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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

6 Mr. Haynes.

7 ORAL ARGUMENT OF JEFFREY K. HAYNES

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

5                   MR. HAYNES: The --

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

10                  MR. HAYNES: The 1863 statute prior to the  
11   Tucker Act amendment to the statute had approximately  
12   the same structure, Your Honor, yes.

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

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

25                  CHIEF JUSTICE ROBERTS: Of course, Irwin

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

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

7 CHIEF JUSTICE ROBERTS: Well, in, in the  
8 more recent case of Kontrick -- I'm looking at footnote  
9 8 of that opinion -- it used 2401 as an example of the  
10 jurisdictional bar and 2401 has pretty much the same  
11 language as 2501.

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

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

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

1 jurisdictional grants to the Court of Federal Claims.  
2 So --

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

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

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

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

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

6 Could not interfere with the plain-text  
7 reading of 2501 once you assume --

8 JUSTICE ALITO: What kind of language would  
9 we have to find in 2501 in order to conclude that it's  
10 jurisdictional? Would it be necessary for the statute  
11 to say that there is no jurisdiction unless the -- the  
12 claim is filed within a certain period of time?

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

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

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

25 JUSTICE GINSBURG: Then there would be a

1 built-in limitation, and usually that's not considered  
2 jurisdictional. It would be under the heading of  
3 failure to state a claim; that is, your claim has been  
4 extinguished, so you have no claim to state, as opposed  
5 to the ordinary operation of the statute of limitations  
6 which bars only the remedy, not the right.

7 MR. HAYNES: Yes, Justice Ginsburg. But  
8 certainly the example -- as the Chief Justice's example  
9 suggested, in 2401, the Federal Tort Claims Act, and  
10 also the statute that's found in the Quiet Title Act  
11 that this Court interpreted in the Block case, Block v.  
12 North Dakota, those statutes of limitations are attached  
13 to the jurisdictional grant in some closer fashion than  
14 2501 is, and so they would more likely to be read to be  
15 a limit on jurisdiction. I think --

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



1 the same about the statute, couldn't we?

2 MR. HAYNES: Justice Scalia, I believe that  
3 the Irwin case answers that question because Irwin  
4 certainly undercut Soriano and Soriano relied on the  
5 Kendall-Finn line of cases. Irwin made a choice, and it  
6 chose to say that the statute of limitations in Title 7  
7 and generally other statutes of limitation are presumed  
8 to be equitably tollable, and if they are equitably  
9 tollable they cannot be jurisdictional. 2501 was used  
10 --

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

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

15 JUSTICE GINSBURG: Bowles said that.

16 JUSTICE SCALIA: Yes.

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

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

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

4 MR. HAYNES: Yes, but I think a -- a fair  
5 reading of Irwin, combined with this Court's decision in  
6 Franconia Associates, which construed Section 2501 to  
7 say that it doesn't have a special accrual rule for the  
8 government and that this Court -- or that courts should  
9 apply statutes of limitations against the government as  
10 against private parties --

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

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

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

19 MR. HAYNES: Yes.

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

23 MR. HAYNES: No, but -- it did not say that  
24 specifically, but I think if you look at Irwin in the  
25 totality, there is -- I don't think there is a way that

1 you could look at Irwin and say that it did not overrule  
2 Soriano. At a minimum -- at a minimum, it took out the  
3 theoretical underpinnings for the Soriano line of cases.  
4 Because --

5 JUSTICE BREYER: How do you suggest we write  
6 the opinion? If you were writing it and then a dissent,  
7 say, or someone or we read in the briefs that here is an  
8 absolute holding of the Supreme Court right on point,  
9 totally clear, says just exactly what the government  
10 says here, and it was codified in 1948, and now we say  
11 the reason, despite that, you win is?

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

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

21 MR. HAYNES: Well --

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

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

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

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

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

19                  MR. HAYNES: I think in order to --

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

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

24                  JUSTICE GINSBURG: Is it just Irwin or a  
25 whole line of cases? There was a time when the

1 jurisdictional label was used rather frequently. There  
2 is a more recent case that says "jurisdiction" is a word  
3 of many meanings, too many meanings. And I think the  
4 Court has been trying to cut down on the too many  
5 meanings.

