

Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective

Ugo Colella *

Adam Bain **

INTRODUCTION

Over one year ago, we suggested in the pages of this review that the United States Supreme Court's decisions in *United States v. Brockamp*¹ and *United States v. Beggerly*² cast doubt on the view among federal courts that the limitations periods of the Federal Tort Claims Act (FTCA) could be equitably tolled.³ Equitable tolling extends a limitations period if a filing deadline passes due to a defendant's misconduct or a diligent plaintiff's failure to file a proper pleading in the correct forum.⁴ Since the Supreme Court decided *Brockamp* and *Beggerly*, courts have clung to the view that equitable tolling is proper in FTCA cases. In doing so, some courts have ignored *Brockamp* and *Beggerly* altogether.⁵ Other courts have

* Associate, Patton Boggs LLP (Washington, D.C.). B.A., Stanford University; J.D., Tulane Law School.

** Trial Attorney, United States Department of Justice, Civil Division, Torts Branch, Environmental Torts Section. B.A., Purdue University; J.D., Indiana University School of Law.

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¹ 519 U.S. 347 (1997).

² 524 U.S. 38 (1998).

³ See 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 (1999); 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 (1992) (arguing that history and purpose of FTCA's statute of limitations precludes equitable tolling).

⁴ See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

⁵ See *Barr v. United States*, No. 98-7164 1999, WL 314634, at *1 (10th Cir. May 19, 1999) (table); *Wartell v. United States*, No. 96-16547, 1997 WL 59980, at *3 (9th Cir. Sept.

distinguished the FTCA from the statutes at issue in those two cases,⁶ have found unpersuasive certain portions of the legislative history,⁷ or have found other reasons to permit equitable tolling.⁸

In light of these recent developments, the *Seton Hall Law Review* has been gracious enough to allow us to explain in greater depth whether the FTCA's legislative history sheds any light on the question of whether the limitations periods in the Act may be equitably tolled, a point that perhaps deserved further elaboration the first time around. Unfortunately, in our 1999 paper we relegated much of the legislative history to a footnote.⁹ We simply pointed out that, 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.¹⁰ To us, this pre-enactment history meant that the 1946 Congress did not intend equitable tolling to apply, especially because the Supreme Court endorsed this method of construing the intent behind the FTCA.¹¹ We also examined the legislative history accompanying the 1949 and 1966 changes to the Act's statute of limitations and argued that this history, combined with the pre-enactment history, indicated a congressional intent to preclude equitable tolling.¹²

19, 1997) (table); *Hudson v. United States Postal Serv.*, Nos. C 99-5117 WHA, C 00-0093 WHA, 2000 WL 23678, at *3 (N.D. Cal. Feb. 29, 2000); *St. John v. United States*, 54 F. Supp. 2d 1322, 1326-27 (S.D. Fla. 1999); *Yillah v. United States*, No. Civ.A. 98-2842, 1998 WL 661545, at *3 (E.D. Pa. Sept. 24, 1998); *Berlin v. United States*, 9 F. Supp. 2d 648, 653 (S.D. W.Va. 1997); *Magdalenski v. United States*, 977 F. Supp. 66, 71 (D. Mass. 1997); *Midland Psychiatric Assocs., Inc. v. United States*, 969 F. Supp. 543, 553 (W.D. Mo. 1997); *Hyatt v. United States*, 968 F. Supp. 96, 100-01 (E.D.N.Y. 1997).

⁶ See *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (holding that two-year period may be equitably tolled because FTCA not as complex as statute in *Brockamp*); *Forman v. United States*, No. Civ. A. 98-6784, 1999 WL 793429, at *9 (E.D. Pa. Oct. 6, 1999) (holding that six-month limitations period may be equitably tolled because, among other reasons, the *Brockamp* Court "said that the more complex the limitations period, the less likely equitable tolling is permissible").

⁷ See *Stanfill v. United States*, 43 F. Supp. 2d 1304, 1308 (M.D. Ala. 1999) (holding that six-month period may be equitably tolled because legislative history provided "scant" evidence of an intent to preclude equitable tolling); *Forman*, 1999 WL 793429, at *8 & n.11 (stating that neither *Beggerly* nor *Brockamp* considered legislative history in reaching their conclusions); see also *Perez*, 167 F.3d at 916 (holding that two-year period may be equitably tolled because legislative-history evidence to the contrary was, among other things, "equivocal").

⁸ See *Forman*, 1999 WL 793429, at *8-*10 (holding that six-month limitations period may be equitably tolled because there is no built-in tolling, the period is "short," the "nature of tort law suggests that equitable considerations are proper under the FTCA," and applying equitable tolling would not present administrative problems).

⁹ See *Parker & Colella*, *supra* note 3, at 907-08 n.111.

¹⁰ See *id.*

¹¹ See *id.* at 907 & n.109.

¹² See *id.* at 905-14.

Courts have not been swayed by the FTCA's legislative history, perhaps because they think it is irrelevant or perhaps because they think it is inconclusive.¹³ These results are not altogether surprising given certain normative and practical considerations that arise when legislative history is presented as a basis for construing a statute. From a normative perspective, resort to legislative history can be a touchy subject with Article III courts. Judges who have textualist leanings would much rather draw their conclusions about congressional intent from the plain terms of the statute under review. On the other hand, there are judges who have intentionalist leanings who do not become as queasy as textualists when presented with arguments based on legislative history—although intentionalists do insist that the legislative evidence rise to a threshold level of reliability.¹⁴ From a practical perspective, legislative history is not as accessible to courts and litigants as are other sources for decision, is often much harder to navigate, and requires courts and litigants to absorb and analyze a great deal of information.¹⁵ Add to this the fact that the FTCA's legislative history, as it pertains to whether equitable tolling was contemplated for the Act's statute of limitations, has never been fleshed out in any great detail.

In this Article, we defend the use of legislative history in construing the FTCA, not because it is "correct" in the normative sense, but because long-standing precedent and the unique history of the Act require courts to look to the Act's legislative history to ascertain congressional intent. In Part I, we restate the problem that we addressed in our 1999 paper, pointing out that the Supreme Court's recent decisions in *Beggerly* and *Brockamp* require courts to re-examine the question of whether equitable tolling is proper in FTCA cases. In Part II, we present the answers that a few courts have given to the *Beggerly-Brockamp* question. We pay particular attention to those courts' analyses of the FTCA's legislative history in reaching the conclusion that equitable tolling is proper in FTCA cases.

In Part III, we shift gears a bit and briefly visit the academic debate surrounding the use of legislative history in statutory construction. The

¹³ See *Perez v. United States*, 167 F.3d 913, 916 (5th Cir. 1999) (holding that evidence from legislative history is "equivocal"); *Stanfill v. United States*, 43 F. Supp. 2d 1304, 1308 (M.D. Ala. 1999) (holding that legislative history provided "scant" evidence to rebut the presumption favoring equitable tolling); *Forman v. United States*, No. Civ. A. 98-6784, 1999 WL 793429, at *8 & n.11 (E.D. Pa. Oct. 6, 1999) (holding that legislative history was irrelevant).

¹⁴ See *infra* Part III, for a more extended discussion of this issue.

¹⁵ Justice Scalia has said that resort to legislative history is "a waste of research time and ink" and "condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). As we shall see, however, Justice Scalia has not been so unforgiving when it comes to the equitable tolling question or when it comes to interpreting the intent behind the FTCA. See *infra* notes 75-79 and accompanying text.

academic commentary has opened up a number of schools of thought that purportedly shed light on the question of whether legislative history should be used in statutory construction. We conclude, however, that as a practical matter, there are only two approaches to the legislative history problem: Judges either rely upon legislative history (the intentionalists) or they do not (the textualists). We then examine the intentionalist and textualist methodologies at work in sovereign immunity cases, with a particular emphasis on equitable tolling and FTCA cases. We conclude that the Supreme Court has adopted an intentionalist approach to determine whether Congress intended equitable tolling to apply in cases against the federal government and that the Court has consistently looked to the FTCA's legislative history for evidence of congressional intent.

In Part IV, we present the legislative history accompanying the FTCA's statute of limitations and show that Congress, having crafted a precise and unambiguous limitations regime in the Act, has assumed the task of remedying any inequities produced by the Act's limitations periods. In Part V, we critically examine the few cases that have addressed, or more accurately, have failed to address, the FTCA's legislative history in determining whether the Act's limitations periods may be equitably tolled in circumstances not specifically covered by the language of the statute. We compare the reasoning in those cases to the legislative history accompanying the changes to the Act's statute of limitations and conclude that the few decisions that have attempted to apply the reasoning of *Beggerly* and *Brockamp* to the FTCA should not be followed. Rather, Congress's historical involvement in changing the Act's statute of limitations to account for inequitable circumstances, read in conjunction with other indicators of congressional intent detailed in our 1999 paper,¹⁶ suggests that the FTCA's limitations periods may not be equitably tolled. Finally, in Part VI, we comment on what the future may hold and offer some thoughts on the broader context within which the equitable tolling question must be answered.

¹⁶ See Parker & Colella, *supra* note 3, at 905-14 (arguing that built-in tolling of the two-year period and purposes underlying the two-year and six-month limitations period, in addition to legislative history, compel the conclusion that equitable tolling is impermissible in FTCA cases).

I. THE PROBLEM RESTATED

We start with the basics. The FTCA is a limited waiver of the United States' historical immunity from tort liability. It must be strictly construed.¹⁷ The Act's statute of limitations provides the following:

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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.¹⁸

Thus, the FTCA contains two time limitations with which claimants must comply. The first requires a claimant to file an administrative tort claim with the appropriate federal agency within two years from the time the claim accrues.¹⁹ The second requires a claimant to file suit in federal district court within six months after the agency denies, in writing, the administrative claim.²⁰ The Supreme Court and lower courts have held that the Act's limitations periods are conditions on Congress's waiver of the United States' immunity from tort suits, and they are designed to facilitate the prompt presentation of tort claims against the United States.²¹

The FTCA's statute of limitations, however, has been changed since 1946, the year the Act was passed. The original statute required a claimant to file suit in federal district court within one year after the claim accrued, and there was no mandatory requirement that a claimant submit a tort claim to a federal agency before filing suit.²² However, 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.²³ In 1949, the one-year limitations period was extended to two

¹⁷ See *United Servs. Auto. Ass'n v. United States*, 105 F.3d 185, 187 (4th Cir. 1997); *Hayes v. United States ex rel. United States Dep't of the Army*, 44 F.3d 377, 378 (5th Cir.), *cert. denied*, 516 U.S. 814 (1995); *Nelson v. United States*, 838 F.2d 1280, 1284 (D.C. Cir. 1988).

¹⁸ 28 U.S.C. § 2401(b) (1994).

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999); *Flory v. United States*, 138 F.3d 157, 160 (5th Cir. 1998); *Hart v. Dep't of Labor ex rel. United States*, 116 F.3d 1338, 1341 (10th Cir. 1997) (quoting *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir. 1991)); *Arigo v. United States*, 980 F.2d 1159, 1160 (8th Cir. 1992); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 742 (4th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1025 (1991); *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, 530 (7th Cir. 1983), *cert. denied*, 467 U.S. 1231 (1984).

²² See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified at 40 U.S.C. §§ 2, 33 & 40 (1986)).

²³ See *id.*

years, and the six-month limitations period applicable to agency denials and claimant withdrawals remained the same.²⁴ In 1966, the statute of limitations was changed again to correspond with the administrative-presentment requirement that Congress added to the Act.²⁵ Under the 1966 changes, an FTCA claimant had two years after a tort claim accrued to submit that claim to the appropriate federal agency for possible settlement.²⁶ The administrative-presentment requirement—which, until 1966, had not been mandatory—now became a permanent procedural requirement for bringing tort claims against the United States. To comport with this new requirement, Congress provided tort claimants an additional six months within which to file suit in federal court after the claim was denied by the agency.²⁷ In 1988, Congress created limited exceptions to the Act's statute of limitations in circumstances where the United States is substituted as the proper party-defendant in cases involving federal employees who were named as improper parties for common law tortious acts or omissions arising from the course and scope of their employment.²⁸

Prior to 1990, courts almost uniformly held that the Act's two-year and six-month limitations periods could not be equitably tolled.²⁹ That changed in 1990, with the Supreme Court's holding in *Irwin v. Department of Veterans Affairs*.³⁰ In *Irwin*, the Court held that there is a rebuttable presumption that limitations periods in waiver-of-sovereign-immunity statutes may be equitably tolled.³¹ *Irwin* involved Title VII of the Civil Rights Act of 1964, which imposed a thirty-day limitation period on cases brought against private parties and the United States. Finding no congressional indication to the contrary, the Court concluded that because equitable tolling is available in suits against private party defendants, it would be incongruous to conclude that equitable tolling would be unavailable in suits against the United States.³²

²⁴ See H.R. REP. NO. 81-276, at 3 (1949) [hereinafter H.R. REP. NO. 276]; S. REP. NO. 81-135, at 4 (1949) [hereinafter S. REP. NO. 135]; H.R. REP. NO. 80-1754, at 4 (1948) [hereinafter H.R. REP. NO. 1754].

²⁵ See, e.g., H.R. REP. NO. 89-1532, at 6-7 (1966) [hereinafter H.R. REP. NO. 1532]; S. REP. NO. 89-1327, at 2-3 (1966) [hereinafter S. REP. NO. 1327].

²⁶ See 28 U.S.C. § 2401(b) (1994).

²⁷ See *id.* In addition, the claimant could file suit at any time after allowing the agency six months to consider the claim, provided that the agency had not granted or denied the claim. See 28 U.S.C. § 2675(a) (1994).

²⁸ See 28 U.S.C. §§ 2679(d)(5)(A)-(B) (1994). In our 1999 paper, we did not include the equitable tolling provisions of § 2679 in our analysis.

²⁹ See Parker & Colella, *supra* note 3, at 887-88 & n.12 (cases cited therein).

³⁰ 498 U.S. 89 (1990).

³¹ See *id.* at 95-96.

