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Waves of Change Towards a More Unified Approach: Equitable Tolling and the Federal Tort Claims Act

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ABSTRACT

The Supreme Court's landmark decision in Irwin v. Department of Veteran's Affairs *sparked a shift in sovereign immunity jurisprudence. As a result, the canon of strict construction is no longer the preeminent tool for restricting the scope of sovereign immunity waivers. In a contemporaneous development, the Court began to approach procedural rules associated with waivers of sovereign immunity as less absolute, instead applying them similarly to those against private individuals. This juxtaposition suggests the need for a reexamination of certain statutes. Prior to these two developments, appellate courts and commentators rejected the argument that the Federal Tort Claims Act's ("FTCA") statute of limitation was subject to equitable tolling. The Ninth Circuit's recent decision in* Kwai Fun Wong v. Beebe *embraced the Supreme Court's new jurisdictional framework and rejected those earlier positions. Concurring and dissenting opinions refused to accept the Supreme Court's sovereign immunity and procedural limitations zeitgeist. The discord suggests that these concurrent shifts have yet to achieve a harmonious whole. This article*

aims to navigate the waters. Standing on the shoulders of the majority's opinion while also placing the crux of the court's argument in the context of the Supreme Court's modern precedents, it attempts to shed light on the superiority of the argument that equitable tolling is entirely compatible with the FTCA. In so doing, this article primarily extrapolates from the statute's text meanwhile questioning the notion that the FTCA's legislative and statutory history indicates a contrary intent.

"Perchance hee for whom this Bell tolls may be so ill, as that he knowes not it tolls for him; And perhance I may thinke my selfe so much better than I am, as that they who are about mee, and see my state, may have caused it to toll for me, and I know not that."[1]

I. INTRODUCTION

More than two decades ago, the Supreme Court's decision in *Irwin v. Department of Veteran's Affairs* brought about a drastic shift in waiver of sovereign immunity jurisprudence.[2] The Court held that there is a rebuttable presumption that equitable tolling applies to suits against the government in the same manner as in suits against private individuals.[3] Subsequently, the Court solidified *Irwin* by moving away from its traditional sovereign immunity approach.[4] Simultaneously, the Court's jurisprudence regarding associated procedural rules, such as statutes of limitations applicable to government defendants, fluctuated considerably.[5] Due to these concurrent shifts, appellate and district courts struggled with the question of whether equitable tolling is applicable to the limitations provision of the Federal Tort Claims Act ("FTCA"), the preeminent means of redress for people injured by the negligence of federal government employees.[6]

The Supreme Court's 2008 decision in *John R. Sand & Gravel Company v. United States*[7] juxtaposed these two waves of change and reemphasized the need to examine whether a limitations provision is properly "jurisdictional" or not, as a prerequisite to the application of equitable tolling.[8] In the wake of *John R. Sand*, the Court attempted to clarify its approach to the jurisdictional issue by providing more accuracy and predictability to its use of the jurisdictional term.[9] Interestingly enough, these cases neither solved the issue

1. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, Meditation XVII 86 (1623) (Anthony Raspa, ed. 1975). The number of claims filed each year under the FTCA—and the aggregate dollar amount of those claims—leaves no doubt as to the potential impact of applying equitable tolling. *See* GREGORY SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.02, at 104 (4th ed. 2006) (noting the "billions of dollars in claims made against the United States each year . . . .").

2. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990).

3. *Id.* at 95-96.

4. *See* Franconia Assoc. v. United States, 536 U.S. 129 (2002); Scarborough v. Principi, 541 U.S. 401 (2004); John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008).

5. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013); Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012); Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

6. *Compare* Estate of George v. Veteran's Admin. Med. Ctr., 821 F. Supp. 2d 573 (W.D.N.Y. 2011) (holding that the statute of limitations is jurisdictional and therefore is not subject to equitable tolling) *with* Sublet v. United States, No. 2:08 CV 1410, 2010 WL 3419422, at *3 (W.D. LA. Aug. 25, 2010) ("Equitable considerations that normally have the effect of tolling 'are not given that effect when the claim is under the [FTCA].'") (quoting Childers v. United States, 442 F.2d 1299, 1303 (5th Cir. 1971)).

7. *John R. Sand & Gravel Co.*, 552 U.S. 130.

8. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 545 (2008) (noting "[b]ecause the United States may not be sued without its consent, the existence of a statutory waiver of sovereign immunity is necessarily a jurisdictional inquiry").

9. *See, e.g.*, *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817; *Gonzalez*, 132 S. Ct. at 648; *Henderson*, 131 S. Ct. at

nor compelled the circuit courts to abide by any single interpretation—resulting in the current circuit split.[10] Much of the disagreement is due to the fact that appellate courts largely misunderstood or ignored the Supreme Court's more liberal approach to sovereign immunity and increasingly narrow use of the jurisdictional label.[11]

The Ninth Circuit recently addressed this complicated issue in *Kwai Fun Wong v. Beebe*, albeit with great difficulty.[12] In *Kwai*, the court overruled its longstanding precedent holding that the limitations provision of the FTCA was strictly jurisdictional and therefore not subject to equitable tolling principles.[13] However, both the *Kwai* majority and two dissents strained to reach their foregone conclusions.[14] This was not surprising given the lack of specific guidance by the Supreme Court in *John R. Sand* and later cases.[15] Coupled with a dearth of commentary addressing the issue in recent years, a comprehensive analysis of the FTCA's limitations provision is overdue.[16]

This note attempts to answer the threshold[17] procedural question of whether the two-year limitations provision contained in section 2401(b) of the FTCA is jurisdictional and argues that the Supreme Court's recent case law compels the conclusion that it is no more than an ordinary statute of limitations to which a presumption of equitable tolling applies. Part II discusses the issue in its jurisprudential context vis-à-vis *Irwin* and the Court's growing dissatisfaction with the strict construction canon traditionally applied sovereign immunity waivers.[18] Part III provides a working foundation of the Court's more structured jurisdictional analysis—a primarily textualist framework.[19] Part IV briefly analyzes the competing positions among the circuit courts.[20] Part V analyzes Previous Supreme Court

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1202.

10. *See, e.g.*, Phillips v. Generations Family Health Ctr., 723 F.3d 144 (2d Cir. 2013); Goldblatt v. Nat'l Credit Union Admin., No. 11-4307-cv 2012, WL 5458082, at *55 (2d Cir. Nov. 9, 2012) (noting that "in this Circuit, it is an open question whether equitable tolling is available for tort claims brought pursuant to the FTCA"); Bazzo v. United States, 494 Fed. App'x 545, 546 (6th Cir. 2012) ("[t]he question whether § 2401(b)'s exhaustion provisions constitute jurisdictional requirements divides circuit courts and even prompts inconsistent rulings within this circuit").

11. *See e.g.*, *In re* FEMA Formaldehyde Prods. Liab. Litig., 646 F.3d 185 (5th Cir. 2011).

12. Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013) (en banc).

13. *Id.* at 1045-54; June v. United States, 2013 WL 6773664 (9th Cir. Dec. 24, 2013).

14. *See generally Kwai*, 732 F.3d 1030.

15. *Id.* at 1045 (noting "there is no Supreme Court precedent on the question.").

16. *See, e.g.*, Max Compton, Note, *Under John R. Sand & Gravel Co., May Lower Courts Apply Their Own Precedent in Determining Whether A Statute Waiving Sovereign Immunity is Jurisdictional?*, 29 GA. ST. U. L. REV. 583 (2013). Initial scholarship on this issue predominately sought to address the question of whether *Irwin's* presumption was rebutted by the FTCA's legislative history. That discussion is both outside the scope of this article and is thoroughly saturated, however, a number of the propositions relevant to that second step in the analytical framework are relevant to this discussion. *See* Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174 (2000); Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly*, 29 SETON HALL L. REV. 885 (1999); Richard Parker, *Is The Doctrine Of Equitable Tolling Applicable To The Limitations Periods In The Federal Tort Claims Act?*, 135 MIL. L. REV. 1 (1992).

17. The second step in the analytical framework on this issue is whether the presumption set forth in *Irwin* is rebutted due to its inconsistency with the statute's text. Young v. United States, 535 U.S. 43, 49-50 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute . . . . Congress must be presumed to draft limitations periods in light of this background principle.") (internal citations omitted). There exists some analytical overlap between the two steps. As previously discussed, extensive commentary, and multiple cases provide insight into that step in the analytical framework. *See* United States v. Beggerly, 524 U.S. 38 (1998); United States v. Brockcamp, 519 U.S. 347 (1997); *see supra* note 16.

18. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990).

19. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013).

20. *Compare* Santos *ex rel*. Beatos v. United States, 559 F.3d 189 (3d Cir. 2011) *with In re* FEMA Trailer

interpretations of related FTCA provisions.[21] Part VI argues that strong textual and teleological considerations offer persuasive evidence that section 2401(b) is, and was always meant to be, no more than an ordinary statute of limitations.[22] Finally, Part VIII offers conclusions and sets forth some basic implications of adopting this approach as standard procedure for suits brought pursuant to the FTCA.[23]

II. AN EVOLVING WAIVER

A. The FTCA: Purpose and History

The FTCA is a congressional waiver of sovereign immunity, which allows financial compensation for torts caused by government employees committed within the scope of their employment.[24] The general purpose in enacting the FCTA was to treat individuals harmed by government employees similar to victims of torts committed by private citizens.[25] The Act itself did not seek to create any new causes of action, but instead attempted to "build upon the legal relationships formulated and characterized by the states."[26] Congress enacted the FTCA in 1946 after extensive congressional deliberation in response to growing concerns regarding the inability of injured individuals to recover from the federal government for tortious wrongs committed by its employees.[27] As such, Congress's objective was to balance individuals' private interests in resolving their tort claims and the public interest in not over-burdening either the legislature, via private bills, or the judicial systems, through an exorbitant amount of litigation.[28]

As a waiver of sovereign immunity, the FTCA states that courts must treat the government "in the same manner and to the same extent as a private individual."[29] Federal district courts maintain exclusive jurisdiction over claims brought pursuant to the FTCA.[30] The centerpiece of the ensuing analysis is the limitations provision of the Act, section 2401(b), which 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

Formaldehyde Prods. Liab. Litig., 646 F.3d 185 (5th Cir. 2011).

21. McNeil v. United States, 508 U.S. 106 (1993); United States v. Kubrick, 444 U.S. 111 (1979).
22. Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013) (en banc).
23. *See, e.g.*, Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493 (2004).
24. Federal Tort Claims Act, 28 U.S.C. §§ 2401-02, 2411-12, 2671-72, 2674-80, 1346, 1402 (2012).
25. SISK, *supra* note 1, at 104-05.
26. Richards v. United States, 369 U.S. 1, 7 (1962).
27. SISK, *supra* note 1, at 103.
28. *Id.*
29. 28 U.S.C. § 2674 (2012).
30. 28 U.S.C. § 1346(b)(1) (2012):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for 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.

