Fordham Law Review

Volume 74 | Issue 5 Article 9

2006

Section 2401(B) Reconfigured: Irwin v. Department of Veterans Affairs Leads to the Right Result for the Wrong Reasonss

Elana Wexler

Section 2401(B) Reconfigured: Irwin v. Department of Veterans Affairs Leads to the Right Result for the Wrong Reasonss

Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Benjamin Zipursky for his guidance with this Note. I would also like to thank my family, friends, and Marc for their continuous support and encouragement. This Note is dedicated to the memory of Vaness Ilana Pean (1989-2005), an incredible person whose life was cut short but whose love of life, and famous words "you always miss 100% of the shots you don't take," inspire me everyday.

SECTION 2401(B) RECONFIGURED: *IRWIN V. DEPARTMENT OF VETERANS AFFAIRS* LEADS TO THE RIGHT RESULT FOR THE WRONG REASONS

*Elana Wexler**

INTRODUCTION

Imagine that "*X*," a close family member, is admitted to a veterans' hospital for alcohol-related treatment.[1] Only a few days after *X*'s admission to the hospital, he suffers an apparent life-threatening cardiac event, and the doctors at the hospital tell you that *X* is close to death from natural causes and no medical intervention can save his life. *X* dies a few days later. His death certificate states that *X* died of heart-related conditions, including myocardial infarction. Six months after *X*'s death, government investigators contact you and inform you that they want to exhume *X* for the purpose of resolving some suspicions that they have with the high number of deaths at the hospital where he was treated and subsequently died. You assent to the investigators' request to exhume *X*. Following the autopsy, investigators tell you that *X*'s death certificate is inaccurate in attributing his death to a heart attack. The investigators still equivocate, however, as to whether *X* died of natural or unnatural causes. The government provides you with no other information regarding *X*'s death, but promises to keep you informed about the progress of the investigation. Despite your attempts, you are unsuccessful in gaining additional information about *X*'s death. A year and a half after *X*'s death, the Assistant U.S. Attorney meets with you to inform you that a chemical inexplicably has been discovered in *X*'s body, but that further investigation is needed to determine whether the chemical was lawfully or unlawfully administered. Several months after this meeting and more than two years after *X*'s death, investigators tell you for the first time that *X* had been poisoned by the chemical while at the hospital. Within two years of learning of *X*'s poisoning, you pursue administrative remedies. The administrative agency denies your claims,

* J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Benjamin Zipursky for his guidance with this Note. I would also like to thank my family, friends, and Marc for their continuous support and encouragement. This Note is dedicated to the memory of Vanessa Ilana Péan (1989-2005), an incredible person whose life was cut short but whose love of life, and famous words "you always miss 100% of the shots you don't take," inspire me everyday.

1. This scenario is based upon *Skwira v. United States*, 344 F.3d 64 (1st Cir. 2003).

and you subsequently commence a wrongful death action against the United States in federal district court.

As a matter of fairness, does it make sense to require you, as the plaintiff, to demonstrate that you were diligent in ascertaining sufficient information about your claim and therefore have filed your claim with the administrative agency in accordance with applicable time limitations? Does it make more sense to require the United States, as the defendant, to show that you failed to exercise reasonable diligence in pursuing your claim and therefore have not complied with applicable time limitations?

It is well settled that the United States, as a sovereign nation, is immune from suit unless it specifically consents to be sued.[2] The Federal Tort Claims Act ("FTCA")[3] expressly waives the United States's immunity from suits in tort and permits individuals to bring suit against the federal government for personal injuries and property damages "caused by the negligent or wrongful act[s] or omission[s] of" government employees.[4] Before bringing suit against the United States, individuals must first file their claims with "the appropriate Federal agenc[ies] within two years after such claim[s] accrue[]."[5] Prior to 1990, courts uniformly viewed this two-year time requirement for presenting claims to administrative agencies as a jurisdictional hurdle for plaintiffs to overcome before federal district courts could hear their cases.[6] In addition, courts viewed this time requirement as nonwaivable and not subject to equitable tolling.[7]

In 1990, the U.S. Supreme Court held in *Irwin v. Department of Veterans Affairs* that there was a rebuttable presumption of equitable tolling in suits brought against the federal government.[8] Interpreting *Irwin*, the U.S. Courts of Appeals for the Third and Eighth Circuits have subsequently held that the two-year limitations period in the FTCA is not a jurisdictional prerequisite, but instead an affirmative defense.[9] These courts maintain that the filing requirement under the FTCA is not jurisdictional because, if it

2. *See, e.g.*, United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)); United States v. McLemore, 45 U.S. (1 How.) 286, 287-88 (1846).

3. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 2401-2402, 2411-2412, 2671-2472, 2674-2480 (2000).

4. *Id.* § 1346(b)(1).

5. *Id.* § 2401(b); *see id.* § 2675(a); Garza v. U.S. Bureau of Prisons, 284 F.3d 930, 934 (8th Cir. 2002).

6. *See infra* Part I.B.3.

7. *See, e.g.*, Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir. 1990); *see also* Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 Mil. L. Rev. 1, 1 (1992). Equitable tolling is "[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." Black's Law Dictionary 579 (8th ed. 2004).

8. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990); *see infra* Part I.B.4.

9. *See, e.g.*, Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002); Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991); *see also* Arthur v. United States, 299 F. Supp. 2d 431, 434 (E.D. Pa. 2003); Diltz v. United States, 771 F. Supp. 95, 97 (D. Del. 1991); *infra* Part I.C.2.

were, courts would be unable to employ the doctrine of equitable tolling, and *Irwin* categorically stated that equitable tolling is permissible in suits against the government.[10] In contrast to the view of the Third and Eighth Circuits, federal courts in the First, Fourth, and Seventh Circuits have continued to view the limitations period in the FTCA as jurisdictional, rather than as an affirmative defense.[11] These courts hold that *Irwin* does not change the fact that statutes of limitations in statutes that waive sovereign immunity are jurisdictional by nature.[12] In applying the FTCA, courts have struggled with the implications of the statute of limitations as provided by § 2401(b) of the FTCA.[13] This Note examines the debate over how § 2401(b) ought to be construed.[14]

Part I of this Note examines the history and development of the United States's liability for the tortious acts or omissions of its employees. Part II explores the conflict over the meaning of § 2401(b). Finally, Part III argues that although *Irwin* does not render § 2401(b) an affirmative defense, both the text of the FTCA and traditional notions of statutes of limitations compel courts to construe § 2401(b) as an affirmative defense.

I. THE UNITED STATES'S LIABILITY FOR TORTIOUS ACTS COMMITTED BY GOVERNMENT EMPLOYEES: HISTORY AND DEVELOPMENT

For more than 150 years, the doctrine of sovereign immunity barred individuals from bringing tort suits against the United States government. This Part discusses the development of the United States's liability for the tortious acts or omissions committed by governmental employees. Part I.A examines the doctrine of sovereign immunity from the English feudal system to its adoption in the United States. Part I.B describes the FTCA, which allows private litigants to sue the United States for injuries caused by the tortious acts of its employees. Part I.B also discusses the impact of the

10. *Schmidt*, 933 F.2d at 640; *see Motley*, 295 F.3d at 822; *Hughes*, 263 F.3d at 278; *see also infra* Part II.B.1.

11. *See, e.g.*, Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003); Gonzalez v. United States, 284 F.3d 281, 287 (1st Cir. 2002); Rush v. Lock, 19 F. App'x 416, 418 (7th Cir. 2001); Kokotis v. U.S. Postal Serv., 223 F.3d 275, 278 (4th Cir. 2000); Ahmed v. United States, 30 F.3d 514, 516 (4th Cir. 1994); Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992); *Gonzalez-Bernal*, 907 F.2d at 248; *see also infra* Part I.C.1.

12. *See, e.g.*, *Kokotis*, 223 F.3d at 278, 280; *see also infra* Part II.A.1. Many district courts also continued to hold that § 2401(b) is a jurisdictional prerequisite. *See, e.g.*, Johnson v. United States, No. EP-02-CA-580, 2005 WL 1605822, at *7 n.31 (W.D. Tex. June 30, 2005); Johnson v. United States, 906 F. Supp. 1100, 1108-09 (S.D. W. Va. 1995); Willis v. United States, 879 F. Supp. 889, 891 (C.D. Ill. 1994).

13. *See Skwira*, 344 F.3d at 71 & n.8; *see also* Rodriguez v. Potter, No. Civ. A. H-03-5325, 2005 WL 2030838, at *1 n.3 (S.D. Tex. Aug. 22, 2005).

14. Ugo Colella and Adam Bain have noted that "courts have inconsistently allocated the burden of proof for [Federal Tort Claims Act ("FTCA")] jurisdictional issues—sometimes imposing it on plaintiffs, sometimes on the United States . . . [and thus,] have rendered non-uniform an area of FTCA law that ought to be driven by one approach to allocation." Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 Fordham L. Rev. 2859, 2866 (1999).

Supreme Court's decision in *Irwin*, which impelled certain courts of appeals to change their views on the nature of the FTCA's statute of limitations. Finally, Part I.C introduces the circuit split concerning § 2401(b).

A. *The History of Sovereign Immunity in the United States*

Derived from the English feudal system, the doctrine of sovereign immunity completely protected the government from suit for centuries.[15] Under the feudal system, "[t]he king, being at the pinnacle . . . was by the nature of the system subject to no court at all."[16] This section describes the doctrine of sovereign immunity and its meaning both at English common law and in the United States. This section also provides an overview of the criticisms of applying the doctrine in the United States.

1. The Doctrine of Sovereign Immunity: The English Feudal System

Under English common law, the English maxim that "'the king [could] do no wrong'" was universally accepted.[17] Throughout the English feudal period, "[t]he lord of each manor held court for his subjects, but was himself never subject to the jurisdiction of his own court."[18] Even as the feudal system began to recede, the king remained omnipotent and immune from suit.[19] Furthermore, "[w]hen the king's power declined, the fiction of the unity of crown and state persisted, and the fact that the king traditionally had not been subject to judicial sanctions provided a foundation for the doctrine of immunity for the English government."[20]

The English maxim did not stand for the proposition that the king was incapable of wrongdoing, but only that the king could not be sued for wrongdoing.[21] Even in fourteenth-century England it was recognized that the king could commit an illegal act.[22] Yet, under the doctrine of sovereign immunity, the king could never be included as a defendant in an action.[23] Furthermore, the king could not be held liable for the tortious acts of the Crown's employees because "to impute liability in tort to the State [for such acts] would be to impute tort to the King who '[could] do no wrong.'"[24] Only if the king gave consent to being sued for wrongdoing could he

---

15. *See Developments in the Law: Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 829 (1957) [hereinafter *Developments*].

16. *Id.*

17. Langford v. United States, 101 U.S. 341, 342 (1879); *see* United States v. Thompson, 98 U.S. 486, 489 (1878).

18. *Developments*, *supra* note 15, at 829 ("A lord was subject only to the court of a noble higher than he in the feudal hierarchy.").

19. *See id.* at 829-30.

20. *Id.* at 830.

21. *See Langford*, 101 U.S. at 343; Herbert Barry, *The King Can Do No Wrong*, 11 Va. L. Rev. 349, 353 (1925).

22. *See Developments*, *supra* note 15, at 829.

23. *See* United States v. Thompson, 98 U.S. 486, 489 (1878).

24. Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1, 37 n.20 (1926) (citations omitted).

become a defendant in English Courts of Law or Equity.[25] In the absence of permission from the king, individuals injured as a result of the negligent acts or omissions of the king's employees could seek redress only from the employees directly.[26]

2. Adoption of Sovereign Immunity in the United States

After the Revolutionary War, as the colonies gained independence, each embraced the doctrine of sovereign immunity that previously had belonged to the king.[27] When the colonies adopted the U.S. Constitution, the United States government gained the benefit of sovereign immunity as well.[28] The Supreme Court declared that the common law doctrine prohibiting a sovereign from being "sued in his own courts without his consent . . . is equally applicable to the supreme authority of the nation, the United States."[29] In *Hill v. United States*, the Supreme Court held that "[n]o maxim is thought better established, or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot . . . be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends."[30] The Court stated that, for public policy reasons, allowing the

25. Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850) ("[A]n attempt to overrule or to impair [the maxim] on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power.").

26. *See Developments*, *supra* note 15, at 830.

27. *See Thompson*, 98 U.S. at 489-90. The English king, as a personal ruler, was "merely the agent of the sovereign" while the sovereign in the United States "has from the beginning been separated from the government." Borchard, *supra* note 24, at 38. Nevertheless,

> [t]he substitution of popular for kingly sovereignty has . . . effected no change in the theory of suitability or responsibility, and notwithstanding the difference between State and government, principal and agent, and the supposed control of the "rule of law" and constitutional limitations, the sovereignty of the people becomes in practical operation the sovereignty of the government.

Id. at 39.

28. *See* Barry, *supra* note 21, at 358-59.

29. The Siren, 74 U.S. (7 Wall.) 152, 154 (1868). Professor Kenneth Culp Davis cites Justice Horace Gray's dissenting opinion in *United States v. Lee* as providing the best argument in favor of sovereign immunity:

> "The maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defence and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of customs-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country."

Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383, 393 (1970) (quoting United States v. Lee, 106 U.S. 196, 226 (1882) (Gray, J., dissenting)). Davis then states that "[i]f the government were 'dispossessed' of its military bases and equipment during an emergency, surely the judicial interference could be harmful." *Id.*

30. *Hill*, 50 U.S. (9 How.) at 389.

government to be sued would undermine the executive functions of the government.[31]

The doctrine of sovereign immunity renders the United States immune from suit unless the United States expressly consents to be sued.[32] Therefore, individuals who institute suits against the government "must bring [their] case[s] within the authority of some act of Congress."[33] In addition, the United States's consent to suit "must be strictly observed and exceptions . . . are not to be implied."[34]

Sovereign immunity, however, does not protect government officers from suit.[35] Government officers "are answerable, as private individuals, for wrongs committed even in the course of their official work, just as a private agent is answerable for a wrong committed by him on behalf or at the command of his principal."[36] Thus, individuals injured by government officers may bring private actions directly against those officers.[37] In determining whether or not such injured persons are entitled to any award of damages, courts must determine whether the government employees' conduct which caused the injuries was legally authorized.[38] In addition to seeking remedies at law, individuals injured by government officers can seek equitable remedies, including injunctions.[39] In both law and equity, government officers are answerable as private individuals for conduct that injures others.[40]

---

31. *See id.* The U.S. Supreme Court has noted that "the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government." *The Siren*, 74 U.S. (7 Wall.) at 154; *see also* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) (stating that "'the interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief'" (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840))). Davis states that, in *Larson*, the Supreme Court asserted a "clearly false proposition that interference of the courts with ordinary duties of executive departments would produce nothing but mischief." Davis, *supra* note 29, at 394. Instead, argues Davis, the "Court should have said that experience had proved overwhelmingly that a limited scope of judicial review of ordinary duties of executive departments produces better government." *Id.*

32. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980).

33. *The Siren*, 74 U.S. (7 Wall.) at 154.

34. Soriano v. United States, 352 U.S. 270, 276 (1957) (citing United States v. Sherwood, 312 U.S. 584, 590-91 (1941)).

35. Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1480 (1962).

36. *Id.*

37. *Id.* at 1480-81.

38. *See id.* at 1481 ("The plaintiff cannot sue to redress merely any unauthorized action by an officer."). In providing "[a] classic statement of the theory and operation of nonstatutory review," Professor Clark Byse notes that to seek redress from an officer, a "plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff, entitling the latter to recover damages." *Id.* at 1480-81.

39. *See id.* at 1481.

40. *Id.*

3. Criticisms of Sovereign Immunity in the United States

Although the doctrine of sovereign immunity has a long history, many scholars argue that sovereign immunity should be abolished because it yields a substantial amount of injustice.[41] As the role of the federal government expanded, the number of tortious acts committed by government employees increased, yet those injured by these tortious acts could not commence lawsuits against the federal government solely because the employer of the tortfeasors was the federal government; if these tortfeasors had been employees of private companies, persons injured could have sought redress in the court system.[42] Persons injured by government employees could apply to Congress for private bills of relief, but the process was expensive for individuals and burdensome to Congress.[43]

Early criticisms of the doctrine focused on the difficulty inherent in applying a nonfederal concept to a federal government. Professor Edwin Borchard, for example, noted that the English king, as a personal ruler, was "merely the agent of the sovereign" while the sovereign in the United States "has from the beginning been separated from the government."[44]

In the decades following the FTCA's enactment, scholars further developed this early criticism of sovereign immunity. Professor Erwin Chemerinsky argues that the doctrine of sovereign immunity "is an anachronistic relic" that has no place in American society.[45] According to Chemerinsky, the doctrine of sovereign immunity, which is based on the English maxim that "the King can do no wrong," is fundamentally inconsistent with the American view of government and with the Constitution.[46] The United States federal government is premised both "on

---

41. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1203 (2001) (stating that no government, regardless of whether at the federal, state, or local level, "should be accorded sovereign immunity in any court"); Davis, *supra* note 29, at 383 & n.1; John E. H. Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 Admin. L. Rev. 39, 58 (1969) (stating that sovereign immunity "is not only anachronistic but also dangerous to our democratic institutions if allowed to exist untrammeled by controls appropriate to contain it"). Furthermore,

> [e]ven though all will agree that the government as a litigant differs from a private corporation or an individual in that it represents the community as a whole, and that the government clearly ought not to be stopped by 'any plaintiff who presents a disputed question,' the crucial question is whether a private party who asserts that a government officer is wrongly interfering with his legal rights may have a judicial determination of the dispute between the private party and the officer.

Davis, *supra* note 29, at 394.

42. *See* Feres v. United States, 340 U.S. 135, 139-40 (1950).

43. *See id.* at 140 ("The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication."); H.R. Rep. No. 76-2428, at 2 (1940).

44. Borchard, *supra* note 24, at 38.

45. Chemerinsky, *supra* note 41, at 1201. Although courts have consistently applied the doctrine of sovereign immunity, they have often done so without any justification. *See id.*

46. *Id.* at 1202.

a rejection of a monarchy and of royal prerogatives,"[47] and on "the fundamental recognition that the government and government officials can do wrong and must be held accountable."[48] Article VI of the Constitution provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[49] Despite this clear declaration, sovereign immunity, which is not ingrained in the Constitution,[50] undermines the Constitution by barring "suits for relief against government entities."[51] Chemerinsky contends that the doctrine of sovereign immunity violates the fundamental maxim that "no one, not even the government, is above the law."[52] Consequently, "[t]he judicial role of enforcing and upholding the Constitution is rendered illusory when the government has complete immunity to suit."[53]

In addressing the doctrine of sovereign immunity, the Supreme Court repeatedly "has asserted that courts cannot 'interfere with the public administration'[54] . . . [or] that 'the Government . . . cannot be stopped in its tracks.'"[55] Yet, this justification for the doctrine of sovereign immunity does not stand, according to Professor Kenneth Culp Davis, because "courts[,] including the Supreme Court[,] are constantly interfering with the public administration and constantly stopping the government in its tracks."[56]

---

47. *Id.* (citing U.S. Const. art. I, § 9). Article I, Section 9, of the United States Constitution provides that "No Title of Nobility shall be granted by the United States." U.S. Const. art. I, § 9.

48. Chemerinsky, *supra* note 41, at 1202. Chemerinsky argues that "sovereign immunity undermines the basic principle, announced in *Marbury v. Madison*, that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

49. U.S. Const. art. VI, cl. 2.

50. *See* Chemerinsky, *supra* note 41, at 1202 ("Nowhere does the [Constitution] mention or even imply that governments have complete immunity to suit.").

51. *Id.*

52. *Id.* ("The effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.").

53. *Id.*

54. Dugan v. Rank, 373 U.S. 609, 620 (1963), *quoted in* Davis, *supra* note 29, at 401.

55. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949), *quoted in* Davis, *supra* note 29, at 401.

56. *Larson*, 337 U.S. at 704. For example, in 1918, in *Hammer v. Dagenhart*, the Supreme Court enjoined the U.S. Attorney and the entire federal government from enforcing a 1916 statute which attempted to prohibit interstate shipment of products manufactured through child labor. 247 U.S. 251 (1918), *discussed in* Davis, *supra* note 29, at 401. Professor Davis provides another example of the Supreme Court's efforts to limit government activity: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *discussed in* Davis, *supra* note 29, at 402. After President Truman seized the steel mills in an effort to prevent "a strike that he believed would jeopardize national defense," the Supreme Court ruled that Truman's seizure was beyond the President's constitutional power. *Youngstown*, 343 U.S. at 579. Davis states that it is

> utterly incongruous for the courts to stop the President and Congress in their tracks and to interfere in the public administration of the most vital programs and at the same time to recite and hold that sovereign immunity prevents stopping the

4. United States's Waiver of Sovereign Immunity for Tortious Acts of Government Employees

Although the principle of sovereign immunity remained inviolate for common law tort actions from the ratification of the U.S. Constitution in 1789 until 1946, when Congress passed the FTCA,[57] Congress did waive the United States's sovereign immunity in certain other situations.[58] For example, in the 1920s, Congress consented to suits against the federal government for certain admiralty and maritime torts.[59]

Prior to the passage of the FTCA, individuals who were injured by the acts or omissions of government employees could only bring suit against the government employees themselves, not against the federal government.[60] In a 1922 case, the Supreme Court held that the United States could not be held liable in tort, reasoning that "[t]he United States [had] not consented to be sued for torts . . . [and] a tort is a tort in a legal sense only because the law has made it so."[61]

As the American jurisdictional system developed, people became increasingly dissatisfied with the doctrine of sovereign immunity.[62] Consequently, Congress passed the FTCA in 1946.[63]

B. *The Federal Tort Claims Act*

The FTCA "waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States."[64] For plaintiffs to sue the United States in tort, they must comply with the two-year limitations period provided in § 2401(b).[65] This section describes the provisions of the FTCA, with a particular emphasis on the time limitations imposed by § 2401(b). This section also explains that courts consistently held that § 2401(b) was a jurisdictional prerequisite until the Supreme Court's ruling in *Irwin*, which held that statutes of limitations in waiver of sovereign immunity statutes could be equitably tolled.[66]

> government in its tracks or interfering in public administration when a single officer is claiming a pile of coal or a piece of land and when the government has no special program with respect to the coal or the land!

Davis, *supra* note 29, at 402 (emphasis omitted).