³² See *id.* at 95. Indeed, *Irwin* should be read together with the Court's earlier decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-99 (1982), which examined the

As we pointed out in our earlier paper, despite *Irwin*'s clear rebuttable-presumption rule, lower courts reflexively (and incorrectly) relied on the case as authority for the proposition that equitable tolling is available against the United States, without engaging in an analysis of whether the presumption favoring tolling had been rebutted.³³ In many instances, courts citing *Irwin* reflexively found that equitable tolling was available against the United States in FTCA actions.³⁴ However, in *United States v. Brockamp*³⁵ and *United States v. Beggerly*³⁶ the Supreme Court rejected the notion that *Irwin* meant that equitable tolling is always available against the United States. In those cases, the Supreme Court made more explicit what should have been clear from *Irwin*, namely courts are required to look at congressional intent—as evinced in text, purpose, and legislative history—to determine whether the presumption in favor of equitable tolling has been rebutted.³⁷ In particular, the *Brockamp* Court articulated the *Irwin* test as follows: The rebuttable presumption may be overcome if there is “good reason to believe that Congress did not want the equitable tolling doctrine to apply” in a particular category of cases.³⁸ Accordingly, after *Brockamp* and *Beggerly*, courts are required to answer the following question: Is there good reason to believe that Congress did not intend equitable tolling to apply to FTCA cases?

II. THE CURRENT ANSWER TO THE *BEGGERLY-BROCKAMP* QUESTION

In the FTCA context, few courts have addressed the issue since *Beggerly* and *Brockamp*. Those that have engaged in the required analysis found that *Irwin*'s rebuttable presumption had not been overcome and have concluded that the Act's limitations periods can be equitably tolled.³⁹ Since *Beggerly* and *Brockamp*, however, some courts have not followed those decisions and have, instead, relied upon previous cases that cite *Irwin* as the basis for concluding that the Act's limitations periods may be equitably tolled.⁴⁰ The few cases that have specifically addressed *Beggerly* and *Brockamp* require closer examination.

statute of limitations provisions of Title VII (including the legislative history) and concluded that Congress intended equitable tolling to apply. *See id.* at 392-98.

³³ *See Parker & Colella, supra* note 3, at 887-88 (describing the pre-*Irwin* cases, which held that equitable tolling was unavailable under the FTCA, and the post-*Irwin* cases that held that equitable tolling was available).

³⁴ *See id.* at 888 n.13 (cases cited therein).

³⁵ 519 U.S. 347 (1997).

³⁶ 524 U.S. 38 (1998).

³⁷ *See Beggerly*, 524 U.S. at 48-49; *Brockamp*, 519 U.S. at 349-54.

³⁸ *Brockamp*, 519 U.S. at 350.

³⁹ *See supra* notes 6-8 (authorities cited therein).

⁴⁰ *See supra* note 5 (authorities cited therein).

In *Perez v. United States*,⁴¹ the Fifth Circuit held that the FTCA's two-year limitations period may be equitably tolled. The court rejected suggestions in the legislative history that the FTCA should not be equitably tolled, reasoning that the arguments were "equivocal at best."⁴² In reaching that conclusion, the *Perez* court concluded that "deductions from congressional inaction are notoriously unreliable."⁴³ The court also commented that "[p]erhaps these pieces of evidence are the best that can be collected from a legislative record that does not directly address the issue, but they are insufficient to overcome the presumption of *Irwin* that the government is subject to equitable tolling."⁴⁴ The district court's decision in *Stanfill v. United States*⁴⁵ proceeded along similar lines. There, the court concluded that the six-month limitations period is subject to equitable tolling.⁴⁶ Relying largely on *Perez*, the court held that the evidence from the FTCA's legislative history was "scant" and "insufficient to rebut the presumption that equitable tolling should apply to the six-month limitations period"⁴⁷ Finally, the district court in *Forman v. United States*⁴⁸ disregarded the legislative history altogether, concluding that neither *Beggerly* nor *Brockamp* considered legislative history in their equitable tolling determinations.⁴⁹

⁴¹ 167 F.3d 913 (5th Cir. 1999).

⁴² *Id.* at 916 (citing Parker & Colella, *supra* note 3).

⁴³ *Id.* at 916-17 (citing *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 803 n.3 (1985) (White, J., dissenting)).

⁴⁴ *Id.* at 917. In addition to rejecting the legislative history, the *Perez* court also anchored its conclusion to the alleged non-jurisdictional nature of the FTCA's limitations periods. According to the court, "whether the limitations provisions of the FTCA are jurisdictional in which case equitable tolling could not apply—remains an open question in this circuit." *Id.* at 915 (emphasis added). On this point, *Perez* is on shakier ground, for at least one court has already disagreed with *Perez*'s conclusion on the jurisdictional issue. See *Heinrich v. Sweet*, 44 F. Supp. 2d 408, 414 n.6 (D. Mass. 1999). Most importantly, however, *Perez* is flatly inconsistent with other, post-*Irwin* Fifth Circuit decisions, in which the court has held that the Act's limitation periods are jurisdictional. See *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998) ("It is well-settled that these limitation periods are jurisdictional." (emphasis added)); *Johnston v. United States*, 85 F.3d 217, 218 n.2 (5th Cir. 1996) ("FTCA time limitations are jurisdictional."); *MacMillan v. United States*, 46 F.3d 377, 380 n.3 (5th Cir. 1995) ("The failure to timely file an administrative claim under the Federal Tort Claims Act is a jurisdictional defect.").

⁴⁵ 43 F. Supp. 2d 1304 (M.D. Ala. 1999).

⁴⁶ See *id.* at 1308.

⁴⁷ *Id.* at 1308 (citing Parker & Colella, *supra* note 3).

⁴⁸ No. Civ. A. 98-6784, 1999 WL 793429 (E.D. Pa. Oct. 6, 1999).

⁴⁹ See *id.* at *8 n.11 (citing Parker & Colella, *supra* note 3, at 905-15).

III. WHY LEGISLATIVE HISTORY MATTERS: CRASHING THE COCKTAIL PARTY

The use of legislative history in statutory interpretation has fallen into disrepute in recent years. Its use has been described as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”⁵⁰ It may be amusing to think of legislative history as a “cocktail party,” and its interpretation as merely a search for one’s “friends.” The real question, however, if we may carry the metaphor, is whether to attend the cocktail party at all, and, if so, whether there is something to be learned from getting to know everyone there.

In our 1999 paper, we assumed that all indicators of congressional intent—statutory text *and* legislative history—were relevant to and probative of the question of whether the FTCA’s Imitations periods may be equitably tolled. Because we now wish to elaborate on the part of our earlier position that emphasized legislative history, we need to address a threshold issue: Why should legislative history be considered at all when courts answer the *Beggerly-Brockamp* question?

Of course, for trial attorneys the short answer is that the case law expressly endorses such an approach, a point we shall elaborate upon in a moment. But first, we must look at the theoretical underpinnings of the approach we advocate here and consult the legal commentary on the subject. There is plenty of it. Over the years, numerous commentators have written about the propriety of relying on legislative history as a guide to statutory interpretation.⁵¹ What emerges are many schools of thought:

⁵⁰ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (attributing this statement to Judge Harold Leventhal).

⁵¹ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (1997); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1996); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1247 (William N. Eskridge & Philip P. Frickey eds., 1994); Orrin Hatch, *Legislative History: Tool of Construction or Destruction?*, 11 HARV. J.L. & PUB. POL’Y 43 (1988); William S. Jordan III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369 (1999); Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History*

the textualists; the new textualists; the intentionalists (including the simple intentionalists and the imaginative reconstructionists); the purposivists; the common law originalists; and the public justificationists.⁵²

We shall not add another “ist” to this already over-crowded list of statutory constructionists. As we have commented before in a different context,⁵³ the academic commentary does more to obscure matters than to provide real insight into judicial decision-making, much less prescribe practical, clearly-defined paths for how judges decide cases. Indeed, the commentary does not provide useful rules for those who actually will have to litigate and decide the equitable tolling question. Contrary to the view among academics, our view is simple. Judges take one of two approaches to the problem posed by legislative history: either they look only at the text of the statute (the textualists) or they go beyond the text to arrive at congressional intent (the intentionalists). The benefits and drawbacks of relying on legislative history in statutory interpretation have been summarized quite well by Judge Kozinski,⁵⁴ and we see no need to repeat them here. Suffice it to say that the textualists disregard legislative history largely because they think it is illegitimate and unreliable, and intentionalists embrace legislative history mainly because they see it as a useful guide for understanding (but not replacing) the meaning of statutory language.⁵⁵

Let us now take a closer look at how textualists and intentionalists derive meaning from a waiver-of-sovereign-immunity statute. The

Debate and Beyond, 51 STAN. L. REV. 1 (1998); Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432 (1995); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998); Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366 (1998); Jesse M. Barrett, Note, *Legislative History, the Neutral, Dispassionate Judge, and Legislative Supremacy: Preserving the Latter Ideals Through the Former Tool*, 73 NOTRE DAME L. REV. 819 (1998); Edward Heath, Note, *How Federal Judges Use Legislative History*, 25 J. LEGIS. 95 (1999); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

⁵² See Bell, *supra* note 51 (identifying the public justificationist and describing the simple intentionalist); Breyer, *supra* note 51 (identifying the intentionalist); Easterbrook, *supra* note 51 (the textualist); Hart & Saks, *supra* note 51 (identifying the purposivists); Posner, *supra* note 51, at 817-22 (identifying the imaginative reconstructionist); SCALIA, *supra* note 51 (identifying the new textualist); Schacter, *supra* note 51 (identifying the common law originalist).

⁵³ See 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, 2885-86 (1999) (criticizing the numerous theoretical formulas for the burden of proof concept because most practitioners know what the concept means).

⁵⁴ See Kozinski, *supra* note 51, at 812-14.

⁵⁵ See *id.*

textualist school, whose most notable spokesperson is Justice Scalia, sees legislative history as the “last hope of lost interpretive causes, th[e] St. Jude of the hagiology of statutory construction”⁵⁶ In the waiver-of-sovereign-immunity context, Justice Scalia generally follows the textualist methodology. In *United States v. Nordic Village, Inc.*,⁵⁷ Justice Scalia, writing for a seven-to-two majority, reasoned that “[w]aivers of the Government’s sovereign immunity, to be effective, must be unequivocally expressed[,] . . . strictly construed in favor of the sovereign, and not enlarged . . . beyond what the language requires”⁵⁸ According to Justice Scalia, an unambiguous statute cannot be made ambiguous by resorting to legislative history. The Justice further noted that “[i]f clarity does not exist, it cannot be supplied by a committee report.”⁵⁹

By contrast, the intentionalist takes a different view of the importance of legislative history in construing waiver statutes. The intentionalist, whose most notable spokesperson is Justice Breyer, not only looks to the language of a statute, but also examines other reliable and relevant sources of congressional intent, including legislative history, when interpreting a particular statute. Intentionalists do not seek to understand the subjective motivations of Congress, but rather to define congressional “intent” as the objective purpose behind legislation.⁶⁰ For the intentionalist, legislative history is not always relevant or reliable. Yet, the intentionalist will use legislative history in statutory interpretation when that history aids judges in crafting a workable, consistent, and understandable body of statutory law.⁶¹

⁵⁶ *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring).

⁵⁷ 503 U.S. 30 (1992).

⁵⁸ *Id.* at 33, 34 (citations and internal quotations omitted).

⁵⁹ *Id.* at 37; *accord* *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text . . .”).

⁶⁰ *See* Breyer, *supra* note 51, at 864 (“Conceptually . . . one can ascribe an ‘intent’ to Congress in enacting the words of a statute if one means ‘intent’ in its . . . sense of ‘purpose’, rather than its sense of ‘motive.’”).

⁶¹ *Id.* at 862 (“‘If the history is vague, or seriously conflicting, do not use it.’ No one claims that history is always useful; only that it sometimes helps.”). The author continues:

[O]ne should recall that legislative history is a *judicial* tool, one judges use to resolve difficult problems of judicial interpretation. It can be justified . . . by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws [C]ourts might use it as part of their overarching interpretive task of producing a coherent and relatively consistent body of statutory law” (emphasis in original).

Id. at 867 *See generally* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:03 (6th ed., rev. 2000) (“It is established practice in American legal processes to consider relevant information concerning the historical background of enactments in making decisions about how a statute is to be constructed and applied.”).

Whether textualism or intentionalism is the “correct” method of statutory construction in the normative sense surely is not a matter that we address here; that debate is best left to the law professors, who have much to say on the subject. Rather, we are more concerned with the practical, real-world problem of understanding how the Supreme Court and lower courts (who take their cues from the Court) will approach the question of whether equitable tolling is available in FTCA cases. Unfortunately, it is becoming increasingly difficult to get a firm grip on the Supreme Court’s approach to interpreting waiver-of-sovereign-immunity statutes. The Court’s recent decision in *West v. Gibson*⁶² demonstrates why.

In *West*, the Court had to decide whether, pursuant to Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) had the authority to award compensatory damages against the United States. In a closely divided five-to-four decision, Justice Breyer (joined by Justices Stevens, O’Connor, Souter, and Ginsburg) looked to “[t]he language, purpose, and history of the 1972 Title VII extension and the 1991 [Compensatory Damages Amendment]” to reach the conclusion that “Congress has authorized the EEOC to award compensatory damages in Federal Government employment discrimination cases.”⁶³ Included in Justice Breyer’s analysis was a review of legislative history and the changes made to Title VII in 1972 and 1991.⁶⁴

In dissent, Justice Kennedy (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) reasoned that, because the text of Title VII did not waive the United States’ immunity from an EEOC award of compensatory damages, Congress did not waive the United States’ immunity in the manner suggested by the majority.⁶⁵ The dissenters disagreed with the majority’s resort to legislative history, reasoning that “it contradicts our precedents and sets us on a new course, for before today it was well settled that ‘[a] statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text.’”⁶⁶

The Court’s decision in *West* is one example of how the individual Justices interpret waiver statutes. Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer have endorsed intentionalism through an analysis of Title VII’s legislative history, whereas Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas endorsed textualism by eschewing a legislative history analysis.

⁶² 527 U.S. 212 (1999).

⁶³ *Id.* at 217.