Id.

> 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 is presented.[31]

Originally, the limitations provision required that the claimant must file suit in the proper federal district court within one year of the claim's accrual.[32] Additionally, it did not require that the claimant file his or her case with the appropriate federal agency prior to filing suit in district court.[33] However, in 1948, Congress reorganized the FTCA under Title 28.[34] The limitations provision in particular failed to receive much attention during that process.[35] However, the recodification separated the FTCA's jurisdictional provision[36] from its limitations provision.[37]

In 1949, Congress modified the limitation provision and gave claimants two years from the date of the accrual of their claim to file suit.[38] Thereafter, the limitations provision underwent numerous revisions over the course of many decades.[39] In 1966, Congress passed a modification to the law that required the claimant to first file their claim with the proper administrative agency.[40] The purpose for this modification was to give the appropriate agency time to contemplate settlement without recourse to litigation.[41] Additionally, in 1988, Congress specifically inserted a tolling provision for erroneous omissions of the government as the proper defendant.[42] At no time did Congress enact any other tolling provision within the FTCA and it does not contain any other such provision to this very day.[43] As a result of the FTCA's age and extensive modifications, gleaning the proper intent from the legislative history is a difficult task, one that is normally delegated to the judiciary.[44]

B. Irwin and Shifting Sovereign Immunity Jurisprudence

The present lack of cohesion among the circuit courts came about largely on the heels of the Supreme Court decision in *Irwin v. Department of Veteran's Affairs*.[45] Prior to *Irwin*, federal courts consistently and unanimously held that equitable tolling did not apply to the FTCA because section 2401(b)'s two-year limitations provision was a jurisdictional

31. Pub. L. No. 111-350, § 5(g)(8), 124 Stat. 3848 (2011).
32. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601 ("1946 Act"), tit. IV, 60 Stat. 812 (1946).
33. *Id.*
34. *See* Pub. L. No. 80-773 ("1948 Act"), § 1, 62 Stat. 869 (1948); Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1056 (9th Cir. 2013) (Tashima, Circuit Justice, dissenting).
35. Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 6 (1991).
36. 28 U.S.C. § 1346(b) (1996).
37. *Kwai*, 732 F.3d at 1056 (Tashima, Circuit Justice, dissenting).
38. Colella & Bain, *supra* note 16, at 178-79.
39. *Id.*
40. McNeil v. United States, 508 U.S. 106, 112 n.7 (1993).
41. *Id.* Congress's goal in this matter has been largely a success. *See* Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331 (2000).
42. 28 U.S.C. §§ 2679(d)(5)(A)-(B), Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4564 (1988).
43. 28 U.S.C. § 2401 (2012).
44. Sinclair & Szypszak, *supra* note 35, at 6.
45. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990).

bar to untimely claims.[46] In the wake of *Irwin*, federal courts reversed course and immediately began to apply equitable tolling to FTCA two-year limitation period.[47]

In *Irwin*, Chief Justice Rehnquist, writing for the Court, compared the application of equitable tolling in suits against the government to suits against private individuals, and concluded that the same rationale applied to both.[48] Holding that equitable tolling applied to the facts in *Irwin*,[49] the Court stated:

> Once Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.[50]

Instead of limiting this rule to Title VII, the Court declared, "[w]e think this case affords us the opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government."[51] Today *Irwin* remains the general rule on questions of equitable tolling as applied to federal statutes.[52]

Historically speaking, the government benefitted from two strong presumptions against a waiver of sovereign immunity.[53] One early Supreme Court decision described the first presumption, stating that, "the sovereignty of the United States raises a presumption against its suability, unless it is clearly shown."[54] Thus, there is a presumption that the government has not waived its immunity, rather, it must expressly state the waiver—leaving no room for courts to imply them.[55] The second presumption is when the government

46. *See, e.g.*, Gould v. U.S. Dep't of Health & Human Servs., 905 F.2d 738, 742 (4th Cir. 1990) (en banc) (interpreting the two-year limitations period); Berti v. Veterans Admin. Hosp., 860 F.2d 338, 340 (9th Cir. 1988) (interpreting the six-month limitations period); Houston v. U.S. Postal Serv., 823 F.2d 896, 902 (5th Cir. 1987) (commenting on the two-year and six-month limitations period).

47. Parker & Colella, *supra* note 16, at 887-88.

48. *Irwin*, 498 U.S. at 95. The statute at issue in *Irwin* was Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-16(c)).

49. The plaintiff, Shirley Irwin, brought her claim for unlawful discharge alleging discrimination based on race and disability. The Veteran's Administration denied her claim and the Equal Employment Opportunity Commission affirmed. A letter indicating the final decision was sent to Irwin and her attorney on March 19, 1987. She claimed to have received the letter on April 7. Her attorney received the letter on March 23, but did not learn of it until April 10 because he was on vacation at the time. She did not file suit in district court until May 6, 1987, more than thirty days after she received the letter. The district court subsequently dismissed the claim as untimely, claiming that it lacked jurisdiction. *Irwin*, 498 U.S. at 90-93.

50. *Id.* at 95-96.

51. *Id.* at 95.

52. *Id.*

53. Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1249 (2014).

54. E. Transp. Co. v. United States, 272 U.S. 675, 686 (1927).

55. *Irwin*, 498 U.S. at 95 ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.") (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)). *See also* Price v. United States, 174 U.S. 373, 375-76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it

does expressly state the waiver, the terms of the waiver must "be strictly construed in favor of the sovereign."[56] Therefore, the plaintiffs are at a distinct disadvantage regarding whether a waiver exists, and if it does, the extent of the waiver's scope.[57] Courts often comingle these two presumptions, however, they are properly analyzed as separate and distinct, the first determining the need for, but not the impact of, the second.[58]

The initial question of whether Congress waived the federal government's immunity is typically an easy one, particularly in light of the substantial number of sovereign immunity waivers in force today.[59] The FTCA provides a clear answer on this initial question.[60] It plainly states that the "United States shall be liable . . . for tort claims, in the same manner and to the same extent as private individuals."[61] The real issue regarding section 2401(b), therefore, is the scope of that waiver.[62]

The Supreme Court's approach to the scope of the waiver inquiry fluctuated significantly after its decision in *Irwin*.[63] After *Irwin*, the Court encountered challenges to sovereign immunity with increasing frequency.[64] Fortunately, a number of those cases specifically addressed limitations provisions.[65] Taken together, those cases signaled a shift in the Court's approach and likely foreshadowed their effect on section 2401(b).[66]

In the 2002 term, the Supreme Court heard *Franconia Associates v. United States*.[67] The question in that consolidated case was whether the claim accrual rule under in the Tucker Act was subject to the strict construction canon.[68] Under section 2501 of the Tucker Act, plaintiffs must file their claim within six years of the claim's accrual.[69] The petitioners, suing for breach of their loan agreements with the federal government, filed their claims nine years after the breach of their loans.[70] The petitioners argued that the accrual of their claims should follow the common law contract accrual rule.[71] The government filed a motion to dismiss, arguing that the petitioner's claim was untimely due to the strict construction rule for waivers of sovereign immunity.[72]

The Court ruled for the petitioners, rejecting the government's argument as "an 'unduly restrictive' reading of the congressional waiver of sovereign immunity."[73] The Court found that such a rigid construction was not "a realistic assessment of legislative intent."[74]

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consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").

56. McMahon v. United States, 342 U.S. 25, 27 (1951).
57. Sisk, *supra* note 53, at 1251.
58. *Id.*
59. *See e.g.*, The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491; the Contracts Disputes Act, 41 U.S.C. §§ 7101-09 (formerly 41 U.S.C. §§ 601-13); the Clean Water Act, 33 U.S.C. §§ 1365(a)(2), 1369(b).
60. 28 U.S.C. § 2674 (1988).
61. *Id.*
62. 28 U.S.C. § 2401(b) (2012).
63. Sisk, *supra* note 53, at 1256.
64. *Id.*
65. *Id.*
66. 28 U.S.C. § 2401(b) (2012).
67. Franconia Assocs. v. United States, 536 U.S. 129 (2002).
68. *Id.* at 133.
69. 28 U.S.C. § 2501 (2004).
70. *Franconia*, 536 U.S. at 133.
71. *Id.* at 138.
72. *Id.*
73. *Id.* at 145 (quoting Bowen v. City of New York, 476 U.S. 467, 479 (1986)).
74. *Id.* (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

Consequently, the Court refused to accept that the scope of the section 2501's waiver was subject to strict construction in favor of the government.[75] Rather, the Court noted the "unexceptional" nature of section 2501, and therefore approached it as if the six-year limitation period applied to private individuals, thereby approving the use of the common law accrual rule.[76]

Two years later the Court rendered its decision in *Scarborough v. Principi*.[77] The petitioner filed an application for attorney fees under the Equal Access to Justice Act ("EAJA")[78] within the statutorily required thirty days, however, the petitioner failed to include a necessary allegation.[79] Thus, the issue was whether the petitioner was allowed to amend the application outside the thirty-day period.[80] The Court ultimately decided that the petitioner's application was amendable outside the thirty-day period because such a practice would not create an "unfair imposition" on the government.[81]

The intriguing component of *Scarborough* is the disagreement between Justice Ginsburg's majority opinion and Justice Thomas's dissent.[82] *Irwin* requires the courts to treat government statutes of limitations the same as those against private individuals.[83] However, Justice Thomas read *Irwin* as requiring application of the presumption only when a "private-litigation equivalent" exists.[84] He agreed with the government's position that the EAJA's fee-shifting provision[85] lacked a private equivalent.[86] As such, he concluded that *Irwin* was inapplicable.[87] The majority, however, did not believe that *Irwin* was so limited.[88] Justice Ginsburg, writing for the majority, noted that, "[b]ecause many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin's* reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent."[89] Thus, *Scarborough* simultaneously expanded *Irwin* by not requiring a private-litigation equivalent to statutes of limitations for government defendants and provided additional evidence of the Court's aversion to the strict construction canon when Congress clearly waives federal sovereign immunity.[90]

In *John R. Sand & Gravel Co. v. United* Sates, the Court again recognized the problems resulting from its decision in *Irwin* nearly two decades earlier and provided further

