty Act, ch. 95, 41 Stat. 525 (1920); and (3) damage caused by other public vessels, see Public Vessels Act, ch. 428, 43 Stat.

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[1] Accord 1911 Act § 24 Twentieth, 36 Stat. 1093 (no suit in district court against the government "shall be allowed" unless brought within six years of accrual) (now codified in substantially similar form at 28 U.S.C. 2501).

[2] The version of the Tucker Act that passed the House of Representatives authorized tort claims, but the Senate refused to waive sovereign immunity with respect to such claims. See H.R. 6974, 49th Cong., 1st Sess. § 1 (1887); 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.04, at 2-16 to 2-17 (Mar. 1994).

1112 (1925). Courts recognized that the time limits for filing suit under those statutes were jurisdictional in nature. See p. 31, *infra*.

In the absence of any general tort cause of action against the United States, however, persons with such claims continued to seek relief from Congress in the form of private bills. By the 1920s and 1930s, Congress was swamped with such requests. See *Dalehite* v. *United States*, 346 U.S. 15, 25 n.9 (1953) (cataloging thousands of private claim bills introduced in the 68th, 70th, 74th, 75th, 76th, 77th, and 78th Congresses). The backlog led many to criticize the private-bill system as both "unduly burdensome to the Congress" and "unjust to the claimants." S. Rep. No. 1400, 79th Cong., 2d Sess. 30-31 (1946) (1946 Senate Report). As a result, between 1925 and 1946, Congress considered over 30 proposals to create judicial or administrative remedies for tort claims against the government. 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* §§ 2.08-2.10, at 2-48 to 2-66 (Mar. 1994) (Jayson & Longstreth) (discussing proposals).

c. In 1946, Congress enacted the FTCA as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842. It granted district courts exclusive jurisdiction—"[s]ubject to the provisions of [Title IV]"—to adjudicate tort claims against the United States in circumstances where "a private person[] would be liable to the claimant" under local law. FTCA, ch. 753, § 410(a), 60 Stat. 843-844.

One of the provisions of Title IV on which Congress "condition[ed]" the grant of jurisdiction was Section 420, which contained time limits for bringing FTCA claims in court. *Kubrick*, 444 U.S. at 117; FTCA

§ 420, 60 Stat. 845. That provision included precisely the same language as the 1863 and 1911 Acts applicable to the Court of Claims, declaring that any tort claim "shall be forever barred" unless either (1) it was filed in court within one year of accrual, or (2) it sought less than $1000 and was presented in writing to the federal agency responsible for the alleged harm within one year. *Ibid.* In the latter circumstance, the time to file suit was "extended for a period of six months" following the agency's denial of the claim. *Ibid.*

Congress subsequently revised the FTCA time bars several times. See Jayson & Longstreth § 2.13, at 2-72 to 2-78 (Sept. 2001). In 1948, as part of a general recodification of Title 28, it relocated the FTCA's provisions to different places in Chapters 85, 161, and 171.[3] The Reviser's Note makes clear that Congress intended the 1948 revision to make no substantive change to those provisions. H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947).

In 1949, Congress enlarged Section 2401(b)'s time limit for filing a claim from one year to two years. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62. And in 1966, it made the filing of an administrative claim with the responsible agency—within two years of accrual—a mandatory prerequisite to filing suit in court on all FTCA claims. Act of July 18, 1966 (1966 Act), Pub. L. No. 89-506, §§ 2(a), 7, 80 Stat. 306, 307. Congress also adjusted the time limit for filing suit to six months

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[3] See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2401, 2671-2680, 62 Stat. 933, 971, 982-985. The 1948 Act referred to Chapter 173, not Chapter 171, but that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

after administrative denial of the claim. *Ibid.* That version of Section 2401(b) remains in effect today.

B. The Present Controversy

1. Respondent Kwai Fun Wong is a native of Hong Kong. Pet. App. 243a. She also claims to be a minister in the Wu Wei Tien Tao Association, a worldwide non-profit religious organization. *Id.* at 242a-243a. In 1992, respondent entered the United States. *Id.* at 246a. That same year, she received a religious worker's visa and also filed an application for permanent residence. *Ibid.* In 1999, she left the United States to attend a funeral in Hong Kong, but she neglected first to obtain a valid advance parole document necessary for her to lawfully re-enter the United States. *Id.* at 247a; see 8 C.F.R. 245.2(a)(4)(ii) (1999). Upon her return, she was briefly granted temporary parole into the United States, but the INS revoked her parole and issued her a notice of expedited removal from the country after she failed to appear for a scheduled immigration inspection. Pet. App. 250a-251a; see 8 U.S.C. 1225(b)(1)(A)(i) (requiring expedited removal when an applicant for admission lacks documents required for entry into the United States).

On June 17, 1999, the INS took respondent into custody in Portland, Oregon, pending her removal from the United States. Pet. App. 110a; see 8 C.F.R. 235.3(b)(2)(iii) (requiring detention in such circumstances). Because the INS lacked any federal facility in Portland to house immigration detainees, it placed respondent in immigration detention at the Multnomah County Detention Center. Pet. App. 254a. During five days of detention, Multnomah County officials strip-searched respondent in accordance with a county policy requiring such searches for new de-

tainees being placed in the general jail population. *Id.* at 257a; see *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (upholding similar strip-search policy). County officials also allegedly disregarded the INS's request that respondent receive vegetarian meals—a request made so as to enable respondent to comply with the dietary requirements of her religion. Pet. App. 254a. Respondent was removed from the United States on June 22, 1999. *Id.* at 110a.

2. On May 18, 2001, respondent filed an action in federal court seeking damages based on her removal and the conditions of her detention prior to removal. Pet. App. 5a, 110a-111a, 131a. The complaint asserted various constitutional claims against INS officials in Portland under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 131a; J.A. 43-44. That same day, respondent also presented an FTCA claim to the INS. Pet. App. 5a, 110a-111a; J.A. 23-26. Among other things, the claim alleged negligence based on the conditions of respondent's detention. Pet. App. 5a, 110a-111a; J.A. 25-26.

In October 2001, respondent filed a first amended complaint, adding the United States as a defendant and asserting additional claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1. Pet. App. 111a & n.4; J.A. 46-59. On November 9 and 14, 2001, respondent sought leave to file a second amended complaint adding an FTCA claim against the United States. Pet. App. 5a-6a, 111a-112a; J.A. 8-9, 60-77.[4]

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[4] The individual defendants were ultimately dismissed from the case, as were the RFRA claims. Pet. App. 187a-306a. Several FTCA claims were later dismissed as well. *Id.* at 239a-306a.

At the time of respondent's motion to add the FTCA claim, the district court would not have had jurisdiction over that claim, because (1) the INS had not finally denied her administrative claim, and (2) six months had not yet elapsed from the date on which she had presented that claim to the INS. See *McNeil* v. *United States*, 508 U.S. 106 (1993). Respondent therefore asked the court to grant her motion "on or after November 20, 2001," at which time she could treat the agency's failure to act as a denial for purposes of 28 U.S.C. 2401(b). Pet. App. 5a-6a, 111a; J.A. 60. The United States opposed the motion to amend and argued that respondent should file a new civil action after completely exhausting her administrative remedies. Pet. App. 182a-184a; J.A. 80-83.

On December 3, 2001, the INS issued a final denial of respondent's administrative claim. Pet. App. 6a; J.A. 85-87. Respondent thus had six months (until June 3, 2002) to bring an action in federal court under the FTCA, 28 U.S.C. 2401(b). Pet. App. 6a. But respondent neither filed a new civil action nor asked the district court to expedite her still-pending motion to amend.

On April 5, 2002, the magistrate judge recommended that respondent be granted leave to file a second amended complaint. Pet. App. 130a, 182a-185a. On June 25, 2002, three weeks *after* Section 2401(b)'s six-month deadline had passed, the district court adopted the magistrate judge's findings and recommendation. *Id.* at 128a-129a. Seven weeks later, on August 13, 2002, respondent filed a second amended complaint

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Because the United States is the only remaining defendant, and a negligence claim under the FTCA is the only remaining claim, *id.* at 5a, this brief will use the term FTCA "claim" throughout.

adding (among other things) an FTCA claim against the United States. *Id.* at 7a; J.A. 94-110.

3. After an interlocutory appeal on unrelated issues, see 373 F.3d 952, the United States moved for summary judgment on respondent's FTCA claim in October 2005. Pet. App. 108a-109a, 112a-117a, 190a-238a; J.A. 17. The government argued that the district court lacked jurisdiction over the claim because it was not timely filed under 28 U.S.C. 2401(b). Pet. App. 108a-109a, 112a-117a.

