No. 06-1164

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The statute of limitations codified in 28 U.S.C. § 2501 provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The question presented is:

Whether the statute of limitations in 28 U.S.C. § 2501 limits the subject matter jurisdiction of the Court of Federal Claims.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Court Rules

Legislative Materials

Other Authorities

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 457 F.3d 1345. Pet. App. 1a-40a, 157a. The opinion of the Court of Federal Claims denying in part the government's motion for judgment on the pleadings is reported at 57 Fed. Cl. 182. Pet. App. 127a-154a. The opinion of the Court of Federal Claims following a bench trial is reported at 62 Fed. Cl. 556. Pet. App. 41a-126a.

JURISDICTION

The court of appeals' judgment was entered on August 9, 2006. Petitioner's timely petition for rehearing en banc was denied on November 30, 2006. Pet. App. 155a-156a. This Court granted the petition for writ of certiorari on May 29, 2007. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Tucker Act provides in relevant part:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

Section 2501 of Title 28 of the United States Code reads in relevant part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

STATEMENT OF THE CASE

This case arises out of an inverse condemnation claim by petitioner John R. Sand & Gravel Company ("John R. Sand") for a physical taking arising from construction of a fence by the United States Environmental Protection Agency ("EPA") in 1998 that permanently and completely excluded John R. Sand from approximately 42 acres of its 158-acre sand and gravel leasehold. The Court of Federal Claims found that John R. Sand filed its claim timely on May 20, 2002, but, after a bench trial, found the government not liable for a taking. On appeal, the Court of Appeals for the Federal Circuit did not address the merits of John R. Sand's taking claim, but *sua sponte* held, over a vigorous dissent, that the statute of limitations for the Court of Federal Claims, 28 U.S.C. § 2501, was jurisdictional, and held that John R. Sand's taking claim was barred as untimely.

1. Statement of Facts

The Federal Circuit found to be undisputed the pertinent facts set forth in the Court of Federal Claims' decision on the government's motion for judgment on the pleadings, 57 Fed. Cl. 182 (Pet. App. 127a-155a), and decision after trial, 62 Fed. Cl. 556 (Pet. App. 41a-126a). Pet. App. 2a, 15a.

a. John R. Sand's Leasehold

John R. Sand leased 158 acres in Metamora Township, Lapeer County, Michigan, in 1969 for a term of

50 years. Pet. App. 128a, Pl. Ex. 44, Record 361, 368. The lease entitles John R. Sand to exclusive use of the property for mining and removing marketable stone and sand. Pet. App. 53a, Pl. Ex. 44, ¶1. John R. Sand's sand and gravel production facilities, including buildings, a crushing and wash plant, and a water supply well and pond (the "Plant Area"), are located in the center of its rectangular leasehold. A sand and gravel pit is located southeast of the Plant Area. Pet. App. 152a n. 3. A contaminated landfill known as the Metamora Landfill is located in the northern portion of the leasehold. Pet. App. 128a. John R. Sand's Plant Area is not in the landfill area. See figure attached to the Federal Circuit's decision ("February 1994 Fence Alignment"), Pet. App. 157a, 457 F.2d at 1361.

b. EPA's Early Activities

In 1984, the United States Environmental Protection Agency ("EPA") placed the landfill on its National Priority List of hazardous waste sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq*. ("CERCLA"). Pet. App. 128a. In 1986, EPA issued a record of decision ("ROD") setting forth remedial action plans concerning portions of the landfill. Pet. App. 128a. By 1989, EPA had installed monitoring wells in the landfill area. Pet. App. 128a. In 1990, EPA issued a second ROD that called for a cap over the landfill. The 1990 ROD did not describe the metes and bounds of the landfill cap, did not indicate when construction of the cap would begin, and did not exclude John R. Sand from any portion of its leasehold. Pet. App. 129a.

c. Early EPA Fences

EPA erected fences in John R. Sand's Plant Area in 1992-1993 that temporarily prevented John R. Sand from operating its machinery and selling finished products to

customers. Pet. App. 129a. Following John R. Sand's protests, EPA relocated the fences outside the Plant Area and John R. Sand continued its mining and gravel operations. Pet. App. 130a. In February 1994, EPA installed another fence in the Plant Area that temporarily deprived John R. Sand of access to its water well and pond, but EPA removed this fence in the summer of 1994 and John R. Sand continuously used the Plant Area thereafter. Pet. App. 130a.

d. Amended ROD and Administrative Order

On August 28, 1996, EPA amended the 1990 ROD to authorize moving contaminated waste remaining at the landfill under the proposed landfill cap. The 1996 amended ROD did not define the area of the cap or any area to which John R. Sand's access would be barred. Pet. App. 130a.

On December 18, 1996, EPA issued an Administrative Order to John R. Sand that required John R. Sand to provide entry and access to EPA and its representatives to all portions of John R. Sand's leasehold. The Administrative Order asserted that access was necessary to complete remedial actions for the landfill pursuant to a 1993 consent decree between EPA and a group of defendants ("Settling Defendants"). Pet. App. 130a-131a, 153a n. 6. The Administrative Order defined by metes and bounds an "Area of Institutional Controls" containing the landfill cap system. The Area of Institutional Controls is the cross-hatched area shown on Exhibit C to the Administrative Order. Joint Trial Exhibit 45, Record 118, 124; Pet. App 158a. The Area of Institutional Controls includes an area larger than the landfill cap and its boundary was not fenced in 1994. Pet. App. 157a.

Following disputes between John R. Sand and EPA concerning EPA's access to the landfill site, the government filed a complaint in the District Court for the Eastern District of Michigan seeking an order in aid of access. In March 1998, the district court issued an order granting the

government and its representatives access to the landfill site and authorizing relocation of the perimeter fence. Pet. App. 119a n.7, Pet. App. 132a. The fence, completed on May 12, 1998, enclosed about 42 acres of John R. Sand's leasehold and completely excluded John R. Sand from the Area of Institutional Controls. Pet. App. 132a.

2. Proceedings in the Court of Federal Claims: Motion for Judgment on the Pleadings

About four years after EPA constructed the final perimeter fence, on May 20, 2002, John R. Sand filed its complaint for a permanent physical taking of the portion of its leasehold enclosed within the Area of Institutional Controls. Pet. App. 132a; J.A. 4a–20a. The government's answer listed as a defense the statutes of limitations in 28 U.S.C. § 2501, but did not describe the statute of limitations as jurisdictional. J.A. 29a–30a .

The government moved for judgment on the pleadings, arguing that the six-year statute of limitations in 28 U.S.C. § 2501 barred John R. Sand's claim. Pet. App. 132a, 134a. The government argued that EPA's activities since 1992, including temporary occupation, removal of hazardous materials, and installation of monitoring wells and original fencing, were the events that fixed the government's liability. Pet. App. 135a. The Court of Federal Claims noted that it must determine when the government had clearly and permanently physically taken John R. Sand's property to identify the date of accrual of John R. Sand's claim. Pet. App. 136a.

Except as to the monitoring wells, the court found that the government did not demonstrate that John R. Sand's property was "clearly and permanently" taken in 1992 to cause a physical taking. Pet. App. 141a. The court found that the government failed to demonstrate that construction of the 1992-1993 fences destroyed John R. Sand's right to possess, use or dispose of its property in the Area of

Institutional Controls within the rule for a permanent physical taking set forth in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982). Pet. App. 142a. The court found that John R. Sand had the right to possess and in fact made extensive and valuable use of the portion of its leasehold that later became the Area of Institutional Controls by mining the area until EPA issued the December 1996 administrative order. Pet. App. 142a. See exhibit 10 to plaintiff's memorandum in opposition to motion for judgment on the pleadings (docket no. 21) (Evatz declaration). As to the monitoring wells, the court found that John R. Sand's claim as to the area occupied by the wells was barred, but the extent of the taking for the individual wells did not "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. Pet. App. 143a. The court did not decide exactly when John R. Sand's claim first accrued, whether December 1996 or May 1998. Pet. App. 150a.

3. Proceedings in the Court of Federal Claims: Trial

Before trial, the Court of Federal Claims requested briefs on the date of accrual of John R. Sand's claim. John R. Sand and the government agreed in separate briefs that John R. Sand's claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998. J.A. 31a–36a, 37a–40a. In addition, John R. Sand and the government stipulated before trial that the May 1998 fence "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls. Stipulated Facts No. 20, J.A. 43a. After trial on liability, the Court of Federal Claims determined, among other things, the accrual date of John R. Sand's claim. Pet. App. 50a-52a. The court found as a matter of law that John R. Sand's taking claim accrued in May 1998 when the government's agents completed the fence around the Area of Institutional Controls. Pet. App. 52a. The court found that the access disputes before that date

prevented the government from "permanently and exclusively occupying" the Area of Institutional Controls. Pet. App. 52a. The court found that the May 1998 fence "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls, citing the parties' stipulated facts. Pet. App. 52a.

