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4 Petitioner : No. 13-1075

6 MARLENE JUNE, :

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10 Wednesday, December 10, 2014

11

15 APPEARANCES:

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 13-1075, United
5 States v. June.

6 Ms. Prelogar.

7 ORAL ARGUMENT OF ELIZABETH PRELOGAR

8 ON BEHALF OF THE PETITIONER

9 MS. PRELOGAR: Mr. Chief Justice, and may it
10 please the Court:

11 There is good reason to believe that
12 Congress did not want the equitable tolling doctrine to
13 apply to the FTCA time bar, and I'd like to begin by
14 focusing on a few of the issues that arose last hour
15 that are particularly important to understanding
16 Congress's intent.

17 To start with the questions, Justice Scalia
18 and Justice Kagan, that you were asking at the end about
19 the nature of our rule and what separates this statute
20 from other statutes. I want to be very clear: We're
21 not urging a categorical rule about all pre-Irwin
22 statutes. Here, we have statute-specific evidence about
23 the FTCA that makes clear that Congress did not want
24 this particular enactment to be subject to equitable
25 tolling.

1 And that's most clear, of course, from the
2 plain text and those 12 words, "Every claim against the
3 United States cognizable shall be forever barred
4 unless," that was lifted, Justice Scalia, as you said
5 verbatim from the Tucker Act context where it had been
6 repeatedly interpreted as a jurisdictional limit not
7 subject to tolling.

8 JUSTICE KAGAN: Ms. --

9 CHIEF JUSTICE ROBERTS: You don't doubt that
10 if -- if those words appeared in a statute that Congress
11 passed tomorrow, we would not interpret them as a
12 jurisdictional bar, would we?

13 MS. PRELOGAR: Mr. Chief Justice, I think it
14 would depend on whether there was an indication that
15 Congress was intending to incorporate those words from
16 the Tucker Act context.

17 JUSTICE GINSBURG: I thought at least if a
18 statute passed tomorrow, we have the clear statement
19 rule that we have said -- we have told Congress if you
20 don't want to have any tolling, if you want this to be
21 jurisdictional, absolutely rigid, you say so, and of
22 course, Congress, it's your call. But we're not going
23 to interpret a statute that doesn't make that clear
24 statement as jurisdiction.

25 MS. PRELOGAR: But this Court has also

1 emphasized, Justice Ginsburg, that there are no magic
2 words that are required in this context. And I think
3 Bowles v. Russell makes that particularly clear. There,
4 those words, "shall" and "notice of appeal," were
5 interpreted to have jurisdictional import. And so to
6 here in this context --

7 JUSTICE GINSBURG: Because this Court had
8 before -- had before said that provision about how much
9 time you have to appeal, that that was jurisdictional.
10 And I thought the Court's position was we decided it
11 once, and we're going to stick with it. But if we
12 haven't decided it, then we look at it. We look for a
13 clear statement.

14 MS. PRELOGAR: It was not only Section 2107
15 in -- in that context, but also predecessor provisions
16 and other similar statutory requirements. And that's
17 what the Court said in Henderson, when a long line of
18 this Court's decisions interpreting similar requirements
19 have said that those requirements are jurisdictional,
20 then we'll presume that Congress intended the same
21 meaning. Here, we have the identical language that had
22 that jurisdictional label attached to it. And that's --

23 JUSTICE GINSBURG: I don't -- I don't quite
24 get the identical language because "shall be barred," I
25 mean, that's common to a lot of statute of limitations.

1 You're not suggesting that this would be different if it
2 just said "shall be barred" rather than "forever
3 barred," are you?

4 MS. PRELOGAR: No. We're saying that when
5 Congress lifted and incorporated word for word the
6 then-prevailing Tucker Act time bar, it clearly was
7 signaling an intent to incorporate the judicial
8 interpretations of that Tucker Act time bar.

9 And -- and, Justice Ginsburg, I -- I think
10 this is an important point about those early Tucker Act
11 cases. Those were not drive-by jurisdictional rulings.
12 Those were carefully considered decisions that attached
13 jurisdictional consequences to the -- the Tucker Act
14 time bar and said that it couldn't be waived. It wasn't
15 subject to equitable tolling.

16 So this wasn't a -- an argument that was
17 made in passing or something that the Court didn't
18 carefully consider. Rather, the Court made a -- a
19 decision in those cases that that language had
20 jurisdictional import.

21 JUSTICE KAGAN: Ms. -- Ms. Prelogar, I'm
22 wondering what you think about Mr. Schnapper's analogy
23 to the private right of action cases, because it seems
24 to me very similar is that we're dealing in an area here
25 in which Congress doesn't generally say what it wants

1 with respect to some kind of procedural rule, maybe
2 because Congress doesn't usually think about it.

3 And we have one set of interpretative rules
4 to deal with that situation, and then those
5 interpretative rules basically switch off and we get the
6 opposite set of interpretative rules. And the way it's
7 worked in the private right of action cases, we don't
8 look back and say, well, gosh, you were enacting this
9 statute in the world of Cort v. Ash, and you used
10 language that was identical to language that the Court
11 assumed gave rise to a private right of action there,
12 and so you get a private right of action, too.

13 We've not said that. We've said, you know,
14 now we're in a different world and we're going to
15 require more of you than what the old -- than the old
16 language that gave rise to a private right of action
17 under Cort. Why is this any different?

18 MS. PRELOGAR: Justice Kagan, this Court has
19 said in the implied private right of action context that
20 you have to look at the contemporary legal context.
21 That was the Cannon case that we cite in our opening
22 brief and our reply brief. And this Court, in Alexander
23 v. Sandoval, made clear that -- that those holdings
24 hinged on the fact that Congress had acquiesced in the
25 decision that had prevailed at the governing time.