The magistrate judge disagreed, Pet. App. 112a-117a, and in April 2006 the district court adopted her findings and recommendation, *id.* at 106a-107a. The court recognized that the FTCA claim was not filed within the time limit set forth in Section 2401(b). *Id.* at 113a-114a. But the court equitably tolled the six-month time period for 81 days (between the date the magistrate judge recommended that respondent be granted leave to amend and the date the district court granted such leave), and it declined to dismiss the FTCA claim. *Id.* at 117a.

Several years later, while the case was still pending in district court, the United States moved for reconsideration of that decision based on the Ninth Circuit's intervening decision in *Marley* v. *United States*, 567 F.3d 1030, cert. denied, 558 U.S. 1076 (2009). Pet. App. 103a-105a. That case held that Section 2401(b)'s six-month time limit for filing suit cannot be equitably tolled because the statutory deadlines for FTCA claims are jurisdictional. 567 F.3d at 1033-1038. In October 2010, the district court granted the motion, held that it lacked jurisdiction over respondent's untimely FTCA claim, and entered final judgment for the United States. Pet. App. 103a-105a.

4. Respondent appealed. After oral argument in May 2012, the court of appeals *sua sponte* ordered the case to be heard en banc to resolve a conflict between two of its own precedential decisions. Pet. App. 307a; J.A. 2-3. A divided en banc panel reversed. Pet. App. 1a-102a.

a. Judge Berzon, writing for an eight-judge majority, first held that the FTCA's six-month time bar is not jurisdictional. Pet. App. 4a-36a. The court found that "nothing in the language of [Section] 2401(b)—including the term 'shall . . . be barred,' and the word 'forever'—supplies a 'clear statement' that Congress intended the six-month filing deadline to be jurisdictional." *Id.* at 22a-23a. The court noted that the time bar is located in a different section and chapter than the FTCA's "jurisdiction-granting provision" in 28 U.S.C. 1346(b)(1), and it declined to give any weight to the statutory history demonstrating that this placement was a result of the 1948 recodification of Title 28, in which no substantive changes were intended. Pet. App. 23a-29a. The court also relied on the absence of precedent from this Court ranking the time limit as jurisdictional. *Id.* at 30a-32a (distinguishing *Bowles* v. *Russell*, 551 U.S. 205, 209 n.2 (2007)).

The court of appeals acknowledged that "even if [a time deadline] is not jurisdictional, tolling may still be precluded by a sufficiently clear congressional expression of that restriction." Pet. App. 15a. But in addressing that issue, the court applied a "particularly strong" "presumption in favor of equitable tolling." *Id.* at 36a-38a (relying on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)). The court found a "strong" presumption warranted because, in its

view, Congress intended "suits against the government" under the FTCA to be "treated no differently than suits against private defendants," and because courts have applied a "discovery" rule to determine when a claim "accrues" for purposes of the two-year deadline for presenting a claim to the responsible agency. *Ibid.* (citation omitted). The court ultimately concluded that the strong presumption in favor of equitable tolling had not been "overcome." *Id.* at 40a-43a.

Finally, the court of appeals held that the six-month time limit should be tolled in this case. Pet. App. 43a-48a. The court proceeded on the assumption that respondent's FTCA claim was filed beyond the six-month limit and thus was "too late," declining to find an earlier "constructive filing date" under which the claim would have been timely. *Id.* at 43a-45a. In the court's view, however, respondent's failure to file an FTCA complaint within six months after her claim was denied by the INS "was not the consequence of any fault or lack of due diligence on [her] part," but the result of "the delay inherent in the Magistrate Judge system." *Id.* at 46a, 47a. The court rejected the government's contention that equitable tolling was inappropriate because respondent could have "request[ed] a timely ruling" or could have filed a separate FTCA complaint anytime during the six-month period. *Id.* at 47a. The court accordingly remanded for the FTCA claim to proceed. *Id.* at 48a.

b. Chief Judge Kozinski concurred in the judgment. Pet. App. 48a-52a. He agreed with the dissenters that "[Section] 2401(b) is jurisdictional" and that "the FTCA's text, context, and relevant historical treatment prohibit equitable tolling of the statutory

deadline." *Id.* at 48a, 51a. But he construed respondent's court filings to render her claim timely and, thus, concurred in the judgment. *Id.* at 48a-52a.

c. Judges Tashima and Bea dissented in two separate opinions, which they both joined. Pet. App. 52a-102a. Judge Tashima concluded that the statutory "history, once understood in full context, dispels any doubt that the FTCA's limitations provision was intended to be jurisdictional." *Id.* at 52a. He explained that "the limitations provision was jurisdictional as of the original 1946 Act, for the grant of jurisdiction was expressly '[s]ubject to'—that is, 'contingent or conditional upon'—compliance with that provision." *Id.* at 55a (brackets in original; citation omitted). And, he continued, Congress did not "intend[] to strip the limitations provision of its jurisdictional status only two years later" when it "reorganize[d] Title 28" in the 1948 recodification. *Id.* at 54a, 56a-58a.

Judge Bea concluded that "Congress clearly expressed its intent that [Section] 2401(b) would have 'jurisdictional' consequences." Pet. App. 102a. He explained that "[j]urisdictional treatment accords with the statute's text," particularly Congress's command that late claims shall be "forever barred." *Id.* at 69a-84a, 102a. He also pointed to Section 2401(b)'s "context" in the "larger statutory scheme," including the administrative exhaustion requirement, as well as its "broad, system-related purposes." *Id.* at 93a, 97a-102a. Finally, he contrasted Section 2401(b) to the general six-year statute of limitations for filing suit against the government in Section 2401(a), which expressly provides for tolling in certain specified circumstances. *Id.* at 101a-102a.

SUMMARY OF ARGUMENT

The FTCA provides that a tort claim against the United States "shall be forever barred" if it is not filed in court within six months after being denied by a federal agency. 28 U.S.C. 2401(b). That six-month limit is a jurisdictional requirement that is not subject to equitable tolling. Because respondent's claim was filed more than seven months after being denied by the INS, it was properly dismissed by the district court.

A. Under this Court's precedent, whether a statutory time limit for suing the United States is subject to equitable tolling ultimately turns on Congress's intent. This Court has established a "rebuttable presumption" allowing tolling of time limits for filing suit in appropriate circumstances. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). But the purpose of that presumption is to "accurately reflect Congress's likely meaning in the mine run of instances where it enacted a Government-related statute of limitations," and the presumption does not control in circumstances where the text and history reveal "Congress's intent to the contrary." *John R. Sand & Gravel* v. *United States*, 552 U.S. 130, 137-138 (2008). Equitable tolling is not appropriate when Congress intended a time bar to serve as a jurisdictional limit on the power of district courts. Tolling may also be precluded even if the time bar is nonjurisdictional.

B. When Congress enacted the FTCA in 1946, it intended the statutory time limit for filing suit to be a jurisdictional requirement not subject to equitable tolling. First, Congress borrowed the statutory text of that time bar from the 1863 and 1911 Acts governing Tucker Act suits in the Court of Claims. At the

time, this Court had already repeatedly interpreted those virtually identical provisions—addressing closely analogous damages actions against the United States—to be jurisdictional limitations forbidding courts from tolling the time limits for filing suit. Those provisions had a settled legal meaning, and Congress adopted that meaning when it incorporated their "shall be forever barred" directive into the FTCA. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011).

Second, Congress understood the FTCA time limit as a condition on its waiver of sovereign immunity. Congress legislated against a background assumption that such time bars would be strictly construed not to permit equitable tolling. This Court acknowledged that background rule in *Soriano* v. *United States*, 352 U.S. 270 (1957), where it explained that Congress enacted the Tucker Act and statutes allowing tort claims against the government on the "assum[ption] that the limitation period it prescribed meant just that period and no more." *Id.* at 275-276. Decades later, in *Irwin*, this Court announced a new (and quite different) background assumption with respect to time limits for filing suit in court, but it confirmed that what ultimately matters is the enacting Congress's actual intent.

Other aspects of the original FTCA's text and history confirm that equitable tolling is prohibited. For example, the "shall be forever barred" formulation itself constrains jurisdiction by "confin[ing]" the district court's power of "review" over the case, as this Court expressly recognized in *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004). The absence of any exceptions to

the bar starkly contrasts with the otherwise-comparable provision applicable to Tucker Act claims.

C. The subsequent evolution of the FTCA reinforces the conclusion that equitable tolling is not available. In 1949, Congress extended the suit filing deadline for an extra year to address hardship cases, thereby confirming that such cases are to be addressed by Congress itself, not by courts via equitable tolling. Congress then reenacted the time bar in 1966—after *Soriano* and at a time when the uniform view of the circuit courts was that tolling of Section 2401(b) was *not* available.