On the merits, the Court of Federal Claims determined that John R. Sand's lease constituted a compensable property interest. Pet. App. 52a-58a. The court held, however, that John R. Sand's physical taking claim was non-compensable under equitable principles of "justice and fairness" set forth in regulatory takings cases, in part because John R. Sand had not prevented the continuation of landfilling activities on its leasehold after its lease began in 1969. Pet. App. 72a-73a. The court further held that a 1995 Michigan statute, enacted 26 years after John R. Sand's valid 1969 lease, operated as a background principle of nuisance law pursuant to *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992). Pet. App. 81a. Pursuant to that statute, and observing that no Michigan case supported the result, the court held that the government could abate John R. Sand's continued mining in the Area of Institutional Controls as an anticipatory nuisance by permanent physical occupation of the Area of Institutional Controls. Pet. App. 111a-112a.[1]

[1] The Court of Federal Claims decision after trial is arguably contrary to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." (footnote omitted)), and *Lucas*, 505 U.S. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). The Federal Circuit did not address the trial court's decision on the merits, Pet. App. 28a, and the merits of the takings issues are not part of the question presented here.

4. Proceedings in the Federal Circuit

In a split decision, the Federal Circuit vacated and remanded for dismissal, but did not address the merits. Over a vigorous dissent, the panel majority held 28 U.S.C. § 2501 to be jurisdictional, determined that the government's construction of the temporary 1994 fence caused John R. Sand's permanent physical taking claim to first accrue, and held that John R. Sand's complaint filed in 2002 was time-barred.

The panel majority would not have addressed the accrual of John R. Sand's claim but for the majority's view that the statute of limitations is jurisdictional and must be addressed *sua sponte* by the court. The government did not appeal the rejection by the Court of Federal Claims of the government's argument that the statute of limitations barred John R. Sand's claim. Pet. App. 13a. The government conceded on appeal that John R. Sand's taking claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998, and therefore 28 U.S.C. § 2501 did not bar John R. Sand's claim. Pet. App. 14a. The panel majority addressed the jurisdictional issue at the suggestion of the Metamora Group as amicus curiae.[2] Pet. App. 13a-14a, 31a n. 9.

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[2] After this Tucker Act action was filed, the Settling Defendants in the CERCLA consent decree (sometimes known as the Metamora Landfill Settling PRP Group ("MLSPG") and now known as the Metamora Group) moved to intervene as of right and permissively under Rule 24 of the Rules of the Court of Federal Claims (RCFC). The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004). Before trial, the government moved to issue notice to interested parties pursuant to RCFC Rule 14(b). The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co.*, 60 Fed. Cl. 272 (2004). The Metamora Group moved to stay the trial pending appeal of the denial of their motion to intervene. The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 347 (2004). The Federal Circuit affirmed denial of

The panel majority recognized that this Court's recent jurisprudence, beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004), considers statutes of limitations and other "claim-processing" rules as non-jurisdictional. The panel majority, however, distinguished § 2501 from this Court's recent statute of limitations jurisprudence, concluding that § 2501 "creates a jurisdictional condition precedent" for suit in the Court of Federal Claims. Pet. App. 18a-19a.

The panel majority further held that John R. Sand's claim for a permanent physical taking accrued upon construction of the temporary February 1994 fence because "EPA's presence destroyed JRS&G's right to exclude others," Pet. App. 24a, even though the Court of Federal Claims found that the February 1994 fence was removed in the summer of 1994 and John R. Sand continuously used the area afterward. Pet. App. 130a.

The dissent argued that this Court's recent statute of limitations jurisprudence applies to § 2501 and that "it is incorrect to accord unique status to § 2501 and hold that it is a limit on 'jurisdiction.'" Pet. App. 34a-36a. As to the panel majority's "permanence" analysis, the dissent argued that the majority's position "brings serious imprecision to takings law." The dissent argued that John R. Sand's claim for a permanent taking of the Area of Institutional Controls should not have accrued based on construction of fences in a separate area of the leasehold, especially since the fences were later removed, restoring the area to continuous use of John R. Sand. Pet. App. 39a.

The Federal Circuit denied John R. Sand's petition for rehearing *en banc* on November 30, 2006. Pet. App. 155a-156a.

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intervention in an unpublished decision. *John R. Sand & Gravel Co. v. Brunswick Corp.*, 143 Fed. Appx. 317 (Fed. Cir. 2005).

SUMMARY OF ARGUMENT

A statute of limitations characterized by this Court as "unexceptional," *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002), and codified by Congress in 1948 in a procedure chapter of the Judicial Code – separate and distinct in language from the jurisdictional provisions that also waive federal sovereign immunity – should not be treated as "jurisdictional," such that a court is obliged to raise and resolve its application *sua sponte*, even when the government expressly conceded the timeliness of the action and waived the issue on appeal.

The text of 28 U.S.C. § 2501, which *assumes* subject matter jurisdiction, should not simultaneously be read to *limit* subject matter jurisdiction. Section 2501 by its express terms bars an untimely action only when the Court of Federal Claims already has taken jurisdiction of the matter: "Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claims first accrues" (emphasis added). When jurisdiction does lie in the Court of Federal Claims under a statutory waiver of sovereign immunity, such as the waiver found in the Tucker Act, 28 U.S.C. §1491(a)(1), § 2501 operates only as a non-jurisdictional procedural time constraint to disallow stale claims.

Examining the jurisdictional and procedural statutes applicable to the Court of Federal Claims in their structural context – as classified by Congress in the 1948 codification of Title 28 of the United States Code – confirms that § 2501 does not limit the subject matter jurisdiction of the Court of Federal Claims. The statutes codified in the jurisdictional chapter for the Court of Federal Claims, including § 1491(a)(1), speak in the forthright and distinctive language of "jurisdiction." By contrast, § 2501 and other provisions codified in the procedural chapter for the Court of Federal Claims address jurisdiction, if at all, only to confirm the prior attachment or exercise of jurisdiction by the Court of Federal

Claims. Moreover, both at the time that Congress enacted the predecessor to § 2501 and at the time that Congress revised and codified Title 28, the prevailing rule in American law was that a statute of limitations is a procedural device and an affirmative defense that may be waived or otherwise forfeited.

Recognizing the non-jurisdictional nature of this unexceptional statute of limitations does not weaken the doctrine of federal sovereign immunity, does not expand the scope of any statutory waiver of sovereign immunity, and does not hold the United States responsible for previously unrecognized types of liability or for novel forms of relief. John R. Sand does not quarrel with the general understanding that a cognizable claim against the United States, falling within the scope of an express statutory waiver of sovereign immunity and filed in a tribunal with authority over that class of claims, ordinarily presents a non-waivable question of subject matter jurisdiction. See *United States v. Mitchell*, 463 U.S. 206, 212 (1980) ("the existence of consent [to suit by a waiver of sovereign immunity] is a prerequisite for jurisdiction"); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-15 (1940) (a judgment entered against the United States by a court lacking authority to adjudicate the claim is void for lack of jurisdiction by reason of sovereign immunity). But see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (describing a pre-Tucker Act case implicating the Fifth Amendment taking clause as "a specific application of the constitutional exception to the doctrine of sovereign immunity").

Such genuine jurisdictional requirements are plainly satisfied in this case. The Tucker Act, 28 U.S.C. § 1491(a)(1), clearly and unambiguously waives the sovereign immunity of the United States for claims founded upon the Constitution, including the allegation of a taking by the federal government of private property. The Court of Federal Claims indisputably has jurisdiction under the Tucker Act to

hear John R. Sand's inverse condemnation claim and to grant the monetary relief sought by John R. Sand. See *Franconia*, 536 U.S. at 141 (finding that the requirement of a statutory waiver of sovereign immunity was "satisfied" under the Tucker Act, ruling that the government thus was no longer "cloaked with immunity," and only then examining accrual of the statute of limitations in 28 U.S.C. § 2501).

The suggestion that § 2501 is jurisdictional is impossible to square with this Court's ruling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). *Irwin* superseded earlier decisions that had strictly applied statutes of limitations against the United States as jurisdictional conditions on the waiver of sovereign immunity. Because this "Court has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. ____, No. 06-5306, slip op. at 9 (U.S., June 14, 2007), this Court's presumptive allowance of equitable tolling of statutes of limitations on claims against the government removes such statutes of limitations from the category of jurisdictional commands. In addition, devising a special jurisdictional rule for statutes of limitations, absent express congressional endorsement, would conflict with this Court's clarifying direction that statutes of limitations applicable to suits against the federal government generally should be construed in conformity with the standards applicable to private disputes. *Franconia*, 536 U.S. at 141-42; *Irwin*, 498 U.S. at 94-96.

In *Kontrick*, 540 U.S. at 456, this Court admonished that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling with a court's adjudicatory authority." When the government has thrown off the cloak of sovereign immunity by expressly granting jurisdiction to a federal tribunal to hear a class of claims, and when the government deliberately strips away any defense based on the applicable

statute of limitations for those claims, the government should not later be permitted to slip the cover of immunity back over itself by clothing an "unexceptional" statute of limitations with a jurisdictional label.

ARGUMENT

SECTION 2501 OF TITLE 28 IS AN UNEXCEPTIONAL PROCEDURAL STATUTE OF LIMITATIONS THAT DOES NOT LIMIT THE SUBJECT MATTER JURISDICTION OF THE COURT OF FEDERAL CLAIMS.

A. BY ITS PLAIN LANGUAGE, § 2501 BARS A CLAIM FILED MORE THAN SIX YEARS AFTER ACCRUAL, WHEN THE CLAIM ALREADY IS ONE TO WHICH SUBJECT MATTER JURISDICTION IN THE COURT OF FEDERAL CLAIMS HAS ATTACHED.