⁶⁴ *See id.* at 219-21.

⁶⁵ *See id.* at 224-28 (Kennedy, J., dissenting).

⁶⁶ *Id.* at 228 (Kennedy, J., dissenting) (quoting *Lane*, 518 U.S. at 192).

The Court's decision in *Lane v. Pena*⁶⁷ provides a different understanding. In *Lane*, Justices O'Connor, Souter, and Ginsburg—who, as part of the majority, sanctioned the use of legislative history in *West*—took a page out of the textualist book and insisted that a waiver of the federal government's immunity “must be unequivocally expressed in statutory text” and that legislative history cannot supply a waiver of immunity where none exists in the text of the statute.⁶⁸

Whatever may be the fate of textualist or intentionalist approaches to construing congressional waivers of sovereign immunity in the run of cases, we have seen these two methodologies at work in the equitable tolling context. Fortunately, the Court appears to have settled on one approach—intentionalism. But, it has not always been that way. In *Soriano v. United States*,⁶⁹ the Supreme Court initially endorsed a textualist approach to decide whether equitable tolling is available in suits against the federal government. The Court in *Soriano* held that when Congress sets a limitations period in the text of a waiver statute, it “mean[s] just that period and no more.”⁷⁰ Thus, *Soriano*, like Justice Scalia's textualist opinion in *Nordic Village*, answers the equitable tolling question this way: If equitable tolling is not found in the text of the waiver statute, courts must conclude that equitable tolling does not come within the congressional waiver of sovereign immunity.

However, *Soriano*'s textualist approach appears to have been displaced by *Irwin*, *Brockamp*, and *Beggerly*, which plainly prescribe an intentionalist framework for resolving the question of whether equitable tolling is permissible in a statute that waives the United States' sovereign immunity. The rebuttable-presumption rule prescribed by the *Irwin* Court necessarily requires courts to look beyond the text of a statute to determine whether Congress intended equitable tolling to apply. *Irwin* instructs that if the text of a statute of limitations within a waiver statute does not include equitable tolling, that fact alone does not compel the conclusion that equitable tolling is impermissible. According to *Irwin*, a difference in language (*i.e.*, statutory text) is not enough to “manifest a different congressional intent with respect to the availability of equitable tolling.”⁷¹ Moreover, the rebuttable-presumption rule itself endorses an intentionalist approach. “[A]ll presumptions used in interpreting statutes,” the Supreme Court has said, “may be overcome by specific language *or specific*

⁶⁷ 518 U.S. 187 (1996).

⁶⁸ *Id.* at 192 (relying on Justice Scalia's opinion in *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)).

⁶⁹ 352 U.S. 270 (1957).

⁷⁰ *Id.* at 276.

⁷¹ 498 U.S. 89, 95 (1990).

legislative history that is a reliable indicator of congressional intent. . . . The congressional intent necessary to overcome the presumption may . . . be inferred . . . *from the collective import of legislative and judicial history behind a particular statute.*"⁷² In *Brockamp* and *Beggerly*, we see the intentionalist methodology at work. In those cases, the Court looked to the language of the waiver statutes, their purpose, their legislative history, or some combination of the three to reach the conclusion that equitable tolling was impermissible.⁷³

Indeed, not even Justice Scalia has insisted upon a textualist approach to resolve the equitable tolling problem, or, for that matter, other statutory construction problems that arise in the FTCA context. Justice Scalia's agreement with the *Irwin* majority is particularly interesting. Justice White (joined by Justice Marshall, who can hardly be dubbed a textualist) issued a concurring opinion in which he carried the textualist banner. Justice White reasoned that the Court should have held, consistent with *Soriano*, that equitable tolling was impermissible because the text of Title VII did not provide for it.⁷⁴ Rather than follow the textualist approach suggested by Justice White, Justice Scalia instead joined the *Irwin* majority, which laid down a rebuttable-presumption rule of statutory construction.⁷⁵ In *Brockamp*, the Court examined legislative history in reaching its conclusion that equitable tolling was impermissible,⁷⁶ and in *Beggerly*, the Court looked to the text of, and the purposes behind, the Quiet Title Act in reaching its conclusion that equitable tolling was inconsistent with congressional intent.⁷⁷ In each of these cases, which surely do not qualify for entry into the textualist hall of fame, Justice Scalia joined majority

⁷² *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (citations omitted) (emphasis added).

⁷³ See *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998) (looking to the language and purpose behind the Quiet Title Act and concluding that equitable tolling is inconsistent with both); *United States v. Brockamp*, 519 U.S. 347, 350-53 (1997) (looking to language, purpose, and legislative history of tax-refund statute and concluding that equitable tolling is inconsistent with congressional intent); *Irwin*, 498 U.S. at 95 (looking to the fact that Title VII suits brought against private defendants subject to equitable tolling, such that same claims against the United States should also be subject to equitable tolling).

⁷⁴ See *Irwin*, 498 U.S. at 98 (White, J., concurring) ("It seems to me that the Court in this case, by holding that the [30-day] time limit in [Title VII's statute of limitations] is subject to equitable tolling, . . . has enlarged the waiver in [the statute of limitations] beyond what the language of that section requires.").

⁷⁵ Since *Irwin*, Justice Scalia has expressed his disapproval of the use of presumptions in statutory interpretation, referring to them as "dice-loading rules" that cause "a lot of trouble." See SCALIA, *supra* note 51, at 28.

⁷⁶ See *Brockamp*, 519 U.S. at 352 (relying on House Conference Report).

⁷⁷ See *Beggerly*, 524 U.S. at 49 ("Equitable tolling of the already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights, and we hold that it is incompatible with the Act.").

opinions that endorsed an intentionalist approach to statutory construction. In addition, beyond the equitable tolling issue, Justice Scalia has often joined majority and dissenting opinions in FTCA cases that rely upon the Act's legislative history.⁷⁸

Accordingly, although the text of waiver-of-sovereign-immunity statutes has factored into an examination of congressional intent, Justice Scalia (perhaps uncharacteristically) has not insisted that text, and text alone, remains determinative in every case. That brings the intentionalist approach to interpreting waiver-of-sovereign-immunity statutes squarely in line with FTCA precedent. Largely because the FTCA enjoys a rich historical pedigree, the Supreme Court has recognized that "[t]he Federal Tort Claims Act of 1946 was the product of some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment."⁷⁹ Because of this rich pedigree, the Supreme Court has consulted the Act's legislative history for genuine indications of congressional intent. In particular, the Court has consistently relied upon the FTCA's pre-enactment legislative history to determine what Congress intended in various provisions of the Act.⁸⁰ In addition to the pre-

⁷⁸ See *Smith v. United States*, 507 U.S. 197, 202-03 n.4 (1993) (Justice Scalia joining majority opinion, which relied on pre-enactment legislative history for interpreting meaning of language in 28 U.S.C. § 2680(k) (1994)); *McNeil v. United States*, 508 U.S. 106, 112 n.7 (1993) (unanimous decision relying on legislative history accompanying the 1966 changes to the FTCA); *United States v. Smith*, 499 U.S. 160, 167 n.9 (1991) (Justice Scalia joining majority opinion, which relied on legislative history accompanying the 1988 changes to the FTCA); *Sheridan v. United States*, 487 U.S. 392, 410-11 (1988) (O'Connor, J., joined by Rehnquist, C.J. & Scalia, J., dissenting) (relying on pre-enactment legislative history for guidance in interpreting assault and battery exception in 28 U.S.C. § 2680(h)); *Berkovitz v. United States*, 486 U.S. 531, 538-39 n.4 (1988) (unanimous decision relying on pre-enactment legislative history for guidance in interpreting the discretionary function exception).

⁷⁹ *United States v. Spelar*, 338 U.S. 217, 219-20 (1949); see also *Molzof v. United States*, 502 U.S. 301, 308 (1992) (reporting that Congress spent twenty-eight years drafting and redrafting the FTCA); *United States v. Neustadt*, 366 U.S. 696, 707 (1961) (same). See generally David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 291-94 (1988) (analyzing the historical background of the discretionary function exception).

⁸⁰ See *Smith*, 507 U.S. at 202-03 n.4 (consulting 28 U.S.C. § 2680(k)); *Berkovitz*, 486 U.S. at 538-39 n.4 (consulting 28 U.S.C. § 2680(a)); *United States v. Shearer*, 473 U.S. 52, 55, 59 (1985) (consulting 28 U.S.C. § 2680(h)); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-09 & n.8 (1984) (consulting 28 U.S.C. § 2680(a)); *Kosak v. United States*, 465 U.S. 848, 858 n.17 (1984) (consulting 28 U.S.C. § 2680(c)); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 463-64 & n.4 (1980) (same); *Logue v. United States*, 412 U.S. 521, 531 (1973) (consulting 28 U.S.C. § 2671 (1994)); *Laird v. Nelms*, 406 U.S. 797, 801 (1972) (consulting 28 U.S.C. § 1346(b)(1) (1993)); *United States v. Muniz*, 374 U.S. 150, 153-58 (1963) (deciding whether prisoners could state claims under FTCA); *Richards v. United States*, 369 U.S. 1, 8-10, 14 & nn.15-17, 20, 29 (1962) (consulting 28 U.S.C. §§ 1346(b)(1), 2674); *United States v. Gilman*, 347 U.S. 507, 511-12 n.2 (1954) (consulting 28 U.S.C. § 2672 (1994)); *Dalehite v. United*

enactment history, both the Supreme Court and lower courts have relied upon the legislative history accompanying the 1949, 1966, and 1988 changes to the FTCA's statute of limitations.⁸¹ Thus, the FTCA's legislative history is not only relevant, but critical to determine what Congress intended when it enacted and later modified the Act's statute of limitations.

Returning to the metaphor we introduced at the beginning of this section, *Beggerly*, *Brockamp*, *Irwin*, and well-settled precedent extend an invitation to the cocktail party. Lower courts should accept the invitation.

States, 346 U.S. 15, 26 n.11, 28 nn.17, 20, 45 (1953) (consulting 28 U.S.C. §§ 1346(b)(1), 2680(a)); *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-50 & n.8 (1951) (deciding whether the United States can be sued for tort contribution); *Spelar*, 338 U.S. at 220-21 nn.6-10 (consulting 28 U.S.C. § 2680(k)); *Brooks v. United States*, 337 U.S. 49, 51-52 nn.2-4 (1949) (deciding whether members of the armed forces could recover under FTCA).

Although he has joined FTCA decisions in which the Act's pre-enactment legislative history has been relied upon for ascertaining congressional intent, Justice Scalia has given a tongue-lashing to the use of failed legislative proposals in the interpretive process. *See United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring) ("I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court" [*i.e.*, that Congress's failure to enact a proposal has meaning]); *id.* ("Congress can not express its will by a failure to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law."); *id.* at 536 ("[T]he Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme. Today's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was."); *id.* at 536-37 ("If we take this sort of material seriously, we require conscientious counsel to investigate (at clients' expense) not only the hearings, committee reports, and floor debates pertaining to the history of the law at issue (which is bad enough), but to find, and then investigate the hearings, committee reports, and floor debates pertaining to, later bills on the same subject that were never enacted. This is beyond all reason, and we should say so.").

⁸¹ *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) (relying on H.R. REP. NO. 100-700 and 1988 changes to Act); *McNeil v. United States*, 508 U.S. 106, 112 nn.7, 8 (1993) (relying on legislative history accompanying the 1966 changes to the Act); *United States v. Smith*, 499 U.S. 160, 167 n.9 (1991) (relying on H.R. REP. NO. 100-700 and 1988 changes to Act); *United States v. Kubrick*, 444 U.S. 111, 120-21 n.6 (1979) (relying on H.R. REP. NO. 276 regarding the 1949 changes to the Act's statute of limitations); *Rodriguez v. Sarabyn*, 129 F.3d 760, 764-65 (5th Cir. 1997) (relying on H.R. REP. NO. 100-700 and 1988 changes to Act); *Avery v. United States*, 680 F.2d 608, 610-11 (9th Cir. 1982) (relying on S. REP. NO. 1327 regarding the 1966 changes to the Act); *Tucker v. United States Postal Serv.*, 676 F.2d 954, 958 (3d Cir. 1982) (same); *Odin v. United States*, 656 F.2d 798, 801-02 nn.11, 17, 804-05 nn.25-26 (D.C. Cir. 1981) (same); *Lunsford v. United States*, 570 F.2d 221, 224 (8th Cir. 1977) (relying on H.R. REP. NO. 1532 regarding the 1966 changes to the Act); *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 90 (3d Cir. 1972) (relying on H.R. REP. NO. 276 regarding the 1949 changes to the Act's statute of limitations).

IV. THE LEGISLATIVE HISTORY ACCOMPANYING THE FTCA'S STATUTE OF LIMITATIONS AND WHAT IT SAYS ABOUT CONGRESSIONAL INTENT

Let us now return to the FTCA and place the equitable tolling question in the proper historical context, for that history provides valuable insights into whether Congress intended equitable tolling to apply to the Act's limitations periods. At the turn of the twentieth century, the United States was immune from tort liability under the historical doctrine of sovereign immunity.⁸² Not all tort compensation was precluded, but sovereign immunity prevented individuals from seeking tort compensation in Article III courts. In the early 1900s, persons who suffered from tortious conduct committed by a government employee could seek compensation through a private bill of relief from Congress.⁸³ The private bill consisted of a legislative proposal presented in Congress that would either provide tort compensation to an individual or provide the injured party with a jurisdictional ticket to adjudicate a particular claim.⁸⁴ Although there were statutes on the books waiving the United States' immunity for certain claims,⁸⁵ there was no statute that generally waived the United States' immunity from tort liability. Some time passed before Congress finally enacted a tort statute applicable to the United States. During that time period, Congress actively tried to shape the contours of what would later become the FTCA.

A. *The Pre-Enactment Legislative History*

The federal tort claims legislation that made its way through various Congresses prior to the 1946 enactment of the FTCA reveals that equitable tolling provisions were proposed at various times and in various forms.⁸⁶ Between 1925 and 1931, bills that were introduced in the House and Senate contained a wide range of time limitations applicable to tort actions brought against the United States. Three of the bills did not even include a waiver of sovereign immunity for property damage claims.⁸⁷ In each of the proposals that waived immunity for all tort claims, the limitations period for property damage claims was different from the periods prescribed for

⁸² See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

⁸³ See Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 314, 321-22 (1942).