In addition, from the 1950s through the 1980s, Congress passed a series of private laws expressly conferring "jurisdiction" on district courts to hear untimely FTCA claims "notwithstanding" Section 2401(b)'s time bar. Throughout the same period, Congress repeatedly declined to enact a series of proposals to authorize limited forms of tolling of FTCA claims. The only exception was in 1988, when Congress authorized one form of tolling applicable only in a single, carefully delineated circumstance not at issue here. Taken as a whole, this history makes plain that any "realistic assessment of legislative intent," *Irwin*, 498 U.S. at 95, precludes equitable tolling of the FTCA's six-month deadline for filing suit.

ARGUMENT

THE FEDERAL TORT CLAIMS ACT'S TIME BARS ARE NOT SUBJECT TO EQUITABLE TOLLING

Respondent filed her FTCA complaint against the United States more than seven months after the INS denied her administrative claim. Pet. App. 7a. That complaint was untimely under 28 U.S.C. 2401(b),

which imposes a six-month time limit for filing suit. Congress used jurisdictional language to frame that time bar. It has always understood the bar to be a strict limit on its waiver of sovereign immunity, and it never intended the bar to be subject to equitable tolling. The court of appeals' conclusion to the contrary is erroneous and should be reversed.

A. Whether Equitable Tolling Is Available Turns On Statutory Intent

The doctrine of equitable tolling "pauses the running of * * * a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). In recent years, this Court has adopted a rebuttable presumption that federal statutes of limitation requiring that suits be filed in court by a certain time—including those applicable to suits against the United States—are subject to equitable tolling. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

This Court has emphasized, however, that it "do[es] not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose." *Lozano*, 134 S. Ct. at 1236. Rather, "whether equitable tolling is available is fundamentally a question of statutory intent." *Id.* at 1232; see *Irwin*, 498 U.S. at 95 (justifying rebuttable presumption as "a realistic assessment of legislative intent"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) (noting that purpose of presumption is to "accurately reflect Congress's likely meaning in the mine run of instances where it enacted a Government-

related statute of limitations"). The presumption in favor of tolling may therefore be rebutted "by demonstrating Congress's intent to the contrary." *Ibid.*

One way to show that equitable tolling is unavailable is to establish that the statutory time limit is a "jurisdictional" restriction on a court's power to adjudicate the case. *John R. Sand & Gravel*, 552 U.S. at 133-134. A jurisdictional limit is "more absolute" than other time limits; it "require[s] a court to decide a timeliness question despite a [party's] waiver" and "forbid[s] a court to consider whether certain equitable considerations warrant extending a limitations period." *Ibid.* Jurisdictional treatment is appropriate, for example, when a statutory time bar "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver of sovereign immunity." *Ibid.*

For a statutory time limit to qualify as jurisdictional, this Court requires a "clear indication" from Congress. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks omitted). But Congress "need not use magic words in order to speak clearly." *Ibid.* Ultimately, the analysis focuses on the "legal character" of the filing requirement, as evident in the "text, context, and relevant historical treatment" of the statutory provision at issue. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010) (citation omitted). And significantly in this case, "[w]hen 'a long line of this Court's decisions left undisturbed by Congress' has treated a similar requirement as 'jurisdictional,' [the Court] will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citation omitted).

Even if a limitations period is not jurisdictional, equitable tolling may still be precluded. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826-828 (2013) (holding nonjurisdictional statutory time limit not subject to equitable tolling). As with the jurisdictional analysis, the basic inquiry examines Congress's intent—and, specifically, whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). That question must be answered using traditional tools of statutory construction. See, *e.g.*, *id.* at 351-354 (rejecting equitable tolling based on text, context, purpose and history of statutory time limit); see also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (similar).

B. The FTCA Time Limits For Filing Suit Were Not Subject To Equitable Tolling When Enacted In 1946

The statutory text, history, and purpose all confirm that Congress originally understood the deadline for filing an FTCA claim in court as a mandatory time bar not subject to equitable tolling. That time bar is a jurisdictional limit on the court's power to act. But tolling is precluded even if this Court were to determine that Section 2401(b)'s time limit is nonjurisdictional. To the extent the *Irwin* presumption in favor of equitable tolling applies to this case, it is rebutted by the strong textual and historical evidence of Congress's intent.

1. Congress used the exact language that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits

This Court has often recognized that "[w]hen * * * judicial interpretations have settled the

meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998).[5] The Court has endorsed this principle in the precise context at issue here—when determining whether a particular statutory time limit qualifies as jurisdictional. As the Court recently explained in *Henderson*, it "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional.'" 131 S. Ct. at 1203 (internal quotation marks and citation omitted) (citing *John R. Sand & Gravel*, 552 U.S. at 133-134).[6]

That rule resolves this case. When Congress drafted the FTCA time bar in 1946, it used the same unequivocal text ("shall be forever barred") that appeared in the parallel time bars applicable to monetary claims against the United States under the 1863 and 1911 Acts. This Court had already interpreted that language—on at least *six* separate occasions—as imposing a jurisdictional requirement not subject to waiver or equitable tolling. In these circumstances,

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[5] See, *e.g.*, *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

[6] See also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824 (confirming that "this Court's interpretations of similar provisions in many years past" is "probative of whether Congress intended a particular provision to rank as jurisdictional") (citation omitted); *Reed*, 559 U.S. at 168 (same); *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007).

the only reasonable conclusion is that Congress intended the FTCA's identically worded time limit to be a jurisdictional bar prohibiting district courts from adjudicating untimely claims.

a. The text Congress chose for the FTCA's suit-filing bar is materially indistinguishable from the text it had previously used to set deadlines for damages actions against the United States in the Court of Claims under the Tucker Act and its predecessors. See p. 7, *supra*. Those earlier formulations had emphatically declared that "[e]very claim against the United States" under the relevant statute "shall be forever barred" if not filed within a stated period of time, subject to certain specific exceptions.[7]

This Court first interpreted that language in *Kendall* v. *United States*, 107 U.S. 123 (1883). There, the Court rejected the plaintiff's request for tolling under the 1863 Act on the ground that he was not able to bring his claim within the statutory period due to legal disabilities imposed by Congress during the Civil War. *Id.* at 124-125. The Court explained that the time bar was "jurisdiction[al]," that it was not subject to judi-

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[7] Compare FTCA § 420, 60 Stat. 845 ("Every claim against the United States cognizable under this title *shall be forever barred*, unless within one year after such claim accrued [the claim is presented to the responsible agency or] an action is begun.") (emphasis added), with 1911 Act § 156, 36 Stat. 1139 ("Every claim against the United States cognizable by the Court of Claims, *shall be forever barred* unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues.") (emphasis added), and 1863 Act § 10, 12 Stat. 767 ("[E]very claim against the United States, cognizable by the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues.") (emphasis added).

cial "engraft[ing]" of exceptions such as "sickness, surprise, or inevitable accident," and that "it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not." *Id.* at 125-126; see *John R. Sand & Gravel*, 552 U.S. at 134 (summarizing *Kendall* in those terms).

Several years later, this Court reaffirmed its jurisdictional analysis in *Finn* v. *United States*, 123 U.S. 227 (1887). There, the Court rejected the argument that the government could waive the time bar when opposing a claim. It explained that "[t]he duty of the court" when faced with an untimely claim—"whether limitation [i]s pleaded [by the United States] or not"—is "to dismiss the petition." *Id.* at 232. The Court noted that "the statute * * * makes it a condition or qualification of a right to a judgment against the United States that—except where the claimant labors under one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant * * * within six years after suit could be commenced thereon against the Government." *Ibid.*; see *John R. Sand & Gravel*, 552 U.S. at 134-135 (discussing *Finn*).