1 JUSTICE KENNEDY: Were -- were those --

2 JUSTICE SCALIA: Didn't our cases --

3 JUSTICE KENNEDY: -- were those two cases
4 pre- or -- that you just cited pre- or post-Irwin?

5 MS. PRELOGAR: Well, I was talking about the
6 private right of action cases, Justice Kennedy.

7 So with respect to statutes that -- that
8 predate Irwin, if you actually look at how Irwin has
9 fared and what the Irwin scorecard is, more often than
10 not, this Court has held that there isn't equitable
11 tolling in suits against the government. The Court's
12 considered that in five cases, and in four of them,
13 Brockamp, Beggerly, John R. Sand & Gravel, and Auburn
14 Regional Medical Center, it's held that the presumption,
15 if it applies, is rebutted. So I think --

16 JUSTICE SCALIA: Didn't -- didn't the
17 private right of action cases suggest rather strongly
18 that Cort v. Ash was wrong? That the prior notion that
19 when Congress says nothing about it, there is an implied
20 cause of action was wrong?

21 MS. PRELOGAR: That's true, Justice Scalia.

22 JUSTICE SCALIA: And have we -- have we said
23 that prior notions of what Congress meant in the past
24 about jurisdiction were wrong at the time?

25 MS. PRELOGAR: No, not at all. And I think

1 that is --

2 JUSTICE SCALIA: So I don't think the two
3 are parallel at all.

4 MS. PRELOGAR: And it's an important point
5 here that there's no question that when Congress was
6 enacting the FTCA in 1946 and at all relevant times
7 thereafter, when it was making changes to this time bar,
8 it -- it did view that as a jurisdictional limit, and
9 the Court has never questioned that -- that historical --

10 JUSTICE GINSBURG: That was -- that was the
11 way everything was -- involving the government and
12 sovereign immunity was all, quote, "jurisdictional."

13 And then we said -- and if -- if Congress
14 made a statute, we said, well, we call that
15 jurisdictional. Congress never called it
16 jurisdictional.

17 Then we took a fresh look at this, and we
18 said that's -- that's an exorbitant use of the word
19 "jurisdiction." Sure, you can have a -- you can have a
20 statute that has a very tight time line; that doesn't
21 mean it's jurisdictional.

22 MS. PRELOGAR: Justice Ginsburg, let me
23 respond to that by -- by taking a moment to emphasize
24 the history of the FTCA, because I think it's perfectly
25 clear that Congress at every turn, at every relevant

1 historical juncture, signaled its approval of the view
2 that this time bar was jurisdictional and could not be
3 tolled.

4 Congress has made significant changes to the
5 time bar four times: In 1946, 1949, 1966 and 1988. And
6 at each of those times, Congress's words and actions
7 were either inconsistent with or unnecessary in light of
8 an equitable tolling doctrine.

9 I could just tick through them. In 1946,
10 Congress enacted the FTCA time bar and expressly
11 declined to include a tolling provision, even though it
12 had considered earlier bills that did include that kind
13 of tolling provision, which, as this Court has said, it
14 was a deliberate choice, rather than an inadvertent
15 omission.

16 In 1949 Congress was aware that there had
17 been individual cases of hardship and debated in one of
18 the hearings whether to create a reasonable cause
19 exception. Instead of doing so, Congress decided to
20 extend the deadline from 1 year to 2, which would have
21 been unnecessary if equitable tolling could take care of
22 the hardship.

23 1966 is particularly important because at
24 that point there were 2 decades of experience with the
25 FTCA and every lower court to consider the issue had

1 held that it was jurisdictional and not subject to
2 tolling. Congress was aware of those decisions because
3 repeatedly litigants came to it during that time period
4 and requested relief in the form of a private bill. And
5 there, Justice Ginsburg, Congress did use that magic
6 word "jurisdictional." Congress repeatedly granted
7 relief through private laws that conferred jurisdiction
8 on district courts notwithstanding the time bar in
9 Section 2401(b).

10 Finally, in the --

11 JUSTICE GINSBURG: Well, it was responding
12 to our cases that use "jurisdiction."

13 MS. PRELOGAR: And acquiescing in those
14 cases, I would argue, when Congress then, in 1966,
15 reenacted the time bar without making any material
16 change. Congress was aware that this is how courts were
17 interpreting the -- interpreting the time bar, and this
18 Court itself had just recently announced in Soriano that
19 the Tucker Act time bar and that language was
20 jurisdictional, not subject to tolling, and -- and Congress
21 acted in reliance on those decisions when it reenacted
22 the bar in '66.

23 Finally, in 1988, this was when Congress
24 enacted the Westfall Act. At that point in time there
25 was a particular situation of hardship that had arisen

1 when a claimant had sued a Federal employee and then the
2 United States was substituted as a defendant after the
3 time had run to present a claim to the administrative
4 agency.

5 JUSTICE GINSBURG: Ms. Prelogar, I do think
6 that the -- the other side's account, at Mr. Schnapper's
7 account of the Westfall Act, the one that Congress was
8 intending to benefit was not the plaintiff, not the
9 injured plaintiff. It was the Federal employee, because
10 until Westfall v. Erwin, the Federal employee was off
11 the hook. He wasn't -- so then when this Court, said,
12 Federal employee, you are going to be stuck, then
13 Congress passed a relief measure for the Federal
14 employee, not -- not the plaintiff.

15 MS. PRELOGAR: It's absolutely the case,
16 Justice Ginsburg, that that was the overall purpose of
17 the Westfall Act. But Congress included
18 Section 2679(d)(5), which was the provision that gave
19 the claimant extra time to present a claim, 60 extra
20 days, if the claimant was out of luck because the time
21 of the statute had run by the time the United States was
22 substituted as a defendant. And that exception that
23 Congress introduced in 1988 would have been entirely
24 unnecessary if Congress thought that courts could take
25 care of this on a case-by-case basis through equitable

1 tolling.

2 So I think that the historical story here is
3 consistent and it's clear. At every turn --

4 JUSTICE SOTOMAYOR: You are equating
5 reasonable cause or -- or something comparable with
6 equitable tolling. Equitable tolling, as Justice
7 Ginsburg pointed out earlier, is much harder to get.

8 MS. PRELOGAR: That's absolutely true,
9 Justice Sotomayor, that it might be hard to get it in an
10 individual case. But -- but I think that it's clear,
11 and this again comes from the Tucker Act line of cases,
12 that Congress did view this as a -- a strict limit on
13 the waiver of sovereign immunity, and that Congress had
14 a right to suggest that it didn't even want to extend
15 that waiver one bit more.