⁸⁴ See *id.* at 322; Roscoe Pound, *The Tort Claims Act: Reason or History?*, 37 TUL. L. REV. 685, 689 (1963).

⁸⁵ See Holtzoff, *supra* note 83, at 314-20 (describing the few waiver-of-sovereign-immunity statutes).

⁸⁶ See *infra* p. 220 (table attached as an appendix to this paper presenting the various statute of limitations proposals that were considered by Congress prior to 1946).

⁸⁷ See generally H.R. 8914, 69th Cong. (1926); H.R. 12179, 68th Cong. (1925); H.R. 12178, 68th Cong. (1925).

personal injury and death claims.⁸⁸ The 1926 House and Senate bills extended the limitations periods for personal injury and death claims (but not property damage claims) by six months if “reasonable cause” was shown.⁸⁹ The 1926 bills provided that the limitations periods on all tort claims did not begin to run for persons under eighteen or for those who are “mentally incompetent” so long as “such individual[s] are] without a guardian, trustee, or committee.”⁹⁰

In 1928 and 1930, the House and Senate again considered bills that prescribed different limitations periods for property damage, personal injury, and death claims.⁹¹ The limitations periods prescribed in the 1928 and 1930 bills were different from the limitations provisions of the 1926 bills.⁹² In addition, the 1928 and 1930 bills retained equitable tolling in personal injury and death cases for “reasonable cause shown,” and extended the tolling period from six months to one year.⁹³ All limitations periods were subject to tolling in cases involving persons under the age of twenty-one, “idiots, lunatics, insane persons, and persons beyond the sea.”⁹⁴ In 1931, however, the bills that were introduced in Congress did not include the “reasonable cause” provision,⁹⁵ and only one of the bills contained a tolling provision for minors under twenty-one, “idiots, lunatics, insane persons, and persons [at] sea.”⁹⁶

In 1932, a Senate bill reinstated the “reasonable cause” provision.⁹⁷

⁸⁸ See S. 211, 72d Cong. (1931); H.R. 5065, 72d Cong. §§ 1(d), 202(a) (1931); H.R. 17168, 71st Cong. §§ 2, 202 (1931); H.R. 16429, 71st Cong. §§ 1, 22 (1931); H.R. 15428, 71st Cong. §§ 1(d), 202(a) (1930); S. 4377, 71st Cong. §§ 1(d), 202(d) (1930); H.R. 9285, 70th Cong. §§ 1(b), 202(a) (1928); S. 1912, 69th Cong. §§ 1(b), 202(a) (1926); H.R. 8914, 69th Cong. § 5 (1926); H.R. 6716, 69th Cong. (1926); H.R. 12178, 68th Cong. § 6 (1925).

⁸⁹ See S. 1912, 69th Cong. § 202(a) (1926); H.R. 6716, 69th Cong. § 202(c) (1926). *But see* H.R. 8914, 69th Cong. (1926) (not providing for any equitable tolling).

⁹⁰ S. 1912, 69th Cong. § 304 (1926); H.R. 6716, 69th Cong. § 305 (1926); *see also* H.R. REP. No. 69-667, at 7 § 305 (1926) (Committee report on S. 1912, stating that “the rights of minors and mental incompetents who are without a guardian, trustee, or committee at the time their claims accrue are *protected*, by providing that the [s]tatutes of limitation in the bill are *toll*ed until the appointment of a representative to take advantage of their rights.” (emphasis added)). *But see* H.R. 8914, 69th Cong. (1926) (not providing for any equitable tolling).

⁹¹ See H.R. 15428, 71st Cong. §§ 1(d), 202(a) (1930); S. 4377, 71st Cong. §§ 1(d), 202(a) (1930); H.R. 9285, 70th Cong. §§ 1(b), 202(a) (1928).

⁹² See *infra* p. 220 (appendix table).

⁹³ See H.R. 15428, 71st Cong. § 202(a) (1930); S. 4377, 71st Cong. § 202(a) (1930); H.R. 9285, 70th Cong. § 202(a) (1928).

⁹⁴ H.R. 15428, 71st Cong. § 304 (1930); S. 4377, 71st Cong. § 304 (1930); H.R. 9285, 70th Cong. § 304 (1928).

⁹⁵ See S. 211, 72d Cong. (1931); H.R. 5065, 72d Cong. (1931); H.R. 17168, 71st Cong. (1931); H.R. 16429, 71st Cong. (1931).

⁹⁶ See H.R. 16429, 71st Cong. § 34 (1931).

⁹⁷ See S. 4567, 72 Cong., § 202(a) (1932).

The 1932 provision, however, differed in two material respects from the prior bills. First, it applied to personal injury, death, *and* property damage claims.⁹⁸ Second, the Senate bill provided that not only must “reasonable cause” be shown to trigger the tolling provision, but that plaintiffs suing the United States in tort were required to “prove affirmatively that the United States has not been prejudiced thereby.”⁹⁹ Additionally, the House held hearings in 1932 to discuss H.R. 5065, which proposed that a property damage, personal injury, or death claim must be submitted to the agency involved or the Comptroller General within thirty days from the date the claim accrued.¹⁰⁰ The claimant would then have one year after an agency denial to file suit in the Court of Claims.¹⁰¹ At the hearing, the House subcommittee wrestled with the issue of whether the thirty-day time frame was sufficient and whether, with such a short limitations period, private bills of relief waiving the statute of limitations should eventually be passed to ensure that a claimant could have his or her tort claim adjudicated.¹⁰²

Between 1933 and 1935, bills introduced in the Senate retained the “reasonable cause” and proof-of-no-prejudice provisions for all tort claims,¹⁰³ but the House bills during that same period did not contain any tolling provisions at all.¹⁰⁴ During the 1933-1935 period, the House and Senate also prescribed different limitations periods for property damage claims on the one hand, and personal injury and death claims, on the other.¹⁰⁵ Only one 1934 House bill provided for a uniform limitations period of three years, but like the other House bills during the 1933-1935 period, that bill did not provide for equitable tolling.¹⁰⁶

In 1939, however, H.R. 7236 and S. 2690, which were introduced in the House and Senate, dropped all equitable tolling provisions and set the limitations period for all tort claims at one year. A plaintiff whose claim was below one thousand dollars, and was submitted to an agency for possible settlement, had six months to file suit in federal court after the agency denied the claim.¹⁰⁷ The statute of limitations provisions in H.R.

⁹⁸ See *id.*, § 1(c) (property damage claims), § 202(a) (personal injury and death claims).

⁹⁹ See *id.*

¹⁰⁰ H.R. 5065, 72d Cong. §§ 1(d), 202(a) (1931).

¹⁰¹ See *id.* § 303(2).

¹⁰² See *Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong. 13-14, 28-30, 34 (1932) (hereinafter *1932 House Hearings*).

¹⁰³ See S. 1043, 74th Cong. §§ 1(c) (property damage claims), 202(a) (personal injury claims) (1935); S. 1833, 73d Cong. §§ 1(c) (property damage claims), 202(a) (personal injury claims) (1933).

¹⁰⁴ See H.R. 2028, 74th Cong. (1935); H.R. 129, 73d Cong. (1933).

¹⁰⁵ See *infra* p. 220 (appendix table).

¹⁰⁶ See H.R. 8561, 73d Cong. § 10 (1934).

¹⁰⁷ See S. 2690, 76th Cong. § 301 (1939); H.R. 7236, 76th Cong. § 301 (1939).

7236 and S. 2690 were discussed in 1940 before the Senate and House Judiciary Committees. Attorney General Frank Murphy submitted a statement to the Senate Judiciary Committee, in which he applauded the limitations periods for being “short.”¹⁰⁸ A House Judiciary Committee report prepared by Representative Emanuel Celler of New York (the sponsor of H.R. 7236) stated that the one-year limitations period prescribed for the Act “appears desirable in order to preclude possible prejudice to the Government.”¹⁰⁹ According to a House Report, the six-month period “extended” the limitations period until the agency finally disposed of the claim.¹¹⁰

Judge Alexander Holtzoff, acting as Special Assistant to Attorney General Murphy, testified about the proposed one-year time period. He noted that a short statute of limitations was necessary, but that in cases of undue hardship, the claimant could still petition Congress for a private bill of relief, which was the traditional method for seeking tort compensation. His remarks before the Senate Judiciary Committee are noteworthy:

Section 301 of Title III . . . provides for a statute of limitations of 1 year on these claims. It seemed to us that a *short* statute of limitations, such as 1 year, is necessary for the purpose of protecting the interests of the Government, and is not unfair to the claimant, because the lawyer of the claimant should be able to bring this suit within 1 year after the cause of action has accrued. *If unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committee would have jurisdiction.*¹¹¹

Judge Holtzoff echoed that sentiment before the House, when he engaged in the following exchange with Representative Celler of New York and Representative John Robson of Kentucky:

MR. HOLTZOFF: . . . Title III contains provisions applicable to all claims under the act whether they are for less than \$1,000 and submitted for administrative determination, or whether they are tried in court.

MR. CELLER: Is 1 year a long enough time in which to present a claim?

MR. HOLTZOFF: Of course, it is a question, and it is subject to debate. We have a *short* statute of limitation of 1 year, but my thought is that, *of course, there will be cases in which this will be too short a time.*

¹⁰⁸ H.R. REP. NO. 76-2428, at 5 (1940) [hereinafter H.R. REP. NO. 2428]; *Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 11 (1940) [hereinafter *1940 Senate Hearings*] (statement of Frank Murphy, Attorney General of the United States).

¹⁰⁹ H.R. REP. NO. 2428, at 5.

¹¹⁰ *See id.*

¹¹¹ *1940 Senate Hearings*, *supra* note 108, at 38 (emphasis added).

MR. CELLER: I had this in mind, that if you make it so short, *then you will have lots of claims filed in Congress again.*

MR. HOLTZOFF: *Yes; you will undoubtedly have private bills with that statute of limitations. Of course, you have bills of that kind now, and we have even a 6-year statute in contract cases. I might say this, that we had in mind that a tort claim is sometimes difficult to defend, and the longer your suit is postponed the more difficult it is to get evidence to defend it.*

MR. ROBSION: Most of the States have a 1-year limitation, or a great many of them do.

MR. HOLTZOFF: I think that some of them do. The State of New York, I think, has a 3-year limitation on tort actions against private individuals, and a 6-year statute on contract claims; but it seems to me that this is one of those provisions that is properly subject to debate. *It might properly be increased if the feeling of the committee is that the time is too short. It is one of those things that cannot be answered "Yes" or "No." I do feel, as you suggest Mr. Chairman [Celler], that if you make the time too short, you will be confronted with private bills as to individual claimants waiving the statute as to that particular claim because the claimant abandons his rights, or something of that kind.*¹¹²

Judge Holtzoff's testimony plainly suggests that if an FTCA plaintiff could not comply with the time periods prescribed in the Act's statute of limitations, then a tort remedy (in the form of a private bill of relief) would lie with Congress, not with the courts. That, of course, was the view expressed in the 1932 House hearings.¹¹³ The 1940 Senate and House Hearings provided the only analysis of the statute of limitations, and the statute of limitations enacted in 1946 was, in all material respects, the same as the one discussed by Judge Holtzoff.¹¹⁴ The Supreme Court has repeatedly relied upon the 1940 legislative history, including Judge Holtzoff's remarks, to ascertain Congress's intent with respect to various provisions of the FTCA.¹¹⁵ So have a number of lower federal courts.¹¹⁶

¹¹² *Tort Claims Against the United States: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong. 21 (1940) (hereinafter *1940 House Hearings*) (testimony of Alexander Holtzoff) (emphasis added).

¹¹³ See *1932 House Hearings*, *supra* note 102, at 13-14, 28-30, 34.

¹¹⁴ The only addition to the statute of limitations after 1939 was the six-month limitations period applicable to suits filed after a claimant withdraws a claim from agency consideration. See H.R. 5373, 77th Cong., § 401 (1941); S. 2207, 77th Cong. § 401 (1942).

¹¹⁵ See *Smith v. United States*, 507 U.S. 197, 202-03 n.4 (1993) (looking to S. 2690 and H.R. 7236 for original understanding of the foreign country exception of the FTCA and comparing that to 1942 changes); *United States v. Shearer*, 473 U.S. 52, 55, 59 (1985) (relying on Judge Holtzoff's discussion of the assault and battery exception); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-09 & n.8 (1984) (looking to S. 2690 and H.R. 7236 for original understanding of discretionary

The commentary that immediately followed passage of the FTCA supports the view that the limitations periods prescribed in the original Act should not be extended. One commentator, who described the limitations periods as “strictly operative,” agreed that failure to comply with the Act’s limitations provisions meant that tort compensation would come from a private bill of relief: “The claimant’s failure to make timely presentation still leaves him the alternative of obtaining a special Act waiving the defense of the statute of limitations . . . in such instances as the Congress may desire to set aside the statutory bar.”¹¹⁷ Another commentator, Judge Ben Moore of West Virginia, noted the “peculiarity” of the Act’s statute of limitations, and concluded that the limitations provisions do not contain a “saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned.”¹¹⁸ To Judge Moore, this was unusual because such tolling provisions are “ordinarily found” in federal and state statutes of limitations.¹¹⁹ And, Professor Borchard commented that with the Act’s “short” statute of limitations, “it is possible that claims will still be presented to Congress.”¹²⁰

Most importantly, however, equitable tolling was included in nine of

function exception and comparing that to 1942 changes); *Kosak v. United States*, 465 U.S. 848, 858 n.17 (1984) (looking to testimony of Judge Holtzoff for congressional intent behind 28 U.S.C. § 2680(c) (1994)); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 463-64 & n.4 (1980) (same); *Dalehite v. United States*, 346 U.S. 15, 26 n.11, 28 nn.17, 20 & 45 (1953) (looking to S. 2690 and H.R. 7236 for original understanding of discretionary function exception and comparing that to 1942 changes; pinning congressional intent on Judge Holtzoff’s discussion regarding the need for wrongful conduct, and that the FTCA did not contemplate liability without fault).