After the Tucker Act was passed in 1887, this Court continued to treat the 1863 Act's time bar as a non-waivable jurisdictional constraint on the Court of Claims' authority. For example, in *de Arnaud* v. *United States*, 151 U.S. 483 (1894), the Court affirmed the dismissal of a claim that had accrued in 1862 but had not been submitted to the Treasury Department until 1886. See *id.* at 489, 492-495. The Court quoted at length from its prior decision in *Finn*, explaining that the six-year bar applied whether the government had raised the point or not. See *id.* at 495-496 (quot-

ing *Finn*, 123 U.S. at 232-233); accord *United States* v. *New York*, 160 U.S. 598, 616-619 (1896); see also *Munro* v. *United States*, 303 U.S. 36, 38 n.1, 41 (1938) (applying *Finn* and reaching same conclusion under 1930 statute incorporating Tucker Act procedures). Similarly, in *United States* v. *Wardwell*, 172 U.S. 48 (1898), the Court reaffirmed that the six-year filing requirement imposed by the 1863 Act was "not merely a statute of limitations *but also jurisdictional in its nature*, and limiting the cases of which the Court of Claims can take cognizance." *Id.* at 52 (emphasis added).[8]

b. The legislative history establishes that Congress intended the FTCA to serve as the tort-claim analogue to the Tucker Act and thus confirms that the identical "shall be forever barred" language in the FTCA time bar is likewise a jurisdictional limitation. The Senate Report on the FTCA pointed to the Tucker Act's waiver of sovereign immunity for certain

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[8] Congress had also previously used the same "shall be forever barred" formulation to establish a ten-year time limit for submitting claims for payment to the General Accounting Office (GAO). See Act of Oct. 9, 1940, ch. 788, § 1, 54 Stat 1061 (31 U.S.C. 71a(1), 237(1) (1946)) ("[E]very claim or demand * * * against the United States cognizable by the [GAO] under [31 U.S.C. 71 and 236 (1946)], shall be forever barred unless such claim * * * shall be received [by GAO] within ten full years after the date such claim first accrued."). By 1946, the Comptroller General had interpreted that time bar as an absolute limit on his authority to consider untimely claims. See, *e.g.*, *Overtime Compensation—Forty-Hour Week Employees—Night Work—Claim Procedure*, 25 Comp. Gen. 670, 672 (1946) (explaining that bar "expressly prohibits consideration by the [GAO]" of untimely claims and that GAO "has been granted no powers of dispensation in the matter and, consequently, it legally may make no exceptions to the provisions of the statute"); *Overtime Compensation—Forty-Hour Week Employees—Night Work*, 24 Comp. Gen. 550, 553-555 (1945) (similar).

claims and stated that the Tucker Act's "existing exemption in respect to common-law torts appears incongruous." 1946 Senate Report 31. Similarly, committee reports discussing early drafts of the tort bill emphasized that they would grant tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942).[9] They also frequently explained the history, purpose, and operation of the Tucker Act and emphasized the need for similar legislation to cover tort claims.[10]

More specifically, the House Reports addressing draft tort-claim bills proposed in 1942 and 1945—which contained the exact same time bar enacted in the FTCA in 1946—declared that those bills were "intended" to grant district courts the power to "exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945);

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[9] See, *e.g.*, H.R. Rep. No. 286, 70th Cong., 1st Sess. 2 (1928) (noting Tucker Act and urging adoption of "like provisions" applicable to certain property damage claims); H.R. Rep. No. 667, 69th Cong., 1st Sess. 12 (1926) (reviewing sovereign immunity and stating that proposed claims bill "extends the practice" in Tucker Act); see also H.R. Doc. No. 562, 77th Cong., 2d Sess. 2 (1942) (message from President Franklin D. Roosevelt urging Congress to give tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract"); 86 Cong. Rec. 12,026 (1940) (statement of Rep. McLaughlin) (pointing to Tucker Act as "precedent to govern our conduct in this case").

[10] See, *e.g.*, 1946 Senate Report 31; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2-3 (1945); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. 2-3 (1940).

H.R. Rep. No. 2245, 77th Cong., 2d Sess. 9 (1942). At that time, of course, this Court had already definitively held that the jurisdiction of the Court of Claims was constrained by the six-year time bar—and that the bar was not subject to waiver or equitable tolling. See pp. 22-24, *supra*.[11]

c. Thus when Congress enacted the FTCA time bar in 1946, it adopted a formulation that this Court had already interpreted—multiple times, in the directly analogous context of the Tucker Act—to limit the jurisdiction of federal courts to adjudicate claims against the United States. That is more than sufficient reason to conclude that Congress intended the FTCA time bar to be a jurisdictional requirement not subject to equitable tolling. After all, in 1946, as today, it was well settled that "in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enact-

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[11] Although many of the draft tort claim bills that Congress considered in the 1930s used the "shall be forever barred" formulation, a number of those that did not nonetheless made explicit that the deadlines for suing on tort claims were jurisdictional requirements. See, *e.g.*, S. 1043, 74th Cong., 1st Sess. § 304 (1935) ("The Court of Claims *shall have jurisdiction* to hear and determine any claim allowable as provided in this Act *subject to the following limitations*: (1) That no such suit may be maintained until the claim has been duly filed with the Comptroller General and his decision had thereon * * * ; (2) that no such suit shall be instituted after the expiration of one year from the date of the decision of the Comptroller General."); S. 1833, 73d Cong., 1st Sess. § 304 (1933) (same); S. 4567, 72d Cong., 1st Sess. § 304 (1932) (same). Those other bills thus confirm that Congress envisioned that the FTCA time limits would operate as jurisdictional constraints on the courts' power to adjudicate claims.

ment." *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924).[12] Congress's decision to borrow the language of the 1863 and 1911 Acts clearly manifested its intent to prohibit equitable tolling of FTCA claims.

d. Recent precedent also confirms that this Court's prior construction of the 1863 and 1911 Acts supports treating the FTCA time bar as jurisdictional. In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that the 30-day limit in 28 U.S.C. 2107 for filing a notice of appeal is a jurisdictional requirement not subject to waiver or equitable tolling. 551 U.S. at 209-213. It rooted that conclusion largely in its assessment of "this Court's historical treatment of *the type of limitation* [Section] 2107 imposes (*i.e.*, statutory deadlines for filing appeals)." *Reed*, 559 U.S. at 168 (emphasis added) (discussing *Bowles*); *Bowles*, 551 U.S. at 208-210. As the Court later explained, "[t]he statutory limitation in *Bowles* was of a type that we had long held *did* speak in jurisdictional terms, even absent a 'jurisdictional' label, and nothing about [Section] 2107's text or context, or the historical treatment

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[12] See, *e.g.*, *United States* v. *Merriam*, 263 U.S. 179, 187 (1923) ("The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress."); *Kepner* v. *United States*, 195 U.S. 100, 124 (1904) ("It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."); *The "Abbotsford,"* 98 U.S. 440, 444 (1879); 2 Frank E. Horack Jr., *Statutes and Statutory Construction* § 5201, at 532-535 (3d ed. 1943) ("Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense.") (footnote omitted); Earl T. Crawford, *The Construction of Statutes* § 187, at 321 (1940) (same point).

of that type of limitation, justified a departure from this view." *Reed*, 559 U.S. at 168 (first set of internal quotation marks omitted).

The same is true here. For the reasons explained above, the FTCA time limit for filing suit is "of a type" that this Court has long held *does* "speak in jurisdictional terms." *Reed*, 559 U.S. at 168. The FTCA time bar uses the same language and serves the same purpose—prescribing a specific time limit as a condition of the waiver of sovereign immunity for suits against the United States for money damages—as the parallel provisions applicable to Tucker Act claims. Those provisions should all be interpreted the same way.

This Court's decision in *John R. Sand & Gravel* is also instructive. There, the Court reaffirmed that the time bar applicable to Tucker Act claims is a jurisdictional limit on the authority of district courts. 552 U.S. at 133-139. The Court explained that "[s]pecific statutory language" and "a definitive earlier interpretation" of virtually identical predecessor statutes can establish that a statutory time limit is jurisdictional and not subject to equitable tolling. *Id.* at 134-138. In this case, the Court should once again apply that settled precedent and hold that the "shall be forever barred" formulation that appeared in the 1863 and 1911 Acts—and that Congress incorporated into the FTCA—has jurisdictional effect. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (applying precedent interpreting one statute to a later statute "derived *in haec verba*" from the first statute) (citation omitted).

2. Congress enacted the FTCA time bar against background principles concerning waivers of sovereign immunity that treated such time bars as jurisdictional

In *John R. Sand & Gravel*, this Court explained that when a federal statute of limitations "achieve[s] a broader system-related goal"—such as "limiting the scope of a governmental waiver of sovereign immunity"—it may properly be characterized as "jurisdictional." 552 U.S. at 133-134 (citing *United States* v. *Dalm*, 494 U.S. 596, 609-610 (1990)). That tracks the understanding that prevailed when Congress enacted the FTCA in 1946. At that time, courts construed all of the various time limits applicable to claims for money damages against the United States as jurisdictional conditions on Congress's waiver of sovereign immunity. Congress would not have expected the FTCA time limit to be treated any differently.[13]

a. When Congress enacted the FTCA, this Court had long established both (1) that "[t]he United

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[13] In *Irwin*, this Court explained its new, rebuttable presumption of equitable tolling by noting that "[o]nce Congress has made * * * a waiver [of sovereign immunity]," permitting equitable tolling "amounts to little, if any, broadening of [that] waiver." 498 U.S. at 95. But the Court justified that assertion—and the rebuttable presumption itself—as reflecting what it thought was "a realistic assessment of legislative intent," *ibid.*, and it later confirmed that the presumption can be rebutted "by demonstrating Congress's intent to the contrary," *John R. Sand & Gravel*, 552 U.S. at 138. Here, Congress understood the FTCA time bar as jurisdictional in significant part *because* it operated as a limit on the waiver of sovereign immunity to monetary claims against the United States. *Irwin*'s background presumption therefore does not "accurately reflect Congress's likely meaning" with respect to the FTCA, *id.* at 137, and it does not govern this case.