75. *Franconia*, 536 U.S. at 145.
76. *Id.*
77. Scarborough v. Principi, 541 U.S. 401 (2004).
78. *See* Pub. L. No. 96-481, §§ 201-08, 94 Stat. 2321, 2325-30 (1980) (codified at 5 U.S.C. § 504 (1982); 28 U.S.C. § 2412 (1982)).
79. *Scarborough*, 541 U.S. at 405.
80. *Id.* at 406.
81. *Id.* at 423.
82. *See generally id.*
83. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).
84. *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting).
85. 28 U.S.C. § 2412(d)(1)(A) (1998).
86. *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting).
87. *Id.* Justice Thomas actually went much further, noting "[t]he Court reaches its holding today by distorting the scope of *Irwin* . . . and thereby eviscerating that case's doctrinal underpinnings." *Id.* at 423-24 (internal citation omitted).
88. *Id.* at 422 (majority opinion).
89. *Id.*
90. *Id.*

elaboration of its rule.[91] In this instance, the Court faced the question of whether the statute of limitations was a jurisdictional bar for non-tort money claims against the government when determining whether to apply equitable tolling to an untimely claim under the Tucker Act.[92] Like *Scarborough*, the majority and the dissent disagreed on the scope of *Irwin* and the general state of the Court's sovereign immunity jurisprudence.[93] The majority refused to follow the liberal approach taken in *Franconia* and *Scarborough* solely because previous decisions by the Court treated section 2501 of the Tucker Act as "more absolute" and not subject to a waiver.[94] Thus, the Court's affinity for "basic principles of stare decisis" outweighed the option to follow its new approach to scope of sovereign immunity analysis.[95]

The dissenting opinions of Justices Stevens and Ginsburg fully illuminated the majority's aberration from *Irwin*, *Franconia*, and *Scarborough*.[96] The dissenters noted the fact that the Court's decisions in *Franconia* and *Scarborough* ran contrary to the majority's strict construction of section 2501 of the Tucker Act.[97] Indeed, the dissenting justices rejected the notion that *Irwin* left a carve-out for statutes it previously construed under the traditional strict construction canon.[98] Moreover, the dissenters overtly suggested that the majority's opinion muddied the waters of the Court's recent jurisprudence instead of continuing toward its goal of clarifying the law.[99]

Justice Ginsburg's separate dissenting opinion offered a similarly harsh view of the majority's rationale.[100] She described the majority's decision as "damage[ing] the coherence of the law" by "cling[ing] to outworn precedents at odds with later, more enlightened decisions."[101] She was convinced that *Irwin* abrogated the conceptual underpinnings of the Court's previous interpretations of the Tucker Act's limitations provision specifically, and those of other provisions more generally.[102] Most importantly, Justice Ginsburg adumbrated that the Court's recent decisions, coupled with the majority's decision, would ultimately make section 2401(b) of the FTCA subject to *Irwin's* presumption.[103] Arguably, *John R. Sand* would have produced a unanimous opinion had the Court refused to rely on its earlier interpretations of section 2501 and instead favored its recent decisions in *Franconia* and *Scarborough*.[104]

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91. John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008).

92. *Id.* at 132.

93. *See generally id.*

94. *Id.* at 134. *See also* Soriano v. United States, 352 U.S. 270 (1957); United States v. Greathouse, 166 U.S. 601 (1897); De Arnaud v. United States, 151 U.S. 483 (1894).

95. *John R. Sand & Gravel Co*., 552 U.S. at 139.

96. *Id.* at 140-47 (Stevens, J., & Ginsburg, J., dissenting).

97. *Id.* at 141 n.4.

98. *Id.* at 141-42.

99. *Id.* at 143. They also approvingly quoted the famous passage by Justice Holmes that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

100. *John R. Sand & Gravel Co*., 552 U.S. at 144-47 (Stevens, J., & Ginsburg, J., dissenting).

101. *Id.* at 144 (Ginsburg, J., dissenting).

102. *Id.* at 145.

103. *Id.* at 145-46 ("While holding that the language in § 2501 is 'jurisdictional,' the Court also implies that *Irwin* governs the interpretation of all statutes we have not yet construed—including, presumably, the identically worded [28 U.S.C. § 2401].").

104. Sisk, *supra* note 53, at 1278-79. Justice Frankfurter once lamented that a similar deviation created "a derelict on the waters of the law." Lambert v. California, 355 U.S. 225, 232 (1957).

The aforementioned cases provide evidence of the Supreme Court's departure from the strict construction mantra that disfavored plaintiffs for more than a century.[105] *John R. Sand* provided the only abnormality to an otherwise succinct animosity towards the canon of strict construction.[106] Justice Scalia best summarized the rationale:

> It has been a corollary of the rule disfavoring waiver of sovereign immunity—or was arguably thought to be a part of the rule itself—that "limitations and conditions upon which Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." So, for example, statutes of limitations applicable to suits against the government could not be accorded the sorts of equitable tolling that would be allowed in private suits. This rigidity made sense when suits against the government were disfavored, but not in modern times. It is one thing to regard government liability as exceptional enough to require clarity of creation as a matter of presumed legislative intent. It is quite something else to presume that a legislature that has clearly made the determination that government liability is in the interests of justice wants to accompany that determination with nit-picking technicalities that would not accompany other causes of action.[107]

By comparison, the Court's modern approach, as stated by Justice Alito, is that "[t]he sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."[108]

In regard to section 2401(b) of the FTCA, the Supreme Court's lenient approach to the core matter of federal waivers of sovereign immunity directly crosses paths with its efforts to liberalize its approach to accompanying statutes of limitations.[109] The following section addresses the Court's recent stance on the question of whether a statute of limitations applicable to government defendants is of the more absolute type so as to abrogate the utilization of *Irwin*, or is instead a generic limitations provision to which *Irwin* applies.[110] Analysis of this issue, despite the Court's more liberal approach to sovereign immunity waivers, is still a necessary procedural inquiry.[111] The ensuing analysis assumes, based on the foregoing discussion, the Supreme Court's abandonment of—or at least its antipathy for—the strict construction canon as applied to the scope of federal sovereign

105. Sisk, *supra* note 53, at 1294-95. *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 284 (2012) ("[T]he rigor with which courts have applied the interpretive rule disfavoring waivers of sovereign immunity has abated—rightly so.").

106. SCALIA & GARNER, *supra* note 105, at 286.

107. *Id.* at 285 (internal citations omitted).

108. Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008). *See also* Sisk, *supra* note 53, at 1295 ("At most, the strict construction rule appears to have been assigned a supporting player role.").

109. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013).

110. *Id.*

111. Sisk, *supra* note 8, at 554 (noting "under the Court's sovereign immunity jurisprudence over the past quarter-century, a jurisdictional construction has been maintained for evaluation of the essential character of claims for relief that are permitted against the federal government, but procedural requirements have been applied in the same manner as among private parties").

immunity waivers[112] and instead proceeds from the standpoint that section 2401(b) is subject commonly accepted canons of statutory construction.[113]

III. SOLIDIFYING THE JURISDICTIONAL LABEL

Ordinarily a statute's limitation provision is quintessentially a "claim-processing rule" to which equitable tolling principles may be applicable.[114] Paradoxically, when read as jurisdictional, a statue serves to limit the court's authority to hear any challenge to it.[115] Therefore, a jurisdictional statute is, by definition, not subject to *Irwin's* rebuttable presumption.[116] The rationale is that courts "[have] no authority to create equitable exceptions to jurisdictional requirements."[117] Consequently, the jurisdictional versus non-jurisdictional question is of critical importance such that the Supreme Court exercises considerable restraint in its use of the term.[118]

Jurisdiction in this context refers specifically to subject-matter jurisdiction because the FTCA establishes the district courts' ability to hear a certain type of case, namely negligent torts committed by government employees within the scope of their employment.[119] Since a party may object to subject-matter jurisdiction at any time, a court cannot apply

112. Despite the observation that the Supreme Court has moved beyond faithful adherence to the strict construction canon, some maintain that the doctrine of sovereign immunity is essential to the separation of powers doctrine. Gregory Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899 (2010).

113. This assumption may be somewhat premature in the sense that the Court has yet to expressly repudiate the strict construction canon. However, some do not think it a stretch, insomuch as the Court's recent cases challenge the canon on a consistent basis. Sisk, *supra* note 53. *See also* Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441 (2012); Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011); United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011). Additionally, one can argue that this assumption provides little help in that it may allow the use of anti-canons to negate the strict construction canon altogether. *See e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 195 (2008); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). However, the assumption is not that other canons need bow to strict construction, rather, the assumption is that they now operate on an egalitarian basis in determining the scope of a waiver of sovereign immunity.

114. Auburn Reg'l Med. Ctr., 133 S. Ct. at 825 (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011)).

115. *See* BLACK'S LAW DICTIONARY 991 (4th ed. 1951) (defining "jurisdiction" as "the authority by which courts and judicial officers take *cognizance* of and decide cases") (emphasis added); BLACK'S LAW DICTIONARY 1038 (3d ed. 1933) (similarly using the term "cognizance" to define "jurisdiction"); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136 (2008). In general, if a statute is construed as jurisdictional, plaintiffs are typically at a disadvantage because the statue "must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 276 (1957). *See also* Finn v. United States, 123 U.S. 227, 232-33 (1887); Kendall v. United States, 107 U.S. 123, 125-26 (1883).

116. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1035 (9th Cir. 2013) (en banc). It has been argued that *Irwin* can be read for the proposition that section 2401(b)'s limitations period may "be both jurisdictional and subject to equitable tolling." Parker & Colella, *supra* note 16, at 898. However, the Supreme Court's jurisprudence has yet to accept that statutes of limitations can be both jurisdictional and subject to equitable tolling. Auburn Reg'l Med. Ctr., 133 S. Ct. at 824 ("We reiterate what it would mean were we to type the governing statute . . . jurisdictional. . . . there be no equitable tolling."). Therefore, this note assumes the Court's rejection of such an argument.

117. Bowles v. Russell, 551 U.S. 205, 214 (2007).

118. *Id.* at 215-16 (Souter, J., dissenting) ("In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word.").

119. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010). Certain other injuries, for example, are not covered by the FTCA, including negligent omissions by employees, claims arising in foreign countries, etc. 28 U.S.C. § 2680 (2000).

equitable tolling to jurisdictional limitations provisions.[120] To allow late jurisdictional objections would waste judicial resources and disarm litigants that have already conceded to the tribunal's authority to hear the case.[121] For this reason, "courts are obligated to consider *sua sponte*" issues pertaining to subject-matter jurisdiction.[122] Indeed, as the Court has noted, a statutory provision may contain a time limit that is linguistically emphatic and yet not jurisdictional.[123]

In recent years the Court distinctively narrowed its use of the term "jurisdictional" in a manner that exclusively indicated a court's "adjudicatory authority."[124] Thus, the jurisdictional label is relevant to the extent that it "refers [only] to the to the tribunal's power to hear a case."[125] Due to difficulty and significance of this determination, the Supreme Court adopted a '"readily administrable bright line' rule for determining whether to classify a statutory limitation as jurisdictional."[126] Under this bright line test, a court must review the language, context, and relevant historical treatment of a specific statutory provision when making its determination.[127]

Since federal district courts obtained this authority via congressional authorization, by implication Congress is free to attach conditions to that jurisdiction as it sees fit.[128] Only when judicial inquiry provides a clear indication that Congress intended the rule to be jurisdictional will the Court so label it.[129] The Court has repeatedly refused the notion that Congress must provide such an indication via "magic" words.[130] As such, the default presumption in the Court's jurisdictional analysis is that ordinary filing or claim-processing rules are not deserving of the jurisdictional label.[131]

All of this is to say that the difference between rules that govern the Court's ability to adjudicate a case and more flexible rules primarily concerned with the prompt presentation of claims is paramount.[132] At this point, the vast majority of the Court's attention centers primarily on the textual characteristics of the statutes at hand.[133] Although not expressly declared as such, the jurisdictional inquiry inherently makes use of semantic and

120. *See* FED. R. CIV. P. 12(b)(6); see also Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited.").