¹¹⁶ See *Brock v. United States*, 601 F.2d 976, 978 (9th Cir. 1979) (relying on testimony of Judge Holtzoff regarding meaning of “law of the place” in the FTCA); *United States v. Cohen*, 389 F.2d 689, 691 & nn.13, 14 (5th Cir. 1967) (relying on H.R. 7236 hearings for congressional intent behind attorneys’ fees provision of 28 U.S.C.A. § 2678 (2000)); *Panella v. United States*, 216 F.2d 622, 625-26 (2d Cir. 1954) (relying on Judge Holtzoff’s testimony for an understanding of the assault and battery exception of the FTCA); *Suchomajcz v. United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979) (relying on Judge Holtzoff’s testimony regarding the postal exception in 28 U.S.C. § 2680(b)); *In re Bomb Disaster at Roseville, Cal.*, on Apr. 28, 1973, 438 F. Supp. 769, 777-78, 782 (E.D. Cal. 1977) (relying on Judge Holtzoff’s testimony regarding whether the FTCA precludes imposing strict liability on the United States); *Adams v. Tennessee Valley Auth.*, 254 F. Supp. 78, 81 (E.D. Tenn. 1965) (citing Supreme Court’s reliance on Judge Holtzoff’s testimony in *Dalehite*); *Colorado Ins. Group, Inc. v. United States*, 216 F. Supp. 787, 791 (D. Colo. 1963) (relying on Judge Holtzoff’s testimony regarding the purpose of the exceptions found in 28 U.S.C. § 2680).

¹¹⁷ Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 40 (1946).

¹¹⁸ Ben Moore, *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857, 860 (1947).

¹¹⁹ See *id.*

¹²⁰ Edwin Borchard, *Tort Claims Against the Government: Municipal, State and Federal Liability*, 33 A.B.A. J. 221, 222 (1947).

the thirty-one bills prior to the enactment of the FTCA,¹²¹ though the Act passed by the 1946 Congress did not provide for any equitable tolling of the limitations periods. Judge Moore's observation in 1947 that the Act did not provide for tolling based on minority or mental disability was entirely correct, for six of the thirty-one pre-enactment legislative proposals did include tolling for infants, insane persons, and others under disability.¹²² Courts, therefore, should conclude that the enacting Congress did not intend equitable tolling to apply to FTCA cases.

This conclusion flows naturally from the Supreme Court's decision in *United States v. Muniz*.¹²³ There, the Court decided whether prisoners could bring FTCA claims. In reaching the conclusion that prisoners may bring such suits against the United States, the *Muniz* Court examined the pre-enactment legislative history and noted that several pre-enactment proposals contained provisions that precluded prisoners from bringing tort claims, but that the enacted version of the FTCA did not contain any such exception.¹²⁴ The Court stated:

Six of the 31 bills introduced in Congress between 1925 and 1946 either barred prisoners from suing while in federal prison or precluded suit upon any claim for injury to or death of a prisoner. That such an exception was absent from the Act itself is *significant* in view of the *consistent course of development of the bills proposed over the years* and the marked reliance by each succeeding Congress upon the language of the earlier bills. *We therefore feel that the want of an exception for prisoners' claims reflects a deliberate choice, rather than an inadvertent omission.*¹²⁵

The reasoning in *Muniz* cannot be meaningfully distinguished from the point we are making here. Equitable tolling provisions were included in several pre-enactment bills, so that, under the reasoning in *Muniz*, courts may conclude that the enacting Congress was well aware of equitable tolling when it passed the FTCA in 1946. However, the 1946 Congress

¹²¹ See S. 1043, 74th Cong. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong. §§ 1(c), 202(a); S. 4567, 72d Cong. §§ 1(c), 202(a); H.R. 16429, 71st Cong. § 34 (1931); H.R. 15428, 71st Cong. §§ 202(a), 304 (1930); S. 4377, 71st Cong. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong. §§ 202(a), 304 (1928); S. 1912, 69th Cong. §§ 202(a), 304 (1926); H.R. 6716, 69th Cong. §§ 202(c), 305 (1926).

¹²² See H.R. 16429, 71st Cong. § 34 (1931); H.R. 15428, 71st Cong. § 304 (1930); S. 4377, 71st Cong. § 304 (1930); H.R. 9285, 70th Cong. § 304 (1928); S. 1912, 69th Cong. § 304 (1926); H.R. 6716, 69th Cong. § 305 (1926).

¹²³ 374 U.S. 150 (1963).

¹²⁴ See *id.* at 156.

¹²⁵ *Id.* (emphasis added); see also *Canadian Aviator v. United States*, 324 U.S. 215, 222-23 (1945) (looking to pre-enactment history of Public Vessels Act and drawing conclusions about congressional intent from absence of language in final act that was present in pre-enactment proposals).

declined to include any of those equitable tolling provisions in the Act that was finally passed. Thus, as in *Muniz*, Congress's decision not to include equitable tolling in the original FTCA must be construed as a "deliberate choice, rather than an inadvertent omission."¹²⁶

B. The 1949 Changes to the FTCA's Statute of Limitations

While the initial batch of FTCA cases percolated through the courts, the one-year period worked an injustice in many cases. Indeed, between 1946 and 1949, many FTCA suits were dismissed pursuant to the limitations period, with courts strictly adhering to the one-year time frame.¹²⁷ Accordingly, and consistent with Judge Holtzoff's suggestion in 1940 that Congress could lengthen the limitation period if it found the period to be too short, the 1949 Congress extended the one-year limitations period to two years. The bill originally introduced in the House prescribed a three-year limitations period, but when it emerged from the House Judiciary Committee, the three-year period was replaced with a two-year period.¹²⁸ The House Judiciary Committee explained the reasons for expanding the FTCA's limitations period to two years:

The committee feels 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.

...

It will be observed, then, from the foregoing statistics that the existing limitations of 1 year in the Federal Tort Claims Act is *manifestly unjust* and not in consonance with the practice prevailing in analogous departments of the law.

...

The 1-year existing period is *unfair* to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claims. Moreover, the wide area of operations of the Federal agencies, particularly the armed-services 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

¹²⁶ *Id.*

¹²⁷ See *Anderegg v. United States*, 171 F.2d 127, 128 (4th Cir. 1948) (per curiam), *cert. denied*, 336 U.S. 967 (1949); *Maryland ex rel. Burkhardt v. United States*, 165 F.2d 869, 873-74 (4th Cir. 1947); *Franzino v. United States*, 83 F. Supp. 10, 11 (D.N.J. 1949); *Marino v. United States*, 82 F. Supp. 190, 192 (S.D.N.Y. 1948); *Wickman v. Inland Waterways Corp.*, 78 F. Supp. 284, 286 (D. Minn. 1948); *Ins. Co. of N. Am. v. United States*, 76 F. Supp. 951, 954 (E.D. Va. 1948); *Turkett v. United States*, 76 F. Supp. 769, 770-71 (N.D.N.Y. 1948).

¹²⁸ H.R. REP. NO. 276, *supra* note 24, at 4; see also H.R. REP. NO. 1754, *supra* note 24, at 1.

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.

It is not the intention of the Federal Government to deprive tort claimants to their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence. However, it is not believed that the enlargement of the existing period of limitations to 2 years as proposed . . . will unnecessarily vex the agencies concerned, nor will it foster a lack of diligence on the part of claimants in the prosecution of their claims. The period of 2 years proposed in the bill represents a happy medium which has been tested and found satisfactory in the laboratory of legal experience.¹²⁹

The report that the Senate Judiciary Committee published contained the same language as the House report.¹³⁰ The plain import of the language in the 1949 Senate and House reports, like the testimony of Judge Holtzoff in 1940, indicates that Congress intended to cure the perceived unfairness in the FTCA's statute of limitations by extending the limitations period applicable to all FTCA suits. The language does not imply that Congress intended to incorporate equitable tolling into the Act and create special exceptions for narrow classes of cases. As we said in our 1999 paper, the two-year period—a "happy medium," according to the 1949 Congress—reflects a congressional balance between compensating tort victims and protecting the United States against defending stale claims.¹³¹

Indeed, H.R. 2403, a bill introduced in the House in 1949, would have permitted a maximum five-year extension of the two-year limitations period on the basis of equitable factors such as infancy and insanity. In particular, the bill proposed a subsection (c) to 28 U.S.C. § 2401 that would have provided the following:

(c) The time within which an action may be brought on a tort claim against the United States, or within which such claim may be presented for administrative settlement, shall not include any period during which a person entitled to bring such action or present such claim is under the age of twenty-one or is insane, or both, if any such disability of infancy or insanity, or both, exists when such claim accrues. The expiration of such time shall not be delayed for more than five years by reason of the disability of insanity.¹³²

¹²⁹ H.R. REP. NO. 276, *supra* note 24, at 2-4 (emphasis added).

¹³⁰ See S. REP. NO. 135, *supra* note 24, at 2, 4.

¹³¹ See Parker & Colella, *supra* note 3, at 909.

¹³² H.R. 2403, 81st Cong., (1949).

H.R. 2403 was referred to the House Judiciary Committee on February 7, 1949. However, the House Judiciary Committee Report we have quoted above was issued approximately one month later, and H.R. 2403 is not even mentioned. Although failed legislative proposals are generally frowned upon when used as evidence of the intent of a prior Congress,¹³³ that surely cannot be the case here. Congress changed the statute of limitations in 1949, and one may properly look to the proposals that were submitted and rejected—for example, the proposal that would have expanded the limitations period to three years—for indications of what the Congress may have intended. Indeed, the only inferences that can be drawn from the fact that H.R. 2403 failed to pass support the position that Congress did not intend equitable tolling to apply. Either Congress rejected the notion that equitable considerations such as minority and insanity could toll the statute of limitations, or the 1949 expansion of the statute of limitations incorporated such considerations (although we question the accuracy of this latter interpretation). Both interpretations support the conclusion that Congress extended the statute of limitations in 1949 to account for inequities in its application.¹³⁴

The possibility that Congress may have incorporated equitable tolling considerations into the 1949 changes to the Act by extending the statute of limitations brings us to another critical point. The Supreme Court and lower courts have held that the FTCA's two-year limitations period is tied to a discovery rule of accrual, in which a claim does not accrue—and the limitations period does not begin to run—until the claimant knows, or in the exercise of reasonable diligence, should know of her injury and its cause.¹³⁵ This rule of accrual meets the 1949 House Judiciary Committee's concern that the FTCA's statute of limitations could be “*unfair* to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim.”¹³⁶ The Supreme Court in

¹³³ See *infra* note 167 (authorities cited therein).

¹³⁴ Cf. *United States v. Estate of Romani*, 523 U.S. 517, 533-34 (1998) (declining to draw inference in favor of government where failure of legislation could have meant something contrary to the government's position).

¹³⁵ See *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999); *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir. 1999); *Lhotka v. United States*, 114 F.3d 751, 752-53 (8th Cir. 1997); *Bartleson v. United States*, 96 F.3d 1270, 1277 (9th Cir. 1996); *Kerstetter v. United States*, 57 F.3d 362, 364 (4th Cir. 1995); *MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995); *Goodhand v. United States*, 40 F.3d 209, 212 (7th Cir. 1994); *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994); *McDonald v. United States*, 843 F.2d 247, 248 (6th Cir. 1988); *Barren ex rel. Barren v. United States*, 839 F.2d 987, 990 (3d Cir.), *cert. denied*, 488 U.S. 827 (1988); *Sexton v. United States*, 832 F.2d 629, 633 (D.C. Cir. 1987); *Nicolazzo v. United States*, 786 F.2d 454, 455 (1st Cir. 1986).

¹³⁶ H.R. REP. NO. 276, *supra* note 24, at 3; S. REP. NO. 135, *supra* note 24, at 2; H.R.

Beggerly held that this precise rule of accrual, found in the text of the Quiet Title Act, already contemplates equitable tolling-like considerations, thereby precluding any further tolling for judge-made equitable reasons.¹³⁷

C. *The 1966 Changes to the FTCA's Statute of Limitations*

Congress amended the FTCA's statute of limitations again in 1966, when it imposed a mandatory administrative-exhaustion requirement on FTCA plaintiffs and imposed a corresponding six-month limitations period for filing suit after a claim is finally denied by an agency.¹³⁸ The Justice Department drafted the proposed legislation, and Assistant Attorney General John W. Douglas was the only individual to provide testimony on the 1966 changes to the FTCA. At the hearing before the House Judiciary Committee, Representative William L. Hungate of Missouri expressed concern about the proposed mandatory administrative-presentment requirement, fearing that FTCA plaintiffs would be delayed in seeking redress in federal court. Mr. Douglas responded to this concern by pointing out that, in exchange for the mandatory administrative-presentment requirement, FTCA claimants would have an additional six months within which to bring their tort claims against the United States. This point was made in the following exchange between Mr. Douglas and Representative Hungate:

MR. HUNGATE: Yes. Now, what about the statute of limitations? Will this [mandatory administrative-presentment requirement] have any effect on the statute of limitations?

MR. DOUGLAS: The statute of limitations is set out in the bill. *It actually expands the time within which a suit could be filed in court.* At the present time there is a 2-year statute of limitations, and this bill permits 2 years to file with the agency plus 6 months after the agency acts or refuses to act.

MR. HUNGATE: In other words, the statute of limitations *is extended or would be extended by this 6-month period?*

MR. DOUGLAS: *That is right.*¹³⁹

Thus, to accommodate the new mandatory administrative-exhaustion

REP. NO. 1754, *supra* note 24, at 3.

¹³⁷ See *United States v. Beggerly*, 524 U.S. 38, 48 (1998) ("Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling.").

¹³⁸ See 28 U.S.C. § 2401(b) (1994).