16 JUSTICE SOTOMAYOR: Could I ask a question?
17 You've both been arguing this as if your situations are
18 identical. But do you disagree with the Respondent here
19 who says that -- who characterizes the administrative
20 claim process under the FTCA as claimant friendly?

21 MS. PRELOGAR: Certainly that process is
22 claimant friendly, but when the Court has emphasized
23 that concern in other cases, and I'm thinking here of
24 Bowen and Henderson, the Court was looking specifically
25 at the time bar and whether it was claimant friendly.

1 In Bowen, the time bar itself had a
2 provision that allowed the secretary to extend out the
3 limit for appealing a Social Security benefits denial,
4 and the secretary had interpreted that to encompass
5 principles of equity and fairness.

6 In Henderson, when the Court emphasized the
7 claimant-friendly nature of the procedural posture of
8 that case, the Court emphasized that there was no time
9 limit at all for a veteran to present his claim.

10 So in those cases it was the time bar that
11 was claimant friendly. And here we don't have that at
12 all. We have a strict, absolute limit that has no -- no
13 space within the text to permit any -- any notions of
14 claimant friendliness. So I think that is a relevant
15 distinction between those cases where it has made a
16 difference and where it has not.

17 JUSTICE KAGAN: Ms. Prelogar, I asked
18 Mr. Martinez a question before and, to tell you the
19 truth, I've just forgotten his answer to it, so I'm
20 going to ask you. How about 2401(a)?

21 MS. PRELOGAR: The government's position is
22 that 2401(a) is jurisdictional, but I want to say at the
23 outset that each statute has to be interpreted on its
24 own terms --

25 JUSTICE KAGAN: Well, why is 2401(a)

1 jurisdictional if every statute has to be -- you know,
2 Mr. Martinez said it's those exact 12 words, and 2401(a)
3 doesn't have those exact 12 words.

4 MS. PRELOGAR: 2401(a) originated in the
5 Tucker Act itself in 1887 and, based on that Tucker Act
6 historical pedigree, we think that the same
7 interpretation of it that was longstanding would --
8 would govern here in this context. So that --

9 JUSTICE KAGAN: Is there -- is there any
10 statute of limitations that applies against the Federal
11 government that you don't think is jurisdictional?

12 MS. PRELOGAR: Other than the ones that this
13 Court has -- has already ruled upon, I can't think of
14 any off the top of my head. But I have to confess that
15 I haven't done an extensive statute-specific analysis
16 with respect to all of them.

17 JUSTICE BREYER: Well, if that -- if that's
18 all --

19 JUSTICE SCALIA: Have you stopped beating
20 your husband, right?

21 JUSTICE BREYER: If, in fact -- you've heard
22 this already, but I'd like your specific answer to it.
23 In Irwin, Chief Justice Rehnquist says, we -- a
24 waiver of -- they are holding a new rule. He says that.
25 He says that we now -- a waiver of sovereign immunity

1 cannot be implied, but must be express. Once Congress
 2 has made such a waiver, all right, we think that making
 3 the rule of equitable tolling applicable to suits
 4 against the government in the same way that it is
 5 applicable to private suits amounts to little
 6 broadening. Such a principle -- da, da, da -- and
 7 that's what we hold.

8 Now, has not the Court, I'm not sure,
 9 applied Irwin to statutes that were enacted before
 10 Irwin?

11 MS. PRELOGAR: It has, Justice --

12 JUSTICE BREYER: Now, if, in fact, we were
 13 to hold with you in this, how would we justify that? I
 14 mean, this is a statute that -- that, as much as any, is
 15 trying to equate -- waives sovereign immunity, trying to
 16 equate private suits against private people with suits
 17 against the government. So if some times Irwin applies
 18 to a pre-Irwin statute, when no one in Congress thought
 19 that they would be doing that, why isn't this case in
 20 that?

21 MS. PRELOGAR: Well, let me be --

22 JUSTICE BREYER: I know you've given many,
 23 many answers, but the answers that I hear are all
 24 answers that Congress at the time probably thought that
 25 equitable tolling wouldn't apply. I agree. That is

1 probably what they thought, if they thought about it.
2 But the same is probably true of dozens of statutes that
3 were passed pre-Irwin.

4 So what's the distinction? Because
5 Rehnquist says we now are laying down -- we think this
6 case affords us an opportunity to adopt a more general
7 rule. He thinks he is applying a new rule. And -- and
8 that's applying to prior statutes. So why not this one
9 if it's any?

10 MS. PRELOGAR: Irwin adopted that rule
11 because it judged it to be a realistic assessment of
12 legislative intent. But Irwin made clear that it's a
13 rebuttable presumption. As this Court said in John R.
14 Sand & Gravel, it's not conclusive, and it can be
15 over --

16 JUSTICE BREYER: I agree with you that Irwin
17 does say it is likely to be a realistic assessment of
18 legislative intent. That is one reason given among
19 others. If I don't agree with you, that that was meant
20 to be absolute rather than simply a factor in the mind
21 run of cases, suppose I don't accept your argument
22 there, then I would have to apply it to this statute;
23 right.

24 MS. PRELOGAR: And we agree that the
25 presumption applies at the outset. At the threshold the

1 government has the burden --

2 JUSTICE BREYER: I know, and what you're
3 saying is that there are certain things that rebut it.
4 But all those things, it seems to me, come down to
5 saying, as I just said, that Congress, at the time,
6 thought there wouldn't be equitable tolling. And that's
7 why I asked this question. That would seem to me to be
8 true of many statutes, if not all of them, passed before
9 Irwin, and yet we have applied Irwin backwards.

10 MS. PRELOGAR: It may well be, Justice
11 Breyer, that it's easier for the government to rebut the
12 presumption with respect to pre-Irwin statutes because,
13 of course, under Irwin this Court does have to consider
14 what the prevailing and contemporary legal context was
15 at the time the statute was enacted. Holland makes that
16 clear where it suggests that the presumption has greater
17 force as applied to statutes enacted after Irwin.

18 JUSTICE GINSBURG: But every statute that it
19 applied to in Irwin was enacted, how many years, 18
20 years before Irwin.