57. *See* Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

58. *See* H.R. Rep. No. 76-2428, at 2 (1940). By creating the Court of Claims in 1855, Congress waived the United States's immunity from suits in contract, permitting individuals to bring suit against the federal government for "[g]overnmental responsibility in contract." Davis, *supra* note 29, at 385.

59. H.R. Rep. No. 76-2428, at 2.

60. *See Developments*, *supra* note 15, at 830.

61. The Western Maid, 257 U.S. 419, 433 (1922).

62. *See* Feres v. United States, 340 U.S. 135, 140 (1950).

63. *See* Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

64. S. Rep. No. 79-1400, at 29 (1946).

65. 28 U.S.C. § 2401(b) (2000).

66. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

1. The Provisions of the FTCA

The FTCA expressly waives the United States's immunity from suits sounding in tort, thereby allowing individuals to bring suit against the government for personal injuries and property damages "caused by the negligent or wrongful act[s] or omission[s] of . . . employee[s] of the Government while acting within the scope of [their] office[s] or employment."[67] The FTCA defines "'[e]mployee of the government'" as:

> (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.[68]

For persons injured by the tortious acts of federal government employees, the FTCA is the exclusive means available for suing the federal government.[69]

The underlying purpose of the FTCA was to create fairness for individuals allegedly injured by employees of the United States government.[70] The FTCA sought to balance Congress's interest in limiting the burdensome process of "considering and disposing of private claims,"[71] with claimants' interest in obtaining damages for injuries caused by government employees' negligent acts or omissions.[72] Under the FTCA as

---

67. 28 U.S.C. § 1346(b)(1). The FTCA does not cover certain actions, including the following: United States employees acting within their discretionary authority; Postal Service employees' actions affecting the transmission of mail; seizure of property pursuant to tax or customs duty; admiralty; the establishment of a quarantine; intentional torts including "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"; "fiscal operations of the Treasury or by the regulation of the monetary system"; "combatant activities of the military or naval forces, or the Coast Guard, during time of war"; and actions "arising in a foreign country." *Id.* § 2680(h), (i)-(k).

68. *Id.* § 2671 ("[M]ember[s] of the military or naval forces . . . or . . . member[s] of the National Guard," act "'within the scope of [their] office[s] or employment' . . . [while] "in the line of duty."). Determining whether individuals are in fact employees of the government is a question of federal law. *See* Brooks v. A. R. & S. Enters., 622 F.2d 8, 10 (1st Cir. 1980). Independent contractors for the government are not deemed "'employees of the government.'" *See id.* (quoting 28 U.S.C. § 2671).

69. *See* Auto-Owners Ins. Co. v. United States, No. 3:05 CV 7038, 2005 WL 1863827, at *2 (N.D. Ohio Aug. 4, 2005).

70. *See* S. Rep. No. 79-1400, at 30 (1946).

71. *Id.* Individuals have always been able to seek redress by introducing private bills in Congress, "but such bills place a severe strain upon the legislative process." *Developments*, *supra* note 15, at 887-88.

72. S. Rep. No. 79-1400, at 30. It has been noted that "private bills cannot provide impartial and uniform compensation, and the courts are generally a more suitable forum for

it was originally enacted in 1946, claimants were permitted to bring their tort claims against the United States as long as such claims were brought "within one year after such claim[s] accrued."[73] Claimants were also not required to present their tort claims to federal agencies before filing suit in federal district court.[74] In 1949, Congress amended the FTCA to extend the one-year statute of limitations to two years,[75] and in 1966 Congress further amended the FTCA to make mandatory the requirement that plaintiffs first present their claims to the appropriate federal agencies.[76]

To sue the United States in tort, individuals must strictly comply with the limitations period as provided in § 2401(b): "[T]ort claim[s] against the United States shall be forever barred unless [they are] presented in writing to the appropriate Federal agenc[ies] within two years after such claim[s] accrue[] . . . ."[77] To meet the requirements of § 2401(b), individuals must present to the appropriate federal agency either a completed Standard Form 95 ("SF 95")[78] or some other written statement which describes the claim in sufficient detail, so that the agency can commence its own investigation, as well as the amount of damages sought.[79] Only if the agencies to which the

---

the adjudicatory process of determining the liability of the United States in tort." *Developments*, *supra* note 15, at 888.

73. *See* Federal Tort Claims Act, ch. 753, § 420, 60 Stat. 842, 845 (1946) (codified as amended at 28 U.S.C. § 2401(b)).

74. *See id.* (current version at 28 U.S.C. § 2675(a)). As Ugo Colella and Adam Bain noted, "if a claim was submitted to an agency within one year of accrual, the claimant had six months after the claim was denied or withdrawn by the claimant to file suit in federal court." Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 178 (2000); *see* Federal Tort Claims Act, ch. 753, § 420, 60 Stat. 842, 845 (1946) (current version at 28 U.S.C. § 2401(b)).

75. Federal Tort Claims Act, Pub. L. No. 81-55, 63 Stat. 62 (1949) (codified as amended at 28 U.S.C. § 2401(b)). The reasoning behind this amendment was that "[t]he 1-year existing period [was] unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim." S. Rep. No. 81-135, at 2 (1949). For example, "the wide area of operations of the Federal agencies, particularly the armed service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit." *Id.* The Committee on the Judiciary stated that extending the statute of limitations to two years was not likely to either "unnecessarily vex the agencies concerned, [or] . . . foster a lack of diligence on the part of claimants in the prosecution of their claims." *Id.*; H.R. Rep. No. 81-276, at 4 (1949).

76. Federal Tort Claims Act, Pub. L. No. 89-506, § 2, 80 Stat. 306, 306 (1966) (codified as amended at 28 U.S.C. § 2675(a)).

77. 28 U.S.C. § 2401(b); *see* Garza v. U.S. Bureau of Prisons, 284 F.3d 930, 934 (8th Cir. 2002). As a general rule, tort claims "accrue" at the time of injury. Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992). *But see infra* notes 87-100 and accompanying text.

78. Standard Form 95—Claim for Damage, Injury or Death, http://www.usdoj.gov/civil/forms/forms.htm (last visited Mar. 1, 2006) (requiring claimants to provide appropriate federal agencies with both bases for their claims by stating in detail the "facts and circumstances attending the damage[s], injur[ies], or death[s], identifying persons and property involved, the place[s] of occurrence," and the amount of damages sought in dollars).

79. *See* Ahmed v. United States, 30 F.3d 514, 516-17 (4th Cir. 1994).

claims are presented send individuals "by certified or registered mail, . . . notice[s] of final denial of the claim[s]" can individuals subsequently file their claims against the United States in federal district court.[80] At this stage, the United States is substituted for the previously named federal employees.[81] For those claims that are denied by the federal agencies, individuals have six months to sue the United States in federal district court.[82]

The FTCA allows the United States to be liable for tortious acts "in the same manner and to the same extent as a private individual under like circumstances."[83] Thus, the United States is liable only "where the United States, if a private party, would be liable under the law of the place where the tort occurred."[84]

2. Implications of § 2401(b) as a Jurisdictional Prerequisite

Whether the two-year statute of limitations[85] provided in § 2401(b) is a jurisdictional prerequisite or an affirmative defense has two important ramifications for the parties in FTCA actions: (1) It establishes which party must plead the statute of limitations; and (2) it establishes which party bears the burden of proving the statute of limitations should it become an issue in an action.[86]

The Supreme Court in *United States v. Kubrick* declared that for purposes of determining when a claim accrues in the context of medical malpractice a "discovery rule" applies: Claims "accrue" when injured parties "know[] both the existence and the cause of [their] injur[ies]."[87] The "cause of [their] injur[ies]," as referred to above, does not require that plaintiffs actually know that they have been injured as a result of negligence.[88] Once plaintiffs have discovered sufficient relevant facts

80. 28 U.S.C. §§ 2401(b), 2675(a). If claimants do not receive responses from the federal agencies within six months of filing, their claims are deemed final denials under the FTCA. *See id.* § 2675(a).

81. *See id.* § 2679(d)(1). Thus, "[t]he statute grants jurisdiction to the district courts." Byse, *supra* note 35, at 1518.

82. *See* 28 U.S.C. § 2401(b). Individuals who bring their claims in federal district court have no right to jury trials. *Id.* § 2402.

83. *Id.* § 2674.

84. Attallah v. United States, 955 F.2d 776, 782 (1st Cir. 1992); *see* Richards v. United States, 369 U.S. 1, 13-14 (1962); Hatahley v. United States, 351 U.S. 173, 180-81 (1956); Dumansky v. United States, 486 F. Supp. 1078, 1087 (D.N.J. 1980).

85. A statute of limitations is defined as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued." Black's Law Dictionary, *supra* note 7, at 1450-51.

86. *See infra* text accompanying notes 101-08. It is possible, however, that even if § 2401(b) is an affirmative defense, plaintiffs will have to rebut the government's contention that their cases are time barred by proving compliance with § 2401(b). For an interesting discussion of the burden shifting implicated by § 2401(b), see Colella & Bain, *supra* note 14.

87. United States v. Kubrick, 444 U.S. 111, 113 (1979); *see id.* at 117.

88. *See* Skwira v. United States, 344 F.3d 64, 76 (1st Cir. 2003).

about their injuries, they are considered to know the source of their injuries.[89]

In *Kubrick*, the plaintiff entered a Veterans' Administration hospital seeking treatment for an infection in his right leg.[90] Doctors performed surgery on the plaintiff and then irrigated the infected area with neomycin, an antibiotic.[91] About six weeks after he was discharged from the hospital, the plaintiff noticed loss of hearing, which an ear specialist later diagnosed as bilateral nerve deafness.[92] Other specialists confirmed this diagnosis and one specialist stated that it was highly likely that neomycin caused the plaintiff's hearing loss.[93] The Court found that the plaintiff's claim was time-barred under the FTCA because he filed his claim more than two years after the claim accrued, which was the date on which an ear specialist informed plaintiff that his hearing loss was likely due to the neomycin treatment.[94] The Court reasoned that this information provided plaintiff with sufficient facts about the cause of his injury.[95] If plaintiffs were allowed to wait to file their claims until after they realized that their injuries were negligently inflicted, "the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government," would be undermined.[96]

Courts of appeals have recognized that the rationale of *Kubrick*'s discovery rule may apply outside of the medical malpractice context.[97] But plaintiffs may be better able to discern government involvement in cases of possible medical malpractice where the plaintiff was treated in a government facility than in other contexts.[98] Outside medical malpractice, "plaintiff[s] may have less reason to suspect governmental involvement."[99] With these differences in mind, courts of appeals have held that nonmedical malpractice claims "accrue" when plaintiffs know or should know both of their injuries and of facts sufficient for them to make a connection between such injuries and government activity.[100]

---

89. *See Kubrick*, 444 U.S. at 124.
90. *Id.* at 113.
91. *Id.*
92. *Id.* at 114.
93. *Id.*
94. *Id.* at 115, 122.
95. *Id.* at 123.
96. *Id.* See *id.* at 120 n.7 for the Court's rationale of a discovery rule for medical malpractice claims.
97. *See* Skwira v. United States, 344 F.3d 64, 74 (1st Cir. 2003). The *Skwira* court noted that in *Lhotka v. United States*, 114 F.3d 751, 753 (8th Cir. 1997), the U.S. Court of Appeals for the Eighth Circuit applied the discovery rule to an action for trespass and nuisance, and in *Stoleson v. United States*, 629 F.2d 1265, 1268-69 (7th Cir. 1980), the Seventh Circuit applied the discovery rule to an action for an occupational safety hazard. *Skwira*, 344 F.3d at 74.
98. *See Skwira*, 344 F.3d at 77.
99. *Id.*
100. *Id.* at 78 (Nonmedical malpractice claims "accrue" when "plaintiff[s] know[], or in the exercise of reasonable diligence should know, (1) of [their] injur[ies] and (2) sufficient