1. Section 2501 assumes, and therefore does not limit, subject matter jurisdiction.

After the 1948 revision and codification of Title 28 of the United States Code (the structural significance of which is discussed in Part B of this brief), 28 U.S.C. § 2501 now reads, in pertinent part (and with emphasis added):

> Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.

In plain and unambiguous language, § 2501 bars a claim that has been filed more than six years after the claim accrues, *when* the claim *already* is one that falls within the jurisdiction of the Court of Federal Claims. See *Grass Valley*

Terrace v. United States, 69 Fed. Cl. 341, 347 (2005) (Chief Judge Damich) (referring to this understanding as the "plain English interpretation of the statute"). The meaning "most naturally conveyed by the phrase before us" (see *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)) – "*[e]very claim of which the United States Court of Federal Claims has jurisdiction*" (28 U.S.C. § 2501) (emphasis added) – is that the jurisdictional inquiry has been concluded and jurisdiction has attached. See dissent below ("The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already 'has jurisdiction.'"). Pet. App. 33a. Then, for those jurisdictionally-sufficient claims, § 2501 operates as a bar "*unless the petition thereon is filed within six years after such claim first accrues*." 28 U.S.C. § 2501 (emphasis added).

Section 2501 speaks in procedural terms of the potential failure to timely state a claim, rather than in jurisdictional terms about the authority of the Court of Federal Claims. By its plain text, § 2501 does not limit the jurisdictional power of the court, because it assumes that the court's jurisdictional authority over the class of claims has already been confirmed under a jurisdictional statute. Instead, § 2501 imposes an affirmative defense against continuation of the litigation properly filed in the Court of Federal Claims when a claim is untimely filed.

A contrary interpretation would read the words "of which the United States Court of Federal Claims has jurisdiction" out of the statute. A statute should be construed so that every word has some operative effect. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Giving each word operative effect requires an interpretation that § 2501 does not limit the jurisdiction of the Court of Federal Claims, which jurisdiction the statute assumes by inclusion of the phrase "has jurisdiction."

2. The timeliness inquiry under § 2501 is separate from the antecedent jurisdictional inquiry under 28 U.S.C. § 1491.

For claims filed in the Court of Federal Claims, the jurisdictional inquiry and the accrual of the claim for purposes of the statutes of limitations occur in separate stages and should not be confused:

First, the jurisdiction of the Court of Federal Claims is to be determined by reference to one of the jurisdictional statutory sections. In this case involving an allegation of a taking of private property without just compensation, the jurisdictional section is the Tucker Act, 28 U.S.C. §1491(a)(1). This jurisdictional grant provides in relevant part (with emphasis added):

> The United States Court of Federal Claims *shall have jurisdiction* to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

An unequivocal waiver of sovereign immunity ordinarily is a jurisdictional predicate to any suit against the United States. But see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (referring to a Fifth Amendment taking claim as implicating "the constitutional exception to the doctrine of sovereign immunity"). In any event, § 1491(a)(1) provides such an unequivocal waiver. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468, 472-73 (2003); *United States v. Mitchell*, 463 U.S. at 212.

The Tucker Act waives the sovereign immunity of the federal government for claims "founded" on, inter alia, "the

Constitution." The Fifth Amendment of the United States Constitution states, in pertinent part, that no "private property [shall] be taken for public use, without just compensation." U.S. Const., amend. V. As this Court held more than 60 years ago in *United States v. Causby*, 328 U.S. 256, 267 (1946): "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." See also *United States v. Clarke*, 445 U.S. 253, 257 (1980) (recognizing "the self-executing character of the constitutional provision with respect to compensation"). Accordingly, in this case the subject matter jurisdictional prerequisites to suit have been established and are not contestable.

Second, with jurisdiction over the claim for relief having been confirmed, the question of timeliness of the suit is to be determined under the procedural statute of limitations, 28 U.S.C. § 2501. When the government has properly pleaded the statute of limitations as an affirmative defense (see Fed. R. Civ. Proc. 8(c) and Rule 8(c) of the Rules of the Court of Federal Claims), the court must determine the point in time at which the claim accrued and then determine whether the claim was filed within six years of that accrual date. In an appropriate case, the court may consider whether § 2501 should be equitably tolled in exceptional circumstances. See *Irwin*, 498 U.S. at 94-96. These determinations are procedural in nature, designed to spare the defendant and the court from the practical consequences of being required to adjudicate stale claims.

If the government fails to plead the statute of limitations or, as in this case, initially asserts but then stipulates to timeliness and on appeal waives the limitations issue, the court is not obliged to revisit the jurisdictional stage of the litigation and decide whether the jurisdiction that had attached to the claim has now been divested because the claim may be untimely. The jurisdictional authority of the Court of Federal Claims over a claim under the Tucker Act is not impaired by the possibility that the government could

have, but has not, argued that the claim accrued more than six years before the lawsuit was filed.

3. When Congress has conditioned the jurisdiction of the Court of Federal Claims on the timing of a claim, it has done so directly and within the statute granting subject matter jurisdiction.

When Congress does wish to place a temporal restriction on the subject matter jurisdiction of the Court of Federal Claims, it has demonstrated that it well knows how to do so in simple terms and through express jurisdictional language. Section 1505 of Title 28, commonly known as the Indian Tucker Act, provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States *accruing after August 13, 1946*, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (emphasis added). With the enactment of the Indian Tucker Act in 1946, Indian claimants were granted access to the Court of Federal Claims in the same manner and under the same general terms as other claimants have through the "regular" Tucker Act. See *United States v. Navajo Nation*, 537 U.S. 488, 502-03 & n.10 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. at 468, 472. But Congress expressly withheld jurisdictional authority from the court for claims arising earlier than August 13, 1946, instead

assigning those earlier-arising claims to the Indian Claims Commission created under the same statute. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049. See generally *Cohen's Handbook of Federal Indian Law* § 3.02[6][e], at 152 (Nell Jessup Newton, et al., eds. 2005).

As what may be another example, the statutory subsection in the Court of Federal Claims jurisdictional chapter that waives sovereign immunity for claims against the United States for copyright infringement includes a second paragraph stating, in part, "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action." 28 U.S.C. § 1498(b). Although this three-year limitations period is not directly attached as a proviso to the paragraph creating an "exclusive action" for infringement by the copyright owner against the United States in the Court of Federal Claims, the inclusion of the statute of limitations in the same subsection might be read to characterize the time limitation as a jurisdictional condition on the waiver of sovereign immunity. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations period constitutes a condition on the waiver of sovereign immunity."); but see *Irwin* (discussed in Part D.1 of this brief).

In notable contrast with the Indian Tucker Act and the copyright infringement statute, Congress has not incorporated time limitations in any of the other jurisdictional grants to the Court of Federal Claims, including the Tucker Act, 28 U.S.C. § 1491(a)(1).

B. AS CODIFIED IN TITLE 28 OF THE UNITED STATES CODE, STATUTES GRANTING SUBJECT MATTER JURISDICTION TO THE COURT OF FEDERAL CLAIMS SPEAK FORTHRIGHTLY IN THE LANGUAGE OF "JURISDICTION," WHILE STATUTES CLASSIFIED AS PROCEDURAL (INCLUDING § 2501) ADDRESS JURISDICTION ONLY TO CONFIRM THE PRIOR ATTACHMENT OF JURISDICTION.

1. Crucial differences in statutory language are highlighted by a comparison of those statutes classified as conferring jurisdiction on the Court of Federal Claims as contrasted with those categorized as establishing procedural rules for the court.

In 1948, Congress enacted the revised and reorganized provisions of the Judicial Code into positive law through the codification of Title 28 of the United States Code. Act of June 25, 1948, ch. 646, 62 Stat. 869. As the chief reviser of Title 28, William W. Barron explained, the revision brought about:

> a consolidation of varied and scattered sections pertaining to similar subject matter, a logical, orderly grouping of related principles. While no change was made for the sake of change, we have made the effort, in the words of Cardozo, "to reckon our gains and losses, strike a balance and start afresh."

William W. Barron, *The Judicial Code*, 8 F.R.D. 439, 446 (1949) (quoting Benjamin N. Cardozo, *The Growth of the Law* 19 (1924)).

In testimony presented during the March 1947 hearings before the House Judiciary Committee on the

proposed revision and codification of Title 28, John F. X. Finn, who had served as special counsel to the committee, stated that he was "proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure." *Revision of Titles 18 and 28 of the United States Code, Hearing Before the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 44 (1947). Mr. Finn explained that while such words as "jurisdiction" and "procedure" may be "but labels to the layman," "[t]o lawyers they are the pitfalls of litigation." *Id*. In describing the work of the Title 28 revisers, Mr. Finn concluded that "[w]ise judges and lawyers have objectively and dispassionately explored these pitfalls and covered them with well-drawn statutes so that postwar justice may be sure-footed, courageous, impartial, and serene." *Id*.

To be sure, no direct inference of legislative intent may be drawn by the mere fact that an individual statute was placed within a certain chapter of Title 28 as codified in 1948, nor may dispositive weight be attached to the specific heading assigned to a statutory chapter. See Act June 25, 1948, ch. 646, § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title.") Importantly, however, the collection of statutory provisions addressing a particular subject matter within a single chapter of Title 28 facilitates direct comparisons of related and unrelated provisions. See *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 545-546 (2002) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Such a textually-focused comparison highlights the crucial differences and sharp contrasts in language between those statutory sections that confer jurisdiction on the Court of Federal Claims and

those (including § 2501) that instead establish non-jurisdictional procedural rules.