6 MR. HAYNES: Yes, Justice Ginsburg, I agree,  
7 and those cases start with the Kontrick v. Ryan case and  
8 continue through -- and even in the Bowles case, that's  
9 -- that's a species of appellate jurisdiction which --

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

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

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

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

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

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

24                  JUSTICE KENNEDY: I don't, either, and  
25 that's why, when you say, well, it's a general rule,

1 well, your argument tends to lose force because of the  
2 fact that Congress acts against the background of what  
3 this Court has stated.

4 MR. HAYNES: That may be. However, I don't  
5 think that that general codification or -- or, rather,  
6 the rule of statutory construction that says that the  
7 Congress's codification of the law will then incorporate  
8 this Court's prior decisions, I don't think that can  
9 trump the plain language reading of the statute.

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

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

1 waiver.

2 I don't think one can say that if you expand  
3 the principle to cover the whole -- the whole matter of  
4 whether it's jurisdiction. So why not read Irwin more  
5 moderately to -- to -- if we have to overrule one of two  
6 things, the whole doctrine of the jurisdictional nature  
7 of statutes of limitations in sovereign immunity cases  
8 and the other is simply, oh, yes, there is sovereign  
9 immunity, but can there be equitable tolling, why  
10 shouldn't we adopt the more limited one?

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

16 And the example I would give, Justice  
17 Scalia, is in the Indian Tucker Act, which is found on  
18 page 9A of the appendix to the blue brief. The Indian  
19 Tucker Act, Section 1505 -- excuse me -- section 1505,  
20 says that claims that accrue to Indians after August 13,  
21 1946, go to the Court of Federal Claims. The Court of  
22 Federal Claims has jurisdiction over those claims.

23 That is -- and before that date, such Indian  
24 claims went to the Indian Claims Commission. So in 1505  
25 Congress said before a date certain a particular forum



1 had jurisdiction; and after a date certain another forum  
2 has jurisdiction. That's -- that's a jurisdictional  
3 kind of date that I think is -- is appropriate to look  
4 at here, because once -- once you put an -- you put  
5 accrual language in a statute of limitations, that by  
6 its nature suggests that there may be equitable tolling  
7 or some kind of tolling if you're talking about a claim  
8 accruing, because there may be estoppel, there may be  
9 waivers, there may be discovery issues. So the text of  
10 the statute itself suggests that there is a form of  
11 tolling allowed in the statute.

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

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

24 MR. HAYNES: Mr. Chief Justice, it certainly  
25 was not the rule in Soriano and Kendall. But our

1 position is that in Kendall the Court ignored the  
2 legislative history which said, this statute of  
3 limitations that we are inserting into the 1863 Court of  
4 Claims Act should be treated -- should be applied to the  
5 government just as to private parties.

6 That's precisely the ruling in Franconia  
7 Associates: That once sovereign immunity has been  
8 waived, once -- once there is a waiver of sovereign  
9 immunity, the government is treated like any other  
10 defendant.

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

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

18 MR. HAYNES: I understand. Again, I suggest  
19 that Irwin erased the theoretical underpinnings of the  
20 Kendall-Finn line of cases by saying that a statute  
21 formerly -- which this Court formerly said was  
22 jurisdictional can be subject to equitable tolling, and  
23 if it is subject to equitable tolling it cannot be  
24 jurisdictional because the hallmarks of "jurisdictional"  
25 are strict construction, it can't be waived and

1     forfeited, and it has to be raised sua sponte. And so  
2     if you take out one of those legs of the statute, I  
3     don't see how it can be held to the jurisdictional.

4                 JUSTICE GINSBURG: It did say statutory time  
5     limits -- this is Irwin -- applicable to lawsuits --  
6     well, the sentence about the suits: The rule of  
7     equitable tolling applicable to suits against the  
8     government. It says the rule that was announced is  
9     applicable to the government, the same as with respect  
10    to private parties.

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

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

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

25                CHIEF JUSTICE ROBERTS: Well, I think your

1 argument is more strongly supported by Irwin than  
2 Franconia. Franconia simply involved an accrual rule,  
3 which doesn't go to what the jurisdictional effect of  
4 the bar on commencing a case is.

