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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Haynes.

ORAL ARGUMENT OF JEFFREY K. HAYNES

ON BEHALF OF THE PETITIONER

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

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

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