2. Statutes defining the subject matter jurisdiction of the Court of Federal Claims speak expressly and distinctively in the language of jurisdiction.

In its codification of Title 28, Congress reserved the fourth part for provisions on jurisdiction and venue of the federal courts: "Part IV – Jurisdiction and Venue." Chapter 91 of that part, entitled "United States Court of Federal Claims," contains sixteen sections expressly defining and limiting the subject matter jurisdiction of the Court of Federal Claims. These sections are reprinted in the Appendix to this brief.

Nearly all of the sections in Chapter 91 speak forthrightly in the language of "jurisdiction."[3] Sections 1491, 1494, 1495, 1496, 1497, 1499, 1503, 1505, 1507, and 1508 state that "[t]the United States Court of Federal Claims shall have jurisdiction" over a defined claim or set of claims. Sections 1500, 1501, 1502, and 1509 state that "[t]he United States Court of Federal Claims shall not have jurisdiction" over a defined set of other claims. Thus, when Congress grants or withholds "jurisdiction" from the Court of Federal Claims, it knows how to do so and does so with distinctive jurisdictional language.

Importantly, with the notable exception of 28 U.S.C. § 1498 discussed above, none of these provisions limits

[3] There are only two exceptions to this pattern of language expressly granting or withholding "jurisdiction." First, the unique provision for congressional reference of claims to the Court of Federal Claims (28 U.S.C. § 1492) does not speak in jurisdictional terms because it does not grant jurisdiction as such. Second, the provision waiving sovereign immunity for claims against the United States alleging infringement of patents and copyrights (§ 1498) confers jurisdiction by creating an exclusive action in the Court of Federal Claims.

jurisdiction to those cases in which a claim has been filed within a specified time period. This textual omission is significant. In *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982), which held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit in federal court, the Court began its analysis by focusing on the text and structure of the statute. The Court observed as important that the provision actually granting the court jurisdiction "contains no reference to the timely-filing requirement" and that the provision setting the time limitations appears as an entirely separate section of the statute. *Id*. at 383-94.

3. Section 2501, as the general statute of limitations for the claims within the subject matter jurisdiction of the Court of Federal Claims, is a procedural provision that does not speak in jurisdictional terms.

Section 2501, as the general statute of limitations for claims before the Court of Federal Claims, is codified in a separate part of Title 28 entitled "Part VI – Particular Proceedings" and in Chapter 165 entitled "United States Court of Federal Claims Procedure." In addition to setting the time for filing suit in 28 U.S.C. § 2501, the sections in this chapter address such procedural, non-jurisdictional matters as aliens' privilege to sue (§ 2502); appearance of parties before the court, presentation of evidence, examination of witnesses, rules of practice and procedure, and holding trials (§ 2503); the qualifications of witnesses (§ 2506); discovery (§ 2507); new trials and stays of judgment (§ 2515); payment of judgments (§ 2517); and the conclusiveness of judgments (§ 2519). These sections are reprinted in the Appendix to this brief.

While, again, the mere fact of placement of these provisions into a chapter labeled as "procedure" does not

permit any conclusive inference of legislative intent, an examination of the specific language of these procedural statutes, particularly when compared to the jurisdictional statutes discussed in Part B.2 of this brief, reveals significant differences that confirm congressional intent for a non-jurisdictional purpose.

None of the provisions in Chapter 165 speaks in the language of "jurisdiction" – except to confirm the court's previous exercise of or the availability of subject matter jurisdiction over the claim to which the court is to apply the procedural rule. See 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.") (emphasis added); *id*. § 2502(a) ("Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims *if the subject matter of the suit is otherwise within such court's jurisdiction.*") (emphasis added); *id*. § 2510(a) ("The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims *might take jurisdiction* * * * .") (emphasis added).

Like the other rules codified in Chapter 165, § 2501 should be read as a procedural limitation so that it "fit[s] harmoniously within a set of provisions composing a coherent chapter of the Judicial Procedure part of the United States Code." See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 136 (1995) (Ginsburg, J., concurring); see also *Henderson v. United States*, 517 U.S. 654, 674 (1996) (Thomas, J., dissenting) (contending that a statutory service requirement was jurisdictional, and saying that "[t]he key to understanding the scheme enacted by Congress" lay in Congress's decision not to place this requirement in a procedural section).

John R. Sand recognizes that "some time limitations," notably the statutory period for filing a notice of appeal in a civil action, "are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003); see also *Bowles v. Russell*, No. 06-5306 (U.S., June 14, 2007) (holding that a timely civil appeal under 28 U.S.C. §2107 is a jurisdictional requirement).[4] In this case, however, Congress's considered and repeatedly precise direction in a series of statutory sections that the Court of Federal Claims "shall [or shall not] have jurisdiction" over one or another type of claim plainly identifies those provisions that are jurisdictional in nature. When Congress instead eschewed such distinctive language, and especially when Congress crafted a procedural provision like § 2501 that actually assumes the prior existence of subject matter jurisdiction, reformulation of the provision into a jurisdictional restriction does violence to the language that Congress adopted.

C. THE LEGAL CONTEXT OF THE HISTORICAL PERIOD AND THE LEGISLATIVE HISTORY OF ITS PREDECESSOR CONFIRM THAT § 2501 IS NOT JURISDICTIONAL BUT RATHER IS AN ORDINARY STATUTE OF LIMITATIONS TO BE APPLIED CONSISTENT WITH TRADITIONAL UNDERSTANDINGS.

1. The Tucker Act grants subject matter jurisdiction to the Court of Federal Claims to hear claims over which Congress has waived sovereign immunity.

As the first significant grant of permission by the sovereign United States to its citizens to seek relief against it

[4] The inapplicability of *Bowles v. Russell* to the context of a statute of limitations is addressed in Part D.3 of this brief.

in the courts, the United States Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts. Act of February 24, 1855, ch. 122, 10 Stat. 612; see generally Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 Vill. L. Rev. 155, 175-76 (1998). The Court of Claims originally had authority only to recommend that Congress pay claims, thereby serving as an advisor to Congress regarding the merits of such claims. William M. Wiecek, *The Origin of the United States Court of Claims*, 20 Admin. L. Rev. 387, 397 (1968). President Lincoln urged Congress to give the "power of making judgments final" to the Court of Claims, arguing that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). Congress responded in 1863 by granting the Court of Claims power to make binding and final judgments with appellate review by the Supreme Court. Act of March 3, 1863, ch. 92, 12 Stat. 765.

In 1886, Representative John Randolph Tucker introduced a bill to revise the jurisdiction and procedures of the Court of Claims and to replace the 1855 and 1863 statutes. H.R. 6974, 49th Cong. (1886); see generally *United States v. Mitchell*, 463 U.S. at 213. The Tucker Act, enacted in 1887, confirmed the authority and nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and expanded the court's authority to include actions based upon the Constitution. Tucker Act, ch. 359, 24 Stat. 505 (1887). This grant of jurisdiction to what today is the Court of Federal Claims, and the attendant waiver of sovereign immunity for money claims, is today codified in 28 U.S.C. § 1491(a)(1). See *United States v. Mitchell*, 463 U.S. at 212-16 (§ 1491 waives sovereign immunity, in addition to

directing a claim to the appropriate forum through its jurisdictional directives). On the history and authority of the Court of Federal Claims and the Tucker Act, see generally Gregory C. Sisk, *Litigation With the Federal Government* ch. 4 (4th ed., 2006).

2. The legislative history of the predecessor to § 2501 demonstrates that Congress intended the statute of limitations to be procedural, not jurisdictional.

When Congress granted the then-Court of Claims authority to enter binding judgments in 1863, a six-year limitations period was first introduced.[5] Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767. In the previous 1855 statute creating the Court of Claims, Congress had not included a statute of limitations in the authorizing legislation. See Act of February 24, 1855, ch. 122, 10 Stat. 612. Thus, when considering whether to grant power to the Court of Claims to enter binding judgments, Congress naturally concluded that a statute of limitations should be added to protect against stale claims. See H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) ("A man who neglects his business for six years cannot complain of the government for refusing his suit; and there is no doubt that a statute of limitations is even more demanded in justice to the government than it is to private individuals.").

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[5] This earliest statute of limitations applicable to claims before the then-Court of Claims provided in pertinent part:

> [E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.

Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767.

Once having agreed that a time bar should be adopted, however, the expressed sense of the members of Congress was that such a statute of limitations should be applied in the same manner as for private parties. See Cong. Globe, 37th Cong., 3d Sess. 414 (1863) (Sen. Sherman) ("As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals"). The Chair of the Senate Judiciary Committee explained the inclusion of a statute of limitations "because there can be no reason whatever for acts of limitation as between citizen and citizen * * * which does not apply as between Government and citizen." Cong. Globe, 36th Cong., 1st Sess. 984 (1860) (Sen. Bayard).