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

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

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

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

23 JUSTICE GINSBURG: Even if -- even if you're  
24 right, couldn't the Federal Circuit say: Well, that's  
25 all very interesting but Day v. McDonough told us that

1 if we want to raise it on our own -- we don't have to if  
2 it's not jurisdictional; but if we want to, we can.

3 MR. HAYNES: Justice Ginsburg, I think Day  
4 v. McDonough does not help the government here. Day v.  
5 McDonough said that, yes, in the habeas situation the  
6 district court might raise sua sponte the timeliness of  
7 the claim. What the Court was -- the majority was clear  
8 on this, and the three-member dissent was also crystal  
9 clear on this: That if the government waives the  
10 statute of limitations, the Court would not have -- it  
11 would be an abuse of discretion for the Court to  
12 override that waiver.

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

23 So, Day v. McDonough, I think, helps our  
24 position and not the government's position. And that  
25 was made emphatically clear by at least eight members of

1 this Court in Day v. McDonough, the majority and the  
2 three-member dissent.

3 One other point I'd like to make, and that  
4 is that if this Court holds that the statute of -- that  
5 2501 is jurisdictional, then the judges in the Court of  
6 Federal Claims for every case filed in front of them on  
7 their general jurisdiction docket have to -- will have  
8 to scrutinize the allegations in every complaint to  
9 determine if the complaint is -- has been timely filed.

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

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

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

18 (Laughter.)

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

23 But that's true, Justice Kennedy, if the  
24 government has, has waived it then the court doesn't  
25 have to, wouldn't have to do that. If they -- excuse

1 me, if they raise it, the government doesn't have to --  
2 I'm sorry. If the government raises --

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

5 MR. HAYNES: Right.

6 JUSTICE KENNEDY: -- then you're going to  
7 have to determine it anyway, subject to clearly  
8 erroneous findings of fact, as to when the person  
9 entered the property and so forth.

10 MR. HAYNES: That's correct.

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

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

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

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

3           CHIEF JUSTICE ROBERTS: Thank you,  
4   Mr. Haynes.

5           Mr. Stewart.

6           ORAL ARGUMENT OF MALCOLM L. STEWART

7           ON BEHALF OF THE RESPONDENT

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

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

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

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

25          JUSTICE STEVENS: You don't think Irwin even



1 changed the equitable tolling rule?

2 MR. STEWART: We don't. Irwin read in the  
3 way we would read it, established that at least with  
4 respect to statutes that provided for private suits  
5 against both governmental and private defendants, and  
6 perhaps with respect to suits against the government  
7 generally, that there is a presumption of equitable  
8 tolling. But the Court in Irwin recognized that that  
9 presumption could be rebutted. And in both Kendall and  
10 Soriano, the Court had relied on, inter alia, the fact  
11 that the statute listed specific instances in which the  
12 6-year period could be tolled as evidence that there was  
13 no general authority to toll the statutory time limit.

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

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

20 JUSTICE STEVENS: What do you do with  
21 Justice Rehnquist's sentence: "We think this case  
22 affords us an opportunity to adopt a more general rule  
23 to govern the applicability of equitable tolling suits  
24 against the government"? Is there an implied exception  
25 for Soriano there?

1           MR. STEWART: I think there are two bases on  
2   which we would distinguish that language. The first is  
3   by its terms Chief Justice Rehnquist's sentence was  
4   addressed to equitable tolling, not to waivability. And  
5   it's true that the Court in Bowles has linked the two,  
6   but it doesn't appear that the Court in Irwin made that  
7   equation. That is, in the Irwin opinion the Court  
8   recited the fact that both the district court and the  
9   court of appeals had ordered the case dismissed for lack  
10  of jurisdiction, because the filing requirement had not  
11  been met. And the Court said, we think that the statute  
12  is subject to --

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

20           MR. STEWART: It was at least a general rule  
21  for equitable tolling with respect to statutes like  
22  Title 7 that authorize suit against both the government  
23  and against private defendants. And there has been some  
24  back and forth in the Court since then as to whether the  
25  Irwin language extends more broadly. In Brockamp, the

1 Court suggested that some private analog is necessary  
2 before the Irwin presumption applies. In Scarborough  
3 versus Principi, the Court seemed to tilt in the  
4 opposite direction.