Assume that § 2401(b) requires that plaintiffs (1) allege in their complaints facts from which district courts can infer that the statute of limitations has been met; and (2) bear the burden of proving compliance with § 2401(b). If the United States moves to dismiss plaintiffs' claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP"),[101] alleging that district courts lack jurisdiction over the matters therein, in order to prove compliance with § 2401(b), plaintiffs would have to demonstrate that they acted diligently in filing their claims with the appropriate federal agencies.[102] Now assume instead that § 2401(b) requires that the United States (1) plead the statute of limitations in its answer or in a motion to dismiss; and (2) bear the burden of proving that plaintiffs failed to comply with the statute of limitations.[103] If the United States moves to dismiss plaintiffs' claims pursuant to Rule 12(b)(6),[104] the United States would have to prove plaintiffs' failure to comply with § 2401(b) by showing that plaintiffs did not act diligently in filing their claims with the appropriate federal agencies.[105]

It is settled law that plaintiffs bear the burden of proving jurisdictional matters,[106] whereas defendants bear the burden of proving affirmative defenses.[107] A jurisdictional prerequisite is a requirement that must be

---

facts to permit . . . reasonable person[s] to believe that there is a causal connection between the government and [their] injur[ies].").

101. If a defendant moves to dismiss for lack of subject matter jurisdiction, the defendant moves pursuant to 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP"). Fed. R. Civ. P. 12(b)(1).

102. *See, e.g.*, Gould v. U.S. Dep't of Health & Human Servs., 905 F.2d 738, 745-46 (4th Cir. 1990).

103. *See* Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001) (stating that because § 2401(b) is an affirmative defense, "it is the defendant's burden to establish the date when the plaintiff knew, or reasonably should have known, of the cause of his injury").

104. If a defendant moves to dismiss based, for example, on the affirmative defense of the statute of limitations, the defendant moves pursuant to Rule 12(b)(6) of the FRCP. Fed. R. Civ. P. 12(b)(6).

105. *See Hughes*, 263 F.3d at 278.

106. *See, e.g.*, McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936).

107. *See* Motley v. United States, 144 F. Supp. 2d 1128, 1131 (E.D. Mo. 2001) (because § 2401(b) is an affirmative defense, "the burden is on the government to prove . . . that plaintiffs failed to comply with the limitations period"); Black's Law Dictionary, *supra* note 7, at 451 ("defendant bears the burden of proving an affirmative defense"). While Ugo Colella and Adam Bain recognize that § 2401(b) is a jurisdictional condition on the FTCA's waiver of immunity, they do not believe that this necessarily means that plaintiffs must bear the burden of "demonstrating that a federal district court has jurisdiction to entertain the FTCA suit." Colella & Bain, *supra* note 14, at 2864. Colella and Bain question whether § 2401(b) is purely jurisdictional, thus requiring the FTCA plaintiff to demonstrate that a federal court can hear the FTCA suit or whether § 2401(b) is an affirmative defense, "imposing on the United States the burden of proving a lack of subject matter jurisdiction." *Id.* The authors conclude that § 2401(b) is a jurisdictional prerequisite and present a framework for determining whether the requirements in § 2401(b) have been met. *Id.* at 2866, 2917. They contend that plaintiffs must allege in their complaints that the actions are "jurisdictionally viable." *Id.* at 2866. If the United States government seeks to challenge the courts' jurisdiction, the government must produce evidence sufficient for "a prima facie case that the plaintiff[s] [have] failed to meet . . . the Act's jurisdictional condition[]." *Id.* at 2867.

satisfied in order for a court to adjudicate the matter before it.[108] Jurisdiction is "[a] court's power to decide a case."[109] For courts to consider cases, plaintiffs' complaints must allege "the grounds upon which the court[s'] jurisdiction depends."[110] It is well settled that such jurisdiction must be based on either the Constitution or the laws of the United States.[111]

An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true."[112] Under the Federal Rules of Civil Procedure ("FRCP"), defendants must affirmatively set forth either in a responsive pleading or in a motion any affirmative defenses they have to the allegations that plaintiffs assert.[113] Defendants waive their right to assert affirmative defenses not raised in their answers or motions.[114]

3. Prior to 1990 Courts Consistently Viewed § 2401(b) as Jurisdictional

Prior to 1990, courts uniformly viewed § 2401(b) as a jurisdictional prerequisite that plaintiffs had to satisfy in order to bring suit against the United States under the FTCA:[115] "'In any suit against the United States, the statute of limitations is an integral part of the government's consent to suit, and as such is an issue of subject matter jurisdiction that cannot be waived.'"[116] In *Gould v. United States Department of Health and Human Services*, the Fourth Circuit, in holding that § 2401(b) was jurisdictional,

---

If the government succeeds in establishing a prima facie case of lack of jurisdiction, then plaintiffs bear the burden of persuasion that the courts do have jurisdiction over their claims. *See id.*

108. *See* Fed. R. Civ. P. 8(a).

109. Black's Law Dictionary, *supra* note 7, at 867.

110. Fed. R. Civ. P. 8(a).

111. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

112. Black's Law Dictionary, *supra* note 7, at 451; *see* Fed. R. Civ. P. 8(c).

113. Fed. R. Civ. P. 8(c), 12(b).

114. Fed. R. Civ. P. 12(h).

115. *See, e.g.*, Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir. 1990) (stating that "filing of a timely administrative claim is a jurisdictional requirement that cannot be waived"); Houston v. U.S. Postal Serv., 823 F.2d 896, 902 (5th Cir. 1987) (same); Crawford v. United States, 796 F.2d 924, 927 (7th Cir. 1986) (same); Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) (same); Radman v. United States, 752 F.2d 343, 344 (8th Cir. 1985) (same); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984) (stating that § 2401(b) "establishes two jurisdictional hurdles, both of which must be met"); Garrett v. United States, 640 F.2d 24, 26 (6th Cir. 1981) (stating that § 2401(b) is a "valid [jurisdictional] condition[] under which suits may be maintained under the statute"); Klotzman v. United States, Civ. A. No. HAR-90-1377, 1990 WL 157519, at *2 (D. Md. Oct. 12, 1990) (stating that § 2401(b) is a jurisdictional condition to suit); *see also* Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 Seton Hall L. Rev. 885, 887 (1999). For claims that are filed more than two years after plaintiffs' "injuries" occur, the burden is on the plaintiffs to prove that they fall "within an exception to the statute of limitations." *Crawford*, 796 F.2d at 929. Prior to 1990, plaintiffs bore the burden of both pleading and proving compliance with § 2401(b). Daniel A. Morris, Federal Tort Claims § 3:2 (1993).

116. *Crawford*, 796 F.2d at 928 (quoting Walters v. Sec'y of Def., 725 F.2d 107, 112 n.12 (D.C. Cir. 1983)).

reasoned that "[t]he terms of [the United States's] consent to be sued in any court define that court's jurisdiction to entertain the suit."[117] Moreover, courts held that § 2401(b) "could not be construed to operate merely as periods of limitation, but had to be interpreted as conditioning the government's liability under the Act."[118]

Furthermore, courts consistently held that equitable tolling could not extend the time period prescribed by the FTCA within which administrative claims must be filed.[119] One rationale behind this view was that "the purpose behind the FTCA's limitations periods—prompt presentation of claims against the United States—[was] inconsistent with the doctrine of equitable tolling."[120] However, in *Crawford v. United States*, the Seventh Circuit held that, although rare, equitable tolling could exist in suits against the government.[121] In *Crawford*, a nineteen-year-old male, who was mentally disabled, was injured when "he tripped over metal spikes that had been left in the ground when a U.S. mailbox had been removed."[122] Although Crawford was immediately treated for his injuries, he did not file his claim with the Postal Service until more than four years passed after the date on which he was injured.[123] Crawford's claims were denied by the Postal Service.[124] Subsequently, he filed suit against the United States in federal district court, arguing "that he lacked the mental capacity to discover that the Postal Service had caused his injury" and therefore that the statute of limitations in § 2401(b) was tolled.[125] The Seventh Circuit held that, because Crawford had "[t]he burden of establishing that he was within an exception to the statute of limitations[,] . . . he had to prove . . . that, given his incapacity, he did not know and could not by reasonable diligence have discovered that the cause of his accident was an act by the Postal Service."[126] Thus, since Crawford failed to make such proof, the court could not entertain Crawford's suit.[127]

---

117. Gould v. U.S. Dep't of Health & Human Servs., 905 F.2d 738, 741 (4th Cir. 1990) (citing United States v. Sherwood, 312 U.S. 584, 586 (1941)).

118. Morris, *supra* note 115, § 3:2.

119. *See, e.g.*, *Gould*, 905 F.2d at 742 ("'[S]trong equitable considerations notwithstanding, the two-year limitation period of 28 U.S.C. § 2401(b) cannot be tolled or waived.'" (quoting Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978))); Cogburn v. United States, 717 F. Supp. 958, 960 (D. Mass. 1989) (noting that § 2401(b) is either a jurisdictional prerequisite or is subject to equitable tolling).

120. Parker & Colella, *supra* note 115, at 892. In finding that the limitations periods contained in § 2401(b) could not be equitably tolled, courts reasoned "that the FTCA contained a limited waiver of sovereign immunity that is strictly construed, so that courts were not at liberty to extend the time limitations in the FTCA beyond what Congress expressly provided." *Id.*

121. *See Crawford*, 796 F.2d at 926-27.

122. *Id.* at 926.

123. *Id.*

124. *See id.*

125. *Id.*

126. *Id.* at 929 (citation omitted).

127. *See id.*

4. *Irwin v. Department of Veterans Affairs*

Federal employment discrimination law provides that individuals can commence private lawsuits against the government if they file their claims in federal district court within a specified time period after receiving notice of denial from the Equal Employment Opportunity Commission ("EEOC").[128] In *Irwin*, the plaintiff filed his complaint in the federal district court "44 days after the EEOC notice was received at his attorney's office, but 29 days after the date on which he claimed [his attorney] received the letter."[129] The plaintiff contended that the thirty-day period did not begin to run until the plaintiff "[had] notice of his right to sue."[130] Irwin's attorney was out of the country at the time that the EEOC's letter arrived at his office, and Irwin therefore argued that the thirty-day period did not begin to run until his attorney returned to his office and received actual notice of the EEOC's denial.[131] The district court dismissed Irwin's complaint on the ground that the "[d]istrict [c]ourt lacked jurisdiction because the complaint was not filed within 30 days of the EEOC's decision."[132] The Fifth Circuit affirmed the district court's dismissal on the ground that the filing period is jurisdictional, and therefore the district court did not have the authority to consider Irwin's claims.[133]

In the Supreme Court, the plaintiff acknowledged that he filed his complaint in federal district court more than thirty days after the EEOC's letter was received at the office of Irwin's attorney, but the plaintiff asserted that his failure to file within the thirty-day period should be "excused under equitable tolling principles."[134] The Court held that, while equitable tolling can apply to lawsuits under Title VII, Irwin could not have the benefit of equitable tolling, because his failure to file timely was due solely to neglect.[135] The Court stated that equitable tolling is extended only sparingly. The *Irwin* court referred to only two instances in which equitable tolling applies: (1) cases "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period";[136] and (2) cases where the claimant "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[137] The Court declared that equitable tolling does not extend to situations

128. *See* 42 U.S.C. § 2000e-16(c) (2000); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 91 (1990). When *Irwin v. Department of Veterans Affairs* was decided, the time period was thirty days. *See Irwin*, 498 U.S. at 91.