Congressional debates about the 1863 legislation highlighted the controversial question of jurisdiction, but always in terms of the authority of the Court of Claims to hear certain claims and the nature of the claims for relief against the government that should be cognizable before that tribunal.[6] Members of Congress well-understood the concept

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[6] See, *e.g.*, H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) (reporting that the bill would give to the Court of Claims "jurisdiction of all claims for which the government would be liable in law or equity were it liable to be sued in courts of justice," with certain exceptions, and that "[j]urisdiction is also given to the court of all set-offs, counter-claims, and claims for damages, whether liquidated or unliquidated on the part of the government against the claimant"); Cong. Globe, 36th Cong., 1st Sess. 983 (1860) (Sen. Bayard, Chair Judiciary Committee) (explaining that the committee bill "enlarges the jurisdiction of the court, so as to give it all jurisdiction over all claims proper against the Government whether founded on contract or on act of Congress; or founded upon legal or equitable obligation, according to the general principles of law"); Cong. Globe, 36th Cong., 1st Sess. 985 (1860) (Sen. Benjamin) (proposing "exclu[sion] from the jurisdiction of the Court of Claims those claims which are purely political in their character"); Cong. Globe, 37th Cong., 2d Sess. app. 124 (1862) (Rep. Porter) (stating that proposed bill "enlarges the jurisdiction of the court, by extending it to all claims for which the Government would be liable in law or equity if it were suable in courts of justice"); Cong. Globe, 37th Cong., 3d Sess. 304 (1863) (Sen.

of jurisdiction and used the term in its ordinary sense of judicial power over a class of claims. By contrast, no participant in the legislative process ascribed jurisdictional status to the statute of limitations that would apply to those claims that fell within the jurisdictional authority of the Court of Claims.

3. Construing § 2501's predecessor as non-jurisdictional is consistent with contemporary legal context.

The long and consistent characterization in American common law of statutes of limitations as non-jurisdictional matters of procedure confirms that Congress, in enacting the original predecessor to § 2501, understood the limitations period to be non-jurisdictional and waivable. Congressional intent with respect to a statutory provision should be interpreted in light of the contemporary legal context. *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 71 (1992). The leading American treatise on statutes of limitations when the predecessor to § 2501 was enacted in 1863 explained that:

> Without destroying, therefore, and simply prescribing a period in which a right may be enforced; and withholding merely the remedy, after the lapse of an appointed time, for reasons of private justice and public policy, a statute of limitations, it has been uniformly considered, is no violation of the sacredness of private rights.

Fessenden) (criticizing proposal as "giv[ing] away the whole jurisdiction and power of Congress over claims against the Government" to the court); Cong. Globe, 37th Cong., 3d Sess. 395 (1863) (Sen. Clark) (proposing "not [to] give the court jurisdiction of anything except things arising under the law of Congress, or an express or implied contract").

Joseph K. Angell, *A Treatise on the Limitation of Actions At Law and Suits in Equity and Admiralty* § 22 at 17 (4th ed. 1861).

During the period when the predecessor to § 2501 was enacted, this Court consistently reiterated its understanding that statutes of limitations affect the remedy and not the underlying right of action. *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 413 (1850); *Campbell v. Holt*, 115 U.S. 620, 624-29 (1885). As this Court later explained in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1988), the traditional rule in America was that "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld." A statute of limitations thus has been a classic example of an affirmative defense left to the defendant to raise and establish and subject to waiver or forfeiture. See Fed. R. Civ. Proc. 8(c), RCFC 8(c); see also *Henderson v. United States*, 517 U.S. 654 (1996) (holding that the Suits in Admiralty Act service of process requirement had been superseded by the Federal Rules of Civil Procedure pursuant to the direction of the Rules Enabling Act that, in matters of "practice and procedure," "[a]ll laws in conflict with such rules shall be of no further force or effect," 28 U.S.C. § 2072(a)).

The strongest evidence that the 1863 time bar was an ordinary and unexceptional statute of limitations lies in the language that Congress selected. The phrasing of the predecessor to § 2501 is comparable to that found in many state statutes of limitations of the period. Angell, *supra* at xxxiii to clxi (setting out state statutes of limitations). Had Congress wished to create a "super" statute of limitations – one that would limit the jurisdiction of a court even when the government had conceded its non-applicability – one would have expected Congress to have composed different, more direct, and more forceful language to accomplish that extraordinary jurisdictional purpose.

4. Early decisions characterizing the predecessor statute of limitations as jurisdictional constitute dicta, contradict the legislative intent, and have been superseded by recent decisions recognizing § 2501 as an unexceptional statute of limitations to be interpreted consistent with practice among private parties.

Unfortunate dicta in a series of Supreme Court decisions decided in the late 19th century, and cited into the 20th century,[7] suggested that the predecessor statute of limitations for cases in the then-Court of Claims had jurisdictional force. These decisions failed to carefully analyze the plain language of the text, ignored the legislative history, and neglected the ubiquitous legal understanding of a statute of limitations as a waivable affirmative defense.

In the first decision in this series, *Kendall v. United States*, 107 U.S. 123 (1883), the Court refused to judicially imply an additional disability as a basis for delaying accrual under the statute of limitations for the Court of Claims. Given that Congress had adopted specific delayed-accrual rules in the statute for persons with certain "disabilities" inhibiting timely presentation of a claim (married women, minors, the mentally disabled, and persons overseas) and had expressly forbidden any other disability from preventing a claim from being barred, the Court unremarkably held that it lacked "authority to engraft [another] disability upon the statute." *Id*. at 125. Despite the Court's passing reference to the time bar as having jurisdictional character, *Kendall* did not present that question as the limitations issue was not raised by the Court *sua sponte*. Indeed, the Court observed that the petition had not been filed within six years, that "[t]he government demurred, and that the petition was

[7] See *Soriano v. United States*, 352 U.S. 270 (1957) (overturned by *Irwin*, as discussed in Part D.1 of this brief).

dismissed upon the ground that the claim was barred." *Id*. at 124; see also 2 S. Ct. at 124 (reporting that "[t]he government pleaded limitation" in the case).

In *Finn v. United States*, 123 U.S. 227, 232-33 (1887), the question before the Court was whether the executive could revive a claim that had originally been denied by the executive twelve years earlier. With respect to this second attempt by the claimant, which the executive had allowed based on newly-discovered evidence, the Court responded that "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id*. at 233. While the predecessor to § 2501 lay in the background, that statement was addressed to a special statutory procedure by which the executive referred claims to the Court of Claims. (The present day counterpart is 28 U.S.C. § 2510, which governs referrals by the Comptroller General to the Court of Federal Claims.)

Although *United States v. Wardwell*, 172 U.S. 48, 52 (1898), declared most directly that the predecessor to § 2501 was "not merely a statute of limitations but also jurisdictional in its nature," the government there affirmatively challenged the timeliness of the action, but not the jurisdiction of the court. *Id*. at 50, 52. The question of whether the statute could be waived by the government was not presented. Thus, the supposed jurisdictional edifice for the predecessor statute to § 2501 was grounded on dicta.

Moreover, the *Kendall-Finn-Wardwell* line of cases incorporated jurisdictional concepts into the statute of limitations contrary to the legal norms of the period and without any indication of legislative intent to contravene the common legal understanding. *Finn* acknowledged "the general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions," and further allowed that "[a]n individual may

waive such a defence, either expressly or by failing to plead the statute." *Finn*, 123 U.S. at 232-33. Nonetheless, without careful analysis or explanation, *Finn* formulated the axiom that these common-place legal rules have "no application to suits in the Court of Claims against the United States." *Id*. at 232-33. In so doing, *Finn* and these other decisions departed from the Court's contemporaneous directive that "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." See *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880).

This Court has returned from the early detour from general legal understanding and now gives closer attention to the legislative intent underlying a federal statute of limitations. And this Court has done so in the very context of § 2501. In *Franconia*, after re-examining the text and historical context of the predecessor statute, the Court unanimously found § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous state statutes of limitations applicable to suits between private parties." 536 U.S. at 145. Rejecting the government's plea in that case for a "special" rule of accrual to benefit the sovereign, the Court characterized the government's proposition as "present[ing] an 'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than 'a realistic assessment of legislative intent.'" *Id*. (citations omitted). In light of *Franconia,* as well as the Court's approval of equitable tolling of statutes of limitations applying to waivers of sovereign immunity as next discussed, the obsolete *Kendall-Finn-Wardwell* line of cases has been displaced and superseded.

D. THIS COURT DOES NOT CHARACTERIZE STATUTES OF LIMITATIONS ON CIVIL CLAIMS AGAINST THE UNITED STATES AS JURISDICTIONAL BUT INSTEAD DIRECTS THEM TO BE APPLIED IN THE SAME MANNER AS AMONG PRIVATE PARTIES.

1. This Court's decisions approving equitable adjustments to statutes of limitations applicable in federal government cases negate any characterization of these statutes of limitations as jurisdictional.

In *Irwin*, the Court rejected the lower court's ruling that a statute of limitations on a waiver of sovereign immunity was an absolute jurisdictional limit and instead allowed the limitations period for filing an employment discrimination claim against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), to be equitably tolled, just as with claims against private parties. 498 U.S. at 91-96. A concurring opinion objected to equitable tolling against the federal government, citing earlier decisions holding that conditions on waivers of sovereign immunity — specifically including statutes of limitations — must be strictly observed. *Id.* at 97-100 (White, J., concurring in part and concurring in the judgment). The Court majority responded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id*. at 95.