5 But part of our point is, even if the Irwin  
6 presumption of equitable tolling extends categorically  
7 to all suits against the government, equitable tolling  
8 is not the same thing as jurisdictionality or  
9 waivability. The Court in Bowles did link the two, but  
10 in Irwin itself the Court recited the fact that the  
11 lower courts had dismissed for lack of jurisdiction.

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

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

21 CHIEF JUSTICE ROBERTS: You know, I don't --  
22 it's -- we've found it difficult enough to figure out  
23 which statutes are jurisdictional and which are not.  
24 And now you want us to say, well, even if it's  
25 jurisdictional, the consequences may be different for

1 jurisdiction and for equitable tolling and for  
2 waivability. I mean, it seems to me that's a very  
3 difficult argument.

4 MR. STEWART: Well, the Court has said both  
5 with respect to Section 2501 and its predecessors and  
6 with respect to statutory time limits for suing the  
7 government generally, that the terms of Congress's  
8 consent to suit define the jurisdiction of the reviewing  
9 court and a time limit for commencing suit is one of  
10 those terms. And I would direct the Court's attention  
11 in particular to United States v. Dalm, which is cited  
12 in our brief on page 23. It was decided less than 9  
13 months before Irwin was decided. And the opinion in  
14 Dalm is suffused with references to the jurisdictional  
15 character of the time limit for commencing suit against  
16 the government.

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

22 MR. STEWART: Obviously, the government was  
23 on the other side in Irwin, so in a sense I'm not the  
24 best person to defend the Court's reasoning. But as  
25 between the reading of Irwin that would create this

1 anomaly, that there could potentially be a  
2 jurisdictional limit that was nevertheless subject to  
3 equitable tolling, and the argument on the other side  
4 that Irwin sub silentio swept away numerous decisions of  
5 this Court that had recited that the, that the terms of  
6 the government's consent to suit are jurisdictional  
7 limits and a time limit is one of those terms.

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

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

1 private employer would be in like circumstances, and --

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

5 MR. STEWART: Well, in Franconia, the Court  
6 was dealing with a different question. It was what do  
7 the words "first accrues" mean? And it held that the --  
8 it essentially treated the phrase "first accrues" as a  
9 term of art, as one that had appeared in prior statutes  
10 governing suits against other defendants. And so it saw  
11 no reason to believe that Congress intended those words  
12 to mean anything different in Section 2501 than they  
13 meant in other statutes of limitations.

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

25 JUSTICE STEVENS: Let me ask this question,

1 Mr. Stewart. Supposing we didn't have any precedent at  
2 all, just the whole -- this is the first time this issue  
3 had arisen, and we have the plain language of this  
4 statute. Would you not read this statute, without any  
5 background, supporting your opponent?

6 MR. STEWART: We wouldn't read it to -- if  
7 all we had was the text of the statute, we would not  
8 read it to permit waiver. And I should explain why.  
9 The statute is reproduced in pertinent part at page 2 of  
10 the government's brief. And the statute provides "Every  
11 claim of which the United States" -- "Every claim of  
12 which the United States Court of Federal Claims has  
13 jurisdiction shall be barred unless the petition thereon  
14 is filed within 6 years after such claim first accrues."

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

20 JUSTICE KENNEDY: Aren't statutes of  
21 limitations generally more equivocal than that?

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

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

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

8 JUSTICE STEVENS: Yes.

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

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

22 MR. STEWART: Rule 8(c) says the following  
23 affirmative defenses shall be pled in the responsive  
24 proceeding, and it lists statute of limitations. I  
25 think it could certainly -- it obviously couldn't



1     supersede the decisions of this Court or even of the  
2     Federal Circuit --

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

6             MR. STEWART: I think the rule basically  
7     tracks, although not precisely tracks, the language of  
8     the -- the parallel Federal Rule of Civil Procedure, and  
9     we would read it simply to mean to the extent this is an  
10    affirmative defense, it should be pleaded initially. It  
11    doesn't say that the defense is waived if not pleaded.