21 MS. PRELOGAR: In 1972. That's correct,
22 Justice Ginsburg. Of course, there is a relevant change
23 in the law that happened in that time period. In 1967
24 -- this is, of course, after the FTCA had been reenacted
25 -- this Court decided *Honda v. Clark*. That was the

1 first decision holding that there could be equitable
2 tolling in a suit against the government. And so, by
3 the time Congress enacted Title VII in 1970-- in 1972, it was
4 legislating against a backdrop where there wasn't a
5 uniform line of precedence from this Court saying that
6 every statute waiving sovereign immunity was -- was necessarily
7 subject to tolling.

8 I think the important point here -- and this
9 comes from *Honda v. Clark* as well -- is an observation
10 about - about the mode of statutory interpretation that we're
11 urging. In *Honda v. Clark* the reason the Court reached
12 that conclusion that there could be equitable tolling
13 notwithstanding the sovereign immunity considerations,
14 is because the statute in that case, the Trading with
15 the Enemy Act, had been expressly patterned after the
16 Federal Bankruptcy Act. And this Court said that lower
17 courts had interpreted the Bankruptcy Act to permit
18 equitable tolling. And so, the Court said that the
19 Trading with the Enemy Act should be interpreted the
20 same way.

21 That's precisely the argument we're making
22 here. It's an argument about how Congress would have
23 understood these words when it took them directly from
24 the Tucker Act context and imported them into the FTCA.

25 I would like to make a brief observation

1 about respondent's primary effort to distinguish the
2 Tucker Act cases. And -- and this is the distinction that
3 respondent draws between the court of claims and
4 district courts.

5 Respondent says that those tribunals
6 exercise fundamentally different powers when it comes to
7 equitable tolling. But that would radically alter how
8 this Court has long understood the court of claims'
9 powers. As we explained in our reply brief, all of
10 respondent's cases deal with the issue of equitable
11 remedies. Whether the court of claims can issue an
12 injunction. No, it can't, but that's also true of
13 district courts applying FTCA claims. There the
14 district court is only considering a claim for money
15 damages.

16 And the important point is this Court has
17 never distinguished between the powers of the court of
18 claims and powers of district courts with respect to
19 equitable doctrines, equitable recoupment, equitable
20 reformation of a contract, the equitable doctrines of
21 laches and estoppel. Down the line, the Court has
22 indicated that the court of claims has those powers
23 equally with district courts.

24 So there is simply no tenable basis to say
25 that that tribunal-focused analysis creates a difference

1 between the presumptions that should apply with respect
2 to equitable tolling. It also doesn't do anything to
3 explain this Court's Tucker Act cases. If, in fact,
4 respondent were right and this was a function of the
5 tribunal, then what this Court could have said in those
6 cases is, here is a statute administered by the court of
7 claims; thus, there's no equitable tolling.

8 But, of course, that's not what this Court
9 did in Kendall, Finn, Soriano, John R. Sand & Gravel,
10 the entire line of cases. Instead, those cases turned
11 on the text of the time bar and the fact that this was a
12 waiver of sovereign immunity and that Congress intended
13 that waiver to be interpreted narrowly.

14 And -- and, Justice Breyer, to your point about how
15 equitable tolling rarely applies -- Justice Ginsburg, I
16 think you mentioned this as well -- I do think it's
17 important to look at this historical context and what
18 this meant for Congress in 1946. And by today's light
19 it's not a particularly big deal to sue the United
20 States in its own name for money damages, but when
21 Congress enacted the statute in 1946 it was an
22 incredibly big deal. And, in fact, it took Congress two
23 decades of debating this bill to even grow comfortable
24 with the idea and to get everyone on board with waiving
25 the sovereign immunity of the United States for tort

1 actions.

2 The Federal government was out ahead of the
3 states in this. The house report that accompanies the
4 1946 legislation notes only four states that had waived
5 their sovereign immunity for tort claims. By 1969, it
6 was only 17 states that had fully waived their sovereign
7 immunity, only four of which, by the way, permitted any
8 form of tolling.

9 So I think it's pretty clear that when you
10 look at the statute and you look at what Congress
11 intended in 1946, those were the factors that motivated
12 it, this was a strict condition on the waiver of
13 sovereign immunity and Congress intended it to be
14 interpreted narrowly.

15 If there are no further questions I would
16 like to reserve the remainder of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Rosenkranz.

19 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

20 ON BEHALF OF THE RESPONDENT

21 MR. ROSENKRANZ: Mr. Chief Justice, and may
22 it please the Court:

23 All of the arguments that you heard in Wong
24 apply with equal force to our case; that is, Mr.
25 Schnapper's arguments. But they apply with extra force

1 with respect to the administrative presentment
2 requirement. And the inclusion now of an administrative
3 presentment requirement actually sheds some light on
4 what Congress must have meant with respect to the filing
5 provisions. So there are additional reasons with
6 respect to administrative presentment, and a lot of the
7 arguments that the government has been making,
8 particularly in the first argument in Wong, simply don't
9 apply to 1966 or to administrative presentment.

10 So Ms. Prelogar says 1966 was important. It
11 was important. As of 1966, this scheme looked like a
12 completely different scheme from the scheme that
13 Congress passed in 1946. The Tucker Act, the suit
14 filing deadline runs from accrual. There's no
15 presentment requirement. The statute of limitations for
16 filing a lawsuit is six years from accrual. There are
17 statutory disability provisions. FTCA, the suit-filing
18 deadline now runs from an agency action, from the final
19 determination. Presentment is required. The statute of
20 limitations for filing the lawsuit is now six months
21 from the agency action and there are no listed
22 exceptions.

23 Now, the context is fundamentally different
24 than for the presentment provision and now for the
25 entire FTCA statute of limitations, but let me just talk

1 first about presentment. So the central -- first of
2 all, the central focus of presentment is informality, is
3 flexibility. You fill out a one-and-a-half page form.
4 You literally handwrite into little boxes. It takes 30
5 minutes to fill out. If you send it to the wrong
6 agency, no big deal. The Department of Justice sends it
7 on to the right agency. And the administrative process
8 that is triggered by that filing is not what anyone
9 would view as an adjudication. The statute says it's
10 about settlement, it's about negotiations. To Justice
11 Breyer's point, you're usually unrepresented by counsel.
12 And the notion -- and DOJ says specifically in its
13 regulations that what is supposed to happen are,
14 "Informal discussions, negotiations and settlement
15 rather than any formal or structured process."