With specific and disapproving reference to an earlier case reciting 28 U.S.C. § 2501 as a jurisdictional bar, the *Irwin* Court acknowledged that "previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent." 498 U.S. at 94 (citing *Soriano v. United States*, 352 U.S. 270 (1957)). While observing that

an argument could be made that the language of § 2501 "is more stringent" than that in the Title VII limitations provision, the Court was "not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin*, 498 U.S. at 95. Instead of "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past," the Court said that *Irwin* "affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id*.

This Court in *Irwin* thus turned deliberately and conscientiously away from the rigid jurisdictional approach previously reflected in the *Kendall-Finn-Wardwell* line of cases and perpetuated in *Soriano*. See *Irwin*, 498 U.S. at 94-95; see also *id*. at 98 (White, J., concurring in part and concurring in the judgment) (saying that the decision "directly overrules a prior decision by this Court, *Soriano v. United States*, 352 U.S. 270 (1957)"); *Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961, 964 n. 4 (Fed. Cir. 1993) (concluding that, with *Irwin*, "the Supreme Court now considers [*Soriano*] to be obsolete if not overturned"); *Oropallo v. United States*, 994 F.2d 25, 29 n.4 (1st Cir. 1993) (recognizing that *Irwin* "overruled or made irrelevant" *Soriano*). *Soriano*, a decision that had refused to permit equitable tolling under § 2501, was grounded upon and shared in the mistaken jurisdictional characterization of the statute of limitations adopted in *Kendall*. See *Soriano*, 352 U.S. at 273-74 (relying primarily on *Kendall* in refusing to permit equitable tolling of § 2501). See also Calvin W. Corman, *Limitation of Actions*, § 8.2 at 290 (Supp. 1993) ("The recognition of equitable tolling by the Supreme Court in *Irwin* carries an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government.").

Irwin does not stand alone in rejecting the government's insistence upon rigid or jurisdictional

application of statutes of limitations in cases involving claims against the United States. In *Bowen v. City of New York*, 476 U.S. 467 (1986), the Court reaffirmed its declaration that "the 60-day requirement [for filing claims in District Court challenging the administrative denial of disability benefits under the Social Security Act] is not jurisdictional, but rather constitutes a period of limitations." *Id*. at 478. In construing the statute of limitations to allow equitable tolling, the *Bowen* Court said it "must be careful not to 'assume the authority to narrow the waiver [of sovereign immunity] that Congress intended,'" or to construe the waiver "'unduly restrictively.'" *Id*. at 479 (citations omitted).

Subsequently, in *Scarborough v. Principi*, 541 U.S. 401 (2004), the Court relied upon *Irwin* as instructive in another context that also involved a time limitation contained in a waiver of sovereign immunity. In *Scarborough*, the Court held that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, that did not contain the statutorily-required allegation that the government's position was not "substantially justified" may be amended to cure this defect after the 30-day filing period had expired. *Id*. at 420-421. In so holding, the Court found *Irwin* to be "enlightening on this issue," because *Irwin* recognized that limitation principles should apply to the federal government in the same way as to private parties. *Id*. The Court further said that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.'"[8] *Id*. at 421 (citation omitted).

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[8]Even if the general rule applying statutes of limitations to waivers of sovereign immunity in a manner consistent with that among private parties were to be limited to a "readily identifiable private-litigation equivalent" (see *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting)), the takings claim for damages presented in this case is parallel to a private action for damages resulting from trespass to real

The rule in *Irwin* creating a presumption that statutes of limitations applicable to waivers of sovereign immunity are subject to equitable tolling cannot be reconciled with the suggestion that such provisions are jurisdictional conditions on the government's consent to suit:

First, the *Irwin* Court reversed the lower court's ruling that the statutory filing deadline for employment discrimination claims against the government "operates as an absolute jurisdictional limit." See *Irwin*, 498 U.S. at 91; see also *Bowen*, 476 U.S. at 478-79 (rejecting the argument that the Social Security Act statute of limitations is "jurisdictional," instead characterizing it as "a period of limitations" that may be equitably tolled).

Second, a truly jurisdictional provision is not subject to waiver or equitable adjustments. See *Bowles v. Russell*, slip op. at 9 (holding that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," meaning that the "Court has no authority to create equitable exceptions to jurisdictional requirements"). The sine qua non of a jurisdictional rule is a demand for strict compliance with its terms. By adopting a general rule of equitable tolling in civil cases against the government, with specific reference to § 2501 (*Irwin*, 498 U.S. at 94-95), *Irwin* emphatically confirmed the non-jurisdictional nature of these statutes of limitations. See also *Zipes,* 455 U.S. at 393 (noting that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Wood-Ivey Systems Corp.*, 4 F.3d at 969 n. 3 (Plager, J., concurring) ("Since *Irwin*, compliance with statutory time limits is no longer jurisdictional, in the old sense that when a Congressional specified time limit had expired a court had no power to entertain the case.").

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property. See Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1197 (1950).

Third, the *Irwin* Court directed that once the government has waived sovereign immunity, a statute of limitations should be applied "in the same way that it is applicable to private suits." *See id*. at 95. Among private parties, of course, a statute of limitations is an affirmative defense that may be waived. Fed. R. Civ. Proc. 8(c).

2. Once Congress has waived sovereign immunity, a statute of limitations should be applied to the government in the same manner as to private parties.

In recent decades, this Court has directed that statutes of limitations applicable to suits against the federal government generally and in the Court of Federal Claims specifically should be construed in conformity with the standards applicable to private disputes. In *Franconia*, a unanimous Court rejected the government's contention "that § 2501 creates a special accrual rule for suits against the United States." Instead, the Court directed that determination of when a claim accrues for purposes of § 2501 should proceed in the same manner and under the same legal principles as would apply in a suit among private parties. 536 U.S. at 145. Drawing upon its earlier decision in *Irwin*, the Court declared "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Franconia*, 536 U.S. at 145; see also *Irwin*, 498 U.S. at 95-96 ("once Congress has made such a waiver [of immunity covering a particular type of claim]," then the principle of equitable tolling of the statute of limitations should be "applicable to suits against the Government, in the same way that it is applicable to private suits").

In the context of private litigants, of course, a statute of limitations is an affirmative defense that the defendant must plead and establish. See Fed. R. Civ. Proc. 8(c). Rather than being "a jurisdictional prerequisite," "a statute of

limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes,* 455 U.S. at 393. "A statute of limitations defense * * * is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*." *Day v. McDonough*, 547 U.S. 198, 205 (2006) (emphasis in original).

This Court's treatment of statutes of limitations in a manner consistent with ordinary expectations arising in private litigation, in contrast with its approach toward those statutes that grant permission to sue the sovereign and define the scope of cognizable claims (for which the Court has occasionally upheld special and narrow rules in favor of the government) reflects an appreciation of the distinct differences between these types of provisions and the contrast in public policy implications. Compare *Library of Congress v. Shaw*, 478 U.S. 310, 317-19 (1986) (strictly construing the amenability to suit of the United States under Title VII and declining to hold the government responsible for the remedy of interest absent express congressional consent) with *Irwin*, 498 U.S. at 93-96 (holding that the limitations period on claims against the United States arising under that same statute — Title VII — need not be strictly enforced and allowing equitable tolling of the statute of limitations).

3. *Bowles v. Russell* does not apply to statutes of limitations, does not override the traditional rule that a statute of limitations is a non-jurisdictional affirmative defense, and does not contradict *Irwin* or *Franconia*.

This Court's recent decision in *Bowles v. Russell*, 551 U.S. ___, No. 06-5306 (U.S., June 14, 2007), does not reverse course from *Irwin*, *Bowen*, and *Scarborough*. *Bowles* confirmed the venerable rule that filing a timely notice of appeal is "an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case

involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). Indeed, as the government explained in its amicus brief in *Bowles*: "A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject matter jurisdiction of the lower court ends and that of the appellate court begins." Brief for the United States as Amicus Curiae Supporting Respondent in *Bowles v. Russell*, No. 06-5306 (U.S.), p.10. By contrast, in the present case, it is undisputed that the takings claim alleged by John R. Sand falls comfortably within the subject matter jurisdiction of the Court of Federal Claims under the Tucker Act. See also *Scarborough*, 541 U.S. at 413 (a statutory time prescription for filing a petition for an award of attorney's fees under the Equal Access to Justice Act is not jurisdictional given that the court already had taken subject matter jurisdiction over the underlying action).

Importantly, the majority opinion in *Bowles* neither mentioned statutes of limitations nor disturbed this Court's precedents in *Irwin* and *Franconia*, which held that statutes of limitations, even those applicable to waivers of sovereign immunity, should be applied in a manner consistent with the rules that apply to private parties. Moreover, nothing in *Bowles* contradicts this Court's near-unanimous declaration just one year earlier in *Day v. McDonough*, 547 U.S. at 207-208,[9] that a federal statute of limitations is not jurisdictional and may be waived. See *Bowles*, dissenting op. at 5 (Souter, J., dissenting) (observing, without disagreement by the majority, that a statute of limitations is an affirmative defense, is not jurisdictional, and may be waived).

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[9]In *Day*, with the exception of Justice Stevens, who believed the Court should postpone the entry of judgment pending the decision of another case before the Court, those Justices in the majority and in dissent agreed that a federal statute of limitations is not jurisdictional and may be waived. *Day*, 547 U.S. at 212 (Scalia, J., dissenting) (emphasizing "the traditional forfeiture rule for unpleaded limitations defenses").