¹³⁹ *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing Before Subcomm. of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 18 (1966) [hereinafter *1966 Hearings*] (testimony of John W. Douglas, Assistant Attorney General) (emphasis added).

requirement, the 1966 changes had the added benefit of expanding the then-applicable two-year limitations period to include an additional six months to file suit after administrative remedies had been exhausted. The view expressed in 1966 is fully consistent with the 1940 view of the six-month limitations period, namely, that it operated as an extension of the time within which to bring a tort claim against the United States.¹⁴⁰ In addition, in 1966, the Act's statute of limitations was "simplif[ied]" to reflect the new changes to the procedure for adjudicating tort claims against the United States.¹⁴¹ The 1966 Congress intended this new administrative-exhaustion procedure, combined with the corresponding limitations periods, to expedite the resolution of tort claims brought against the United States. According to reports from the House and Senate Judiciary Committees, the 1966 changes had the "purpose of providing *for more fair and equitable treatment* of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."¹⁴² Moreover, the House and Senate Judiciary Committees also concluded that "the more *expeditious procedures* provided by this bill will have the effect of reducing the number of pending claims *which may become stale and long delayed* because of the extended time required for their consideration."¹⁴³

Although Congress added these procedures for a more expeditious consideration of tort claims, the 1966 congressional amendments did *not* make equitable tolling applicable to tort suits against the United States. This was not because Congress thought equitable tolling would automatically be incorporated into a statute that was silent on the issue. To the contrary, the 1966 Congress legislated against the backdrop of the Court's decision in *Soriano*, which held that when Congress prescribes a limitations period, it means "just that period and no more."¹⁴⁴ The Supreme Court has consistently held that Congress is aware of background legal principles when it enacts legislation and that those background principles must be considered when ascertaining congressional intent.¹⁴⁵

¹⁴⁰ See H.R. REP. NO. 2428, *supra* note 108, at 5.

¹⁴¹ H.R. REP. NO. 1532, *supra* note 25, at 5; S. REP. NO. 1327, *supra* note 25, at 8.

¹⁴² H.R. REP. NO. 1532, *supra* note 25, at 5 (emphasis added); S. REP. NO. 1327, *supra* note 25, at 2.

¹⁴³ H.R. REP. NO. 1532, *supra* note 25, at 6 (emphasis added); S. REP. NO. 1327, *supra* note 25, at 2.

¹⁴⁴ *Soriano v. United States*, 352 U.S. 270, 276 (1957); see also *Library of Cong. v. Shaw*, 478 U.S. 310, 319 (1986) (holding that waivers of sovereign immunity "must" be read against the backdrop of judicial decisions concerning the matter for which immunity is claimed to be waived), *superseded by statute on other grounds as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

¹⁴⁵ See *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-31 (1996); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 71-72 (1992); *Merrill Lynch, Pierce, Fenner &*

Nor can the 1966 Congress's failure to include equitable tolling in the FTCA be explained by saying that Congress did not consider the subject. We know this because that same year, 1966, in the same set of FTCA bills,¹⁴⁶ Congress enacted a three-year limitations period for tort claims brought by the United States that explicitly provided for equitable tolling in certain limited circumstances.¹⁴⁷ It surely does not strain the interpretive imagination to conclude that Congress's decision to include equitable tolling in tort cases brought by the federal government, but not to include equitable tolling in tort cases brought against the government, means that Congress did not intend equitable tolling to apply to FTCA cases—especially with *Soriano* in the background.

D. The 1988 Changes to the FTCA's Statute of Limitations

A new statute of limitations problem arose with the mandatory administrative-presentment requirement. Between 1966 and the 1980s, many tort plaintiffs sued federal employees in state court, only to learn later that the employee was a federal employee acting within the scope of her employment at the time the tortious act or omission occurred. Under the 1966 changes to the FTCA, the United States was deemed the only proper party in tort cases involving certified federal employees, thereby triggering the mandatory administrative-presentment requirement.¹⁴⁸ In many cases,

Smith, Inc. v. Curran, 456 U.S. 353, 379 (1982); Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97 (1979).

¹⁴⁶ See HOUSE COMM. ON THE JUDICIARY, ESTABLISHING A STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT, H.R. REP. NO. 1534, 89th Cong. 3 (1966).

¹⁴⁷ See 28 U.S.C. § 2415(b) (1994) (statute of limitations); § 2415(e) (1994) (tolling provision); § 2416 (1994) (tolling provisions). In particular, the three-year limitations period applicable to tort suits brought by the United States may be equitably tolled under the following circumstances: (1) if the United States' tort suit is dismissed without prejudice, the government can bring a second, otherwise time-barred suit if that second suit is filed within one year after the dismissal [under 28 U.S.C. § 2415(e)]; (2) "the defendant or the *res* is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico" [under 28 U.S.C. § 2416(a)]; (3) "the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason" [under 28 U.S.C. § 2416(b)]; (4) "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances" [under 28 U.S.C. § 2416(c)]; or (5) "the United States is in a state of war declared pursuant to Article I, Section 8, of the Constitution of the United States" [under 28 U.S.C. § 2416(d)].

¹⁴⁸ See 28 U.S.C. § 2672 (1994) ("Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government . . ."); § 2679(b)(1) (1994) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any

by the time a plaintiff discovered that an administrative claim had to be filed with the appropriate federal agency, the two-year limitations period for such claims had expired. Thus, FTCA plaintiffs invoked the doctrine of equitable tolling to save their claims, making the same arguments that won the day in cases involving private tort defendants. Federal courts, however, were not swayed. In nearly all cases, courts declined to equitably toll the two-year limitations period, despite the admitted inequities that would result.¹⁴⁹ For example, in *Wollman v. Gross*,¹⁵⁰ the Eighth Circuit recognized the “harsh ramifications” of applying the two-year time period strictly in federal employee cases, but nevertheless concluded that “Congress has chosen to [impose the two-year time period] and any change is its prerogative and not that of the courts.”¹⁵¹

In 1988, Congress did just that, and once again changed the FTCA by passing the Federal Employees Liability Reform and Tort Compensation Act.¹⁵² This amendment provided a procedure for substituting the United States as the proper party defendant in tort cases brought against federal employees acting within the scope of their employment when the tortious

other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.”)

¹⁴⁹ See *Houston v. United States Postal Serv.*, 823 F.2d 896, 902 n.4 (5th Cir. 1987) (noting that reasoning of cases denying relief where limitations period has run before discovery of employee status is “persuasive”); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986) (dismissing claim for failure to comply with two-year limitations period despite plaintiff not knowing employment status of tortfeasor until it was too late); *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982) (“Neither plaintiff’s lack of knowledge regarding Stennies’ federal employment nor the United States’ removal of this case from state court to district court eliminates the jurisdictional requirement that a timely administrative claim be filed.”); *Wollman v. Gross*, 637 F.2d 544, 549 (8th Cir. 1980) (recognizing “especially harsh ramifications” but declining to extend the two-year period “whenever plaintiff is unaware of the status of the defendant as a federal employee acting within the scope of his employment”), *cert. denied*, 454 U.S. 893 (1981); *Flickinger v. United States*, 523 F. Supp. 1372, 1375-76 (W.D. Pa. 1981) (declining to equitably toll limitations period where plaintiff did not discover that tortfeasor was federal employee until after two-year period expired); *Dunaville v. Carnago*, 485 F. Supp. 545, 548 (S.D. Ohio 1980) (same); *Lien v. Beehner*, 453 F. Supp. 604, 606 (W.D.N.Y. 1978) (same); *Binn v. United States*, 389 F. Supp. 988, 991-93 (E.D. Wis. 1975) (same); *Baker v. United States*, 341 F. Supp. 494, 495-96 (D. Md. 1972) (same). *But cf.* *Staples v. United States*, 740 F.2d 766, 768 (9th Cir. 1984) (holding that FTCA plaintiff, who sues federal employee in state court, satisfies presentment requirement); *Kelley v. United States*, 568 F.2d 259, 266 (2d Cir.) (same), *cert. denied*, 439 U.S. 830 (1978).

¹⁵⁰ 637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

¹⁵¹ *Id.* at 549.

¹⁵² Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 28 U.S.C.).

act or omission occurred.¹⁵³ The 1988 changes to the FTCA were largely aimed at curing the problems produced by the Supreme Court's decision in *Westfall v. Erwin*,¹⁵⁴ which held that federal employees could be personally liable in tort, unless they could prove they were acting within the scope of their employment and their actions were cloaked in government discretion.¹⁵⁵ Fearing a massive expansion of tort liability, Congress acted swiftly and decisively, crafting a precise scheme for substituting the United States for the employee as the proper party-defendant.¹⁵⁶

Congress, however, went further than just crafting a new substitution procedure. To remedy the perceived unfairness of barring plaintiffs who found out too late that the United States was the proper party-defendant, Congress provided for equitable tolling of the two-year period in limited circumstances. Specifically, Congress extended the two-year limitations period where the administrative claim would have been timely filed with an agency on the date suit was filed against the employee, as long as the claim was presented to the appropriate federal agency within sixty days of the dismissal of the action.¹⁵⁷ The House Report accompanying the 1988 changes states:

[S]ection 8 also contains provisions to ensure that no one is *unfairly* affected by the procedural ramifications of this provision. For example, if an injury has occurred before H.R. 4612 is enacted, but no lawsuit has yet been filed relative to that claim, the claimant will have to pursue a remedy against the United States, not against the employee. If a lawsuit has been filed, but it has not proceeded to final judgment, the United States will be substituted for the employee (or, if the lawsuit has been filed against both the United States and the employee, the employee will be dismissed from the suit), and resolution will occur accordingly.

Under H.R. 4612, no one who previously had the right to initiate a lawsuit will lose that right. Similarly, no one who has already initiated

¹⁵³ See 28 U.S.C. § 2679(d)(1)-(5) (1994).

¹⁵⁴ 484 U.S. 292 (1988), *superseded by statute as stated in* Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).

¹⁵⁵ See *id.* at 299.

¹⁵⁶ See 28 U.S.C. § 2679(b)(1)-(2); § 2679 (d)(1)-(5).

¹⁵⁷ See 28 U.S.C. § 2679(d)(5); see also *Mittleman v. United States*, 104 F.3d 410, 412 (D.C. Cir. 1997) (describing the inequitable circumstances that preceded the 1988 changes to the FTCA); *Bewely v. Campanile*, 87 F. Supp. 2d 79, 81 (D.R.I. 2000) ("In cases where the United States is substituted as a defendant, [§ 2679(d)(5)] provides relief from the two-year period of limitations . . ."); *Filaski v. United States*, 776 F. Supp. 115, 117 (E.D.N.Y. 1991) ("[A]s to a situation in which the United States is substituted as defendant, . . . the FTCA provides protection for the plaintiff who has no knowledge of the federal presence in a case."); *Egan v. United States*, 732 F. Supp. 1248, 1250 (E.D.N.Y. 1990) (discussing the equitable tolling provisions of 28 U.S.C. § 2679(d)(5)).

a suit will lose their claims solely because the procedural prerequisites associated with the FTCA are being made applicable. Persons who have a claim, but have not initiated a lawsuit, will still be allowed to submit an administrative claim against the United States for up to two years after the date of enactment, or within the time remaining under what otherwise would be the applicable state statute of limitations.

Persons who have initiated a lawsuit but never submitted an administrative claim to the Government *will not lose their right to pursue a lawsuit* for having failed to submit such a claim. Instead, as long as their suit was timely under state law when it was filed, they will have at least 60 more days to file a timely administrative claim.¹⁵⁸

Thus, just like it did in 1949, Congress changed the Act's statute of limitations in 1988 to account for inequities in its application.

V. A CRITICAL EXAMINATION OF THE CURRENT ANSWER TO THE *BEGGERLY-BROCKAMP* QUESTION

This rather extended discussion of the FTCA's legislative history demonstrates that Congress has modified the limitations periods in the Act when those periods produced seemingly inequitable results. The one-year period in the original Act was applauded for being "short," and the recommended remedy for failing to comply with that time period was a private bill from Congress. The firm, one-year period stood in sharp contrast to many of the pre-enactment proposals, which made some form of equitable tolling available. However, in 1949, Congress extended the one-year time period to two years because the one-year period proved to be "manifestly unjust" and "tend[ed] toward injustice in many instances."¹⁵⁹ In 1966, the statute of limitations provided claimants with an additional six months to bring a tort claim against the United States. That change, combined with the new administrative-exhaustion requirement, was designed to provide for more "fair and equitable treatment" of FTCA plaintiffs.¹⁶⁰ That same year, and in the same set of bills, Congress provided for equitable tolling in tort cases brought by the federal government. Finally, in 1988, Congress remedied the possible "unfair[ness]" that would result from the substitution procedure by providing equitable tolling in the text of the Act.¹⁶¹ Courts often analyze the history of a waiver-of-immunity-statute to determine congressional

¹⁵⁸ H.R. REP. NO. 100-700, at 7, 8 (1988) (emphasis added) (footnotes omitted) [hereinafter H.R. REP. NO. 100-700].

¹⁵⁹ H.R. REP. NO. 276, *supra* note 24, at 2, 3; S. REP. NO. 135, *supra* note 24, at 3, 4; H.R. REP. NO. 1754, *supra* note 24, at 2, 3.

¹⁶⁰ See H.R. REP. NO. 1532, *supra* note 25, at 5; S. REP. NO. 1327, *supra* note 25, at 2.

¹⁶¹ See H.R. REP. NO. 100-700, *supra* note 158, at 7.

intent.¹⁶²

Accordingly, the point here is *not* simply that Congress's failure to include equitable tolling for particular circumstances equals an intent to preclude equitable tolling in other circumstances. Rather, we have shown that, unlike many other waiver statutes, Congress has been actively involved in modifying the FTCA's statute of limitations. Furthermore, each time it has done so, Congress has extended the limitations period for equitable reasons—in 1949, by one year; in 1966, by six months; and in 1988, by sixty days. The Supreme Court has noted that “[w]hen Congress acts to amend a statute it intends its amendment to have real and substantial effect.”¹⁶³ If judge-made equitable tolling were available in 1949, 1966, and 1988, there would have been no need for Congress to make the changes that it did—especially in 1988, when it provided for equitable tolling in the text of the Act itself.