121. *Gonzalez*, 132 S. Ct. at 648 ("[A] valid objection may lead a court midway through the briefing process to dismiss a complaint in its entirety. '[M]any months of work on the part of the attorneys and the court may be wasted.'") (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)).

122. *Id. See also Henderson*, 131 S. Ct. at 1202 ("Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); United States v. Cotton, 535 U.S. 625, 630 (2002).

123. Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

124. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160 (2010).

125. Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009); Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'") (quoting Republic. Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

126. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (quoting Arbough v. Y & H Corp., 546 U.S. 500, 516 (2006)).

127. *Reed Elsevier, Inc.*, 559 U.S. at 166.

128. William James Goodling, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1157 (2013).

129. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

130. *Id.*

131. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

132. Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

133. *See generally Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817.

syntactic canons of construction.[134] This development, in accordance with the disinclination for the strict construction sovereign immunity canon, simultaneously provides clarity and flexibility without invading congressional purview.[135]

Despite the Court's attempt at clarity, inter-circuit and intra-circuit splits remain prevalent.[136] Since the *John R. Sand* Court neither clearly overruled *Irwin* or expressly affirmed its continued vitality—a failure actually adding to the confusion among circuit courts—difficulty characterizing section 2401(b) lingers.[137] Instead, the *John R Sand* anomaly was simply the result of a long line of jurisdictional treatment that the Court found compelling, despite substantial authority to the contrary.[138] It is due to the lack of clarity stimulated by *John R. Sand* that lower courts continue to adhere to pre-*Irwin* precedents that overwhelmingly found that section 2401(b) was jurisdictional.[139] However, confusion of this sort is unfounded given the Court's numerous recent decisions holding that filing deadlines are ordinarily not jurisdictional.[140] As the ensuing sections seek to demonstrate, section 2401(b) is not so absolute as to necessitate the jurisdictional label.[141]

IV. CIRCUIT COURT DISARRAY: STATUS REPORT

A. The Traditional Approach

In the wake of Hurricane Katrina and Hurricane Rita's devastating impact on the Gulf Coast in 2005, the Federal Emergency Management Agency ("FEMA") provided emergency housing units ("EHUs") to hundreds of victims who lost their homes.[142] Little did those victims know that the EHUs would emit formaldehyde, causing respiratory and asthma problems to numerous occupants.[143] Many EHU recipients asked federal authorities about the cause of the problem, only to hear that it was "nothing to worry about."[144] After more than two years of continued problems, the victims filed a class action lawsuit against FEMA and argued that the government's assurances established proper grounds to equitably toll their claims.[145] In 2011, with the fate of thousands of claimants in its hands, the Fifth Circuit Court of Appeals ruled that the plaintiffs could not avail themselves of the equitable tolling doctrine.[146] The court decided that it had no authority to hear the case because section 2401(b)'s two-year limitation, as read by the court, is jurisdictional.[147] The

134. Sebelius v. Cloer, 133 S. Ct. 1866 (2013).

135. *Id.*

136. *See In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., 646 F.3d 185 (5th Cir. 2011); see also Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1035 (9th Cir. 2013); Motta *ex rel.* A.M. v. United States, 717 F.3d 840, 846 (11th Cir. 2013); Goldblatt v. Nat'l Credit Union Admin., No. 11-4307-cv, WL 5458082 (2d Cir. Nov. 9, 2012); Bazzo v. United States, 494 Fed. Appx. 545, 546 (6th Cir. 2012).

137. John R. Sand & Gravel Co., 552 U.S. 130, 143 (2008) (Stevens J., concurring).

138. *Id.* at 139 (majority opinion).

139. *Id.* at 143 (Stevens, J., concurring).

140. *See e.g.*, Scarborough v. Principi, 541 U.S. 401, 414 (filing deadline for fee application under Equal Access to Justice Act); Kontrick v. Ryan, 540 U.S. 443, 459-60 (filing deadlines for objection to debtor's discharge in bankruptcy).

141. 28 U.S.C. § 2401(b) (2012).

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

143. *Id.*

144. *Id.*

145. *Id.* at 190.

146. *Id.*

147. In re *FEMA*, 646 F.3d at 190. This former majority rule was often read very broadly. David D. Doran,

court refused to reach the merits of the case as doing so would have, in the court's view, "extend[ed] the waiver beyond that which Congress intended."[148]

Until late 2013, the Ninth Circuit also refused to allow equitable tolling of claims under section 2401(b) of the FTCA.[149] In a long line of cases, it preserved section 2401(b)'s incompatibility with equitable tolling principles under the rationale that strict compliance with its timing requirement is a precondition to the district court's jurisdiction.[150] This position was strange given the court's previous holding that section 2401(a)'s requirements established a waivable procedural bar[151] and its earlier case's express adoption of tolling pursuant to 2401(b).[152] Those occasional contradictory holdings evidently did not deter the circuit's overall distaste for equitable tolling in the context section 2401(b)[153] until it—sitting en banc—overruled those decisions in *Kwai Fun Wong v. Beebe*.[154]

B. Trending Authority

The Third Circuit observes a different interpretation, allowing equitable tolling of section 2401(b) for deserving plaintiffs.[155] This circuit also grappled with contrary interpretations in its precedent.[156] However, the court explained its post-*Irwin* rationale by stating "[w]e believe that Congress, in adopting the statute of limitations in the FTCA, did not demonstrate that it intended to preclude equitable tolling . . . ."[157] The panel recognized the turbulence of the Supreme Court's jurisprudence, but it correctly recognized the fact that *Irwin* is still good law and that *John R. Sand* seemingly allowed the court to follow its own precedent on this issue.[158] In addition to the Third Circuit, the First, Seventh, Eight, and Tenth Circuits all apply the equitable tolling doctrine to section 2401(b) based on the same rationale.[159]

Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis, 64 WASH. L. REV. 681, 684-85 & n.24 (1989) ("[S]tatutes of limitation that limit the time during which actions may be brought against the federal government are 'jurisdictional,' rather than 'substantive' or ['']procedural,' because their expiration deprives the court of subject matter jurisdiction over the case").

148. *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 118 (1979)). At least one court had held that widespread publicity regarding the government's role in causing a harm is sufficient for the limitations period to begin to run. *See* Donahue v. United States, 634 F.3d 615 (1st Cir. 2011).

149. *See* Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013) (en banc) (overruling the Ninth's Circuit's longstanding line of jurisprudence refusing to apply equitable tolling to section 2401(b)).

150. *See* Adams v. United States, 658 F.3d 928 (9th Cir. 2011); N. Am. Broad., LLC v. United States, 306 Fed. App'x 371 (9th Cir. 2008); Marley v. United States, 567 F.3d 1030 (9th Cir. 2008); Augustine v. United States, 704 F.2d 1074 (9th Cir. 1983); Blain v. United States, 552 F.2d 289 (9th Cir. 1977); Mann v. United States, 399 F.2d 672 (9th Cir. 1968).

151. Cedars-Sinai Med. Ctr. v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997).

152. *See* Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996) (noting "[n]othing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.").

153. *See e.g.*, *Adams*, 658 F.3d 928.

154. *Kwai*, 732 F.3d 1030.

155. Santos *ex rel*. Beatos v. United States, 559 F.3d 189 (3d Cir. 2009).

156. *See e.g.*, Bradley v. United States, 856 F.2d 575, 577-78 (3d Cir. 1988).

157. *Santos*, 559 F.3d at 195-96.

158. *Id.* at 197. *See also* Compton, *supra* note 16.

159. Donahue v. United States, 634 F.3d 615 (1st Cir. 2011); Arteaga v. United States, 711 F.3d 828 (7th Cir. 2013); Motley v. United States, 295 F.3d 820 (8th Cir. 2002); McKinney v. United States, 428 Fed. App'x 795 (10th Cir. 2011).

C. The Remaining Frontier

The Second, Sixth, Eleventh, and D.C. Circuits have yet to define their stance on the question of whether equitable tolling applies to section 2401(b).[160] The D.C. Circuit correctly noted the reason for the indecision by stating that "[w]e have never squarely addressed whether equitable tolling applies to the FTCA's statute of limitations, and we need not do so here, for [the plaintiff] has failed to meet the due diligence requirement of equitable tolling."[161] Facing the same problem these four circuits continue to wait for the proper plaintiff to arrive before setting forth a particular view of section 2401(b).[162] Therefore, potential plaintiffs in these jurisdictions face uncertainty due to the lack of a definitive ruling by either their particular circuit or the Supreme Court.[163]

V. HISTORICAL TREATMENT: *KUBRICK* AND *MCNEIL*

This section analyzes the Supreme Court's historical treatment of two pertinent provisions of the FTCA.[164] Recent cases, particularly *John R. Sand*, placed overwhelming weight on the Court's earlier interpretations of the provision at issue.[165] However, this section argues that section 2401(b) is antithetical to section 2501 of the Tucker Act to the extent that it has not received the same extensive treatment.[166] This dearth of historical treatment is arguably insufficient to support the presumption that a Supreme Court encounter with section 2401(b) would lead to an outcome like the aberration that was *John R. Sand*.[167] To the contrary, the Court's current disposition towards waivers of sovereign immunity in general and statutes of limitations in particular strongly suggests that section 2401(b) is not jurisdictional.[168]

In 1979 the Supreme Court decided *United States v. Kubrick*, where it faced the issue regarding when a claim accrues under the FTCA.[169] In *Kubrick*, the plaintiff developed acute hearing loss after receiving treatment for an infected femur at a Veteran's Administration ("VA") hospital in 1968.[170] Independent physicians subsequently confirmed his bilateral nerve deafness.[171] In 1969, one of those independent physicians, upon reviewing

160. M.J. *ex rel.* Jarvis v. Georgetown Univ. Med. Ctr., No. 13-283(GK), 2013 WL 4478681 (D.D.C. Aug. 22, 2013); Phillips v. Generations Family Health Ctr., 723 F.3d 144 (2d Cir. 2013); Bazzo v. United States, 494 Fed. App'x 545 (6th Cir. 2012); Motta *ex rel*. A.M. v. United States, 717 F.3d 840 (11th Cir. 2013).

161. Norman v. United States, 467 F.3d 773, 776 (D.C. Cir. 2006).

162. *Phillips*, 723 F.3d at 149.