129. *Irwin*, 498 U.S. at 91.

130. *Id.* at 92.

131. *See id.* at 91.

132. *Id.*

133. *See id.* at 93.

134. *Id.*

135. *See id.* at 95-96.

136. *Id.* at 96.

137. *Id.*

where plaintiffs neglect to file timely claims merely as the result of a lack of due diligence.[138]

It is a well-settled principle that equitable tolling can apply to time requirements in actions among private litigants.[139] In *Irwin*, the Court announced "a general rule to govern the applicability of equitable tolling in suits against the Government:"[140] "[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."[141] The Court explained that applying equitable tolling to statutes in which the government has waived sovereign immunity, "amounts to little, if any, broadening of the congressional waiver."[142]

C. *The Circuit Split on § 2401(b)*

Since the Supreme Court's ruling in *Irwin*, courts of appeals have interpreted *Irwin* differently. The majority of circuits, particularly the First, Fourth, and Seventh Circuits, continue to view § 2401(b) as a jurisdictional prerequisite, while the Third and Eighth Circuits, in light of *Irwin*, view § 2401(b) as an affirmative defense. This section briefly discusses these competing views.

1. Section 2401(b) as a Jurisdictional Prerequisite

In the years following the Supreme Court's decision in *Irwin*, courts in the First, Fourth, and Seventh Circuits have continued to hold that § 2401(b) is a jurisdictional prerequisite with which individuals must comply in order to bring actions against the government.[143] These courts argue that *Irwin* did not change the view that § 2401(b) is jurisdictional.[144] Rather, *Irwin* made it possible for limitations periods in suits against the government to be equitably tolled.[145]

In *Skwira v. United States*, a World War II veteran who was admitted to the Veterans Affairs Medical Center ("VAMC") for treatment of alcoholism died of apparent "natural causes" a few days after his admission."[146]

---

138. *See id.* ("Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.").

139. *See id.* at 95 (citing Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989)).

140. *Id.*

141. *Id.* at 95-96.

142. *Id.* at 95.

143. *See* Skwira v. United States, 344 F.3d 64, 71 & n.8 (1st Cir. 2003); Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Rush v. Lock, 19 F. App'x 416, 418 (7th Cir. 2001); Kokotis v. U.S. Postal Serv., 223 F.3d 275, 278 (4th Cir. 2000); Ahmed v. United States, 30 F.3d 514, 516 (4th Cir. 1994); Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992); Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir. 1990).

144. *See, e.g.*, *Kokotis*, 223 F.3d at 280.

145. *See* Willis v. United States, 879 F. Supp. 889, 891 (C.D. Ill. 1994).

146. *Skwira*, 344 F.3d at 67.

Almost a year after Skwira's death, government investigators contacted the Skwira family and obtained permission to exhume Skwira in order to investigate a suspicious increase in deaths at the VAMC.[147] Following the autopsy, investigators told the Skwira family that "'the death certificate as printed was incorrect,'" and although "Skwira 'didn't die of a heart attack,' . . . this 'did not mean that he did die of unnatural causes.'"[148] More than two years after Skwira's death, investigators "informed [Skwira's family] for the first time that Skwira had . . . been poisoned [by ketamine] while at the VAMC"[149] and "died of epinephrine poisoning."[150] Approximately a year after the Skwiras received this information, they filed their notice of claim for wrongful death with the Department of Veterans Affairs ("VA").[151] After their claim was denied by the VA, they filed suit against the United States in federal district court, arguing, in response to the United States's motion to dismiss, "that their claim did not accrue until . . . they were told for the first time that Skwira had died as a result of an illegally administered dose of epinephrine."[152] The First Circuit affirmed the district court's dismissal of the family's claim, declaring that the family failed to comply with the jurisdictional prerequisite of § 2401(b) and thus the district court did not have subject matter jurisdiction over the case.[153] The First Circuit held that the statute of limitations began to run immediately after the autopsy when the Skwira family was informed that the death certificate as printed was incorrect.[154] In rejecting the family's contentions that their claims should have been equitably tolled, the First Circuit implied that jurisdictional prerequisites and equitable tolling could coexist, but held that, under the facts presented, the Skwira family's claims were not subject to equitable tolling.[155] Equitable tolling applies if "there are no facts discoverable through the exercise of reasonable diligence which would permit a plaintiff to reasonably believe that her injury is connected with some act of the government."[156] Such was not the case in *Skwira*.[157]

In the Fourth Circuit case *Kokotis v. United States Postal Service*, a motorist sued the Postal Service for injuries she claimed were "due to the negligence of a Postal Service employee."[158] Although Kokotis filed her claim with the Postal Service about one month after she sustained injuries,

147. *Id.* at 68.
148. *Id.*
149. *Id.* at 69.
150. *Id.*
151. *Id.* at 70.
152. *Id.*
153. *Id.* at 71.
154. *Id.* at 80.
155. *See id.* at 81.
156. *Id.*
157. *See id.*
158. Kokotis v. U.S. Postal Serv., 223 F.3d 275, 277 (4th Cir. 2000).

the SF 95 form that she submitted failed to include a sum certain.[159] More than two years after the date of injury, Kokotis "submitted a revised SF 95 requesting a sum certain in the amount of $19,000."[160] The Postal Service denied Kokotis's claim on the ground that her claim was time barred.[161] Subsequently, Kokotis filed her claim in federal district court.[162] The Fourth Circuit agreed with the district court's ruling that Kokotis's failure to "identify a sum certain within the two-year statute of limitations deprived it of jurisdiction over her suit."[163]

2. Section 2401(b) as an Affirmative Defense

Courts in the Third and Eighth Circuits recognize that filing a claim with the appropriate federal agency is a jurisdictional prerequisite to suit, yet these courts hold that the timeliness of filing an administrative claim is an affirmative defense.[164] These circuits hold that, as a result of the Supreme Court's holding in *Irwin*, the two-year limitations period pursuant to § 2401(b) is an affirmative defense.[165] These courts argue that § 2401(b) cannot be jurisdictional because, if it were, courts would be unable to employ the doctrine of equitable tolling, and *Irwin* categorically states that equitable tolling is permissible in suits against the government.[166]

In *Hughes v. United States*, doctors at the VAMC administered the blood thinner heparin to the plaintiff in connection with plaintiff's cardiac surgery.[167] After the operation but while Hughes was still unconscious, he developed gangrene in all four of his limbs as a result of an allergic reaction to heparin, and parts of all four limbs had to be amputated.[168] Upon regaining consciousness, the doctors informed Hughes of his allergic reaction to heparin, but the doctors failed to state that, had the reaction been

159. *Id.* at 278 ("Instead, the cover letter accompanying the form stated that Kokotis was still undergoing medical treatment and included an itemization of Kokotis' medical bills to date.").

160. *Id.*

161. *See id.*

162. *See id.*

163. *Id.*

164. Azizi v. United States, 338 F. Supp. 2d 1057, 1060 (D. Neb. 2004).

165. *See, e.g.*, Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002); Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991); Arthur v. United States, 299 F. Supp. 2d 431, 434 (E.D. Pa. 2003); Diltz v. United States, 771 F. Supp. 95, 97 (D. Del. 1991). In one case, the Eighth Circuit did hold that § 2401(b) was a jurisdictional prerequisite. McCoy v. United States, 264 F.3d 792, 794 (8th Cir. 2001). The court's position in *McCoy*, however, was based on a misreading of an earlier Eighth Circuit case which stated that "[f]or a district court to have jurisdiction over a claim in an FTCA suit, the claim must first have been presented to the appropriate federal agency." Walker v. United States, 176 F.3d 437, 438 (8th Cir. 1999). Although the court in *McCoy* cited *Walker* as support for the proposition that § 2401(b) was jurisdictional, the *Walker* court did not address whether the limitations period set out in § 2401(b) was a jurisdictional prerequisite or not. *See id.*

166. *See, e.g.*, *Schmidt*, 933 F.2d at 640.

167. *Hughes*, 263 F.3d at 273.

168. *Id.* at 273-74.

diagnosed quickly enough and treated with anticoagulants, Hughes could have avoided amputation.[169] The question before the Third Circuit was when Hughes's claim accrued. Hughes contended that his injury was caused by the doctors' failure to administer anticoagulants and not by the heparin itself, and thus the statute of limitations did not begin to run until he was made aware of what caused his injury.[170] Hughes "argue[d] that the statute of limitations was equitably tolled until he received his hospital records . . . [while] the Government argue[d] that Hughes had all relevant information about his injury and its cause when he was discharged."[171] The Third Circuit held that because § 2401(b) is an affirmative defense the government carried the burden of "establish[ing] the date when plaintiff knew, or reasonably should have known, of the cause of his injury."[172]

The Circuit split on how to view § 2401(b) post-*Irwin* stems largely from differing views on how *Irwin* applies to the FTCA. The First, Fourth, and Seventh Circuits do not see *Irwin* as a challenge to their view of § 2401(b) as a jurisdictional prerequisite. The Third and Eighth Circuits, on the other hand, see *Irwin* as mandating a change in how § 2401(b) ought to be approached. These courts hold that § 2401(b) can no longer be considered a jurisdictional prerequisite and must instead be considered an affirmative defense. Part II will further explore these contrasting viewpoints.

II. DETAILING THE CIRCUIT SPLIT—§ 2401(B) AS A JURISDICTIONAL PREREQUISITE OR AS AN AFFIRMATIVE DEFENSE

Part II explores the split among the circuits with respect to whether, in the aftermath of *Irwin*, § 2401(b) is a jurisdictional prerequisite or an affirmative defense. Part II.A discusses the arguments supporting § 2401(b) as a jurisdictional prerequisite. Part II.B explains the reasons supporting § 2401(b) as an affirmative defense.

A. *Section 2401(b) Is a Jurisdictional Prerequisite to Filing Suit Under the FTCA*

This section presents the reasons that speak in favor of the view that § 2401(b) is a jurisdictional prerequisite. Part II.A.1 explores the view that *Irwin* does not alter the fact that § 2401(b) is jurisdictional. Part II.A.2 explains that § 2401(b) is jurisdictional because that provision confers subject matter jurisdiction on federal district courts to entertain tort claims against the government. Part II.A.3 examines the argument that, because § 2401(b) is nonwaivable, it cannot be an affirmative defense but instead must be a jurisdictional prerequisite.

169. *Id.* at 274.
170. *Id.* at 275.
171. *Id.*
172. *Id.* at 278.