16 The notion of applying a rigid, indeed
17 jurisdictional rule to that very informal process, flies
18 in the face of the whole informality that Congress set
19 up for the suit-initiating process.

20 Secondly --

21 JUSTICE SOTOMAYOR: And without need to say,
22 there were no prior cases talking about whether this was
23 equitable tolling under the Tucker Act because there was
24 no such thing.

25 MR. ROSENKRANZ: That is exactly right.

1 The -- the presentment requirements all came into play
2 in the '60s. They were never applied to the Tucker Act.
3 This was part of a spate of new law so the backdrop law
4 against which this is being interpreted, all we have
5 now, not when Congress passed it, but all we have now is
6 Zipes.

7 Now, all of the -- all of the criteria that
8 I was ticking off as to what the statute of limitations
9 looked like, it looks like Title VII. In Zipes this
10 Court tells us -- that is the statute of limitations in
11 Title VII -- in Zipes this Court tells us that the
12 presentment requirement is not subject to equitable
13 tolling. So that's the second point --

14 JUSTICE SCALIA: Mr. Rosenkranz, so I
15 understand you, are you arguing that tolling applies to
16 the presentment provision even though it doesn't apply
17 to other provisions?

18 MR. ROSENKRANZ: No, Your Honor.

19 JUSTICE SCALIA: Is it possible for us to
20 hold that?

21 MR. ROSENKRANZ: That is not what I'm
22 arguing, Your Honor. What I'm arguing is tolling has
23 always applied, certainly, to this statute, certainly
24 under Irwin for reasons that I will explain in a little
25 bit.

1 But when Congress reenacts this in 1966, it
2 makes abundantly clear that that conclusion is correct.
3 Because now we've got this presentment requirement,
4 which I think refreshes congressional intent with
5 respect to what it was thinking on jurisdiction.

6 But -- but I will circle back to this in a
7 moment as I said, but I agree with everything Mr.
8 Schnapper said. In 1946 it was also not jurisdictional
9 for the --

10 JUSTICE SCALIA: I don't know what you mean
11 by "refreshes congressional intent." We have a fairly
12 rigid doctrine that repeals by implication are not
13 favored. And are you saying that intent was "refreshed"
14 so that even if Congress originally thought this was
15 jurisdictional in the narrow sense, it now no longer is
16 because of the adoption of the presentment provision?

17 MR. ROSENKRANZ: I am not, Justice Scalia.
18 Let me just be clear. Our position is from 1946 on, it
19 has always been subject to equitable tolling, it has
20 never been jurisdictional. But to the extent that
21 anyone doubts that -- because as Justice Alito points
22 out, Congress wasn't thinking about any of this, so all
23 we are talking about is a battle of presumptions. We
24 have two clear statement rules.

25 And I grant you, Justice Scalia that there's

1 also another clear statement rule with respect -- or
2 another presumption, that is, with respect to choosing
3 language from another source, which I will also get to
4 in a moment, but let me just, if I may, finish on
5 presentment.

6 The third point I was going to make is that
7 as originally drafted, this presentment requirement was
8 never a requirement. It was in the original FTCA. It
9 was permissive. So with respect to repeals by
10 implication, what happens next is Congress makes it a
11 requirement. And the presumption then, or the
12 Government's position then, as I understand it, is, when
13 Congress turned it in -- turned it from permissive to a
14 requirement, Congress also made that requirement both
15 jurisdictional and impervious to the age-old doctrine of
16 equitable tolling.

17 Next point, this Court has never ever found
18 that an administrative presentment provision is
19 jurisdictional or overcomes the presumption in favor of
20 equitable tolling. And that really is a version of the
21 point that Justice Sotomayor was making.

22 Fourth, it is at least relevant that the
23 statute here runs from accrual and not from some hard
24 and fast point. And the -- the Government is making
25 this argument that our fraudulent concealment point is

1 really an accrual point. Well, if it is, then that
2 means that the same conversations one would have about
3 fraudulent concealment one would have about accrual
4 anyway.

5 So I -- I kept promising that I was going to
6 go back to the baseline points, and the baseline
7 points --

8 JUSTICE GINSBURG: Mr. Rosenkranz, in that
9 regard, would you clarify what is the Government's --
10 what is your position in response to the Government's
11 rather strong answer to your suggestion that equity was
12 foreign to the claims court?

13 MR. ROSENKRANZ: Well, yes, Your Honor.
14 First, let me begin by saying that our basic position is
15 that -- that the presumption exists that Irwin was a sea
16 change in the law, that Irwin changes things as to every
17 other statute moving forward. But we've also ticked off
18 a series of differences between the Federal Tort Claims
19 Act and the Tucker Act, and this difference in forum was
20 one of them.

21 So from the start, and I mean 1863, the --
22 the claims court was just a very different body from a
23 district court. Congress viewed it really as an arm of
24 Congress at first and then it got adjudicatory powers,
25 but it didn't have, in 1863 when Congress passed the

1 statute and in the 1870s, '80s and into the early 20th
2 Century when this Court was interpreting the statute,
3 the court of claims just simply did not have equitable
4 powers. This Court said it in Bowen. "The claims court
5 does not have the general equitable powers of a district
6 court."

7 Now, the Government cites several cases --

8 JUSTICE SCALIA: You -- you contradict the
9 Government on that point. I'm sure the Government said
10 just the opposite.

11 MR. ROSENKRANZ: The Government did say just
12 the opposite and the Government cites several cases.
13 Now, it is telling --

14 JUSTICE GINSBURG: It didn't say the
15 opposite. It said the claims court didn't have the
16 authority to give equitable remedies. It didn't have
17 the authority to enjoin. But from the beginning it had
18 equitable doctrine as part of its --

19 MR. ROSENKRANZ: Agreed, Your Honor. The
20 Government has taken the opposite position from what I'm
21 saying with respect to whether the court of claims from
22 the start had broad equitable powers putting aside
23 injunctions.

24 And my point is, the first case that the
25 Government cites is 50 years after the court of claims

1 was created. By that point, the jurisdictional train
2 had left the station. Kendall had been decided, Finn
3 had been decided. It was already set in stone that this
4 was a court whose -- for whom the statute of limitations
5 was jurisdictional.