163. *Bazzo*, 494 Fed. Appx. at 546 n.2 (6th Cir. 2012) (noting the various approaches taken by district and appellate courts on the issue).

164. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 169 (2010).

165. John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008).

166. *Id.* at 144-47 (Ginsburg, J., dissenting). The only assertion of inconsistency in this regard is to precedential authority. As Justice Ginsburg noted, section 2501 and section 2401 offer similar linguistics despite their dissimilar histories. *Id.*

167. *See generally id.*

168. *Id.* at 144-47 (Ginsburg, J., dissenting).

169. United States v. Kubrick, 444 U.S. 111, 113 (1979). "A tort claim . . . shall be forever barred unless it is presented . . . within two years after such claim accrues . . ." 28 U.S.C. § 2401(b) (2012). For a thorough analysis of the FTCA's accrual rule in the context of medical malpractice claims, *see* Cory Zajdel, *Discovery Rule in Medical malpractice Under the Federal Tort Claims Act: The Supreme Court's Decision in* United States v. Kubrick *Was Not Meant to be Secondary Authority*, 20 J. CONTEMP. HEALTH L. & POL'Y 443 (2004); David L. Abney, *For Whom the Statute Tolls: Medical Malpractice Under the Federal Tort Claims Act*, 61 NOTRE DAME L. REV. 696 (1986).

170. *Kubrick*, 444 U.S. at 113-14.

171. *Id.* at 114.

the records from the VA hospital, opined that Mr. Kubrick's deafness resulted from that hospital's treatment.[172] However, Mr. Kubrick did not actually file his claim until 1972, more than two-years after he initially received notification of the possible connection between his treatment at the VA hospital and his hearing loss.[173] The district court allowed the suit to proceed and the appellate court affirmed, both agreeing that the statute of limitations did not begin to run in 1969 because the plaintiff did not reasonably know that his treatment at the VA hospital was the cause of his injury.[174]

The Supreme Court reversed the decisions of the district and appellate courts and held that a claim accrues under section 2401(b) when the plaintiff knows the cause and the existence of his injury, not when he knows that the cause was the negligence of a government employee.[175] En route to this holding the Court made the observation that the obvious purpose of section 2401(b) is the "prompt presentation of claims."[176] It described section 2401(b) as a statute of limitations that served as a condition upon the FTCA's waiver of sovereign immunity.[177] Accordingly, the Court assumed that it did not have the authority to either expand or narrow the scope of the waiver beyond what Congress intended.[178]

However, the Court took note of the fact that the legislative history of the FTCA was silent on the issue of claim accrual.[179] Indeed, the Court noted that the 1949 House Report, "[did] not explain how to determine the date of accrual."[180] Due to this lack of congressional guidance, the Court applied the common law accrual rule.[181] In so doing, the Court implicitly adopted the notion that common law principles are applicable to section 2401(b) so as to extend the limitation beyond two-years from the actual date of the injury.[182] Certainly, this was readily apparent when the Court stated that it "should regard the plea of limitations as a 'meritorious defense, in itself serving the public interest.'"[183] Only when viewing section 2401(b) as an ordinary statute of limitations, and not a jurisdictional absolute, would the defendant have to plead it as a defense.[184]

In 1993 the Court, per Justice Stevens, addressed the issue of whether a claimant may file suit pursuant to the FTCA before exhausting all administrative remedies in *McNeil v. United States*.[185] Section 2675(a) of the FTCA provides "[a]n action shall not be instituted upon a claim against the United States for money damages or injury . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his

172. *Id.*
173. *Id.* at 115.
174. *Id.* at 116.
175. *Kubrick*, 444 U.S. at 123.
176. *Id.* at 117.
177. *Id.*
178. *Id.* at 117-18.
179. *Id.* at 119 n.6.
180. *Kubrick*, 444 U.S. at 119 n.9.
181. *Id.* at 123.
182. *Id.*
183. *Id.* at 117 (quoting Guar. Trust Co. v. United States, 304 U.S. 126, 136 (1938)).
184. *See* John R. Sand & Gravel Co., 552 U.S. 130, 133 (2008) (noting "the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage that is subject to rules of forfeiture and waiver.").
185. McNeil v. United States, 508 U.S. 106, 107 (1993).

claim shall have been finally denied . . . ."[186] The Court found that this language unambiguously required the complete exhaustion of administrative remedies before a claimant could properly file suit.[187] In so holding, the Court found that the language of the statute indicated a congressional intent to avoid placing an extra burden on the judicial system and the Department of Justice via prematurely filed claims.[188] Thus, it concluded that a strictly literal reading promoted the "orderly administration of this body of litigation . . . ."[189]

On the surface, these two cases present somewhat competing agendas, however, they are reconcilable.[190] On the one hand, they both provide a clear signal that the Court is unwilling to expand the FTCA's waiver of sovereign immunity beyond what Congress intended, aided in no small part by the now disfavored strict construction canon.[191] Additionally, as *Kubrick* accurately noted in regards to claim accrual, there are issues on which Congress failed to provide guidance.[192] In order to fill that gap, *Kubrick* expanded the waiver by delaying the start of the two-year limitations period until the claim accrued.[193] Contrary to the flexibility exercised by the Court in *Kubrick*, *McNeil* refused to stretch the scope of the waiver to include premature claims.[194]

The reconciling principle in these two cases is the notion that section 2675(a) and section 2401(b) serve different purposes.[195] From a practical perspective, section 2401(b) is not implicated by section 2675(a) and therefore is not subject to the stringent reading employed in *McNeil*.[196] Instead, section 2675(a) is concerned with allowing the proper federal administrative agency sufficient time to investigate, and if necessary, to settle the claim.[197] For this reason, the *McNeil* Court felt the need to strictly construe the administrative exhaustion requirement to allow federal agencies the opportunity to investigate and evaluate claims.[198] Section 2401(b) simply does not share this concern.[199] Instead, its concern is wholly to provide notice to the proper administrative agency in sufficient time to avoid stale evidence and then encourage filing suit in federal district court while the claim is still fresh with that agency.[200] Because these concerns differ significantly, *McNeil* is less applicable to section 2401(b) than *Kubrick*.[201] In other words, *McNeil's* orderly administration focus should not outweigh *Kubrick's* concern regarding the prompt presentation of claims especially in light of *Kubrick's* acquiescence to applying common law principles to fill Congress's omissions from section 2401(b).[202] With this historical treatment in mind,

186. 28 U.S.C. § 2675(a) (2012).
187. *McNeil*, 508 U.S. at 111.
188. *Id.* at 112.
189. *Id.*
190. *Id.* at 113; United States v. Kubrick, 444 U.S. 111, 125 (1979).
191. *McNeil*, 508 U.S. 106; *Kubrick*, 444 U.S. at 113-14.
192. *Kubrick*, 444 U.S. at 119 n.6.
193. *Id.* at 123.
194. *McNeil*, 508 U.S. at 111.
195. *See* 28 U.S.C. §§ 2401(b), 2675(a) (2012).
196. *McNeil*, 508 U.S. at 111.
197. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1047 (9th Cir 2013) (en banc). *See also* Axelrad, *supra* note 41.
198. *McNeil*, 508 U.S. at 111.
199. 28 U.S.C. § 2401(b) (2012).
200. *Kwai*, 732 F.3d at 1047.
201. United States v. Kubrick, 444 U.S. 111 (1979).
202. *Kwai*, 732 F.3d at 1047.

we now turn to an examination of section 2401(b) itself and address its hermeneutical contours.[203]

VI. PROPERLY CONSTRUED, SECTION 2401(B) IS NOT JURISDICTIONAL

This section argues that section 2401(b) is not jurisdictional by breaking it down into its component parts and employing the diagnostic approach set forth by the Supreme Court and occasionally—though far too infrequently—followed by lower courts when construing statutory provisions of this kind.[204] Analytically, the jurisdictional nature of a statutory provision is inherently an examination of the legal character of the requirement itself, and therefore is quintessentially an exercise in hermeneutics.[205] Thus, the Supreme Court approach is to examine the statute's language, placement, purpose, and its historical treatment.[206]

Unfortunately, circuit courts rarely engage in this exhausting analytical endeavor and instead merely perform what the Supreme Court terms "drive-by jurisdictional rulings" which provide no real evaluation or insight into the true nature of the provision at hand.[207] The Ninth Circuit's recent decision in *Kwai Fun Wong v. Beebe*, however, broke that trend and provided the most thorough dissection of section 2401(b) by any court to date.[208] The following discussion attempts to expand and strengthen the Ninth Circuit's majority approach, and in the process provide a comprehensive evaluation of section 2401(b) from both a linguistic and teleological standpoint.[209]

A. Language

The Supreme Court's approach to statutory construction always begins with an evaluation of the statute's text, regardless of any textualist[210] or intentionalist[211] predispositions

203. *See e.g.*, LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992).

204. *See e.g.*, Klatch v. Rathman, No. 1:13-CV-01452, 2014 WL 537021 (N.D. Ala. Feb. 10, 2014).

205. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010).

206. Dolan v. United States, 560 U.S. 605, 611 (2010). Other courts evaluate additional considerations such as whether any exceptions generally applicable to the statute shed light on the particular provision. Due to the necessary extent of that discussion, it is inevitably beyond the scope of this paper. *See generally id.*

207. Arbough v. Y & H Co., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 91 (1998)); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 5 (2003) ("The concepts and tools of statutory interpretation are not the mechanical product of some kind of positivistic, intellectual assembly line. Statutory interpretation is a process of the mind, not the application of a yardstick."). *See also* Avila-Santoyo v. U.S. Attorney Gen., 713 F.3d 1357 (11th Cir. 2013).

208. Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013) (en banc).

209. *Id.*

210. Under the textualist approach, the wording of a statute must be given its plain meaning without recourse to legislative history, particularly when the statute itself is unambiguous and specifically targets the issue at hand. Ellen P. Aprill & Nancy Staudt, *Theories of Statutory Interpretation (And Their Limits)*, 38 LOY. L.A. L. REV. 1899, 1900 (2005). The rationale for this approach is that Congress meant to say what it said in the statute, and that only the specific words in the statute were debated, voted on, and codified, not the legislative history. James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 891 (1930) ("The gravest sins are perpetrated in the name of the intent of the legislature.").