States, as sovereign, is immune from suit save as it consents to be sued," and (2) that "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). It was also settled that if Congress included a statute of limitations in a law waiving sovereign immunity with respect to a type of claim, compliance with that requirement was one of those "terms of [Congress's] consent to be sued" limiting the court's jurisdiction.

This Court had embraced that latter point many times, including in some of the cases holding that the time bar applicable in the Court of Claims was a jurisdictional requirement not subject to waiver or equitable tolling. In *Finn*, for example, the Court declared that "[a]s the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, *brought within a prescribed period*." 123 U.S. at 231 (emphasis added); see *Munro*, 303 U.S. at 41 (citing *Finn* and applying same analysis). And in *Kendall* the Court explained that "the government could not be sued without its consent," that Congress "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and that the statutory bar on untimely claims was itself one such "restriction[] which that court may not disregard." 107 U.S. at 125.[14]

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[14] The Court continued to apply that rule after 1946. See, *e.g.*, *Soriano* v. *United States*, 352 U.S. 270, 273-276 (1957) (reaffirming that time bar applicable to Tucker Act claims is not subject to equitable tolling and stating that "this Court *has long decided* that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not

The rule that statutory time limits governing suits against the United States for money damages are jurisdictional in nature was not unique to Tucker Act claims. On the contrary, in the decades leading up to the FTCA, federal courts had enforced that rule with respect to the other suits that Congress had authorized against the United States. Thus the Second Circuit had treated the statutory time limit set forth in the Suits in Admiralty Act—and also applicable to the Public Vessel Act—as jurisdictional. See *Phalen* v. *United States*, 32 F.2d 687, 687-688 (2d Cir. 1929) (holding that district court lacked "jurisdiction" due to plaintiff's failure to comply with time limit). And the Court of Claims had reached the same conclusion with respect to patent-infringement claims against the United States under the 1910 Act. *Rodman Chem. Co.* v. *United States*, 65 Ct. Cl. 39, 43, cert. denied, 277 U.S. 592 (1928) (emphasizing that time limit was "jurisdictional"); *E.W. Bliss Co.* v. *United States*, 53 Ct. Cl. 47, 65 (1917) (same, relying on Tucker Act ruling in *Wardwell*).[15] This Court had also applied the same jurisdictional rule to a statute that authorized the Seminole Nation to bring claims against the United States but declared any claim not brought within a

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to be implied") (emphasis added); see also *Dalm*, 494 U.S. at 608 (citing cases for proposition that a "statute of limitations requiring that a suit against the Government be brought within a certain time period" restricts waiver of sovereign immunity and "define[s] the court's jurisdiction to entertain the suit") (citation omitted).

[15] Congress was well aware of these other statutes when it enacted the FTCA. See, *e.g.*, 1946 Senate Report 31; S. Rep. No. 1196, 77th Cong., 2d Sess., at 5 (1942) (noting that proposed bill would "extend to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as * * * patent infringement, or admiralty claims").

specified time period to be "forever barred." *United States* v. *Seminole Nation*, 299 U.S. 417, 419, 421-422 (1937) (citing *Finn* and tying jurisdictional holding to statute's waiver of sovereign immunity).

b. The FTCA time bar is likewise a condition on the waiver of sovereign immunity. This Court said so expressly in *United States* v. *Kubrick*, 444 U.S. 111 (1979), where it noted that the FTCA "waives the immunity of the United States" and emphasized that "in construing the statute of limitations, *which is a condition of that waiver*, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Id.* at 117-118 (emphasis added) (citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).[16] Congress therefore would have expected courts to apply the FTCA time bar as a jurisdictional requirement—just as conditions on waivers of sovereign immunity had always been applied.

This Court's 1957 *Soriano* decision strongly supports that conclusion. The plaintiff in that case was a resident of the Philippines who sought compensation under the Tucker Act for the requisitioning of food and equipment during World War II. *Soriano*, 352 U.S. at 270-271. He filed his claim outside the six-year time limit set forth in 28 U.S.C. 2501, but argued that the time limit should have been tolled for the duration of the war. 352 U.S. at 272. This Court rejected the tolling request as inconsistent with Congress's intent

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[16] See 1946 Senate Report 29 (explaining that FTCA waives sovereign immunity "with certain limitations"); *John R. Sand & Gravel*, 552 U.S. at 133 (recognizing that statutes of limitations "limit[] the scope of a governmental waiver of sovereign immunity").

to enact strict time limits on the scope of its waiver of sovereign immunity. *Id.* at 275-277.

Notably, the Court ranged beyond the Tucker Act context and directly addressed Congress's intent with respect to other claims, including tort claims. The government's brief had expressed concern that allowing equitable tolling of Tucker Act claims would logically imply the same result for claims under other statutes waiving sovereign immunity to suits against the United States, and it cited the FTCA as well as the Suits in Admiralty Act and the Act of 1910.[17] The Court shared that concern, which it emphasized in its opinion:

> To permit the application of the doctrine urged by petitioner *would impose the tolling of the statute in every time-limit-consent Act* passed by the Congress. For example, statutes permitting suits for tax refunds, *tort actions*, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in *each statute* that the period of limitation was not to be extended by war.

Soriano, 352 U.S. at 275-276 (emphases added).

The Court accordingly rejected the argument that tolling was available under those statutes unless Congress expressly stated otherwise. *Soriano*, 352 U.S. at 274-276. It recognized that any other result would

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[17] U.S. Supp. Br. at 41-45, *Soriano*, *supra* (No. 49) (noting that FTCA does not contain provision tolling time limit for legal disability and then arguing that "*[t]he rule of construction sought by petitioner would subject to indefinite extension every statute conferring a limited consent to sue the United States*").

be contrary to Congress's expectation that courts would strictly enforce statutory time limits when they are conditions on its waiver of sovereign immunity:

> *Congress was entitled to assume that the limitation period it prescribed meant just that period and no more.* With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.

Id. at 276 (emphasis added) (footnote omitted).

It may be that after *Irwin*, this Court would not, without more, apply *Soriano*'s categorical rationale to any new statute waiving immunity for claims against the United States. *Irwin*, 498 U.S. at 94-96; see *Holland* v. *Florida*, 560 U.S. 631, 646 (2010). But *Irwin* itself recognized that the availability of equitable tolling turns on a "realistic assessment of legislative intent." 498 U.S. at 95; see *John R. Sand & Gravel*, 552 U.S. at 137-138. And *Soriano* explained that when Congress passed the Tucker Act and then the subsequent tort statutes, it expected the statutory time limits for filing claims to carry jurisdictional consequences. In that era—and in that specific context—Congress did not expect its silence to be taken as implicit consent to equitable tolling. Because tolling is inconsistent with any "realistic assessment" of Congress's intent, *Irwin*, 498 U.S. at 95, it is not available under the FTCA.

3. Other aspects of the FTCA's text and history confirm that Congress did not endorse equitable tolling

Additional features of the FTCA's text and history confirm that the time bar is a jurisdictional condition not subject to equitable tolling.

a. The plain text of the FTCA time bar is significant, even apart from its obvious historical roots in the 1863 and 1911 Acts. That text is straightforward and direct: It declares that "[e]very" untimely claim "shall be forever barred," and it contains no exceptions, caveats, or ambiguities. The "unusually emphatic form" Congress used to establish the time bar supports treating it as a strict requirement not subject to equitable tolling. *Brockamp*, 519 U.S. at 349-354.