6 Now, the cases the Government sites, its
7 best case is Bowles v. United States, that's already
8 1935, I mean, that's many, many years later. And not a
9 single one of those cases, including Bowles, ever
10 creates a case-by-case equitable sort of claimant by
11 claimant analysis of the sort that equitable
12 tolling involves.

13 JUSTICE SCALIA: Well, you say they are
14 later cases but they didn't say the law has changed from
15 what it used to be; did they? Didn't they purport to
16 say that the court of claims had always had that power?

17 MR. ROSENKRANZ: Well, they didn't purport
18 to say it but they did say the court of claims currently
19 has that power, and I grant you that I'm -- that that
20 may sound like splitting hairs, but we're trying to --
21 we're trying to get behind what this Court was doing
22 back in the 1870s and 1880s. And I'll just emphasize,
23 several of the cases that the Government cites, are
24 cases in which what the court of claims does looks like
25 the result is equitable, but what this Court held was

1 that equity had nothing to do with why this Court
2 approved what the court of claims did. But rather, this
3 Court was saying the powers that the court of claims was
4 exercising were actually in the statute.

5 So Milligan is a particularly striking
6 example. This Court said that the court of claims
7 action with which the Government chalks up to equity,
8 actually quote, "Seems to us to fall within these words" --
9 that is, the words of the Tucker Act -- quote "in their
10 obvious and literal sense."

11 But I don't want to dwell too much on the
12 difference between the forums because --

13 CHIEF JUSTICE ROBERTS: Well, if I could
14 just pause there, I mean, obviously I'll go back and
15 reread Bowles. But in Bowles they said the money should
16 be returned because it offended principles of natural
17 justice and equity.

18 MR. ROSENKRANZ: Yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: It doesn't sound
20 like something in the statute.

21 MR. ROSENKRANZ: Yes, Mr. Chief Justice, and
22 what was going on in Bowles was also not
23 claimant-by-claimant decisions, it was sort of a broad
24 class of claimants. And I agree with you. That is the
25 one -- that is the closest case to what the Government's

1 position is.

2 But those other cases are, to the extent
3 that the court of claims is exercising what looks like
4 equity, it's always in favor of the Government. Which
5 is consistent with the manner in which the court of
6 claims was born. It was intended to be a parsimonious
7 doler out of government funds.

8 So I want to turn, though, for a moment to
9 the proposition that this is just a wholesale
10 withdrawal -- excuse me, a wholesale adoption of the
11 Federal Tort Claims Act plunked into a -- excuse me, a
12 wholesale adoption of the Tucker Act plunked into a new
13 framework, a -- a new statute. It is not. Certainly
14 not in 1966 for the reasons that I've described, but
15 also not in 1946.

16 First, I've already mentioned this forum
17 distinction. Secondly, there are -- there is a
18 distinction and Congress understood there to be a
19 distinction between torts and contract claims -- on the
20 one hand, and contract or takings claims on the other
21 hand. Contract claims and takings claims, even
22 contracts, Federal contracts, are governed by Federal
23 law.

24 Torts -- this -- the Congress made the
25 decision that tort claims are going to be governed by

1 State law and it adopted statutes of limitations that
2 mimicked State law statutes of limitations. That
3 one-year statute of limitations was an effort to try to
4 mimic what States were doing. And it changed to two
5 years, Congress said, because it wanted to mimic what
6 States were doing a little bit later.

7 And it's important to understand that the --
8 the State tort laws were always subject to equitable
9 tolling. The differences between a two-year statute of
10 limitations and a six-year statute of limitations is --
11 is very considerable, especially when one brings to mind
12 the sorts of considerations that Justice Breyer
13 mentioned, that tort claimants are often -- are often
14 unrepresented.

15 JUSTICE GINSBURG: Mr. Rosenkranz, may I
16 interrupt you because I thought I heard Ms. Prelogar say
17 that at the time that the FTCA was adopted, there were
18 only four States that applied tolling.

19 MR. ROSENKRANZ: I -- I don't -- I don't
20 believe that is true. Equitable tolling has been a rule
21 that courts -- that courts have applied since the 1800s
22 to all manner of -- of claims. Torts were no exception.
23 And one of the reasons that States had such short
24 statutes of limitations was precisely because equitable
25 tolling provided a relief --

1 JUSTICE SOTOMAYOR: No. She's -- I'm not
2 talking about their equitable tolling in tort cases.
3 She's saying in waivers of sovereign immunity, tort
4 claims against States, which is slightly different.

5 MR. ROSENKRANZ: Oh, yes. Yes, yes. So --
6 so let me just rephrase what I understand the government
7 to be arguing.

8 Those weren't equitable tolling provisions
9 in statutes, as I understand the point the government is
10 making, those are exceptions to statutes of limitations.
11 They're rigid. They look like the Tucker Act
12 exceptions, but they're not case by case. They are --
13 if you're overseas, as Mr. Schnapper said earlier --
14 actually, it doesn't matter whether you're monitoring
15 the docket and you can fully preserve your -- your
16 claims, it's just sort of a flat-out bar. And those are
17 the ones that -- that I believe the government is
18 speaking about.

19 Those are statutory. And as Mr. Schnapper
20 pointed out, statutory exclusions from the statutes of
21 limitations have always coexisted with equitable
22 exclusions. And I also --

23 JUSTICE SOTOMAYOR: Do you think, like
24 Mr. Schnapper, that your way of looking at this would
25 call into question *McNeil v. U.S.*?

1 MR. ROSENKRANZ: No, Your Honor. And I
2 don't think it calls into question McNeil v. U.S. at
3 all. So -- and there are two pieces to the answer. The
4 first piece is, let's assume that McNeil was a
5 jurisdictional ruling, which means that in order to
6 present your -- in order to file your lawsuit, you have
7 to present your claim first to the agency.

8 Well, in order to file a lawsuit, in real --
9 outside of this context, you also have to file a
10 complaint. The filing of a complaint is jurisdictional,
11 but that doesn't mean that the time limit for filing it
12 is jurisdictional. So too here, if indeed the filing of
13 an administrative form -- you know, this administrative
14 presentment is jurisdictional, that doesn't mean that
15 the -- that the time limit for filing it is also
16 jurisdictional.