Let us come back, then, to the statement in *Perez v. United States* and *Stanfill v. United States* that “deductions from congressional inaction are notoriously unreliable.”¹⁶⁴ The legislative history presented here demonstrates that this statement is simply irrelevant to the question of whether the FTCA's limitations periods should be equitably tolled. Here, Congress *has* acted, and we can naturally infer an intent from those actions. Additionally, we have not relied upon minor, potentially out-of-context expressions of congressional intent that are often cited by textualists and intentionalists as a reason for rejecting the use of legislative history in statutory construction.¹⁶⁵ Rather, we have presented a relatively consistent story of congressional intent, with no counter-indications from crafty legislators, in which Congress has considered equitable tolling several times and specifically codified equitable tolling for limited situations. No leap of faith is required to conclude that Congress intended to preclude

¹⁶² See, e.g., *West v. Gibson*, 527 U.S. 212, 214-19 (1999) (tracing the history of Title VII); *United States v. Shearer*, 473 U.S. 52, 55-56 (1985) (tracing history of changes to assault and battery exception in FTCA); *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 166-67 (1976) (tracing the history of the Suits in Admiralty Act); *Marine Coatings of Alabama v. United States*, 71 F.3d 1558, 1560-61 (11th Cir. 1996) (tracing the history of the Public Vessels Act).

¹⁶³ *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995).

¹⁶⁴ *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (citing *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 803 n.3 (1985) (White, J., dissenting)); *Stanfill v. United States*, 43 F. Supp. 2d 1304, 1308 (M.D. Ala. 1999).

¹⁶⁵ See, e.g., Kozinski, *supra* note 51, at 810 (“Committee reports are written and floor statements are often made for the very purpose of influencing the courts.”); SCALIA, *supra* note 51, at 34 (“Nowadays . . . when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of ‘legislative intent,’ affecting the courts rather than informing the Congress has become the primary purpose of the exercise.”).

equitable tolling in other circumstances. Justice Holmes wrote that “it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.”¹⁶⁶

Moreover, we have not relied upon legislative history of the sort indicated by *Perez* and *Stanfill*, namely, legislative proposals that were considered in subsequent Congresses that did not change the statute of limitations. We specifically disavowed that approach in our 1999 paper.¹⁶⁷ To the contrary, we have pointed to the pre-enactment legislative history, which the Supreme Court has repeatedly relied upon as probative of congressional intent.¹⁶⁸ Indeed, the Court’s *Muniz* decision, which is merely one of several Supreme Court decisions that rely upon the FTCA’s pre-enactment legislative history, supports the view that pre-enactment proposals are highly probative of Congress’s intent when it enacted the statute in 1946.¹⁶⁹ We have also relied upon the legislative history accompanying the 1949, 1966, and 1988 changes to the Act’s statute of

¹⁶⁶ *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).

¹⁶⁷ *See Parker & Colella, supra* note 3, at 910-11 n.119. In particular, we declined to rely on equitable tolling proposals that were introduced in the House in 1989 because Congress did not change the FTCA’s statute of limitations that year. *See id.* Had we relied upon those 1989 proposals, we would have run afoul of the well-established Supreme Court authority to which *Perez* and *Stanfill* referred. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (“We have stated, however, that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.”) (internal quotations and citation omitted); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.”) (internal quotations and citation omitted); *United States v. Wise*, 370 U.S. 405, 411 (1962) (“[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.”); *United States v. Price*, 361 U.S. 304, 313 (1960) (“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947) (“We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932 . . .”).

Even so, the Court has not always been consistent on this point, especially in the waiver-of-sovereign-immunity context generally, and in the FTCA context in particular. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486 & n.11 (1994) (mentioning failed legislative proposals considered by Congress in support of Court’s conclusion that “[w]e leave it to Congress to weigh the implications of such a significant expansion of Government liability”); *United States v. Johnson*, 481 U.S. 681, 686-88 & n.6 (1987) (citing failed legislative proposals in support of Court’s conclusion that it declined to allow service members to bring medical malpractice suits against the United States); *Carlson v. Green*, 446 U.S. 14, 20 (1980) (citing failed legislative proposals as support for Court’s conclusion that “Congress has not taken action . . . that would expand the exclusivity of FTCA”).

¹⁶⁸ *See supra* note 81 (authorities cited therein).

¹⁶⁹ *See id.*

limitations—legislative evidence that courts have routinely consulted for ascertaining congressional intent.¹⁷⁰ Thus, all of this legislative evidence, with its documented impact on judicial interpretations of the FTCA, cannot simply be dismissed as “equivocal” or “scant,”¹⁷¹ especially because the *Perez* and *Stanfill* courts did not take a hard look at the Act’s legislative history.

The picture that emerges from an analysis of the FTCA’s legislative history is that, as originally enacted, Congress did not intend equitable tolling to apply. Instead, Congress envisioned that a private bill of relief provided the proper remedy for failure to comply with the Act’s limitations periods. Attorney General Murphy’s statements, Judge Holtzoff’s testimony, and the Supreme Court’s *Muniz* decision, support this conclusion.¹⁷²

To conclude that equitable tolling is permissible in FTCA cases, one would have to find that, when the statute of limitations was changed in 1949, 1966, and 1988, Congress did an about-face and intended to permit the judiciary to expand the limitations period through the doctrine of equitable tolling. As we have shown, the legislative history compels precisely the opposite conclusion. Congress modified the limitations period to account for inequitable circumstances, expanding the period from one to two years in 1949, adding an additional six months in 1966, and including equitable tolling in the text of the Act in 1988. These affirmative congressional actions belie any suggestion that Congress intended the courts, through the doctrine of equitable tolling, to cure any unfairness that may flow from the Act’s limitations periods.

Perhaps the legislative history of the FTCA’s statute of limitations is accorded little weight because of the perception that, unlike the tax-refund statute in *Brockamp* and the Quiet Title Act in *Beggerly*, equitable tolling has historically been applied to the run-of-the-mill tort action.¹⁷³ Accordingly, by putting the United States on a par with private tort defendants, one might argue that Congress may have intended for equitable tolling to apply to tort claims brought against the United States.¹⁷⁴ This

¹⁷⁰ See *supra* note 81 (authorities cited therein).

¹⁷¹ See *Perez v. United States*, 167 F.3d 913, 916 (5th Cir. 1999); *Stanfill v. United States*, 43 F. Supp. 2d 1304, 1308 (M.D. Ala. 1999).

¹⁷² See *supra* Part IV.A.

¹⁷³ See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 1, 3, at 6, 15-20 (5th ed. 1984) [hereinafter PROSSER & KEETON] (presenting the underlying principles of tort law).

¹⁷⁴ See *Forman v. United States*, No. Civ.A.98-6784, 1999 WL 793429, at *9 (E.D. Pa. Oct. 6, 1999) (“[T]ort law historically has accounted for individual facts, balancing analyses, and equitable considerations Unlike cases recently considered by the Court, the very nature of tort law suggests that equitable considerations are proper under the

argument has surface appeal, for it is plain that the Supreme Court's decision in *Irwin* was crafted to avoid the anomalous result that Title VII claims involving private defendants would be subject to equitable tolling, whereas the same claims against the United States would not.¹⁷⁵ In fact, the legislative history accompanying Title VII specifically supported the conclusion that the time periods in that statute may be equitably tolled.¹⁷⁶

This anomaly, however, does not arise in the FTCA context. It is no doubt true that the FTCA holds the United States liable in tort in the same manner as a private defendant in the locality within which the tortious acts or omissions occurred.¹⁷⁷ For statute of limitations purposes, however, the United States is *not* treated like a private defendant, for it is well established that the FTCA itself, not state law, prescribes the applicable limitations periods for FTCA suits as well as the relevant rules for limitations of actions.¹⁷⁸ Thus, unlike private defendants, who may be subject to varied state law limitations periods and different statute of limitations rules, the United States is subject only to those time periods and limitations rules specified in the FTCA. Congress's decisions to modify the Act's limitations periods in 1949, 1966, and 1988, fully support this distinguishing characteristic of the FTCA.

For this reason, the rules of *Lane v. Pena*¹⁷⁹ and *Library of Congress v. Shaw*¹⁸⁰ are more analogous than *Irwin* to the equitable tolling problem presented in the FTCA context. The statutes at issue in *Lane* and *Shaw*, unlike the statute in *Irwin*, did not place the United States on the same footing as private defendants with respect to the statutory provisions at

FTCA.”).

¹⁷⁵ See, e.g., *Webb v. United States*, 66 F.3d 691, 696-97 (4th Cir. 1995) (“Crucial to the Supreme Court’s holding in *Irwin*, that equitable tolling applies in suits under Title VII against the United States, was the fact that ‘the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.’” (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990))), *cert. denied*, 519 U.S. 1148 (1997).

¹⁷⁶ See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982) (cited and relied upon in *Irwin*).

¹⁷⁷ See 28 U.S.C. §§ 1346(b)(1) (1993), 2674.

¹⁷⁸ See *Richards v. United States*, 369 U.S. 1, 13-14 & n.28 (1962); *Bartleson v. United States*, 96 F.3d 1270, 1277 n.4 (9th Cir. 1996); *Johnston v. United States*, 85 F.3d 217, 219 (5th Cir. 1996); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991); *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988); *Zelevnik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Stoleson v. United States*, 629 F.2d 1265, 1268 (7th Cir. 1980); *Maryland ex rel. Burkhardt v. United States*, 165 F.2d 869, 871-74 (4th Cir. 1947). The only exception, of course, is found in the 1988 changes to the Act’s statute of limitations, where Congress explicitly permitted state law limitations periods to be used as a device for saving claims that would be time-barred under the substitution procedure. See H.R. REP. NO. 100-700, *supra* note 158, at 7-8.

¹⁷⁹ 518 U.S. 187 (1996).

¹⁸⁰ 478 U.S. 310 (1986), *superseded by statute on other grounds as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

issue in those cases. The *Lane* and *Shaw* Courts thereby concluded that, absent a clear congressional intent to the contrary, remedies available in suits against private defendants were not available in suits against the United States.¹⁸¹ Indeed, the Court's decision in *Shaw* is particularly illustrative because the statute at issue in that case, like the FTCA, rendered the United States liable "the same as a private person."¹⁸² However, the *Shaw* Court did not put any weight on that fact largely because it begged the question of whether Congress waived the United States' immunity for the remedy sought.¹⁸³ Courts, therefore, should reject the suggestion that general principles of tort law applicable to private parties, which are disclaimed in other parts of the FTCA,¹⁸⁴ require equitable tolling in FTCA cases.

The unique role that Congress has played in determining the applicable limitations periods in FTCA suits also renders unpersuasive comparisons to other waiver-of-sovereign-immunity statutes—an analysis undertaken by the *Perez* and *Forman* courts.¹⁸⁵ The Supreme Court in *Irwin* encouraged lower courts to eschew conclusions about equitable tolling based on the linguistic nuances of statutes of limitations.¹⁸⁶ Indeed, the *Beggerly* Court did not compare the language of the relatively simple statute of limitations in the Quiet Title Act with the relatively complex

¹⁸¹ See *Lane*, 518 U.S. at 196; *Shaw*, 478 U.S. at 316-19.

¹⁸² *Shaw*, 478 U.S. at 319; see also 28 U.S.C. § 1346(b)(1) (1993) (stating that United States held liable in tort in the same manner as a private party); § 2674 (same).

¹⁸³ See *Shaw*, 478 U.S. at 319. In *Shaw* the Court stated:

Title VII's provision making the United States liable 'the same as a private person' waives the Government's immunity from attorney's fees, but not interest. The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest.

Id.

¹⁸⁴ Indeed, unlike private tort defendants, the United States is not liable in a variety of circumstances. See 28 U.S.C. § 2680(h) (1994) (retaining immunity against civil actions for assault and battery, false imprisonment, false arrest, libel or slander, and negligent or intentional misrepresentations); 28 U.S.C. § 2674 (1994) (punitive damages and prejudgment interest); 28 U.S.C. § 1346(b)(1) (strict liability); 28 U.S.C. § 2680(a) (discretionary acts rooted in policy); 28 U.S.C. § 2671 (1994) (acts of independent contractors). See also *Neustadt v. United States*, 366 U.S. 696 (1961) (affirming immunity for negligent or intentional misrepresentations); *Laird v. Nelms*, 406 U.S. 797 (1972) (affirming immunity against strict liability actions). See generally PROSSER & KEETON, *supra* note 173, § 131, at 1032-42 (detailing the differences between general tort law and the FTCA).

¹⁸⁵ See *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999); *Forman*, 1999 WL 793429, at *9.

¹⁸⁶ See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("[W]e are not persuaded that the difference between [the statutes of limitations] is enough to manifest a different congressional intent with respect to the availability of equitable tolling.").

language of the tax statute in *Brockamp*. In *Brockamp*, the Court merely held that the language of the tax statute's limitations periods indicated a congressional intent to foreclose equitable tolling, not that the language itself, severed from other indicators of congressional intent, compelled the conclusion that Congress did not intend equitable tolling to apply.

In this regard, *Perez* and *Forman* are mirror images of the pre-*Brockamp* and pre-*Beggerly* decisions that held that the tax-refund statute and the Quiet Title Act were subject to equitable tolling. In *Brockamp v. United States*,¹⁸⁷ the Ninth Circuit reasoned that equitable tolling was proper because "[t]he specific language of the statute does not speak to the application of equitable tolling principles" and that "the legislative history of [the tax-refund statute] 'is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions.'"¹⁸⁸ In *Fadem v. United States*,¹⁸⁹ a case the Supreme Court remanded to the Ninth Circuit for reconsideration in light of *Brockamp*, the court held that the twelve-year limitations period in the Quiet Title Act could be equitably tolled because, unlike the statute in *Brockamp*, the Quiet Title Act's statute of limitations "is non-technical, non-substantive and comprised of two short sentences"¹⁹⁰ *Perez* and *Forman* said precisely the same thing about the FTCA.¹⁹¹ If the legislative history of the tax-refund statute did not contain an explicit statement that equitable tolling is impermissible (yet the Supreme Court found that equitable tolling *was* impermissible nevertheless), and if the language of the Quiet Title Act was

¹⁸⁷ 67 F.3d 260 (9th Cir. 1995), *rev'd*, 519 U.S. 347 (1997).