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

22            JUSTICE BREYER: No, that isn't -- I don't  
23    think it's quite -- putting the argument as I understand  
24    it, you would say let's look at Irwin, and we read it,  
25    so it's in your mind. Now think of that set of statute

1 of limitations, the Federal ones, the Government ones,  
2 that are either just as ambiguous as Irwin or even more  
3 ambiguous. Think of that set.

4 Now, in Irwin the Court says in the absence  
5 of special circumstances that whole set is going to be  
6 interpreted as nonjurisdictional. That's what it says.  
7 So you say, well, what Irwin didn't talk about is  
8 suppose there's a member of that set where previously  
9 the Court had held it was jurisdictional. It doesn't  
10 tell us what to do. Shall we read it as an exception or  
11 shall we not?

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

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

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

25 JUSTICE BREYER: Absolutely right, and then

1 the question is does the simple fact that we previously  
2 held to the contrary count as a rebuttal? Does Irwin  
3 mean to -- see that's the same question I had before, so  
4 what do you think about that?

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

7 JUSTICE BREYER: Because?

8 MR. STEWART: It's a little artificial to  
9 talk about what language Congress might or should have  
10 used in light of Irwin to make clear its intent that  
11 this be treated as jurisdictional, when Congress in the  
12 1948 Judicial Code chose to recodify essentially the  
13 same language that had previously been construed to  
14 impose a jurisdictional limit. And the point I was  
15 making before about Petitioner's argument as to imputed  
16 congressional intent -- in the end Petitioner's position  
17 depends on the inference that because there was a body  
18 of law out there saying that statutes of limitations are  
19 ordinarily waivable, Congress should be assumed to have  
20 intended to incorporate that body of law.

21 And our point is if you're trying to impute  
22 Congress's intent it makes much more sense to assume  
23 that Congress intended to recodify the same reading that  
24 this Court had attached to this particular provision,  
25 not that Congress intended to incorporate a meaning that

1 the Court had attached to other statutes of limitations  
2 that the Court had specifically distinguished from this  
3 one.

4 And it's worth emphasizing that the  
5 decisions in Kendall and Finn and De Arnaud can't be  
6 accused of the sort of loose or less than meticulous use  
7 of jurisdictional language that this Court has recently  
8 --

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

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

25 JUSTICE GINSBURG: And if we looked at the

1 Court of Federal Claims decisions now, I think they're  
2 spelled out in the opinion. They go both directions.  
3 That is, some say 2501 is jurisdictional, some say it's  
4 not.

5 MR. STEWART: I think the principal line of  
6 authority in the Federal Circuit says it's  
7 jurisdictional, but what can't be disputed is that this  
8 Court has said over and over that it's jurisdictional,  
9 and the Court has again not used those -- that term in  
10 passing.

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

23 MR. STEWART: Well, I think it would be --  
24 again, given the fact in particular that the Court in  
25 Irwin didn't speak explicitly to the question of

1 jurisdictionality one way or the other, I think it is  
2 not uncommon for a -- a dissenting opinion to make  
3 assertions about the reach of a majority opinion, and  
4 the majority opinion sometimes does and sometimes does  
5 not respond to those.

6 JUSTICE STEVENS: But the interesting part  
7 about this is the discussion of the majority of this  
8 case is part of its development of the fact that we've  
9 got cases all over the lot and we want to adopt a clear  
10 rule to apply across the board. So it's part of the  
11 reasoning of the Court.

12 MR. STEWART: Well, I -- but I think at most  
13 the Court in Irwin was not trying to adopt a clear rule  
14 across the board; it was trying to adopt a presumption,  
15 while recognizing that Congress could provide in  
16 individual statutes for a rule different from the one  
17 that the presumption would suggest. And again if --  
18 Congress had already been told that the language it was  
19 using would be treated as jurisdictional -- and the  
20 Court in the Kendall line of cases had not simply used  
21 the label jurisdictional; it had said statutes of  
22 limitations governing suits against private parties can  
23 be waived if they're not asserted in a timely fashion,  
24 but the time limit for filing suit against the United  
25 States in the Court of Claims is different. This is a

1 limit on the Court's authority and the Court is required  
2 to notice it whether it's pleaded by the government or  
3 not.