That same text, of course, also attaches a specific jurisdictional *consequence* to delayed filings, stating that untimely claims "shall be forever barred." 28 U.S.C. 2401(b). Unlike other statutes of limitations that simply authorize a claim to be brought within a specific period, the FTCA provision goes a step further by requiring dismissal of such claims. See generally Pet. App. 70a-80a (Bea, J. dissenting).[18] In com-

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[18] See also *Irwin*, 498 U.S. at 94-95 (quoting 42 U.S.C. 2000e-16(c) (1988)) (within 30 days an employee "may file a civil action")). The *Irwin* Court recognized that "[a]n argument can undoubtedly be made" that the text of 28 U.S.C. 2501, providing that every untimely claim "shall be barred," is "more stringent" than the language in Section 2000e-16(c). 498 U.S. at 95. The Court was "not persuaded that the difference between them [wa]s enough to manifest a different congressional intent with respect to the availability of tolling." *Ibid.* This Court subsequently held in *John R. Sand & Gravel*, however, that the time bar in 25 U.S.C. 2501 is a jurisdictional limit not subject to waiver or tolling, and that *Irwin* had not overruled *Soriano*'s holding to that effect. 552 U.S. at 133-138.

manding that such claims "shall be forever barred," the provision speaks to—and restricts—the "adjudicatory authority" of courts. *Reed*, 559 U.S. at 160-161 (citation omitted) (noting that "[j]urisdictional statutes speak to the power of the court") (citation omitted).

Indeed, this Court, in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), recognized that the FTCA time bars constrain the authority of district courts. There, the Court identified Section 2401(b)'s "shall be forever barred" formulation as being "of a similar order" as a jurisdictional bankruptcy statute that "*confines review* [by the bankruptcy court] to 'matters to which any party has timely and specifically objected." *Id.* at 453 & n.8 (emphasis added). Significantly, the other statute *Kontrick* cited as being of a "similar order" to the bankruptcy statute that "confines review" to timely filings was 28 U.S.C. 2107, which this Court subsequently held in *Bowles* is jurisdictional and not subject to waiver or tolling. 540 U.S. at 453 n.8; see *Bowles*, 551 U.S. at 209-213.

b. The FTCA as originally enacted also expressly conditioned its grant of "exclusive jurisdiction" to district courts on the plaintiff's compliance with the time limitation for filing suit. FTCA § 410(a), 60 Stat. 843-844 (granting jurisdiction "[s]ubject to the provisions of this title"); FTCA § 420, 60 Stat. 845 ("this title" included the bar to filing after the statutory one-year period); see Pet. App. 53a-54a (Tashima, J., dissenting). That cross-reference confirms that the 1946

Because the operative language of the FTCA time bar was modeled on the virtually identical time bar applicable to Tucker Act claims, *Irwin* likewise does not affect the jurisdictional character of 28 U.S.C. 2401(b).

Congress understood the time bar as a direct limit on the district court's jurisdiction.[19]

c. Although the operative text of the FTCA time bar tracks the corresponding text of the 1863 and 1911 Acts, the FTCA does not include the express provisions in those Acts *allowing* tolling in cases where the plaintiff suffered under a legal disability at the time of suit. See pp. 3-5, *supra*. That difference between the otherwise-similar provisions shows that Congress did not want even a limited form of tolling to apply to FTCA cases. See *Lorillard* v. *Pons*, 434 U.S. 575, 581-582, 585 (1978) (holding that Congress's "selective incorporation" of some aspects of one statutory scheme into a new statute "strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully" the relevant aspects of the

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[19] The court of appeals noted that Congress later separated the FTCA's jurisdiction-granting and time-bar provisions—and eliminated the cross-reference to the latter—when it recodified Title 28 in 1948. Pet. App. 26a-29a. But this Court has made clear that changes resulting from the 1948 recodification should not be given substantive significance in statutory interpretation. See, *e.g.*, *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."); H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (noting that 1948 recodification "simplifies and restates" the existing FTCA time bars "without change of substance"). Indeed, Congress in 1948 likewise codified the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, in a different chapter of Title 28 (Ch. 165) from the statutory provision conferring jurisdiction on the Court of Claims, 28 U.S.C. 1491 (Ch. 91). Yet the Court still held in *John R. Sand & Gravel*, 552 U.S. at 133-136, that the Tucker Act time limit is jurisdictional.

original statute); see generally Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 190-192, 220-228 (2000) (Colella & Bain).

The absence of any tolling provision was "a deliberate choice, rather than an inadvertent omission." *United States* v. *Muniz,* 374 U.S. 150, 156 (1963). During the decades-long process of drafting the FTCA, several of the proposed bills contained either a "reasonable cause" exception to the time bar, a savings provision that tolled the time for filing an action during periods of disability (such as infancy or mental incompetency), or both.[20] As this Court concluded in rejecting the argument that FTCA suits may not be brought by federal prisoners, the fact that any such exception is "absent from the [FTCA] itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills." *Ibid.* Ordinarily, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intend-

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[20] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1933); S. 4567, 72d Cong., 1st Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st Sess. §§ 202(a), 304 (1926) (as reported by the House Comm. on Claims); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926); see generally Colella & Bain 190-192, 220-228 (describing proposed bills).

ed." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[21]

The legislative history also suggests that while Congress knew that the FTCA's strict time bar might be harsh in particular circumstances, it expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling. For example, Judge Alexander Holtzoff—a "major figure[] in the development of the [FTCA]," *Kosak* v. *United States*, 465 U.S. 848, 856 (1984), who was then serving as a special assistant to the Attorney General—testified that "[i]f unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committees would have jurisdiction." *Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940).[22]

d. Finally, it is notable that in the period immediately following its enactment, the FTCA time bar was

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[21] Over two decades later, the committee report on a bill proposing to add similar tolling provisions to Section 2401(b) suggested that the 1946 Congress omitted tolling in order "to allay the feelings of those who questioned the advisability of authorizing tort claims suits against the Government." H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969).

[22] Accord *Tort Claims Against the United States: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (statement of Alexander Holtzhoff); see also 69 Cong. Rec. 2200 (1928) (statements of Reps. Bankhead & Underhill) (reflecting understanding that time limit would be strictly enforced and that in "isolated cases" of "hardship" where the claimants could not "confer with counsel or make arrangements about the bringing of a suit" because they live far away or are "in hospital for 8 or 10 or 12 months," their remedy would be to "come back to Congress [for a private bill]"); see generally Colella & Bain 191-194.

generally not understood to permit equitable tolling. Thus in 1947, Judge Benjamin Moore described that time bar in remarks given to the Fourth Circuit Judicial Conference (and later published in the *American Bar Association Journal*) as "peculiar[]"—and unlike other federal and state statutes of limitation—insofar as it "contain[ed] no saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned." *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857, 860 (1947). Judge Moore acknowledged that tolling would not be available in such circumstances, stating "I know of no modern rule of construction whereby [such tolling] can be implied, especially where the right exists only by force of a statute." *Ibid.* In a similar commentary, Judge Leon R. Yankwich noted that "there is no jurisdiction to entertain [an FTCA] action after the expiration of the period within which it might have been brought," that *Finn* and other cases establish that courts "interpreting statutes waiving governmental immunity" are "confined to the letter of the statute," and that no waiver of the FTCA limitations period is permissible. *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143, 153-154 (1949).

C. Events Following The FTCA's Enactment In 1946 Confirm That Section 2401(b) Is Jurisdictional And Not Subject To Equitable Tolling

As explained above, Congress did not intend the original 1946 version of the FTCA time bar to be subject to equitable tolling. That understanding has been confirmed over subsequent decades.

1. Congress addressed hardship cases by extending the suit-filing deadline in 1949

In 1949, Congress extended the suit-filing deadline to two years in order to prevent "unfair[ness]" in particular situations, such as when claimants "suffered injuries which did not fully develop until after the expiration of the period for making claim" or when a deceased tort victim's next of kin did not receive notice of the wrongful death within the statutory period. See H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949); S. Rep. No. 135, 81st Cong., 1st Sess. 2 (1949). The very enactment of the 1949 extension demonstrates that Congress retained, and was prepared to exercise, the authority to determine how to address possible hardships in the application of Section 2401(b)'s strict time limit.

Moreover, in the discussions leading up to the 1949 change, Representative John Gwynne briefly suggested the idea of addressing "hardship cases—where a person had a reasonable excuse for not observing the [time limit]"—by "amend[ing] the [FTCA] so the court might have some discretion" in applying the one-year statute of limitations. *To Extend the Time for Filing Claims Under the Federal Tort Claims Act: Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. 27-28 (Mar. 10, 1948). A representative from the Justice Department dismissed that suggestion as not "practical." *Id.* at 28. Congress's decision to address possible instances of hardship by extending the time limit in the text of the statute itself underscores that Congress did not confer an extra-textual power to do so on the courts.