A notice of appeal in a civil case that transfers a case from the lower court to the appellate court has consistently been held to be jurisdictional in nature. *Bowles*, slip op. at 4-5. By contrast, as discussed above, statutes of limitations just as consistently and throughout our history have been treated as affirmative defenses that may be forfeited or waived.

4. The canon that waivers of sovereign immunity are construed in favor of the sovereign does not permit reformulation of § 2501 from a procedural to a jurisdictional statute.

Waivers of sovereign immunity must be unequivocally expressed in the statutory text. *Irwin*, 498 U.S. at 95; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Conditions or limitations on waivers of sovereign immunity are to be strictly construed in favor of the government and not lightly implied. *United States v. Sherwood*, 312 U.S. 584, 591 (1941). Yet this Court cannot read waivers of sovereign too broadly or too narrowly:

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (Federal Tort Claims Act). See *Irwin*, 498 U.S. at 96 (equitable tolling doctrine applies to suits against the government); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (Federal Tort Claims Act).

First, a waiver of sovereign immunity is congruent with a court's subject matter jurisdiction over actions against the government, because the terms of the waiver define the

court's jurisdiction. *Sherwood*, 312 U.S. at 586. Given that the terms of the government's consent to be sued delineate the scope of the court's jurisdiction, to interpret § 2501 as a condition on a waiver of sovereign immunity and thus as limiting the subject matter jurisdiction of the Court of Federal Claims would be circular. As discussed in Part A of this brief, § 2501 by its express terms assumes that jurisdiction already has attached before the limitations period is to be applied. If § 2501 is read to be a jurisdictional condition on the waiver, then § 2501 must be read to limit the jurisdictional authority of the Court of Federal Claims, which in turn defeats the very assumption of preexisting jurisdiction expressed in the plain language of the statute.

Second, for purposes of the canon of strict construction, the scope of a waiver of sovereign immunity should be defined by those terms and exceptions actually incorporated within the statutory provision that accomplishes the waiver. See *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."). For example, the Tucker Act specifically provides that the jurisdictional grant to the Court of Federal claims and the waiver for certain claims against the United States applies only to "cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Accordingly, this Court has long recognized the tort exception in § 1491(a)(1) as limiting the jurisdiction of the Court of Federal Claims. *Basso v. United States*, 239 U.S. 602 (1916); see also *Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (same). By contrast, § 2501 is codified separately from the jurisdiction and waiver statute, serves as a general statute of limitations applicable to all claims in the Court of Federal Claims, and is not attached to any particular jurisdictional waiver. Moreover, § 2501 is not plausibly construed as a condition on the waiver that defines subject matter jurisdiction, because § 2501 assumes Court of Federal Claims jurisdiction over the claim based upon an unambiguous waiver of sovereign immunity, such as that

contained in § 1491(a)(1), *United States v. Mitchell*, 463 U.S. at 215-216, and applicable to a takings claim as presented in this case, *Causby*, 328 U.S. at 267.

Third, even if another limitations provision incorporated within a different statute waiving federal sovereign immunity might be construed through the canon of strict construction to constitute a condition on that waiver, see *Block v. North Dakota*, 461 U.S. at 287, such a statute-specific interpretation cannot be extrapolated to impose a jurisdictional character on 28 U.S.C. § 2501 in a manner contrary to its own statutory text and structure. For purposes of claims in the Court of Federal Claims, the waiver of sovereign immunity, and its attendant conditions, are now found in the jurisdictional Chapter 91 of the Judicial Code (see Part B.2 of this brief). By contrast, the Court of Federal Claims procedural Chapter 165 does not confer or withhold subject matter jurisdiction, but rather describes the manner in which the Court of Federal Claims will exercise jurisdiction already conferred (see Part B.3 of this brief). Section 2501 should not be construed as a direct condition on the waiver. Indeed, the rule of strict construction for waivers of sovereign immunity is most naturally applied to attempts to augment monetary claims against the United States, *United States v. Idaho*, 508 U.S. 1, 7-8 (1993) (citing cases), rather than procedural matters, see *Irwin* (equitable tolling of statute of limitations) and *Franconia* (accrual of statute of limitations).

Importantly, the canon of strict construction should be understood as a tool that assists interpretation, not as a substitute for careful attention to the statutory language actually enacted by Congress and the statutory structure deliberately selected by Congress. Even if this Court were ordinarily to interpret procedural rules strictly to accomplish a "restrictive legislative purpose when Congress relinquishes sovereign immunity," *Honda v. Clark*, 386 U.S. 484, 501 (1967) (dicta, citing *Kendall, Sherwood* and *Soriano*), an interpretive method may not override the plain language and structure of the statute. See *United States v. Brown*, 333 U.S.

18, 25 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.") (addressing maxim that penal statutes are to be strictly construed); *United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (stating that the rule of "clear statement of waivers of sovereign immunity" does not "require explicit waivers to be given a meaning that is implausible" nor permit "restricting the unequivocal language" of explicit waivers).

Fourth, the canon of strict construction is misplaced when applied to a self-executing constitutional claim. While the Tucker Act provides a judicial remedy for a taking claim against the federal government, the underlying constitutional right to just compensation does not depend on the consent of Congress. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("claims for just compensation are grounded in the Constitution itself"). Indeed, despite the general rule barring an award of interest against the federal government absent an express statutory grant, this Court held in *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933), that, by constitutional command, interest running from the time of the taking must be paid as an element of just compensation under the Fifth Amendment. If the very scope of the remedy for a taking claim is not subject to a canon of strict construction, much less, then, should a procedural time limitation enacted by Congress be construed strictly in favor of the government and against the constitutional claimant. While "[t]he remedy afforded by the Fifth Amendment is subject to a reasonable time bar designed to protect other important societal values," *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003), transforming an unexceptional statute of limitations into a jurisdictional bar is not a reasonable constraint on a self-executing constitutional claim.

Finally, even if it were applicable to a statute of limitations separately codified as a procedural measure and specifically as applicable to a self-executing constitutional

claim, the canon that a condition on a waiver of sovereign immunity should be strictly construed in favor of the government would not justify reformulation of § 2501 into a jurisdictional statute that limits the adjudicatory authority of the Court of Federal Claims. Observing the canon might mean that equitable tolling would not be available under §2501 (although *Irwin* and *Franconia* suggest otherwise). Observing the canon could mean that a claimant would not be able to argue that the government is estopped from asserting the statute of limitations defense based upon government misconduct before or during litigation.

In any event, a parsing of theories of statutory construction should not be necessary in this case. The question here is not what interpretive method – strict, liberal, or ordinary – should be applied to ascertain the meaning of the limitations statute as applied in a particular context or to a particular set of circumstances. Rather, the sole issue is whether § 2501 should be characterized as a *jurisdictional* statute.

E. CONSTRUING § 2501 AS NON-JURISDICTIONAL SERVES TO REDUCE JUDICIAL BURDENS AND PROMOTES EFFICIENT LITIGATION.

Given the longstanding rule that permission to sue the United States must be unequivocally and unambiguously expressed, this Court understandably has shown solicitude for unique governmental interests when determining whether Congress has consented to suit and in construing the breadth of a statutory waiver of sovereign immunity. Questions regarding when civil litigation is an appropriate response to harms caused by governmental activities, which claims are suited for the judicial venue rather than redressed by legislation, the types and theories of liability that should be recognized in suits alleging governmental wrongs, and the forms of relief that may be imposed against the government

as an entity, all go to the very core of the concept of sovereign immunity and its grounding in constitutional separation of powers.

By contrast, the purposes underlying a general statute of limitations are essentially equivalent for both the federal government and private parties. Statutes of limitations "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); see also Cong. Globe, 36th Cong., 1st Sess. 984 (1860) (Sen. Bayard) (describing the proposed statute of limitations for the Court of Claims as based on the concern that "the transaction [may be] so remote, and the evidence so imperfect, that the Government cannot meet it"). The primary purpose of a statute of limitations is fairness to the defendant (see Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950) (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944)), rather than protection of the sovereign government from unconsented claims. The animating principles behind a statute of limitations do not justify a special rule that would excuse the government from the traditional rule of waiver when the timeliness of an action is unchallenged in an answering pleading or, as here, is conceded.

Indeed, to impose a duty upon the courts to investigate the timeliness of claims and calculate when a claim accrued – even when the government has conceded the point – adds to the burdens on the judiciary and expands the subjects for litigation. In application of § 2501, questions of law about when the claim accrues for a class of claims and disputes of fact concerning application of the accrual rule in a case are frequently complex and contested, and not like the kind of issues typically resolved as a threshold jurisdictional inquiry. See, *e.g.*, *Franconia*, 535 U.S. at 141-48

(considering when a contract claim accrues in the context of a repudiation of a contractual duty); opinion below, Pet. App. 20a-28a, 38a-39a (consideration in this case by a divided court whether a claim for a permanent physical taking of a portion of real property first accrues from the date of the government's earlier temporary exclusion of the property holder from another portion of the property).