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

7 JUSTICE GINSBURG: Did Congress think that  
8 Rule 8(c) has no range of application? And -- we have  
9 two recent statements saying statutes of limitations  
10 against the government are like statutes against private  
11 parties. But if 2501, which covers all of the cases  
12 over which the Court of Federal Claims has  
13 jurisdiction -- if, if it's for jurisdictional, then I  
14 don't know what cases there would be in which there's a  
15 time limit in a suit against the government that isn't  
16 jurisdictional.

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

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

4           JUSTICE ALITO:   Doesn't Mr. Haynes have a  
5   point when he suggested at the end of his argument that  
6   questions about accrual involve much more complicated  
7   factual questions than are usually involved in deciding  
8   whether a court has jurisdiction?   So imagine if this  
9   case came up today and the government adhered to its  
10   prior position -- I don't know whether it's still it's  
11   position -- that there had not been a permanent taking  
12   until 1998, would the court -- and none of the events  
13   that happened before 1998 had been brought to the  
14   court's attention -- would the court have to say to the  
15   parties:   Well, this is fine; we see that there was a  
16   fence put up in 1998, but now you have to tell us  
17   everything else that's happened on this site going back  
18   10 years to see whether there -- whether the claim might  
19   have accrued at some earlier point.

20           MR. STEWART:   Well, I guess we'd have two or  
21   three responses to that.   The first is, at least before  
22   judgment could be entered in favor of the plaintiff, the  
23   court would ultimately have to determine not only that  
24   there was -- had been a taking, but would have to  
25   determine the date on which the taking occurred in order



1 to award compensation, if nothing else. So this seems  
2 like the kind of question that would ultimately have to  
3 be determined, at least before the plaintiff could be  
4 successful.

5 The second thing, as was pointed out before,  
6 at least in the majority of cases where there is a  
7 viable limitations argument, the government is going to  
8 plead it, and so asking the court to look beyond this --

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

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

25 But the -- I guess the more fundamental

1 point we would make is the speculation as to disruptive  
2 results would carry a lot more force if the government  
3 were asking for a rule that was different from what had  
4 been done in the past. That is, even Petitioner would  
5 concede that, for the great bulk of the country's  
6 history, this rule was treated as jurisdictional, and  
7 Petitioner's argument is simply that that line of  
8 authority was effectively overruled in Irwin in 1990.  
9 And so if in fact treating this limit as a  
10 jurisdictional limit would have the effect of disrupting  
11 litigation in the CFC, we would expect the Petitioner to  
12 have actual evidence to that effect. If we were asking  
13 for a different rule than had been enforced in the past,  
14 then there would be more --

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

24 MR. STEWART: I think that's true even as to  
25 cases involving barriers that everyone would concede are

1 jurisdictional. For instance, there are cases in which  
2 a litigant sues us, and there is great doubt as to his  
3 standing to sue, and it may be an issue that we think is  
4 otherwise framed in an appropriate context, and the  
5 government might feel that it would be to everyone's  
6 benefit to get the issue resolved when -- one way or the  
7 other. But one consequence of treating that as a  
8 jurisdictional barrier is simply that the government  
9 can't always have its way.

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

15           Certainly the majority of cases involving  
16 both -- I think, involving both 2501 and other  
17 provisions that impose time limits for suits against the  
18 government, in which the courts have held that the  
19 relevant limit is jurisdictional, typically the  
20 situation arises where the government decides to make an  
21 argument on appeal that it didn't make in the district  
22 court. I think a case like this one, where the  
23 government doesn't argue the point even on appeal and  
24 the court of appeals nevertheless holds that the suit  
25 was untimely, those are the rarity. But we certainly

1 agree that the logical implication of treating the time  
2 limit as jurisdictional is that the Federal circuit did  
3 the right thing here.

4 I'd like to say a couple of words about  
5 Bowles. I think Bowles doesn't compel a ruling in the  
6 government's favor, but it does support our position in  
7 various respects. First, as the Chief Justice alluded  
8 to earlier, Bowles emphasized that time limits for  
9 filing notices of appeal had historically been treated  
10 as jurisdictional limits, and the Court said that, given  
11 the choice between calling into question some dicta in  
12 our recent opinions and effectively overruling a century  
13 worth of practice, we think the former option is the  
14 only prudent course.