2. Congress reenacted Section 2401(b) in 1966 against the backdrop of Soriano *and of decisions holding the FTCA time bar to be jurisdictional*

In 1966, Congress revised the FTCA time bar by (1) requiring claimants to present their claims to the appropriate agency within two years, and (2) barring any suit not filed within six months of the agency's denial of the claim. 1966 Act §§ 2(a), 7, 80 Stat. 306, 307. In doing so, Congress also reenacted—without substantive amendment—the key operative language included in the original time limit. *Ibid.*; see 28 U.S.C. 2401(b) (providing that any untimely tort claim against the United States "shall be forever barred"). Three aspects of the 1966 legislation reinforce the conclusion that Congress understood the FTCA time bar to be jurisdictional and not subject to equitable tolling.

a. Congress enacted the 1966 revision of the FTCA against the backdrop of this Court's 1957 analysis in *Soriano*. As discussed above, *Soriano* held that Section 2501's virtually identical time bar must be strictly enforced without tolling. 352 U.S. at 275-276; pp. 32-34, *supra*. The Court explained—in language equally applicable to Sections 2501 and 2401(b)—that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." 352 U.S. at 276. The Court further noted its longstanding precedent establishing "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Ibid.* *Soriano* thus once again assured Congress of the settled doctrine that a statutory time limit with respect to suits

against the government could not be tolled unless the statute said so expressly.

Congress also acted in 1966 against the backdrop of circuit and district court decisions uniformly holding the FTCA time limit to be a jurisdictional requirement not subject to waiver or tolling. For example, the Fifth Circuit had rejected equitable tolling of Section 2401(b) on the ground that the FTCA conditioned the government's waiver of sovereign immunity "upon the suit's being filed within the time fixed in the Act and not otherwise," thereby making "exact compliance with the terms of consent * * * a condition precedent to suit." *Simon* v. *United States*, 244 F.2d 703, 704 (1957); see *United States* v. *Croft-Mullins Elec. Co.*, 333 F.2d 772, 777 n.9 (5th Cir. 1964) (citing *Finn* and holding that "[s]ince the limitation was part of the statute creating the liability, the time is an indispensable condition of the liability, whether limitations are pleaded or not"), cert. denied, 379 U.S. 968 (1965).

Similarly, the Ninth Circuit had dismissed an FTCA case for lack of jurisdiction due to noncompliance with the time limit because "no waiver [of sovereign immunity] exists * * * once the two-year period of limitations has run." *Humphreys* v. *United States*, 272 F.2d 411, 412 (1959). And the Fourth Circuit had relied on this Court's interpretation of the Tucker Act time bar in *Munro* and *Finn* to hold that the FTCA time limit was not subject to waiver. *Anderegg* v. *United States*, 171 F.2d 127, 128 (1948) (per curiam), cert. denied, 336 U.S. 967 (1949).[23]

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[23] See also *Lomax* v. *United States*, 155 F. Supp. 354, 357-359 (E.D. Pa. 1957) (citing *Finn* and holding that FTCA time bar is not subject to waiver and that "it is not within the power of * * * this Court * * * to make exceptions thereto"); *Foote* v. *Public Hous.*

This Court has often emphasized that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580-581.[24] That principle applies here. If Congress had disagreed with *Soriano* or the uniform construction of Section 2401(b) by the lower courts, it surely would have said so. By reenacting the operative language without change, Congress ratified the uniform view that the time limits are jurisdictional requirements not subject to equitable tolling.

b. The 1966 legislation was originally drafted by the Department of Justice and communicated to Congress by Attorney General Nicholas deB. Katzenbach. H.R. Rep. No. 1532, 89th Cong., 2d Sess. 10-15 (1966); S. Rep. No. 1327, 89th Cong., 2d Sess. 2-3, 9-13 (1966). At the time, the Department's longstanding position—including in its *Soriano* brief and other filings—was that Section 2401(b)'s time limit was a jurisdictional condition on the waiver of sovereign immunity and not subject to tolling.[25] The Department would not have

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Comm'r of the U.S., 107 F. Supp. 270, 275-276 (W.D. Mich. 1952) (rejecting argument that tolling of Section 2401(b) time limit is available under express tolling provision in Section 2401(a)); *Whalen* v. *United States*, 107 F. Supp. 112, 113 (E.D. Pa. 1952) (same).

[24] See generally, *e.g.*, *Bragdon*, 524 U.S. at 645; *Cannon* v. *University of Chi.*, 441 U.S. 677, 696 (1979) (presuming that Congress was aware of circuit and district court interpretations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, when it enacted similar language in Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373)).

[25] See, *e.g.*, U.S. Supp. Br., at 41-45, *Soriano*, *supra* (No. 49); U.S. Br. in Opp. at 7, *Pittman* v. *United States*, 382 U.S. 941 (1965) (No.

urged Congress to reenact the operative language of Section 2401(b)'s time bar if it had understood such language to *permit* tolling.[26]

c. The 1966 Act was passed in tandem with a separate bill that created statutes of limitations for certain suits filed *by* the United States—and that expressly provided for tolling in particular circumstances. See Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304. Like the FTCA reenactment, that separate bill was also drafted by the Justice Department, and it was sent to Congress as part of the same communication from Attorney General Katzenbach. See H.R. Rep. No. 1534, 89th Cong., 2d Sess. 2-4, 7-8, 9-14 (1966). Congress considered the Justice Department's companion proposals "as a group," *id.* at 3, and it enacted the separate law on the same day that it amended the FTCA.

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578) (relying on *Soriano* and arguing that Section 2401(b) was not subject to tolling due to claimant's legal disability); see also *Kington* v. *United States*, 265 F. Supp. 699, 701 (E.D. Tenn. 1967) (noting government's argument that Section 2401(b) deprived court of jurisdiction over untimely claim), aff'd, 396 F.2d 9 (6th Cir.), cert. denied, 393 U.S. 960 (1968).

[26] Three years later, the Department confirmed its understanding that the FTCA time bar did not allow tolling. In a letter to the House Judiciary Committee addressing a bill that would have allowed tolling when the claimant suffered under a legal disability, Deputy Attorney General Richard Kleindienst noted the Department's longstanding position "in opposition to the tolling of the statute of limitation in tort claims against the United States" and argued that "[n]o special circumstances have been indicated which suggest a need for tolling the statute, and there are many considerations which clearly indicate that it would be most undesirable to do so." H.R. Rep. No. 629, 91st Cong., 1st Sess. 5-6 (1969) (reprinting Kleindienst letter and confirming that this also reflected the position communicated to Congress in 1967).

The companion statute-of-limitations law is instructive because—in contrast to the 1966 FTCA amendment—it contained a list of "Exclusions" expressly authorizing tolling of the time limits applicable to government-initiated suits in specific circumstances. Act of July 18, 1966, Pub. L. No. 89-505, sec. 1, § 2416, 80 Stat. 305. Those circumstances included (1) the defendant's absence from the country, (2) the defendant's temporary exemption from legal process due to "infancy, mental incompetence, diplomatic immunity, or for any other reason," (3) the lack of actual and constructive knowledge of facts material to the right of action by responsible government officials, and (4) a state of declared war. *Ibid.*

That separate law thus shows that when Congress wanted to authorize tolling of a statutory time limit, it did so explicitly by statute. Congress's decision not to incorporate such provisions in the reenacted Section 2401(b) confirms that it did not want to permit tolling of the time bars.

3. Congress enacted numerous private laws "conferring jurisdiction" to hear FTCA claims "notwithstanding" Section 2401(b)

As explained above, Congress expected that claimants who failed to satisfy the FTCA's timing requirements could nonetheless pursue their claims by seeking private laws from Congress. See p. 39, *supra*. After 1946, Congress repeatedly enacted private laws granting individual claimants the right to bring their otherwise untimely tort claims in court. Many of those private laws used language expressly confirming that Section 2401(d)'s time limits are jurisdictional.

The operative language of private laws enacted to revive untimely FTCA claims from the early 1950s to the mid-1980s commonly provided as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, *notwithstanding the provisions of section 2401 (b)* of title 28, United States Code, *jurisdiction is hereby conferred* upon the United States District Court for [a given district] to hear, determine, and render judgment on the tort claims of [the claimant] against the United States on account of personal injuries sustained on [a given date, and under particular stated circumstances].