211. The intentionalist label is admittedly outdated and overly broad. The faithful agency approach is perhaps the most formidable adversary to textualism. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

among the Justices.[212] The purpose in this initial step of the analytical schema is to determine whether the text's meaning, without more, is sufficiently clear.[213] This initial inquiry asks whether the statute's words or phrases are ambiguous[214] and, if not, whether the plain meaning[215] of the statute produces an absurd result.[216] The analysis that follows evaluates the text of section 2401(b), considering the principle that a court should not move beyond the text when the text is neither ambiguous nor produces an inherently absurd result.[217]

The operative clause of section 2401(b) states that, "[a] tort claim against the United States shall be forever barred unless . . . ."[218] As a preliminary matter, this language—and section 2401 generally—makes no mention of a court's jurisdiction nor does it tend to speak in jurisdictional parlance.[219] Even so, when properly understood, the phrase "forever barred" itself is not wholly incompatible with the doctrine of equitable tolling.[220] Equitable tolling reveals that instead of turning old claims new it "prevents them from becoming stale in the first place."[221] The only indication from this language, then, is that "forever

212. United States v. Quality Stores, Inc., 134 S. Ct. 1395, 1399, 188 L.Ed.2d 413 (2014) ("The beginning point is the relevant statutory text."); Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013) (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006)) ("As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'"); CSX Transp., Inc. v. Ala. Dept. of Revenue, 131 S Ct. 1101, 1107 (2011) ("We begin, as in any case of statutory interpretation, with the language of the statute.").

213. "Our 'inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Cloer*, 133 S. Ct. at 1895 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)). *See also* Dodd v. United States, 545 U.S. 353, 359 (2005) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000)) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."); Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.").

214. In distinguishing vagueness from ambiguity it should be noted that "[a] vague word has one meaning (and its application is unclear in some cases); [and] an ambiguous word has more than one meaning (and it may be unclear, in some cases, which is in use)." TIMOTHY O. ENDICOTT, VAGUENESS IN LAW 54 (2000). *See also*, KENT GREENWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 38-45 (2010).

215. Judge Raymond Randolph noted that even the notion of plain meaning has inherent complexities, particularly due to the fact that words must be interpreted both in the context of the statute itself and in the context of the time at which the statute was enacted. A Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 73-74 (1994).

216. The absurdity doctrine can be stated simply as the Court's unwillingness to apply an unambiguous text if doing so will lead to an obviously absurd result. JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY: JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 201 (2007). One of the Court's earliest explanations of the doctrine was in Sturgess v. Crowninshield, 17 U.S. 122, 202-03 (1819) ("[I]f . . . the plain meaning of a provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, united in rejecting the application."). *See also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

217. *See Cloer*, 133 S. Ct. at 1896; see also Johnson v. United States, 529 U.S. 649, 718 (2000) (Scalia, J., dissenting) (noting "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.").

218. 28 U.S.C. § 2401(b) (2012).

219. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1204 (2011).

220. Perez v. United States, 167 F.3d 913, 916 (5th Cir. 1999).

221. *Id. See also* Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1231-32 (2014) ("equitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant had pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action."). The equitable tolling doctrine, in some rare cases, may stop, then start again, if the extraordinary circumstances reappear. United States v. Ibarra, 502 U.S. 1, 5 (1991).

barred" means neither more nor less than an ordinary statute of limitations, i.e., that Congress struck a balance between litigating a claim on the merits and avoiding claims burdened by faded memories.[222] The Ninth Circuit explained it best, noting that section 2401(b) "merely states what is ordinarily true of filing deadlines: once the limitations period ends, *whether extended by the application of tolling principles or not*, a plaintiff is 'forever barred' from presenting his claim to the relevant adjudicatory body."[223] Thus, equity keeps a claim from becoming stale while still allowing the government to defend a case before evidence becomes lost or destroyed.[224]

Moreover, the Supreme Court's jurisprudence on the issue adds weight to the notion that the words "forever barred" are insufficient to support a reading of the statute as jurisdictional.[225] The Court repeatedly states that it overtly "reject[s] the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'"[226] The Court never requires Congress to use certain words to indicate whether a provision is jurisdictional, instead holding that the context of a word may provide valuable insight.[227] However, the context of section 2401(b) does not indicate that the words "forever barred" have any special significance apart from that of normal statutes of limitations.[228]

The Ninth Circuit took note of the background in which Congress enacted section 2401(b), emphasizing that the phrase "forever barred" is commonplace statutory language, especially in the mid-twentieth century when the FTCA was initially enacted.[229] In fact, Congress enacted numerous statutes around the time of the FTCA that included those same words.[230] Due to the frequency with which Congress employed the "forever barred" language, section 2401(b), when enacted, was nothing more than an ordinary statute of limitations to which Congress understood tolling principles applied.[231] Moreover, recent Supreme Court jurisprudence fortifies the nonjurisdictional character of the phrase via a reliance on the background rule supplied in *Irwin*.[232] Indeed, it is a well-established principle today, if not in the mid-twentieth century, that the Congress does not pass statutes in a vacuum, but instead understands the general presumptions, such as equitable tolling, that courts use to interpret statutes as a matter of course.[233]

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222. Sanchez v. United States, 740 F.3d 47, 57 (1st Cir. 2014).

223. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1038 (9th Cir. 2013) (quoting United States v. Kubrick, 444 U.S. 111, 117 (1079)) (emphasis added).

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

225. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197 (2011).

226. *Id.* at 1205 (quoting Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009)); see also Arbough v. Y & H Co., 546 U.S. 500, 510 (2006).

227. *Henderson*, 131 S. Ct. at 1203.

228. *Kwai*, 732 F.3d at 1039.

229. *Id.* (noting "§ 2401(b)'s 'forever barred' language appears to be more a vestige of mid-twentieth century congressional drafting conventions than a 'clear statement' of Congress's intent to include a jurisdictional filing deadline in the FTCA.").

230. *See e.g.*, 15 U.S.C. § 1223 (1956) ("Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued."); 29 U.S.C. § 255(a) (1947) ("every such action shall be forever barred unless commenced within two years after the cause of action accrued . . ."); *see also Kwai*, 732 F.3d at 1039 (discussing other similar statutes).

231. Perez v. United States, 167 F.3d 913, 917 (5th Cir. 1999).

232. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 143 (2008) (Stevens, J., dissenting).

233. Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1232 (2014) ("As applied to federal statutes of limitations, the inquiry begins with the understanding that Congress 'legislate[s] against a background of common-law adjudicatory principles. Equitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule,' is just such a principle.") (internal citations omitted). *See also* John F. Manning, *Textualism and*

Neither *John R. Sand*, nor any case to date, has overruled *Irwin* or replaced the general notion that such background principles apply no less to government statutes of limitations than to private individuals.[234] Tellingly, Justice Ginsburg dissent in *John R. Sand* noted that section 2501 of the Tucker Act and section 2401(b) of the FTCA contain nearly identical language.[235] She reasoned, and the majority seemed to agree, that but for the Court's existing jurisdictional construction of the Tucker Act's limitation provision, it would have held section 2501—and by implication section 2401(b), as well—to be nonjurisdictional.[236] Therefore, because the phrase "forever barred" means no more than what is ordinarily true of statutes of limitations, it provides no indication that section 2401(b) is a jurisdictional bar.[237]

Beyond the phrase "forever barred," the word "shall" warrants consideration.[238] As a preliminary matter, "shall" does not have a settled meaning but, rather, courts have interpreted it at least five different ways.[239] This multiplicity of meanings presents a difficult problem for courts when applying the mandatory/permissive cannon of statutory interpretation, i.e., the notion that mandatory words impose duties and permissive words grant discretion.[240] Historically, the Supreme Court has been less than consistent with its use of the term.[241] Despite the confusion and misconception, it is commonly agreed that courts should read "shall" as mandatory whenever a statute is unambiguous or when it is reasonable to do so.[242] As such, the Court yearns for coherent interpretations to both avoid erroneous results and to prevent unintentional problems never anticipated by the drafting legislature.[243]

In order to determine whether "shall" is mandatory or discretionary as used in section 2401(b), courts must consider it's proper context.[244] Of particular importance is the fact

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the Equity of the Statute, 101 COLUM. L. REV. 1, 114 (2001) [hereinafter Manning, *Equity of the Statute*]; Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

234. Arteaga v. United States, 711 F.3d 828, 833 (7th Cir. 2013) ("The opinion in *John R. Sand & Gravel* actually reaffirms the presumption that equitable tolling applies to statutes of limitations in suits against the government, while emphasizing that the presumption is rebuttable.").

235. *John R. Sand & Gravel Co*., 552 U.S. at 145-46 (Ginsburg, J., dissenting); 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues").

236. *John R. Sand & Gravel Co*., 552 U.S. at 145-46 (Ginsberg, J., dissenting).

237. *Arteaga*, 711 F.3d at 833.

238. 28 U.S.C. § 2401(b) (2012).

239. *See* BLACK'S LAW DICTIONARY 1499 (9th ed. 2009).

240. SCALIA & GARNER, *supra* note 105, at 112.

241. *Id.* at 114. W. Wis. Ry. v. Foley, 94 U.S. 100, 103 (1876) ("'Shall ought undoubtedly to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right; but need not be for creating a new one."); R.R. Co. v. Hecht, 95 U.S. 168, 170 (1877) (noting "the word 'shall' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."); Moore v. Ill. Cent. R.R., 312 U.S. 630, 635 (1941) ("This difference in language, substituting 'may' for 'shall,' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose."); Scott v. United States, 436 U.S. 128, 146-47 (1978) (Brennan, J., dissenting) ("In a linguistic tour side force the Court converts the mandatory language that the interception 'shall be conducted' to be a precatory suggestion."); United States v. Montalvo-Murillo, 495 U.S. 711, 718 (1990) ("Congress' mere use of the word 'shall' was not enough to remove the Secretary's power to act."); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'").

242. Alabama v. Bozeman, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'") (quoting Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

243. LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 150 (2010).

244. 28 U.S.C. § 2401(b) (2012). Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530 (2013) ("Text may not be divorced from context.").

that Congress drafted the phrase "shall be forever barred" in the passive tense thereby lending credence to the notion that its command is less than mandatory.[245] The passive syntax of the phrase leads to two possible conclusions.[246] It is reasonably directed at either the plaintiff or the court, and, if the former, then it would not mandate a court to do anything.[247] Due to this ambiguity, the phrase's construction does not clearly state that Congress intended it to have mandatory consequences.[248] In the absence of sufficient clarity, the Supreme Court cautions against jumping to a jurisdictional conclusion, instead opting to treat the statute as nonjurisdictional by default.[249] This circumspect approach advocated by the Court guards against the tendency to seize upon the word "shall" as an indicator of jurisdiction.[250]

Previous decisions illustrate this cautious approach in the context of a party attempting to use the word "shall" to prevent a court from taking action to which a missed statutory deadline refers.[251] In *Dolan v. United States* the Court determined that language in the Mandatory Victims Restitution Act[252] that included the word "shall" did not, without more, render the statutory deadline jurisdictional.[253] Similarly, section 2401(b)'s use of the word "shall" does not require the court to dismiss a case for the plaintiff's failure to strictly comply with its requirements.[254] The Court frequently maintains the principle that emphatic and mandatory language is not enough to render a statute jurisdictional.[255] Based upon that abundance of caution, "shall" by itself is insufficient to reveal any indication that Congressional sought to exclude filing extensions via equitable principles.[256] These syntactic and precedential considerations provide little indication that Congress intended drastic consequences such as denying the application of *Irwin's* presumption.[257]

Even though contrary appellate opinions seem to convey the idea that section 2401(b) is subject to ambiguous interpretations, this section argues otherwise.[258] The fact that courts and commentators reach contrary conclusions as to the meaning of a statute does not, per se, mean that the statute is ambiguous.[259] It is often the case that parties or

245. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1040 (9th Cir. 2013) (en banc); Flora v. United States, 362 U.S. 145, 150 (1960) ("This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments.").