15 JUSTICE GINSBURG: But, of course, Bowles --  
16 I mean the Court did miss something. Everyone on the  
17 Court did, and that is that the period to file your  
18 notice of appeal was originally not in any statute. It  
19 was in the rule, the FRAP rule. The opinions, both  
20 sides, assumed that the statute came first, and the rule  
21 was adopted to conform to the statute, but in fact it  
22 was just the opposite. It was a rule, a Federal Rule of  
23 Civil Procedure, which can't affect jurisdiction. We  
24 know that. As Congress says rules of procedure don't  
25 affect jurisdiction. So there was the rule, and then

1 the U.S. Judicial Conference said to Congress, when it  
2 referred the rule to Congress, you might consider a  
3 conforming amendment. And then the statute, after the  
4 rule came into effect, conformed to the rule. So what  
5 the Court, both sides, thought in Bowles -- we just had  
6 it in reverse.

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

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

23 MR. STEWART: But --

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

1 jurisdictional.

2 MR. STEWART: But my point is that, once  
3 this was brought to Congress's attention, Congress could  
4 have chosen to stick with other language, in which case  
5 I have no doubt that the corresponding rule would have  
6 been amended to fit the statute. Again, whatever  
7 level of attention we might privately think that  
8 Congress devoted to this question, the fact is that  
9 Congress acted as a body, passed a law, it was signed --  
10 passed statutes in both houses. It was signed into law  
11 by the President. And from that point forward, it was a  
12 statutory rule and had to be treated as such. So I  
13 agree that this aspect of the problem wasn't addressed  
14 specifically by the opinions in Bowles, but I don't see  
15 any basis --

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

22 MR. STEWART: I think to treat it as a  
23 conforming statute suggests that, in some way, Congress  
24 was obligated to do what the advisors told it to do or  
25 was obligated to conform Section 2107(a) to the terms of

1 the Federal rule, and that's not the case. Congress  
2 could have -- once this matter was brought to its  
3 attention, Congress could have enacted whatever statute  
4 it wanted. It chose to enact a statute that tracked the  
5 preexisting language of the rule, but from that time  
6 forward, the notice of appeal deadline was grounded in  
7 statute, and it was a statutory limit that applied to  
8 Bowles's own notice of appeal. So I don't think there  
9 is a basis for saying the case would or should have come  
10 out differently if the Court had been aware of the  
11 history of the statute's development.

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

22 MR. STEWART: My point is, if we were  
23 reading the statute without reference to any precedent  
24 addressing either 2501 itself or statutes of limitations  
25 generally, kind of the pure myopic, literal reading of

1 the statute, without reference to the legal context,  
2 would suggest that "every" means every, "shall be  
3 barred" means shall be barred, and there is no exception  
4 for cases in which the government fails to raise the  
5 argument in a timely way. And my point is --

6 JUSTICE KENNEDY: My response was all  
7 statute of limitations say that and all statute of  
8 limitations can be waived.

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

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

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



1     you?

2                     (Laughter.)

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

5                     (Laughter.)

6                     CHIEF JUSTICE ROBERTS: It is hard to  
7     understand how they could have lost the case.

8                     (Laughter.)

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

11                    Thank you.

12                    CHIEF JUSTICE ROBERTS: Thank you,  
13    Mr. Stewart.

14                    Mr. Haynes, you have three minutes  
15    remaining.

16                    REBUTTAL ARGUMENT OF JEFFREY K. HAYNES  
17                    ON BEHALF OF THE PETITIONER

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

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

24                    And I think that the way the Court has  
25    framed the issues in Irwin to say that there is a

1 presumption that statutes of limitation are tollable  
2 and, therefore, are not jurisdictional in our view,  
3 tends to show that the Court wants a clear statement  
4 from Congress.

5           The presumption language says Congress may  
6 at any time say otherwise and make a statute of  
7 limitations jurisdictional. Unless it does so, the  
8 statute of limitations would not affect subject matter  
9 jurisdiction.

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

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

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

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

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