To deny jurisdictional status to a statute of limitations would not throw the courthouse door wide open to stale and untimely claims. Nor would such a rule denigrate the importance of diligent presentation of claims against the federal government. When a claim is arguably untimely, the government is quite capable of so asserting and, as the decisions reported in the Federal Reporter, the Federal Supplement and the Federal Claims Reporter illustrate, the government has hardly been timid in asserting statutes of limitations when faced with affirmative claims of liability.

In the present case, the government did question the timeliness of the lawsuit and initially litigated that question before the Court of Federal Claims. Subsequently and based upon the development of the evidentiary record, the government deliberately abandoned that objection, stipulated to the accrual date in the trial court, and conceded on appeal that the claim had accrued within the statute of limitations. Given "this clear waiver and concession by the government" (dissent below, Pet App. 38a), neither solicitude for a public defendant nor the interests of fair and effective adjudication of claims against the sovereign validate judicial resurrection and re-adjudication of an issue definitively resolved to the satisfaction of the government.

F. THE COURT OF APPEALS DISMISSAL MAY NOT BE AFFIRMED AS AN EXERCISE OF DISCRETION TO RAISE *SUA SPONTE* THE TIMELINESS OF A LAWSUIT WHEN THAT COURT SQUARELY DECIDED THE ISSUE AS A MATTER OF JURISDICTION AND THE GOVERNMENT DELIBERATELY WAIVED THE STATUTE OF LIMITATIONS DEFENSE.

This Court granted review in this case solely to address the question whether the statute of limitations limits the subject matter jurisdiction of the Court of Federal Claims. Thus, whether and when an appellate court may *sua sponte* question the application of a non-jurisdictional time limitation is not before the Court. Moreover, the court of appeals below grounded its decision squarely on the purported jurisdictional nature of the statute of limitations, not as an exercise of judicial discretion. Panel majority below, Pet. App. 28a ("we decide the case on jurisdictional grounds"). Nevertheless, to definitively conclude the matter, this Court should confirm that the court of appeals on remand should not address the statute of limitations.

Even though a federal court may have discretion under special circumstances to raise the timeliness of a lawsuit on its own initiative, it would "count" as an "abuse of discretion" for a court to override a party's "deliberate waiver of a limitations defense." *Day v. McDonough*, 547 U.S. at 202 (allowing the federal court to correct the state's error in failing to raise a time bar when the failure involved "an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners").

No special circumstances occurred in this case such that a court of appeals *sua sponte* should have raised the non-jurisdictional statute of limitations defense. In this case, the government not only (1) agreed with John R. Sand in the Court of Federal Claims that John R. Sand had not been

clearly and permanently excluded by the government from the property until a point in time within the six-year time statutory period (dissent below, Pet. App. 38a, quoting government's filing in the trial record, J.A. 37a-40a), but (2) chose not to challenge the timeliness of John R. Sand's lawsuit on appeal, and (3) forthrightly conceded during oral argument before the court of appeals that John R. Sand's claim had accrued within the six year statutory period and therefore was not barred by the statute of limitations (Pet. App. 14a).

CONCLUSION

The judgment of the court of appeals should be reversed, the dismissal of John R. Sand's complaint should be vacated, and this case should be remanded for further proceedings on the merits.

Respectfully submitted,

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§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

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[1] So in original. Probably should be "United".

§ 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Court of Federal Claims for a report in conformity with section 2509 of this title.

§ 1494. Accounts of officers, agents or contractors

The United States Court of Federal Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof,[1] where—

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States.

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[1] So in original. Probably should be "thereon,".

§ 1495. Damages for unjust conviction and imprisonment; claim against United States

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

§ 1496. Disbursing officers' claims

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge.

§ 1497. Oyster growers' damages from dredging operations

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress.

§ 1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the

use or manufacture of the patented invention by or for the United States. Nothwithstanding [1] the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the

Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504 (c) of title 17, United States Code: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a

notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government, and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(e) Subsections (b) and (c) of this section apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

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[1] So in original. Probably should be "Notwithstanding".

§ 1499. Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 3703 of title 40.

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

§ 1501. Pensions

The United States Court of Federal Claims shall not have jurisdiction of any claim for a pension.

§ 1502. Treaty cases

Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

§ 1503. Set-offs

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

§ 1507. Jurisdiction for certain declaratory judgments

The United States Court of Federal Claims shall have jurisdiction to hear any suit for and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1986.

§ 1508. Jurisdiction for certain partnership proceedings

The Court of Federal Claims shall have jurisdiction to hear and to render judgment upon any petition under section 6226 or 6228(a) of the Internal Revenue Code of 1986.

§ 1509. No jurisdiction in cases involving refunds of tax shelter promoter and understatement penalties

The United States Court of Federal Claims shall not have jurisdiction to hear any action or proceeding for any refund or credit of any penalty imposed under section 6700 of the Internal Revenue Code of 1986 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 of such Code (relating to penalties for aiding and abetting understatement of tax liability).

§ 2501. Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

§ 2502. Aliens' privilege to sue

(a) Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

(b) See section 7422(f) of the Internal Revenue Code of 1986 for exception with respect to suits involving internal revenue taxes.

§ 2503. Proceedings generally

(a) Parties to any suit in the United States Court of Federal Claims may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses.

(b) The proceedings of the Court of Federal Claims shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Court of Federal Claims may prescribe and in accordance with the Federal Rules of Evidence.

(c) The judges of the Court of Federal Claims shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(d) For the purpose of construing sections 1821, 1915, 1920, and 1927 of this title, the United States Court of Federal Claims shall be deemed to be a court of the United States.

§ 2504. Plaintiff's testimony

The United States Court of Federal Claims may, at the instance of the Attorney General, order any plaintiff to appear, upon reasonable notice, before any judge of the court and be examined on oath as to all matters pertaining to his claim. Such examination shall be reduced to writing by the judge, and shall be returned to and filed in the court, and may, at the discretion of the attorneys for the United States, be read and used as evidence on the trial. If any plaintiff, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all material matters within his knowledge, the court may order that the case shall not be tried until he fully complies with such order.

§ 2505. Trial before judges

Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment.

§ 2506. Interest of witness

A witness in a suit in the United States Court of Federal Claims shall not be exempt or disqualified because he is a party to or interested in such suit.

§ 2507. Calls and discovery

(a) The United States Court of Federal Claims may call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence. The head of any

department or agency may refuse to comply with a call issued pursuant to this subsection when, in his opinion, compliance will be injurious to the public interest.

(b) Without limitation on account of anything contained in subsection (a) of this section, the court may, in accordance with its rules, provide additional means for the discovery of any relevant facts, books, papers, documents or tangible things, not privileged.

(c) The Court of Federal Claims may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

§ 2508. Counterclaim or set-off; registration of judgment

Upon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

§ 2509. Congressional reference cases

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Court of Federal Claims pursuant to section 1492 of this title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the

court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief judge who is hereby authorized and directed to require the application of the pertinent rules of practice of the Court of Federal Claims insofar as feasible. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpena and the power to administer oaths and affirmations. None of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(c) The hearing officer to whom a congressional reference case is assigned by the chief judge shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

(d) The findings and conclusions of the hearing officer shall be submitted by him, together with the record in the case, to the review panel for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitting the report of the hearing officer to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer.

(e) The panel shall submit its report to the chief judge for transmission to the appropriate House of Congress.

(f) Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Court of Federal Claims shall be noted by the panel or the hearing officer at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the hearing officer a full statement of the circumstances shall be incorporated in the report of the panel.

(g) The Court of Federal Claims is hereby authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional reference cases and to include within its annual appropriations the costs thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of the judges serving as hearing officers and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks).

§ 2510. Referral of cases by Comptroller General

(a) The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

(b) The Court of Federal Claims shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon.

§ 2511. Accounts of officers, agents or contractors

Notice of suit under section 1494 of this title shall be given to the Attorney General, to the Comptroller General, and to the head of the department requested to settle the account in question.

The judgment of the United States Court of Federal Claims in such suit shall be conclusive upon the parties, and payment of the amount found due shall discharge the obligation.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records, and shall be enforceable as other judgments.

§ 2512. Disbursing officers; relief

Whenever the United States Court of Federal Claims finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the Government Accountability Office shall allow the officer such amount as a credit in the settlement of his accounts.

§ 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated

ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

§ 2514. Forfeiture of fraudulent claims

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

§ 2515. New trial; stay of judgment

(a) The United States Court of Federal Claims may grant a plaintiff a new trial on any ground established by rules of common law or equity applicable as between private parties.

(b) Such court, at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

§ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

§ 2517. Payment of judgments

(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

§ 2519. Conclusiveness of judgment

A final judgment of the United States Court of Federal Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

§ 2521. Subpoenas and incidental powers

(a) Subpoenas requiring the attendance of parties or witnesses and subpoenas requiring the production of books, papers, documents or tangible things by any party or witness having custody or control thereof, may be issued for purposes of discovery or for use of the things produced as evidence in accordance with the rules and orders of the court. Such subpoenas shall be issued and served and compliance therewith shall be compelled as provided in the rules and orders of the court.

(b) The United States Court of Federal Claims shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions; or

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(c) The United States Court of Federal Claims shall have

such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Court of Federal Claims is sitting shall, when requested by the chief judge of the Court of Federal Claims, attend any session of the Court of Federal Claims in such district.

§ 2522. Notice of appeal

Review of a decision of the United States Court of Federal Claims shall be obtained by filing a notice of appeal with the clerk of the Court of Federal Claims within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.