Priv. L. No. 85-176, 71 Stat. A66 (1957) (emphases omitted and added).[27]

The text of those private laws confirms that Congress consistently viewed Section 2401(b) as a condition on the exercise of jurisdiction, and not as a run-of-the-mill statute of limitations subject to equitable

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[27] See, *e.g.*, Priv. L. No. 96-30, 93 Stat. 1401 (1979) (virtually identical language granting "jurisdiction" "notwithstanding the time limitation of Section 2401(b) of title 28, United States Code"); Priv. L. No. 96-29, 93 Stat. 1400 (1979) (same); Priv. L. No. 91-116, 84 Stat. 2113 (1970) ("conferr[ing]" "jurisdiction" "notwithstanding the limitations of section 2401 of title 28, United States Code"); Priv. L. No. 91-109, 84 Stat. 2110 (1970) (same); Priv. L. No. 90-284, 82 Stat. 1403 (1968) (same); Priv. L. No. 85-184, 71 Stat. A70 (1957) (same); see also Priv. L. No. 99-15, 100 Stat. 4319 (1986) (granting "jurisdiction" to district court under 28 U.S.C. 1346 to hear tort claim "notwithstanding the two-year limitation set forth in section 2401(b) of title 28, United States Code"); Priv. L. No. 71, 65 Stat. A28 (1951) (granting "jurisdiction" to district court under 28 U.S.C. 1346 "despite section 2401 of title 28, United States Code"); Priv. L. No. 64, 65 Stat. A26 (1951) (same).

tolling. If Section 2401(b) were nonjurisdictional, there would have been no reason for Congress to have "conferred" jurisdiction "*notwithstanding*" that provision.

Some of these private laws were enacted to revive claims that were jurisdictionally barred by Section 2401(b)'s deadline for filing suit in court, and others were enacted to revive claims barred by the deadline for presenting the claim to an agency.[28] Congress therefore plainly recognized that *both* time limits established jurisdictional limits on the power of district courts to adjudicate FTCA claims.

This Court has emphasized that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving* v. *United States*, 517 U.S. 748, 770 (1996) (brackets and citation omitted).[29] Here, the private laws enacted over a number of decades treating Section 2401(b) as jurisdictional provide strong confirmation

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[28] For examples of private bills reviving claims barred by Section 2401(b)'s suit-filing deadline, see Priv. L. No. 91-109, 84 Stat. 2110 (1970); H.R. Rep. No. 58, 91st Cong., 1st Sess. 2-3 (1969); Priv. L. No. 90-284, 82 Stat. 1403 (1968); S. Rep. No. 376, 90th Cong., 1st Sess. 2-3 (1967). For examples of private bills reviving claims barred by the administrative-presentment deadline, see Priv. L. No. 96-30, 93 Stat. 1401 (1979); H.R. Rep. No. 460, 96th Cong., 1st Sess. 2 (1979); Priv. L. No. 96-29, 93 Stat. 1400 (1979); S. Rep. No. 461, 96th Cong., 1st Sess. 1-2 (1979).

[29] See, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228 (2010) (noting that a later-enacted statute can "clarify the understanding" of prior legislation); *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (noting that statutory provisions should be "construe[d] [] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

that the FTCA time bar—as enacted in 1946, and as reenacted in 1966—does not permit equitable tolling.

4. Congress consistently rejected proposals to authorize equitable tolling

After 1946, Congress repeatedly declined to enact bills to permit tolling even in circumstances where the claimant was under various forms of legal disability, such as minority, insanity, imprisonment, or the like.[30] The history surrounding those proposed bills makes clear that Congress was well aware that Section 2401(b) did not permit equitable tolling in its existing form.

For example, the House Judiciary Committee report on a 1969 proposal emphasized (1) the contrast between the specific tolling provisions in Section 2401(a) and the absence of any such provision in Section 2401(b); (2) Congress's rejection of draft bills in the 1920s and 1930s that included tolling provisions; (3) two Ninth Circuit decisions rejecting the availability of tolling under Section 2401(b); and (4) the Justice Department's opposition to allowing the FTCA time bar to be tolled. H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969). The report expressed the view that "the time is overdue for the recognition of the fact that persons suffering from legal disabilities * * * are actually being deprived of their rights because of the presently overstrict limitation provisions now found in [Section 2401(b)]." *Id.* at 4.

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[30] See, H.R. 3261, 101st Cong., 1st Sess. (1989); H.R. 3260, 101st Cong., 1st Sess. (1989); H.R. 1023, 99th Cong., 2d Sess. (1986); H.R. 10575, 92d Cong., 1st Sess. (1971); H.R. 10124, 91st Cong., 1st Sess. (1969); H.R. 4155, 91st Cong., 1st Sess. (1969); H.R. 5713, 90th Cong., 1st Sess. (1967); H.R. 7184, 89th Cong., 1st Sess. (1965); H.R. 2403, 81st Cong., 1st Sess. (1949).

Years later, Deputy Assistant Attorney General Robert Willmore testified before Congress concerning a similar bill. He explained that the Department of Justice was "strongly opposed" to the bill, noting that similar tolling provisions had been proposed "on a number of occasions" in the past and that the Department had "consistently and repeatedly opposed such legislation." *Time Extension for Presenting Tort Claims to Persons Under Legal Disability: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 7 (1986).

Thus, like the private laws that treated Section 2401(b) as jurisdictional, the failed proposals to amend Section 2401(b) to provide for equitable tolling—and the Executive Branch's consistent opposition to such proposals—still further reinforce the conclusion that Section 2401(b) does not permit tolling.

5. Congress in 1988 provided a narrow exception to Section 2401(b)'s time bars in one specific circumstance

In 1988, Congress did enact a provision allowing a form of tolling in one specific circumstance that was then arising with some frequency in FTCA litigation. Before this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), lower courts had typically held that federal employees were absolutely immune from personal liability in state common-law tort actions arising from activities within the scope of their employment, thereby making the FTCA the only remedy in such circumstances. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988) (1988 House Report). But in many cases, claimants had sued private individuals in state court and only subsequently learned that the defend-

ants were federal employees at the time they committed the alleged tort. By then, the FTCA's two-year time limit for presenting a claim to an agency had often expired. Without equitable tolling, such claimants were left without a remedy. See generally Colella & Bain 202-203.

This Court's 1988 *Westfall* decision limited the scope of a federal employee's immunity to circumstances where the employee was performing a discretionary function. 484 U.S. at 299. Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, which overturned the *Westfall* decision and made the FTCA the exclusive remedy for any torts allegedly committed by government employees within the scope of their employment. § 5, 102 Stat. 4564; 1988 House Report 4. The law also created a new procedure for (1) substituting the United States as the proper defendant in such cases and (2) granting the claimant 60 days in which to present an FTCA claim to the appropriate agency. Westfall Act § 6, 102 Stat. 4564; see 28 U.S.C. 2679(d)(2)-(4) and (5). Under the Westfall Act, if the agency denies the claim in those circumstances, the claimant may sue in court and his claim "shall be deemed to be timely presented under section 2401(b) of this title," but only if the claim "would have been timely had it been filed [with the agency] on the date the underlying civil action was commenced." 28 U.S.C. 2679(d)(5).

Congress's decision to grant tort claimants extra time in that limited scenario—but not in others—confirms its understanding that Section 2401(b) does *not* permit equitable tolling in other circumstances.

Indeed, Congress passed the 1988 law at a time when the courts of appeals had consistently characterized Section 2401(b) as jurisdictional and had attached jurisdictional consequences to untimely filings.[31] At no point since 1946 did Congress ever reject that established rule, which comports with the text, history, and purpose of Section 2401(b). See *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (relying on fact that Congress amended the relevant statute six times and left untouched a uniform judicial and administrative interpretation). This Court should enforce that rule here.

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[31] See, *e.g.*, *Richman* v. *United States*, 709 F.2d 122, 124 (1st Cir. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1982); *Childers* v. *United States*, 442 F.2d 1299, 1303 (4th Cir.), cert. denied, 404 U.S. 857 (1971); *Vernell* v. *USPS*, 819 F.2d 108, 111-112 (5th Cir. 1987); *Garrett* v. *United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Maahs* v. *United States*, 840 F.2d 863, 866 n.4 (11th Cir. 1988); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(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.

3. 28 U.S.C. 2501 provides:

Time for filing suit

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.

4. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

5. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial peti-

tion the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

* * * * *

6. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)), provides:

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided, further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

7. Judicial Code, ch. 231, § 156, 36 Stat. 1139 (1911), provides:

SEC. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

8. Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842 (1946), provides in pertinent part:

TITLE IV—FEDERAL TORT CLAIMS ACT

* * * * *

PART 3—SUITS ON TORT CLAIMS AGAINST THE UNITED STATES

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission

complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the

claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

* * * * *

PART 4—PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant

by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

* * * * *

9. Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304, provides in pertinent part:

* * * * *

§ 2416. Time for commencing actions brought by the United States—Exclusions

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

"2415. Time for commencing actions brought by the United States.

"2416. Time for commencing actions brought by the United States—Exclusions."

10. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306, provides in pertinent part:

* * * * *

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this sub-section shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

(b) Subsection (b) of section 2675 of title 28, United States Code, is amended by deleting the first sentence thereof.

* * * * *

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(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."

* * * * *