17 But I said there were two halves. The
18 second half is I agree with Mr. Schnapper, this Court
19 came to a conclusion in McNeil. The conclusion is you
20 can't have your lawsuit without exhausting
21 administrative remedies. That was not stated as a
22 jurisdictional ruling. It was -- it -- it is analyzed
23 much more like an exhaustion ruling, to my mind, which
24 doesn't necessarily mean jurisdictional.

25 So I was beginning to tick off some of the

1 differences between the Federal Tort Claims Act and the
2 Tucker Act, and I was talking about the differences in
3 statutes of limitations, the differences in the nature
4 of the forums, the differences in the nature of the law,
5 and I want to come back to that last one.

6 The FTCA treats the government like a
7 private individual. It says it three times in the
8 statute and it treats the government, to the Chief
9 Justice's question, as a private individual with respect
10 to liability. So it's not with respect to all
11 procedures that might come up, but it says with respect
12 to liability. Well, statutes of limitations dictate
13 liability and the procedures attached to the statutes --
14 excuse me, the time limits attached to the statutes of
15 limitations also affect liability.

16 JUSTICE SOTOMAYOR: I have -- I have a
17 question. Why is it important to tie this presumption
18 of jurisdiction or not to the 1946 Act? I mean, why
19 don't you just say that whatever presumptions existed of
20 borrowing from the Tucker Act obviously changed in 1966.

21 MR. ROSENKRANZ: That --

22 JUSTICE SOTOMAYOR: They changed the
23 language, they changed the process. I mean, do we need
24 to go back? Why -- why not just say, whatever the
25 presumptions were with respect to the jurisdictional

1 nature in the Tucker Act in 1946, or even thereafter,
2 got completely thrown out the window in 1966?

3 MR. ROSENKRANZ: That -- that was indeed,
4 Justice Sotomayor, my opening point. And I've been
5 making this argument --

6 JUSTICE SOTOMAYOR: But then you said I
7 agree with Mr. Schnapper that since 1946 --

8 MR. ROSENKRANZ: So -- so I was making the
9 argument to those like Justice Scalia, who reject our
10 refreshment theory --

11 JUSTICE SOTOMAYOR: Okay.

12 MR. ROSENKRANZ: -- and -- and say, well,
13 what about 1946? And even in 1946, that if you apply
14 the Irwin presumption, which this Court said in Irwin it
15 would, you get the same result. And that's -- that's
16 the fundamental point on the precedence that I want to
17 make sure to emphasize.

18 Our argument is not that this is a living
19 statute that blows in the wind with congressional
20 intent. Our argument is that Irwin made it clear that
21 there is a sea change, that Soriano and all the cases
22 dating back on the Tucker Act adopted a vision of what
23 Congress must have intended that Irwin says is wrong.
24 That is not what Congress intends just because it waives
25 sovereign immunity. And so --

1 CHIEF JUSTICE ROBERTS: Well, I don't think
2 it can be regarded as such a sea change because the
3 basic principle is you're looking to legislative intent.
4 And he said, the -- the late Chief, that the realistic
5 assessment of legislative intent is likely to be found
6 based on the presumption. Of course, you know, subject
7 to rebuttal.

8 So that doesn't seem to me to be -- the
9 whole point is we think this is how best define
10 legislative intent, and that I thought has always been
11 the rule.

12 MR. ROSENKRANZ: Well, that's always been
13 the rule, Your Honor, in the private context and the
14 government is now being put in the private context, but
15 that was not always the rule with respect to the
16 government and certainly not consistently because we
17 have Soriano.

18 CHIEF JUSTICE ROBERTS: But, I mean, that
19 was not a legislative intent. The view was not that we
20 think the presumption of legislative intent is -- is no
21 equitable tolling.

22 MR. ROSENKRANZ: Oh, Your Honor, I -- I beg
23 to differ. As I read Kendall and Finn, they didn't --
24 this Court did not use phrases like "presumption." But
25 what this Court did was to say Congress didn't say

1 anything about this, but it was legislating against a
2 backdrop of waiving sovereign immunity, and when
3 Congress waives sovereign immunity, we have to read
4 statutes in a particular way; we're going to read them
5 very strictly.

6 Irwin says, no, that's not how we're going
7 to read statutes, that the better way to read statutes
8 is to assume the opposite, that Congress did not intend
9 statutes of limitations to be jurisdictional. And
10 sure -- and by the way, John R. Sands says, and I quote,
11 "It was" -- and I quote -- "a turn in the course of the
12 law," which now, quote, "places great weight upon the
13 equitable importance of treating the government like
14 other litigants and less weight on the special
15 governmental interest in protecting public funds."
16 Words that this Court, perhaps by accident, but -- but
17 almost took directly out of the Federal Tort Claims Act,
18 treating the government like it treats other parties.

19 So -- so Justice Scalia makes a powerful --
20 powerful point about a countervailing presumption. But
21 it is not -- by which I mean it is another presumption,
22 but it is a -- it is an argument that doesn't play out
23 plainly in this context. And the reason is, as was
24 covered in quite a bit of detail earlier this morning,
25 the notion of -- of fixating on the words "forever

1 barred" or the eight or 12 words around it to the
2 exclusion of the rest of the statute is just wrong.

3 The -- there was no magic to the words
4 "forever barred," not in 1863, not in 1946. If you do a
5 Westlaw search of forever barred, you will find scores
6 of garden-variety statutes of limitations that are
7 structured exactly this way and that use the exact same
8 words. And that's the point Justice Kagan was pointing
9 out, Professor Sick's -- Sisk's brief at page 20 gives
10 all sorts of examples. Mr. Schnapper gave others. The
11 Fair Labor Standards Act is one. The -- the statutes or
12 statute that this Court was interpreting in both Klehr
13 and Rotella is another.

14 And then layer on top of that the fact that
15 the Federal -- that the Tucker Act no longer even has
16 "forever barred" in the language, and still this Court
17 says it bears the same meaning. And it points out in --
18 in John R. Sand's that the change in language did not
19 make a fundamental difference.