1. *Irwin* Does Not Change the View that § 2401(b) Is Jurisdictional

While the Supreme Court in *Irwin* did not explicitly state that limitations periods in statutes that waive sovereign immunity are jurisdictional, the Court did not indicate that limitations periods are not jurisdictional.[173] The Court held only that equitable tolling can apply to actions against the United States in the same way it can apply to actions against private individuals.[174] Thus, *Irwin* does not "alter the jurisdictional stature of the time limitations applicable to the FTCA and other waivers of sovereign immunity."[175]

Richard Parker and Ugo Colella contend that *Irwin* "contemplates that limitations periods can be both jurisdictional and susceptible to equitable tolling."[176] They maintain that "[l]imitations periods that condition the United States's consent to suit are necessarily jurisdictional."[177] They argue further that, under *Irwin*, such limitations periods "may be equitably tolled if lengthening the time period is consistent with the congressional intent behind the statute."[178] Thus, the effect of *Irwin* is to allow courts to "consider equitable tolling of time limitations in the context of suits brought against the federal government while maintaining the jurisdictional quality of the time limitations."[179] The First Circuit has held that courts cannot "determine whether a particular limitations period [can] be tolled by determining whether the time limit was jurisdictional or not."[180] In other words, equitable tolling is a separate inquiry from the inquiry as to whether time limitations are a jurisdictional prerequisite or whether the time

173. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990); Willis v. United States, 879 F. Supp. 889, 891 (C.D. Ill. 1994). In fact, Richard Parker and Ugo Colella contend that the Supreme Court's decisions in *United States v. Brockamp* and *United States v. Beggerly* "reaffirm the view that limitations periods that condition the United States's waiver of immunity are jurisdictional prerequisites to suit." Parker & Colella, *supra* note 115, at 889.

174. *Willis*, 879 F. Supp. at 891.

175. *Id.*; *see* Johnson v. United States, 906 F. Supp. 1100, 1109 (S.D. W. Va. 1995). As Ugo Colella and Adam Bain have noted, "even if the FTCA's limitations periods may be equitably tolled, *Irwin* simply cannot be read as authority for the proposition that the Act's limitations periods are affirmative defenses rather than jurisdictional prerequisites to suit." Colella & Bain, *supra* note 14, at 2917. Courts that have held that § 2401(b) is not jurisdictional as a result of *Irwin* "have ostensibly said that . . . [§ 2401(b) is] not [a] condition[] of the Act's waiver of sovereign immunity." *Id.* Ugo Colella and Adam Bain have stated that this view is incorrect: "Because the Act's statute of limitations is a condition precedent to bringing suit in federal district court, waiver-of-sovereign-immunity principles compel the conclusion that the statute of limitations is jurisdictional." *Id.*

176. Parker & Colella, *supra* note 115, at 898.

177. *Id.*

178. *Id.* Richard Parker and Ugo Colella contend that "[a]s long as there is no contrary legislative intent, equitable tolling does not expand Congress's waiver of immunity beyond legislatively acceptable limits." *Id.* They then cite *Irwin* for the proposition that "[o]nce Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.* at 893.

179. *Willis*, 879 F. Supp. at 892.

180. Oropallo v. United States, 994 F.2d 25, 29 n.4 (1st Cir. 1993).

limitations are an affirmative defense.[181] Whether the statute of limitations should be equitably tolled is an inquiry into whether plaintiffs "could not have discovered information essential to [their] suit[s]" despite plaintiffs' "exercise of reasonable diligence."[182]

Parker and Colella provide a three-part analysis for determining whether limitations periods in statutes that waive sovereign immunity are subject to equitable tolling:[183] (1) whether the statute provides for tolling; (2) whether equitable tolling is consistent with the text and purposes of the statute, particularly with the limitations provision; and (3) whether either the legislative history of the "statute or its limitations provisions evince a congressional intent to permit equitable tolling."[184] Although these inquiries are not mutually exclusive, any one of the considerations standing alone is capable of supporting a determination that equitable tolling is inappropriate.[185]

Parker and Colella contend that applying the three-part analysis to § 2401(b) reveals that the two-year limitations period for filing claims should not be equitably tolled.[186] First, they argue that "the FTCA already contains a tolling provision" by having the statute of limitations begin to run only when "plaintiff[s] [know] or should have known of [their] injur[ies] and the cause[s] of [those] injur[ies]."[187] Second, they maintain that equitable tolling runs contrary to the purpose of the limitations period in the FTCA, which is "the prompt presentation and resolution of tort claims against the United States."[188] Third, they contend that the legislative history indicates that Congress intended that the statute of limitations in the FTCA not be subject to equitable tolling.[189] As Colella and Adam Bain

181. *See id.*

182. Gonzalez v. United States, 284 F.3d 281, 291 (1st Cir. 2002). In *Kokotis v. United States Postal Service*, the Fourth Circuit stated that "the doctrine of equitable tolling is based on the view that a defendant should not be encouraged to engage in 'misconduct that prevents the plaintiff from filing his or her claim on time.'" 223 F.3d 275, 281 (4th Cir. 2000) (quoting English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987)). Thus, "equitable tolling is appropriate only 'where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.'" *Id.* at 280-81 (quoting *English*, 828 F.2d at 1049).

183. Richard Parker and Ugo Colella have noted that "when answering the equitable-tolling question, courts should determine whether equitable tolling is consistent with the statute under review, and not read *Irwin* for the blanket proposition that equitable tolling is *always* proper in cases involving the United States as defendant." Parker & Colella, *supra* note 115, at 904.

184. *Id.* at 901-02.

185. *See id.* at 902.

186. *Id.* at 905.

187. *Id.*

188. *Id.* at 906 ("Equitable tolling extends the two-year time period in a manner that is inconsistent with this congressional goal. Even though courts are ostensibly permitted to extend the two-year time period through application of the 'should have known' prong of the limitations inquiry, equitable tolling would extend the time even further.").

189. *See id.* at 907-11; H.R. Rep. No. 81-276, at 2 (1949) ("The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances.").

have noted, "prior to enacting the FTCA in 1946, Congress considered legislative proposals that contained equitable tolling provisions, but that when Congress finally enacted the FTCA, it declined to include those provisions."[190]

2. Section 2401(b) Confers Subject Matter Jurisdiction on Federal District Courts

This section explores the argument that § 2401(b) is jurisdictional because § 2401(b) is a grant of subject matter jurisdiction. Part I.A.2.a explains that because waiving sovereign immunity confers jurisdiction, any provision regarding the waiver, such § 2401(b), is a jurisdictional prerequisite. Part I.A.2.b discusses the view that Article III of the United States Constitution impels the conclusion that § 2401(b) is a jurisdictional prerequisite.

a. *The United States's Waiver of Sovereign Immunity Creates Jurisdiction*

Because sovereign immunity prevents individuals from bringing suit against the government, any waiver of sovereign immunity grants courts jurisdiction to hear claims brought against the government.[191] Thus, only if plaintiffs satisfy the requirements of § 2401(b) do federal district courts have jurisdiction to hear tort claims against the federal government.[192] Courts have held that because "[s]overeign immunity is a jurisdictional bar to suits against the federal government," a condition on any waiver of sovereign immunity is necessarily jurisdictional.[193] The administrative filing requirement pursuant to § 2401(b) is a condition on the United States's waiver of sovereign immunity.[194] Satisfying this condition is a jurisdictional prerequisite to bringing any tort action against the United States in federal district court.[195] In *Skwira*, the First Circuit held unequivocally that § 2401(b) was a jurisdictional prerequisite to commencing an action under the FTCA.[196] The court reasoned that the

190. Colella & Bain, *supra* note 74, at 175.

191. *See* Parker, *supra* note 7, at 1.

192. *See* 28 U.S.C. § 2401(b) (2000); Parker, *supra* note 7, at 1-2. The "failure to comply with the FTCA's statute of limitations means that the district court lacks subject matter jurisdiction to entertain the suit and must dismiss it." Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003) (citing Coska v. United States, 114 F.3d 319, 323 n.8 (1st Cir. 1997)).

193. Heinrich v. Sweet, 44 F. Supp. 2d 408, 414 (D. Mass. 1999); *see* Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); Parker & Colella, *supra* note 115, at 889 ("[L]imitations periods that condition the United States's waiver of immunity are jurisdictional prerequisites to suit.").

194. *See* United States v. Kubrick, 444 U.S. 111, 117-18 (1979).

195. *See* Parker, *supra* note 7, at 1.

196. *Skwira*, 344 F.3d at 71.

statute of limitations is one of the express constraints on the United States's waiver of sovereign immunity.[197]

The Third and Eighth Circuits, by implicitly equating the two-year filing requirement in § 2401(b) with statutes of limitations applicable in cases where the defendant is not the federal government, reason that the limitations period in § 2401(b) is an affirmative defense.[198] Yet, these circuits do not acknowledge that § 2401(b) employs language that other statutes of limitations do not, specifically that a claim is "forever barred" unless it is filed with the appropriate federal agency within two years within which a claim occurs.[199] The "forever barred" language "was intended to preserve the effect of sovereign immunity itself, which barred the action entirely."[200] By use of such language, Congress did not intend to authorize private individuals to commence tort actions against the federal government beyond the two-year limitation period even if the government fails to raise the statute of limitations as a defense.[201] Interpreting this language any other way "would effectively allow sovereign immunity to be waived by [the government, as a party, which it is] . . . not empowered to do."[202]

b. *Article III of the Constitution Compels the Conclusion that § 2401(b) Is a Jurisdictional Prerequisite*

Article III, Section 2, of the United States Constitution provides that the federal courts are courts of limited jurisdiction.[203] Congress implements Article III by statutorily granting the federal courts their jurisdiction, and Congress may expand that jurisdiction through further enabling legislation, within the confines of Article III's limitations.[204] Through passage of the

197. *See id.* at 73; *see also* United States v. Mottaz, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." (citing United States v. Sherwood, 312 U.S. 584, 586 (1941))).

198. *See, e.g.*, Hughes v. United States, 263 F.3d 272, 274-75, 278 (3d Cir. 2001); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991).

199. *Compare* 28 U.S.C. § 2401(b) (2000) *with* N.Y. C.P.L.R. 214 (McKinney 2003).

200. Maryland v. Sharafeldin, 854 A.2d 1208, 1214 (Md. 2004).

201. *See Skwira*, 344 F.3d at 73 (noting that any waivers of sovereign immunity authorized by Congress must be strictly construed).

202. *Sharafeldin*, 854 A.2d at 1214.

203. U.S. Const. art. III, § 2; *see* Colella & Bain, *supra* note 14, at 2862. Limited jurisdiction is "[j]urisdiction that is confined to a particular type of case or that may be exercised only under statutory limits and prescriptions." Black's Law Dictionary, *supra* note 7, at 869 ("'It is a principle of first importance that the federal courts are courts of limited jurisdiction. . . . The federal courts . . . cannot be courts of general jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.'" (quoting Charles Alan Wright, The Law of Federal Courts 27 (5th ed. 1994))).