246. 28 U.S.C. § 2401(b) (2012).

247. *Kwai*, 732 F.3d at 1040.

248. *Id.* at 1040-41. A consequentialist approach to the language of section 2401(b) necessarily runs astray of the plain text of the provision, possibly leading to inherently unpredictable reader-oriented tendencies. SCALIA & GARNER, *supra* note 105, at 16-17.

249. Arbough v. Y & H Co., 546 U.S. 500, 516 (2006).

250. Gonzalez v. Thaler, 132 S. Ct. 641, 651 (2012).

251. United States v. Montalvo-Murillo, 495 U.S. 711, 718-19 (1990) (use of the word "shall" in the context of bail hearing makes duty mandatory but does not mean that the sanction for breach is loss of all powers to act.); Brock v. Pierce Cnty., 476 U.S. 253, 262 (1986) (same in the context of misuse of federal funds); Barnhart v. Peabody Coal Co., 537 U.S. 149, 158-63 (2003) (same in the context of benefits assignments).

252. *See* Pub. L. No. 104-132, § 201, 110 Stat. 1214, 1227 (1996) (codified as amended at 18 U.S.C. § 3663A (2012)).

253. Dolan v. United States, 130 S. Ct. 2533, 2539 (2010).

254. 28 U.S.C. § 2401(b) (2012).

255. *Gonzalez*, 132 S. Ct. at 651; Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011); *Dolan*, 130 S. Ct. at 2539.

256. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013).

257. *Gonzales*, 132 S. Ct. at 648.

258. *See e.g.*, *In re* FEMA Formaldehyde Prods. Liab. Litig., 646 F.3d 185 (5th Cir. 2011).

259. GERKEN, *supra* note 216, at 194.

commentators will suggest that competing interpretations prove that a statute is ambiguous so as to allow the court to examine non-textual sources, such as legislative history.[260] But, as Justice Thomas once declared, "[a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong."[261] The Court's recent jurisprudence arguably compels the conclusion that previous antithetical readings of section 2401(b) were just that—wrong, and that there is, and only ever was, one way to read section 2401(b).[262] The following subsections proceed—despite the aforementioned claim that section 2401(b)'s language itself enough to support its non-jurisdictional character—to bolster this conclusion by way of the provision's placement and purpose.[263]

B. Placement

As a general matter, the Supreme Court has held that a statute of limitation is not transformed into a jurisdictional bar simply by means of its location within the particular statute.[264] This is a time-honored approach by the Court.[265] In *Sebelius v. Auburn Regional Medical Center*, the Court stated that "[a] requirement we would otherwise classify as nonjurisdictional does not become jurisdictional simply because it is placed in a section of a statute that contains jurisdictional provisions."[266] However, the location of a statute in a jurisdictional section, or the fact that it cross-references a jurisdictional provision, may indicate that Congress intended the section to carry jurisdictional consequences.[267]

Looking to the FTCA itself, section 1346(b)(1), the statute's jurisdiction-granting provision, states that "[s]ubject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction."[268] However, section 2401(b) is not in chapter 171, but instead is located in chapter 161, titled "United States as Party Generally."[269] Similarly, there is no express reference anywhere in section 1346 to any particular provision in section 2401.[270] Thus, a simple reading of those two sections seems to demonstrate

260. Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 461 (1999). *See also* Wis. R.R. Comm'n. v. Chicago, Burlington & Quincy R.R. Co., 257 U.S. 563, 589 (1922) (stating that legislative history is "admissible to solve doubt and not to create it."); Michael C. Dorf, *Foreward: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 4 (1998).

261. *203 N. LaSalle St. P'ship*, 526 U.S. at 461. Concluding that a statute is ambiguous brings its own problems, i.e., how to interpret and what weight to assign evidence of legislative intent. Mullins, *supra* note 207, at 10.

262. Arteaga v. United States, 711 F.3d 828, 833 (7th Cir. 2013).

263. *See* Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1042-47 (9th Cir. 2013) (en banc).

264. Gonzalez v. Thaler, 132 S. Ct. 641, 651 (2012).

265. Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947).

> [The] heading is but a short-hand reference to the general subject matter involved. . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. . . For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Id.; SCALIA & GARNER, *supra* note 105, at 221.

266. Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 825 (2013).

267. Arbough v. Y & H Co., 546 U.S. 500, 515 (2006).

268. 28 U.S.C. § 1346(b)(1) (1996).

269. 28 U.S.C. § 2401(b) (2012).

270. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1043 (9th Cir. 2013) (en banc).

that Congress harbored no intention that a court should read the two sections together.[271]

As noted in Part II, the current location of section 2401(b) in chapter 161, separate from section 1346's jurisdictional provision, occurred in the 1948 recodification of the FTCA.[272] The obvious potential concern is whether the failure of section 1346 to cross-reference section 2401(b) is a mere scrivener's error deserving of judicial correction.[273] Since construing section 2401(b) as nonjurisdictional is not an absurd result, a court is necessarily faced with the evidentiary problem of determining whether a scrivener's error occurred and, if it determines that one occurred, how to rectify it.[274] Thus, a court must turn to legislative history such as committee, Senate, or House reports to resolve this error issue.[275] However, recourse to such evidence blurs the line between statutory and legislative history.[276] A court must give a recodification or reorganization its effect as implemented absent absurd results or clear scrivener's error such as a missing word or punctuation.[277] Although contradictory interpretations remain, construing section 2401(b) as nonjurisdictional does not produce absurd results and sections 2401(b) and 1346(b)(1) do not produce readily apparent errors; indeed, the two operate harmoniously.[278] Therefore, an examination of epistemically fallible reports and uncodified legislative records is arguably unnecessary altogether.[279]

Assuming, arguendo, that section 1346's failure to cross-reference chapter 161 was a mere congressional oversight or drafting error, nearly seventy years of inaction constitutes sufficient evidence that section 2401(b) is not jurisdictional vis-à-vis section 1346(b)(1).[280] After the Supreme Court handed down its decision in *Irwin*, Congress made no effort to clarify section 2401(b) so as to exclude the possibility of equitable tolling, despite its most recent modification of the FTCA in 2011.[281] In *Holland v. Florida*, for example, the Court noted that Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996[282] after its decision in *Irwin*.[283] From that fact, the Court drew a presumption that Congress must have known that *Irwin's* presumption would apply to the AEDPA's limitations provision just like any other federal statute of limitations.[284] In like manner, Congress could have modified section 2401(b) to specifically exclude the application of *Irwin's* presumption by correcting section 1346's failure to cross-reference

271. *Id.*
272. *See* Pub. L. No. 80-773 ("1948 Act"), § 1, 62 Stat. 869 (1948).
273. *See e.g.*, John David Ohlendorf, *Textualism And The Problem of Scrivener's Error*, 64 ME. L. REV. 119 (2011); Michael S. Fried, *A Theory of Scrivener's Error*, 52 RUTGERS L. REV. 589 (2000).
274. Ohlendorf, *supra* note 273, at 161.
275. *Id.* at 158.
276. SCALIA & GARNER, *supra* note 105, at 256.
277. *Id.* at 256-60.
278. 28 U.S.C. §§ 2401(b), 1346(b)(1) (2012).
279. Ohlendorf, *supra* note 273, at 161; *see also* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1307 (2010) ("[The Court] has apparently reached an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text.").
280. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1042 (9th Cir. 2013) (en banc).
281. *See* Pub. L. No. 111-350 § 5(g)(8), 124 Stat. 3848 (2011).
282. *See* Pub. L. No. 104-132, § 106(b)(3)(E), 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C. § 2244(b) (1994)).
283. Holland v. Florida, 560 U.S. 631, 646 (2010).
284. *Id.*

chapter 161.[285] However, Congress's 2011 modifications to the FTCA did not do so; leading to the conclusion that Congress was presumably not bothered by the potential application of *Irwin's* presumption to section 2401(b).[286]

Opponents of this position argue that the 1948 recodification of the FTCA, which removed section 2401(b) from section 1346, did not change what was previously a jurisdictional provision into a nonjurisdictional provision.[287] Support for this position is premised on the 1948 Reviser's Notes which concluded that the recodification did not intend to change the substance of section 2401(b).[288] The Supreme Court addressed a similar argument in *United States v. Wells*.[289] In *Wells*, a unanimous court stated:

> Respondents also rely on the 1948 Reviser's Note to § 1014, which discussed the consolidation of the 13 provisions into one, and explained that, apart from two changes not relevant here, the consolidation was without change of substance. . . . Respondents say that the reviser's failure to mention the omission of materiality from the text of § 1014 means that Congress must have completely overlooked the issue. . . . But surely this indication that the staff experts who prepared the legislation, either overlooked or chose to say nothing about changing the language of three of the former statutes does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress. . . . In any event, the revisers' assumption that the consolidation made no substantive change was simply wrong. . . . Those who write revisers' notes have proven fallible before.[290]

As previously mentioned, the text of the statute is preeminent, especially when its application does not lead to absurd results.[291] Based upon this previous treatment by the Court, it is unlikely that a comment in the more than sixty-year-old Revisers' Notes would alter the conclusion that a plain reading of the statute reveals today.[292]

Finally, accepting that equitable tolling is compatible with section 2401(b) necessarily precludes the application of the oft quoted "*inclusio unius est exclusio alterius*" canon.[293] As mentioned at the outset, in 1988 Congress amended the FTCA to include a tolling provision for the erroneous omission of the government as the proper defendant.[294] However, section 2401(b) is an insufficiently exhaustive limitation provision[295] rendering

285. *Kwai*, 732 F.3d at 1042.
286. Pub. L. No. 111-350 § 5(g)(8), 124 Stat. 3848 (2011).
287. *Kwai*, 732 F.3d at 1058 (Tashima, Circuit Justice, dissenting).
288. *Id.*
289. United States v. Wells, 519 U.S. 482 (1997).
290. *Id.* at 496-97 (internal quotations omitted).
291. Justice Scalia once expressed the idea by stating that "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 20 (1997).
292. *Wells*, 519 U.S. at 96-97.
293. The phrase roughly translates to "the express mention of one thing excludes anything else not mentioned." Mullins, *supra* note 207, at 23.
294. Pub. L. No. 100-694, §§ 5, 6, 102 Stat. 4564 (1988).
295. *See e.g.*, United States v. Beggerly, 524 U.S. 38 (1998); United States v. Brockamp, 519 U.S. 347 (1997).