20 And as I was saying -- oh, let me just make
21 one more point on this.

22 In 1877, this Court, in a case called
23 Sanger, which was also cited in Professor Sisk's brief,
24 says that that very language, forever barred, is, quote,
25 "an ordinary statute of limitations."

1 So let me just pause and see if the Court
2 has other questions that it wants to draw me to.

3 So if there are no further questions, we
4 respectfully request that the Court affirm the court of
5 appeals. Thank you, Your Honors.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Prelogar, you have eight minutes
8 remaining.

9 REBUTTAL ARGUMENT OF ELIZABETH PRELOGAR
10 ON BEHALF OF PETITIONER

11 MS. PRELOGAR: If I could just make three
12 points. First, with respect to the administrative
13 presentment requirement in particular, I want to be very
14 clear on this. From the beginning, from 1946 forward,
15 there was an optional administrative presentment
16 procedure, and this appears in our brief at page 9a.
17 This is the original text of the FTCA time bar, and it
18 uses the very same operative language with respect to
19 that administrative presentment option: Every claim
20 against the United States cognizable shall be forever
21 barred unless. So this is a procedure that has been in
22 the FTCA from the very beginning.

23 In 1966, what Congress did is make that
24 administrative presentment requirement mandatory. But
25 when it did so, it did so against the backdrop of every

1 lower court to consider the issue, holding that this
2 language was jurisdictional, not subject to tolling. It
3 did so against the backdrop of Congress repeatedly, in
4 the private bills, making clear that this was
5 jurisdictional language and that it had to confer
6 jurisdiction on district courts when plaintiffs were
7 trying to proceed outside the time limits.

8 JUSTICE SOTOMAYOR: Are you saying that the
9 administrative process was jurisdictional? I mean --

10 MS. PRELOGAR: Well, the administrative
11 presentment requirement itself, of course, this Court
12 had held -- which it has held was jurisdictional in the
13 McNeil case. I'm not aware of -- of lower courts in
14 that time limit --

15 JUSTICE SOTOMAYOR: Did we use the language,
16 "jurisdictional"?

17 MS. PRELOGAR: You affirmed for lack of
18 jurisdiction, and I think that McNeil language does show
19 that it's an absolute or strict deadline. There is no
20 room to any exception to it. Every lower court has
21 understood McNeil to be jurisdictional, and Congress, in
22 1988, when it enacted the Westfall Act specifically said
23 in -- in the House report that the administrative
24 exhaustion requirement was jurisdictional, which is why
25 it created that -- that narrow exception to permit an

1 extra 60 days. So I think it is clearly settled that
2 the exhaustion requirement at this point is
3 jurisdictional.

4 But the point that I was trying to make
5 about the 1966 reenactment is there, against that
6 consistent backdrop about what this language means, the
7 language that Congress had used, Congress, to set forth
8 a presentment requirement, used the same language once
9 again and -- and, therefore, intended it to have the
10 same meaning.

11 CHIEF JUSTICE ROBERTS: Well, Mr. Rosenkranz
12 tells us that that language is pretty typical for your
13 ordinary, run-of-the-mill statute of limitations. It
14 sounds pretty daunting, you know, forever barred, but
15 apparently that's the normal language that's used.

16 MS. PRELOGAR: And it's absolutely the case,
17 Mr. Chief Justice, that it is not "forever barred"
18 itself that necessarily has magic import here. It's the
19 Tucker Act analogy, the fact that Congress got this
20 language from the Tucker Act, and that in that context,
21 which was a parallel context, it had interpreted to be
22 jurisdictional which makes the difference here. Every
23 statute will have to be evaluated in light of not just
24 the text but its context and history.

25 JUSTICE BREYER: Are exactly the problem

1 because the -- really the better language in Irwin is,
2 again, the Chief Justice, "A continuing effort on our
3 part to decide each case on an ad hoc basis as we appear
4 to have done in the past would have the disadvantage of
5 continued unpredictability without the corresponding
6 advantage of greater fidelity to the intent of Congress.
7 We think that this" rule affords us -- "this case
8 affords us an opportunity to adopt a more general rule,
9 to govern the applicability of equitable tolling in
10 suits against the government."

11 Yet everything I've heard, not everything,
12 but many of the things I've heard say that this statute
13 is special because if we go into the history of it, if
14 we decide what the various other rules are that might
15 infer intents where they say nothing, if we look over
16 the -- if we do this, if we do that, we will discover
17 that here, unlike many other statutes that use the words
18 "forever barred," here Congress really intended it.

19 Now, how do we reconcile that view with the
20 two sentences I just read?

21 MS. PRELOGAR: Well, Justice Breyer, I think
22 that it would be very easy if the Irwin presumption were
23 just conclusive, but it's not. The Court adopted that
24 presumption as a way to implement congressional intent,
25 and the Court made clear that it's rebuttable, which

1 means that the government is -- if the government can
2 come forward with statute-specific evidence that it is
3 rebutted, the Court needs to honor congressional intent
4 in an individual case. So the Irwin presumption can't
5 excuse the normal statutory interpretation process,
6 looking at the text, context, and history.

7 A brief point on the court of claims issue.
8 If I understand Respondent, he would distinguish our
9 cases by saying that they were all rendered after this
10 Court's Tucker Act line of cases in 1906 and 1935.
11 Notably, that's before Congress enacted the FTCA. And
12 it shows that Congress, when it was enacting that
13 language, had no reason to think that there was some
14 tribunal-based difference between the court of claims
15 and the district court such that the language would be
16 interpreted in fundamentally different ways based only
17 on the tribunal.

18 A final point I -- I would like to make,
19 drawing back, to just focus on what I understand to be
20 the basic divide between the parties in this case.
21 Respondents in both cases seek primarily to rely on a
22 general presumption, the Irwin presumption, which wasn't
23 announced with this particular statute in mind.

24 The government has come forward with an
25 overwhelming amount of statute-specific evidence related

1 to the text, the context, the history of this statute,
2 and that statute-specific evidence has to control. The
3 Irwin presumption is rebutted.

4 If there are no further questions, we
5 respectfully ask that you reverse the decision of the
6 Ninth Circuit.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:58 a.m., the case in the
10 above-entitled matter was submitted.)

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