204. *See* U.S. Const. art. III, § 2; United States v. Kubrick, 444 U.S. 111, 125 (1979); Kanar v. United States, 118 F.3d 527, 529 (7th Cir. 1997) (stating that one meaning of "jurisdiction" is Congress's ability to define the adjudicatory power of the federal courts by statute). However, Congress has never given the courts as much jurisdiction as Article III

FTCA, Congress expanded the jurisdiction of the federal courts by granting the federal courts with exclusive jurisdiction over "claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[205] Initially, the FTCA allowed only tort claims that were brought within one year of accrual.[206] Three years later, Congress increased the federal courts' adjudicatory power to tort claims brought within two years of accrual.[207] Thus, § 2401(b) serves as a limit on Congress's expansion of the federal courts' jurisdiction. Consequently, any limitation or condition, such as the two-year filing period prescribed by § 2401(b), is a prerequisite that must be satisfied before a court can adjudicate a case.[208] For plaintiffs to assert in their complaints allegations showing that the court has jurisdiction,[209] plaintiffs must first satisfy the jurisdictional requirements of § 2401(b).[210]

3. Because § 2401(b) Is Nonwaivable, It Cannot Be an Affirmative Defense

The FTCA gives federal district courts exclusive jurisdiction to adjudicate tort claims brought against the federal government.[211] While § 2401(b) does not itself confer subject matter jurisdiction,[212] § 2401(b) is a critical element that plaintiffs must satisfy to give the federal courts subject matter jurisdiction.[213] Courts have consistently held that the requirements

---

allows. *See* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 320 (5th ed. 2003).

205. 28 U.S.C. § 1346(b) (2000).

206. *See* Federal Tort Claims Act, ch. 753, § 420, 60 Stat. 842, 845 (1946) (codified as amended at 28 U.S.C. § 2401(b)).

207. Federal Tort Claims Act, Pub. L. No. 81-55, 63 Stat. 62 (1949) (codified as amended at 28 U.S.C. § 2401(b)) .

208. *See* Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003) ("[F]ailure to comply with the FTCA's statute of limitations means that the district court lacks subject matter jurisdiction to entertain the suit and must dismiss it.").

209. *See* Fed. R. Civ. P. 8(a).

210. *See Skwira*, 344 F.3d at 71; Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995) ("'[T]he party invoking the jurisdiction of a federal court carries the burden of proving its existence.'" (quoting Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57, 60 (1st Cir. 1993))).

211. *See supra* Part II.A.2.b.

212. *See* 28 U.S.C. §§ 1346, 2401(b). Section 1346(b) of the FTCA establishes subject matter jurisdiction:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . .

Id. § 1346. Section 2401(b) establishes the limits of this subject matter jurisdiction: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." *Id.* § 2401(b).

213. *See Skwira*, 344 F.3d at 71; *supra* Part II.A.2.a.

of § 2401(b) cannot be waived.[214] It is well settled that neither a party to a dispute nor the presiding judge can ever waive subject matter jurisdiction at any point during the proceeding, no matter how far along the case has progressed.[215] Because it is beyond dispute that subject matter jurisdiction can never be waived, and yet, in contrast, affirmative defenses can be waived,[216] § 2401(b) must be jurisdictional.[217]

B. *Section 2401(b) Is an Affirmative Defense*

This section presents the reasons in favor of the view that § 2401(b) is an affirmative defense. Part II.B.1 explores the position that *Irwin* compels the conclusion that § 2401(b) is an affirmative defense. Part II.B.2 explains that § 2401(b) is an affirmative defense because statutes of limitations have traditionally been considered affirmative defenses.

1. *Irwin* Requires Courts View § 2401(b) as an Affirmative Defense

Relying heavily on the Supreme Court's ruling in *Irwin*, the Third and Eighth Circuits maintain that § 2401(b) is an affirmative defense and not a jurisdictional prerequisite, because equitable tolling of § 2401(b) is not compatible with viewing § 2401(b) as jurisdictional.[218] In *Schmidt v. United States*, the Eighth Circuit held, on remand, that implicit in the Supreme Court's holding in *Irwin* that "statutes of limitations in suits against the government are subject to equitable tolling,"[219] is that such statutes of limitations are not jurisdictional prerequisites to commencing actions against the United States.[220] The Eighth Circuit held in *Schmidt* that § 2401(b) was a jurisdictional prerequisite and "that the district court . . . properly required the Schmidts to establish subject matter jurisdiction, and that their failure to do so required a dismissal under Fed. R. Civ. P. 12(b)(1)."[221] After granting petitioners writ of certiorari, the Supreme Court vacated and remanded *Schmidt* to the Eighth Circuit for consideration in light of *Irwin*.[222] On remand, in an effort to follow the Supreme Court's instruction, the Eighth Circuit reversed its earlier decision as to the jurisdictional nature of § 2401(b).[223] Furthermore, in *Motley v. United States*, the Eighth Circuit held that *Schmidt* effectively overruled

214. *See, e.g.*, Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Kokotis v. U.S. Postal Serv., 223 F.3d 275, 278 (4th Cir. 2000); Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992); Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986).

215. *See* Clinton v. New York, 524 U.S. 417, 428 (1998).

216. *See* Fed. R. Civ. P. 12(h).

217. *See* Heinrich v. Sweet, 44 F. Supp. 2d 408, 412 (D. Mass. 1999).

218. *See* Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002); Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991).

219. *Schmidt*, 933 F.2d at 640.

220. *Id.*

221. *Id.*

222. *See* Schmidt v. United States, 498 U.S. 1077 (1991).

223. *See Schmidt*, 933 F.2d at 640.

previous Eighth Circuit decisions that had concluded that § 2401(b) was a jurisdictional prerequisite.[224] Moreover, in discussing § 2401(b) in *United States v. Kubrick*, the Supreme Court stated that "[w]e should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.'"[225] Thus, the Court arguably indicated its recognition that § 2401(b) was an affirmative defense.

2. Statutes of Limitations Have Traditionally Been Considered Affirmative Defenses

Statutes of limitations have traditionally been considered affirmative defenses.[226] Every type of action contains a statute of limitations within which plaintiffs must bring their claims.[227] It is well settled that defendants must assert the defenses of statutes of limitations either in their answers[228] or in motions to dismiss.[229]

In general, state statutes provide that plaintiffs' claims can be dismissed as time barred only if defendants raise a statute of limitations defense in their pleadings.[230] For example, in both Ohio and Pennsylvania, the statute of limitations is listed as an affirmative defense in the Rules of Civil Procedure that is waived if defendants fail to assert it.[231]

In litigation under the FTCA, parties must comply with the FRCP. Pursuant to Rule 8(c), the statute of limitations is an affirmative defense.[232] Defendants must affirmatively plead the defense that the claim is time barred in their answers or in a motion to dismiss, and if defendants fail to do so they waive this defense.[233] The Third and Eighth Circuits

---

224. Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002).

225. United States v. Kubrick, 444 U.S. 111, 117 (1979) (quoting Guar. Trust Co. v. United States, 304 U.S. 126, 136 (1938)).

226. *See, e.g.*, Haskell v. Wash. Twp., 864 F.2d 1266, 1273 (6th Cir. 1988); Davis v. Bryan, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (quoting Santos v. Dist. Council, 619 F.2d 963, 967 n.5 (2d Cir. 1980) (citations omitted))).

227. *See* Glover v. Nat'l Bank of Commerce of N.Y., 141 N.Y.S. 409, 412 (N.Y. App. Div. 1913) ("It is the policy of the state, as defined in the Code of Civil Procedure, that there shall be a fixed limitation for every cause of action whether legal or equitable.").

228. *See* Serrano v. Torres, 764 F.2d 47, 49 (1st Cir. 1985).

229. *See* Callico v. Belleville, 99 F. App'x 746, 749 (7th Cir. 2004).

230. *See* Ariz. R. Civ. P. 8(c); Fla. R. Civ. P. 1.110(d); 735 Ill. Comp. Stat. Ann. 5/2-613(d) (West 2003) ("[A]ny defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint . . . and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply."); Minn. R. Civ. P. 8.03; Ohio R. Civ. P. 8(c); 42 Pa. Cons. Stat. Ann. § 1030(a) (West 2002).

231. Ohio R. Civ. P. 8(c); 42 Pa. Cons. Stat. Ann. § 1030(a); *see also* Ariz. R. Civ. P. 8(c); Fla. R. Civ. P. 1.110(d); 735 Ill. Comp. Stat. Ann. 5/2-613(d); Minn. R. Civ. P. 8.03.

232. Fed. R. Civ. P. 8(c).

233. *See* Edwards v. Armstrong, No. 93-5665, 1995 WL 390279, at *7 (6th Cir. June 30, 1995); Haskell v. Wash. Twp., 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since it is a waivable

consistently hold that, under § 2401(b), the government bears the burden of asserting, "as an affirmative defense, that plaintiffs failed to comply with the limitations period."[234]

III. NOTWITHSTANDING *IRWIN*, § 2401(B) SHOULD BE VIEWED AS AN AFFIRMATIVE DEFENSE

Prior to 1990, courts never analyzed in depth whether § 2401(b) was a jurisdictional prerequisite or an affirmative defense. Instead, courts, marching in lock step, relied on the mantra that § 2401(b) was necessarily jurisdictional because the United States's waiver of sovereign immunity was conditioned on § 2401(b). This part maintains that the pre-*Irwin* approach to § 2401(b) is untenable—§ 2401(b) should be considered an affirmative defense. Part III.A asserts that the Supreme Court's holding in *Irwin* does not require that courts treat § 2401(b) as an affirmative defense. Notwithstanding the Court's holding in *Irwin*, Part III.B argues that courts should view § 2401(b) as an affirmative defense and not a jurisdictional prerequisite.

A. Irwin *Does Not Require Courts to View § 2401(b) as an Affirmative Defense*

The Supreme Court in *Irwin* held that there was a rebuttable presumption of equitable tolling[235] in suits brought against the federal government.[236] Misinterpreting *Irwin*, the Third and Eighth Circuits have held that § 2401(b) is not a jurisdictional prerequisite, because if it were, courts would be unable to employ the doctrine of equitable tolling.[237] First, contrary to the rationale stated by the Third and Eighth Circuits, the Supreme Court in *Irwin* did not hold that § 2401(b) was subject to equitable tolling. The Court held only that equitable tolling could apply to actions against the United States just as equitable tolling could apply to actions against private individuals.[238] Furthermore, *Irwin* did not state that equitable tolling could or should be read into every statute of limitation in a waiver of sovereign immunity statute. Also, even if *Irwin* explicitly held that § 2401(b) was subject to equitable tolling, § 2401(b) would still not necessarily be deemed an affirmative defense.[239] As Parker and Colella

---

defense, it ordinarily is error for a district court to raise the issue *sua sponte*." (citing Davis v. Bryan, 810 F.2d 42, 44 (2d Cir. 1987))).

234. Motley v. United States, 144 F. Supp. 2d 1128, 1131 (E.D. Mo. 2001) (citing Krueger v. Saiki, 19 F.3d 1285, 1286 (8th Cir. 1994)).

235. Whether or not § 2401(b) is subject to equitable tolling after *Irwin* is beyond the scope of this Note. For an interesting discussion of this issue, see Colella & Bain, *supra* note 74.

236. *See supra* text accompanying note 8.

237. *See supra* note 10 and accompanying text.

238. *See supra* note 174 and accompanying text.

239. *See, e.g.*, Willis v. United States, 879 F. Supp. 889, 891-92 (C.D. Ill. 1994) ("The Court does not agree that the effect of *Irwin* is to alter the jurisdictional statute of the time limitations applicable to the FTCA . . . the Supreme Court would have made explicit in *Irwin*

contend, *Irwin* contemplates statutes of limitations that are "both jurisdictional and susceptible to equitable tolling."[240]

The Third and Eighth Circuits have incorrectly held that, as a result of *Irwin*, § 2401(b) cannot be treated as a jurisdictional prerequisite because equitable tolling cannot apply to jurisdictional prerequisites.[241] According to Parker and Colella, whether a limitations period is subject to equitable tolling is a separate inquiry from whether the limitations period is a jurisdictional prerequisite or an affirmative defense.[242] Therefore, while *Irwin* made it possible for § 2401(b) to be equitably tolled, this does not mean that § 2401(b) is necessarily an affirmative defense.