the canon entirely inapposite.[296] Further, the FTCA is inherently—if not expressly—committed to the common-law of torts upon which it is built, such that courts may use common-law principles to fill the gaps of omitted cases.[297] The ensuing section explicates the rationale for applying equitable tolling as completely consistent with the FTCA's overall purpose despite its omission, rather than precluding it because of its exclusion.[298]

C. Purpose

It is axiomatic that Congress need not—and simply cannot—predict each and every scenario to which a statute applies.[299] For this reason, federal judges inherently posses the power to interpret a statute in those unanticipated situations, presumably furthering the overall purpose of the statute as a whole.[300] According to Professor Manning,

> The most important alternative justification for atextual and purposive interpretation relates to an ancient common law doctrine: the equity of the statute . . . when applied, that doctrine authorized courts to extend a clear statute to reach omitted cases that fell within its ration or purpose . . . when the text would inflict harsh results that did not serve the statutory purpose.[301]

Even strict textualists agree that "'objectified' intent—the intent that a reasonable person would gather from the text of the [statute], placed alongside the remainder of the corpus juris" can provide a means of addressing those cases for which the text alone is insufficient.[302]

As the express purpose of the FTCA is to treat the government exactly like "private individuals under like circumstances" and to provide redress for common-law torts, traditional tort principles such as equitable tolling are inherently compatible to the FTCA.[303] Tort law arose primarily as a product of common law rather than statutes.[304] However, historically, tort-law statutes of limitations were always subject to principles of equitable tolling.[305] Furthermore, the Supreme Court presumes—as do lower courts—that Congress

296. SCALIA & GARNER, *supra* note 105, at 107-11.

297. *Id.* at 96, 99.

298. 28 U.S.C. § 2401(b) (2012).

299. Manning, *Equity of the Statute*, *supra* note 233, at 25.

300. *Id.* at 22-23. Kokoszka v. Belford, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by the its various provisions, and give to it such a construction as will carry into execution the will of the legislature . . . .") (quoting Brown v. Duchesne, 19 How. 183, 194 (1857)).

301. *Id.* at 22. Professor Manning argues that the equity of the statute theory did not survive into modern American jurisprudence. *Id.* at 126. However, the Supreme Court typically presumes that Congress drafts with knowledge of the time-honored theory. McQuiggin v. Perkins, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting).

302. SCALIA, *supra* note 291, at 17; *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006).

303. 28 U.S.C. § 2674 (1988).

304. *See* PAGE KEETON *ET AL.*, PROSSER AND KEETON ON THE LAW OF TORTS 19 (5th ed. 1984) ("Tort law is overwhelmingly common law, developed in case by case decision making by courts.").

305. *See* Hedges v. United States, 404 F.3d 744,749 (3d Cir. 2005) (applying equitable tolling to a suit in admiralty because "actions in admiralty are based in principles of tort."); Rotella v. Wood, 528 U.S. 549, 560 (2000) (noting the settled "understanding that federal statutes of limitations are generally subject to equitable

passes tort statutes "against the backdrop of common law rules of tort law."[306] By implication, Congress simply cannot include a statute of limitations in a tort statute without knowledge that courts automatically presume equitable tolling applies.[307] Section 2401(b), *a fortiori*, must be interpreted against this common law background.[308] Indeed, in *Kubrick*, the Court applied the traditional tort concept of claim accrual in determining when section 2401(b)'s period began to run.[309] The simple recognition that the statute of limitation does not begin to run until discovered—a common-law tort rule—supports the proposition that section 2401(b)'s limitations period is not absolute and is instead subject to equitable enlargement as is any normal tort claim.[310]

Moreover, disallowance of equitable tolling runs entirely counter to the purpose of the FTCA, as it would allow a government employee to commit a tortious act and subsequently prevent the claimant from filing his or her claim, even if diligently pursued.[311] Thus, the maxim *nullus commodum capere potest de injuria sua propria* finds itself fully applicable to government defendants under the FTCA no less than to private individuals.[312] This rationale is quite obvious because the language of the FTCA explicitly indicates that its purpose is to treat the government like a private individual.[313] As previously mentioned, Congress's primary objective was to compensate victims of ordinary common-law torts negligently committed by government employees within the scope of their employment who previously had to introduce private bills in Congress.[314] That purpose is ill served by an overly restrictive reading of section 2401(b).[315]

Holland v. Florida is illustrative of this point as well.[316] The AEDPA provided a one-year statute of limitations for filing a writ of habeas corpus and further stated that while a state post-conviction appeal is pending, the one–year statute of limitation did not run against the defendant.[317] The Court read this to be an "ordinary, run-of-the-mill statute of limitations."[318] Based on that reading of the statute the Court had no difficulty applying equitable tolling to the provision.[319] One of the Court's primary considerations was that courts generally allow equitable tolling of habeas corpus appeals.[320] By comparison, equitable principles traditionally govern substantive tort law and these principles existed well

tolling principles.").

306. Manning, *Equity of the Statute*, *supra* note 233, at 114. *See also* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) ("In approaching this question, we start from the premise that when Congress creates a federal tort it adopts the background of general tort law.").

307. Manning, *Equity of the Statute*, *supra* note 233, at 115.

308. 28 U.S.C. § 2401(b) (2012).

309. United States v. Kubrick, 444 U.S. 111 (1979).

310. Arteaga v. United States, 711 F.3d 828, 833 (7th Cir. 2013).

311. Neves v. Holder, 613 F.3d 30, 36 (1st Cir. 2010).

312. BLACK'S LAW DICTIONARY 1856 (9th ed. 2009) ("no one can gain advantage by his own wrong").

313. 28 U.S.C. § 2674 (1988).

314. Dalehite v. United States, 346 U.S. 15, 24-25 (1953).

315. 28 U.S.C. § 2401(b) (2012); Cox v. Roth, 348 U.S. 207, 209 (1955) ("The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent abuses."); Sisk, *supra* note 1, at 104-05.

316. Holland v. Florida, 560 U.S. 631, 645 (2010).

317. 28 U.S.C. §§ 2244(d)(1)-(2) (1996).

318. *Holland*, 560 U.S. at 647.

319. *Id.* at 645-48.

320. *Id.* at 646.

before the FTCA's enactment.[321] Thus, *ex hypothesi*, section 2401(b) fits into an area of law "where equity finds a comfortable home."[322]

VII. CONCLUSION

As this note demonstrates, the Supreme Court's dual jurisprudential fluctuations render previous ideas about—and interpretations of—section 2401(b) of little resonance today.[323] Former efforts by courts and commentators alike were no doubt driven by the need for a uniform approach, and rightly so.[324] What this article has in common with recent cases and commentary, though, is an aversion to the use of legislative history that, correct or not, so thoroughly dominated the traditional approach.[325] Pragmatic and evidentiary concerns drove this movement, due in large part to the difficulty in deriving an accurate picture of a more than fifty-year-old Act with virtually no direct guidance on the issue of equitable tolling.[326] Recognizing the obviousness of this problem, the Court's modern focus centers on text, context, and purpose as the most readily discernable characteristics of a statute.[327] However, any dissatisfaction with legislative history should not ignore, but instead should seek solace in, the general purpose and objectives sought by the Act as a whole. From this perspective, the task of interpreting section 2401(b) specifically, and the various provision of the FTCA writ large, is simplified. Although this approach employs numerous, and at times conflicting approaches to statutory construction, the end goal of a harmonious and equitable construction outweighs the problems inherent in the overreliance on rigidity that plagued previous efforts.

Finally, and most importantly, the argument that section 2401(b) is not jurisdictional only reaches its gestalt with the simultaneous examination of the Court's prevailing approach to *Irwin*, sovereign immunity, and jurisdictional rules.[328] This article's niche is found in combining these developments and applying them to section 2401(b), meanwhile coalescing lower court arguments in support of the propriety of applying equitable tolling to the FTCA.[329] When bolstered by normative and pragmatic concerns, the rationale for this argument appears compelling.[330] Concerns that the systematic application of equitable

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321. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946); Exploration Co. v. United States, 247 U.S. 435, 446-47 (1918); Bailey v. Glover, 88 U.S. 342, 348 (1875); Sherwood v. Sutton, 21 F. Cas. 1303, 1304-05 (No. 12,782) (C.C.D.N.H. 1828); Jones v. Conoway, 4 Yeates 109 (Pa. 1804).

322. *Holland*, 560 U.S. at 647 (citing Munaf v. Geren, 553 U.S. 674, 693 (2008)).

323. *See e.g.*, Powers v. United States, 390 F.2d 602 (9th Cir. 1968); Frey v. Woodard, 481 F. Supp. 1152 (E.D. Pa. 1979).

324. *See e.g.*, Elana Wexler, Note, *Section 2401(b) Reconfigured:* Irwin v. Dep't. of Veterans Affairs *Leads to the Right Result for the Wrong Reasons*, 74 FORDHAM L. REV. 2927 (2006).

325. Colella & Bain, *supra* note 16.

326. KENT GREENWALT, STATUTORY AND COMMON LAW INTERPRETATION 37-38 (2013).

327. Sisk, *supra* note 8, at 605.

328. GREENWALT, *supra* note 326, at 41-42:

> A shift in a provision's content might also occur if a court relies on the general purpose behind a law to alter the interpretation of the meaning of a specific provision whose content is unclear. In this instance, a later court might decide that the meaning of a specific provision was correctly understood by an earlier court in one way, but that, given new legal developments or changed conditions, it should now understand the meaning in a different way, in order to better serve the clear underlying purpose.

Id.

329. Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013); Santos *ex rel.* Beato v. United States, 559 F.3d 189 (3d Cir. 2009); Perez v. United States, 167 F.3d 913 (5th Cir. 1999).

330. Arteaga v. United States, 711 F.3d 828, 834-35 (7th Cir. 2013).

tolling will likely overburden the judicial system are at odds with and should bow to the general purpose of the Act, particularly in light of prevailing views about sovereign immunity.[331] Claimants must still bear the burden of proving equitable tolling applies to their claim, whereas the government, as a defendant, retains the ability to plead the statute of limitations as a defense.[332] The systematic adoption of this approach, either uniformly among the circuits, or by the Supreme Court itself, provides the predictability and uniformity necessary for a remedial mechanist as important as the FTCA, meanwhile avoiding additions to the already dense array of technical requirements the Act imposes.[333]

Jacob Damrill[*]

331. *See* John S. Gannon, *Federal Tort Claims Act—Seeking Redress Against the Sovereign: Balancing the Rights of Plaintiffs and the Government when Applying Federal Rule of Civil Procedure 15(c) to FTCA Claims*, 30 W. NEW ENG. L. REV. 223 (2007).

332. FED. R. CIV. P. 12(b)(1).

333. *See* Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105 (2009).

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