B. *Section 2401(b) Is Best Understood as an Affirmative Defense*

Prior to 1990, courts failed to give any weight to the proposition that § 2401(b) was a jurisdictional prerequisite to filing suit under the FTCA. The Third and Eighth Circuits, in interpreting *Irwin*, have not held that previous notions of § 2401(b) were incorrect; rather, these circuits in *Schmidt* and its progeny have held that *Irwin* required a change in the legal landscape. This section argues that while *Irwin* does not justify viewing § 2401(b) as an affirmative defense, both the text of the FTCA and the traditional understanding of statutes of limitations mandate that § 2401(b) be viewed as an affirmative defense. This section also contends that viewing § 2401(b) as a jurisdictional prerequisite is not justified by either the doctrine of sovereign immunity or public policy.

1. Textual Analysis

A strict textual reading of the FTCA supports the proposition that § 2401(b) is an affirmative defense. Section 1346 of the FTCA expressly waives the United States's immunity from suits in tort, thereby permitting individuals to bring suit against the United States for injuries caused by the tortious acts or omissions of governmental employees.[243] Nowhere in this waiver provision is there mention of the two-year period within which plaintiffs must file their claims with appropriate federal agencies.[244] In fact, the FTCA addresses the two-year filing period more than 150 pages

---

any intent to alter the jurisdictional nature of the time limitations contained in the FTCA and other waivers of sovereign immunity.").

240. Parker & Colella, *supra* note 115, at 898, 903; *see supra* notes 176-79 and accompanying text.

241. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990). It is nevertheless understandable that courts following *Schmidt* view § 2401(b) as an affirmative defense because in *Schmidt* the Supreme Court instructed the Eighth Circuit to reconsider the case on remand in light of *Irwin*. *See* Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991).

242. *See* Parker & Colella, *supra* note 115, at 902-11 (addressing the question of whether § 2401(b) is a jurisdictional prerequisite or an affirmative defense as separate from the question of whether § 2401(b) ought to be subject to equitable tolling).

243. *See* 28 U.S.C. § 1346(b) (2000).

244. *See id.*

into the statute.[245] Thus, contrary to the understanding of many courts that the United States's consent to suit is conditioned on § 2401(b),[246] that section is best understood as applying after the waiver.

If the United States's waiver were conditioned on § 2401(b), § 1346 would contain language indicating that the waiver applies only if plaintiffs file their claims with the appropriate federal agencies within two years from when their claims accrue. Florida state law, for example, in its provision waiving sovereign immunity in tort actions, explicitly states that "the requirements of notice to the agency and denial of the claim . . . are conditions precedent to maintaining an action."[247] Even in the presence of such language, Florida courts have not concluded that the filing requirement is a jurisdictional prerequisite to filing suit against Florida.[248]

2. Traditional View of Statutes of Limitations

Statutes of limitations have traditionally been considered affirmative defenses and the FTCA provides no indication that § 2401(b) should be considered differently from other statutes of limitations.[249] In explaining Rule 8(c) of the FRCP and the meaning of what an affirmative defense is, law professors often use statutes of limitations as the classic example of an affirmative defense.[250] The drafters of the FTCA knew that statutes of limitations are traditionally affirmative defenses. Had the drafters wanted § 2401(b) to be viewed as something other than an affirmative defense, they could have stated so unambiguously. Just because the defendant in FTCA actions is the United States government does not alter the longstanding tradition of classifying statutes of limitations as affirmative defenses. Even if the FTCA had stated that the United States's waiver of sovereign immunity was conditioned on § 2401(b), courts could permissibly view § 2401(b) as an affirmative defense as demonstrated above.[251]

---

245. *See id.* § 2401(b).

246. *See supra* Part II.A.2.a. In *United States v. Kubrick*, the Supreme Court held that "the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." United States v. Kubrick, 444 U.S. 111, 117-18 (1979).

247. Fla. Stat. Ann. § 768.28(6)(b) (West 2005).

248. *See, e.g.*, *In re* Forfeiture of 1978 Green Datsun Pickup Truck, 475 So. 2d 1007, 1009 (Fla. Dist. Ct. App. 1985) ("While a claimant must allege compliance with section 768.28(6) in order to state a cause of action, the failure to do so does not affect subject matter jurisdiction.").

249. *See supra* Part II.B.2.

250. *See, e.g.*, John C.P. Goldberg et al., Tort Law: Responsibilities and Redress 412 (2004) ("Although statutes of limitations do not always make for interesting law school discussions, they are of the utmost practical importance.").

251. *See supra* notes 247-48 and accompanying text.

3. Sovereign Immunity Is an Anachronistic Relic of the English Feudal System

Even though the doctrine of sovereign immunity has a long history in American jurisprudence,[252] the doctrine does not justify treating § 2401(b) as a jurisdictional prerequisite.[253] Professor Chemerinsky contends that sovereign immunity never should have had a place in the American political system.[254] He believes that sovereign immunity "is an anachronistic relic" which is inconsistent with both the United States's conception of government and the United States Constitution.[255] Sovereign immunity is premised on the English maxim that "'the King can do no wrong.'"[256] The federal government, however, is based on a "recognition that the government and government officials can do wrong and must be held accountable."[257] Moreover, the doctrine of sovereign immunity undermines Article VI of the Constitution[258] because the doctrine bars "suits for relief against government entities."[259]

The Supreme Court, in attempting to buttress the doctrine of sovereign immunity, has repeatedly held that courts are not in the position to interfere with public administration.[260] Professor Davis criticizes the Court's position because "courts[,] including the Supreme Court[,] are constantly interfering with the public administration and constantly stopping the government in its tracks."[261] Since sovereign immunity has little place in American jurisprudence today, sovereign immunity cannot present a good reason for concluding that § 2401(b) is a jurisdictional prerequisite.

4. Public Policy

Concluding that § 2401(b) is an affirmative defense does not mean that the government, as the defendant in FTCA actions, is necessarily in a better position than plaintiffs to prove plaintiffs' noncompliance with § 2401(b). The facts at issue in *Skwira*[262] provide a good illustration of why plaintiffs are arguably in a better position than the United States in showing that they were diligent in filing their claims with administrative agencies.

In *Skwira*, the First Circuit, in affirming the district court's decision, held that the Skwira family's cause of action accrued on "November 26, 1996—

252. *See supra* Part I.A.2.

253. U.S. courts have repeatedly applied the doctrine of sovereign immunity without any justification. *See* Chemerinsky, *supra* note 41, at 1201.

254. *See id.* at 1201-02.

255. *Id.*

256. *Id.* at 1202.

257. *Id.*

258. Article VI provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

259. Chemerinsky, *supra* note 41, at 1202.

260. Davis, *supra* note 29, at 401.

261. *Id.*; *see supra* note 56 and accompanying text.

262. *See supra* notes 146-57.

the day after the autopsy—when the family first learned that Skwira did not die of a heart attack, as the death certificate and the VAMC had maintained."[263] The court reasoned that by that date a reasonable person would have formed a sufficient basis "to believe that there was a causal connection between the injury (Skwira's death) and the acts or omissions of a government employee."[264]

No matter which side bears the burden, plaintiffs must be diligent in pursuing their claims in order to bring suit against the United States under the FTCA. Thus, it is more equitable to ask the plaintiffs to show that they were diligent in filing their claims rather than to give the government the difficult burden of proving that the plaintiffs were not sufficiently diligent. Also, plaintiffs have different levels of sophistication and the facts giving rise to a claim are unique in each case. Therefore, it makes more sense to require the plaintiffs to show that they were diligent given the nature of the case, and the plaintiffs' background and linguistic ability, rather than require the government, by applying an across-the-board, one-size-fits-all standard, to show that the plaintiffs failed to exercise diligence.

In *Skwira*, if the plaintiff had the burden of proving diligence, then the plaintiff could show how, as the spouse of an alcoholic, it would be foreseeable that the decedent was vulnerable to a whole host of health risks, only one of which was myocardial infarction.[265] The plaintiff would not necessarily conclude that the decedent's death gave rise to a claim merely by learning that the death certificate was inaccurate. Furthermore, the Assistant U.S. Attorney's statement to the plaintiff that, although the death certificate was incorrect, it did not necessarily follow that the decedent died from unnatural causes, would make the plaintiff even less likely to suspect that the decedent's death resulted from unlawful activity at the VAMC. Instead, if the government in *Skwira* had the burden of proving the plaintiff's lack of diligence, then the government could point to the incorrect death certificate as enough to make the plaintiff suspicious of unlawful activity at the VAMC, without taking into consideration the decedent's overall health condition.

The same analysis would apply to the *Skwira* facts if the defendant had been a private hospital rather than a government-owned hospital—in both situations, the plaintiff is arguably in a better position to prove compliance with a statute of limitation. If plaintiffs are better situated to prove compliance with § 2401(b), then they are always better situated to prove compliance with applicable statutes of limitations. Nevertheless, statutes of limitations have traditionally been viewed as affirmative defenses that

263. *See* Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003).

264. *Id.* at 80. By November 1996, the Skwira family had been informed by investigators of suspicions "about the high number of deaths at the [Veterans Affairs Medical Center]," and "the autopsy demonstrated conclusively that the cause of death listed on Skwira's death certificate was incorrect." *Id.*

265. *See id.* at 67.

defendants bear the burden of proving.[266] Neither the text nor the legislative history of the FTCA indicates any intent for § 2401(b) to be construed differently from how other statutes of limitations are construed.[267]

Accordingly, determining that § 2401(b) is an affirmative defense is not dispositive as to which party, plaintiff or defendant, is in the better position to prove compliance or noncompliance with § 2401(b). It is possible that once the government raises § 2401(b) as a defense, the burden will shift to the plaintiff, who must at that point demonstrate compliance with § 2401(b).[268] Thus, the Supreme Court should create a uniform rule to allocate the burden of persuasion in FTCA cases where compliance with § 2401(b) is in dispute.

As this section demonstrates, § 2401(b) should have been deemed an affirmative defense ab initio. Although *Irwin* does not expressly require that courts consider § 2401(b) to be an affirmative defense, the text of the FTCA, coupled with traditional treatment of statutes of limitations, do require that courts view § 2401(b) as an affirmative defense.

CONCLUSION

While the Supreme Court's ruling in *Irwin* did not necessitate a change in the way that courts had previously approached § 2401(b), the ruling led the Third and Eighth Circuits to properly view § 2401(b) as an affirmative defense in tort suits brought under the FTCA. Statutes of limitations have traditionally been viewed as an affirmative defense.[269] As this Note demonstrates, that legal tradition and the text of the FTCA mandate viewing § 2401(b) as an affirmative defense. Furthermore, neither the provisions of the FTCA nor its legislative history indicates any intent for § 2401(b) to be construed differently from other statutes of limitations.

266. *See supra* Part II.B.2.

267. *See supra* Part III.B.1.

268. For an interesting discussion on this issue of burden shifting, see generally Colella & Bain, *supra* note 14.

269. *See supra* Part II.B.2.