¹⁸⁸ *Id.* at 262 (quoting *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991)).

¹⁸⁹ 113 F.3d 167 (9th Cir. 1997).

¹⁹⁰ *Id.* at 168.

¹⁹¹ See *Perez*, 167 F.3d at 917. The *Perez* court noted:

Perhaps these pieces of evidence are the best that can be collected from a legislative record that does not directly address the issue, but they are insufficient to overcome the presumption of *Irwin* that the government is subject to equitable tolling By comparison, § 2401 makes just one distinction, between the time period generally applicable and that applicable if an agency issues a final denial of the claim.

Id.

Similarly, the *Forman* court stated:

Section 2401 is a garden variety limitations provision, without the attention to detail in [the tax-refund statute] that suggested preemption of equitable remedies In comparison, the Court [in *Irwin*] held that the limitations period of Title VII was subject to equitable tolling in part due to the simple language and to the separate treatment of limitations periods from the treatment of substantive questions In *Irwin*, however, the Court compared similar language to a less emphatic limitations provision and found the particular choice of similar words not dispositive.

Forman, 1999 WL 793429, at *9.

not as complex as that of the tax refund statute (yet the Supreme Court found that equitable tolling *was* impermissible anyway), then it stands to reason that the same reasoning recycled in FTCA cases should also be rejected.

Even so, comparing the FTCA to the statutes at issue in *Beggerly* and *Brockamp* provides no definitive answers because the FTCA is both different from, and similar to, both statutes. The FTCA's statute of limitations contains the same simple language as the Quiet Title Act, which was at issue in *Beggerly*, and also has a built-in tolling provision like that Act. In addition, the text of the FTCA contains equitable tolling,¹⁹² as did the tax statute at issue in *Brockamp*, and, like the tax statute, contains a legislative history replete with references to protecting the United States against stale claims.¹⁹³ On the other hand, the FTCA's limitations periods are relatively "short," while *Beggerly*'s Quiet Title Act had a "long" limitations period. The FTCA is unlike *Brockamp*'s tax statute because the limitations provisions of the FTCA are not as complex as those in the tax statute, and because there are fewer FTCA claims submitted than tax claims. Therefore, one cannot draw any principled conclusion about whether Congress intended to allow equitable tolling of the FTCA's statute of limitations by comparing the Act with other waiver statutes.

Moreover, the *Perez* and *Forman* courts' use of the "linguistic simplicity" method of analysis is flawed for another, more important reason. According to those courts, the FTCA's limitations periods may be equitably tolled because the language of the Act's statute of limitations is "a garden variety limitations provision."¹⁹⁴ This conclusion, however, cannot be squared with the Act's legislative history. In 1966, the House and Senate Judiciary Committee Reports made clear that Congress's intent *was* to "simplif[y]" the Act's statute of limitations and to conform the statute of limitations to the newly-added mandatory administrative-exhaustion requirement.¹⁹⁵ Thus, it would be wrong to conclude that

¹⁹² See 28 U.S.C. § 2679(d)(5)(A)-(B) (1994).

¹⁹³ See, e.g., H.R. REP. NO. 1532, *supra* note 25, at 6-7; S. REP. NO. 1327, *supra* note 25, at 2-3; H.R. REP. NO. 276, *supra* note 24, at 4; S. REP. NO. 135, *supra* note 24, at 2-3; H.R. REP. NO. 1754, *supra* note 24, at 4; H.R. REP. NO. 2428, *supra* note 108, at 5.

¹⁹⁴ *Perez*, 167 F.3d at 917; see also *Forman*, 1999 WL 793429, at *9 (holding that six-month limitations period in FTCA is not complex or tied to jurisdiction of federal courts, therefore equitable tolling of that period was permissible).

¹⁹⁵ See H.R. REP. NO. 1532, *supra* note 25, at 5; S. REP. NO. 1327, *supra* note 25, at 8. In particular, the House and Senate Reports stated the following:

This section amends the provisions of section 2401, the limitations section, to conform the section to the amendments added by the bill. The amendments have the effect of *simplifying* the language of section 2401 to require that a claimant must file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, and to further require the filing of a court

equitable tolling applies to FTCA cases on the ground that the Act's statute of limitations is "simple," when the reason for the simplicity has nothing to do with whether equitable tolling is permissible. In addition to the 1966 legislative history, we question whether simplicity in a waiver-of-sovereign-immunity statute somehow allows a court to apply equitable considerations and excuse a plaintiff from complying with the simple terms of a statutory provision. For instance, the Supreme Court and lower courts have declined to find any equitable exceptions to the FTCA's mandatory administrative-presentment requirement, finding the requirement "clear," easy to understand, and not terribly difficult to follow.¹⁹⁶ Therefore, neither as a matter of precedent nor logic can the "simplicity" rationale support a finding that the FTCA's limitations periods may be equitably tolled.

Nor do we believe that the lengths of the FTCA's limitations periods have any bearing on the equitable tolling issue. The district court in *Forman* held that the six-month limitations period could be equitably tolled because, among other reasons, the time period is "short" as compared to the Quiet Title Act.¹⁹⁷ Putting to one side the arbitrariness of deciding what period is "short" versus "long"—to say nothing about the open-ended invitation to judicial lawmaking such a rule would engender—a comparison to the length of the Quiet Title Act's limitations period loses its persuasive impact when we examine Congress's intent with respect to the FTCA. As we have said, both the one-year and six-month limitations periods in the original Act were applauded for being "short" because they protected the United States from having to defend stale claims.¹⁹⁸ In 1966, Assistant Attorney General Douglas indicated that the six-month period represented an extension of the time within which an FTCA plaintiff could

action within 6 months of notice by certified or registered mail of a final decision of the claim by the agency to which it was presented.

Id. (emphasis added).

¹⁹⁶ See *McNeil v. United States*, 506 U.S. 106, 112-13 (1993) ("[G]iven the clarity of the statutory text, it is certainly not a 'trap for the unwary.'"); *Price v. United States*, 69 F.3d 46, 54 (5th Cir. 1995) (declining to apply equitable considerations to 28 U.S.C. § 2675(a) (1994) where the statutory command is "clear"), *on reh'g*, 81 F.3d 520 (5th Cir.), *cert. denied*, 519 U.S. 927 (1996); *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992) ("The statutory procedure [outlined in 28 U.S.C. § 2675(a)] is clear." (quoting *Caton v. United States*, 495 F.2d 635, 638 (9th Cir. 1974))); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972) ("The language of § 2675(a) . . . is clear and unambiguous and phrased in mandatory terms."); *Meeker v. United States*, 435 F.2d 1219, 1220 (8th Cir. 1970) (same).

¹⁹⁷ See *Forman*, 1999 WL 793429, at *9 ("The presumption favoring equitable tolling is stronger where the limitations period is short.").

¹⁹⁸ See H.R. REP. NO. 2428, *supra* note 108, at 5; 1940 *Senate Hearings*, *supra* note 108, at 11 (statement of Frank Murphy, Attorney General of the United States).

assert her rights against the United States.¹⁹⁹ Therefore, assuming that the length of the limitations period has anything to do with whether equitable tolling is permissible—a very questionable assumption in our view²⁰⁰—there are strong legislative indications that the six-month limitations period was “short” for reasons other than opening the door to equitable tolling.

The FTCA, then, provides a good example of how statutory comparisons often cause courts to stray from an inquiry into the intent behind the particular statute under review. As the methodology endorsed by *Beggerly* and *Brockamp* makes abundantly clear, the focus should always be on Congress’s intent with respect to the FTCA, and the FTCA alone. That intent, which is demonstrated throughout the Act’s legislative history, has been to lengthen the statutory periods themselves or to provide equitable tolling only in specifically limited circumstances. It is irrelevant that the limitations periods Congress has chosen are deemed by the judiciary to be “short” or that the statutory language may be characterized as simple.

Finally, a critic of the conclusions we reach here might mount an attack on two fronts. First, the 1966 legislative history supports the view that equitable tolling is permissible because Congress intended FTCA plaintiffs to be treated more fairly and equitably when they sue the federal government. Second, the purpose of encouraging the prompt presentation of claims against the United States is not inconsistent with the doctrine of equitable tolling because the doctrine is only invoked when a plaintiff has been diligent and when the United States has already been put on notice of the tort claim.²⁰¹ Although these arguments are certainly not without some force, we ultimately reject them.

Congress has itself prescribed the proper balance of fairness to claimants and fairness to the United States in defending tort claims. As the legislative history reveals, Congress’s decision to change the statute of limitations three times since the Act was passed in 1946 demonstrates the

¹⁹⁹ See *1966 Hearings*, *supra* note 139, at 18.

²⁰⁰ See *Parker & Colella*, *supra* note 3, at 901 n.86 (arguing that judicial decision characterizing a limitations period as “generous” or “not generous enough” for purposes of equitable tolling analysis cannot be squared with canons of statutory construction in the waiver-of-sovereign-immunity context).

²⁰¹ See, e.g., *Hyatt v. United States*, 968 F. Supp. 96, 101-02 (E.D.N.Y. 1997) (“In short, the ‘obvious purpose’ of Section 2401(b), in encouraging prompt presentation of claims, is still served if equitable tolling is applied in this case.”). We should point out, however, that *Hyatt* is probably no longer good law in the Second Circuit. *Hyatt*’s premise was that *Irwin* rendered the FTCA’s limitations periods non-jurisdictional and therefore subject to equitable tolling. See *id.* at 100-01. The Second Circuit has since held that the FTCA’s time limitations are jurisdictional. See *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999).

Congress' concern that the balance struck in the statute of limitations remains fair. This means that courts should not be allowed to upset this balance in the equitable tolling context, just like courts are precluded from doing so when other statute of limitations issues arise in FTCA cases. For example, the United States is not permitted to benefit from more stringent statute of limitations rules prescribed in certain states,²⁰² and FTCA plaintiffs are precluded from benefiting from more favorable state-law limitations rules.²⁰³ Courts do not permit the United States or plaintiffs to sidestep the FTCA's statute of limitations out of respect for the balance that Congress has struck in fashioning the time limitations applicable to FTCA suits.²⁰⁴ We propose that courts pay the same respect in the equitable tolling context.

VI. CONCLUSION

The question of whether the FTCA's limitations periods could be equitably tolled after *Beggerly* and *Brockamp* has been, and will continue to be, litigated. The ultimate answer to the equitable tolling problem must come from the Supreme Court, which, in recent years, has shown an interest in more precisely defining the reach of *Irwin*. It appears that it is only a matter of time before the Court will be faced with a case that squarely presents the issue of whether the FTCA is subject to equitable tolling. In this regard, there already exists an inter-Circuit split on the issue of whether the Act's limitations periods are jurisdictional,²⁰⁵ and there are

²⁰² See, e.g., *Bartleson v. United States*, 96 F.3d 1270, 1276 (9th Cir. 1996) (rejecting government's argument that state-law rule of accrual applied to FTCA claim because rule of accrual specified in FTCA applied); *Johnston v. United States*, 85 F.3d 217, 223-24 (5th Cir. 1996) (rejecting government argument that wrongful death claim accrued pre-death because doing so would deprive FTCA claimants of the two-year period prescribed by Congress).

²⁰³ See, e.g., *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 274-75 (10th Cir. 1991) (rejecting FTCA plaintiff's argument that state tolling statute applied to FTCA claim because doing so would upset balance struck by Congress).

²⁰⁴ See, e.g., *Johnston*, 85 F.3d at 220, 223-24 (declining to adopt state law in limitations analysis where to do so would upset congressional balance struck in FTCA's statute of limitations); *Pipkin*, 951 F.2d at 275 (rejecting argument that state-law tolling provision would apply to toll six-month period because "[c]ourts are not free to construe section 2401(b) so as to defeat that section's purpose of encouraging prompt presentation of claims against the federal government").

²⁰⁵ See *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) (holding that FTCA's limitations periods are jurisdictional); *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998) (same); *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997) (same); *Deutsch v. United States*, 67 F.3d 1080, 1091 (3d Cir. 1995) (same); *Goodhand v. United States*, 40 F.3d 209, 214 (7th Cir. 1994) (same); *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992) (same); *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991) (same). *But see* *Perez v. United States*, 167 F.3d 913, 915-16 (5th Cir. 1999) (holding that the FTCA's limitations periods are not jurisdictional); *Kanar v. United States*, 118 F.3d 527, 530-31 (7th Cir. 1997) (same); *Glarner v. United States Dep't of Veterans Admin.*, 30 F.3d

at least three intra-Circuit splits on that precise question.²⁰⁶ Although, as we argued in our 1999 paper, the jurisdiction and equitable tolling issues are analytically distinct,²⁰⁷ courts nonetheless often combine the two in their discussion of the FTCA's statute of limitations. Therefore, by deciding the jurisdictional issue together with the equitable tolling question—which is a virtual certainty in cases where compliance with the Act's statute of limitations is raised as a bar to suit—the Supreme Court or courts of appeals will have a number of opportunities to provide lower courts and litigants with additional guidance on how to resolve these important issues.

We have weighed in on these questions twice. And we have done so not out of some desire to get in the first word or to provide the United States a litigation weapon. Rather, we have tried to provide courts with a complete picture of the FTCA's statute of limitations and its legislative history, a history that is not readily accessible to courts, so that a decision on equitable tolling will be fully informed. In charting what we believe to be the proper course, we have fielded the *Beggerly-Brockamp* pitch and pulled together evidence from the text, purposes, and legislative history of the FTCA that sheds light on the question of whether equitable tolling is consistent with congressional intent.

Unfortunately, after *Beggerly* and *Brockamp*, courts are not likely to

697, 701 (6th Cir. 1994) (same); *Krueger v. Saiki*, 19 F.3d 1285, 1286 (8th Cir.) (same), *cert. denied*, 513 U.S. 905 (1994).

²⁰⁶ In the Fifth Circuit compare *Perez*, 167 F.3d at 915-16 (holding that the two-year limitations period is not jurisdictional) with *Flory*, 138 F.3d at 159 (holding that the FTCA's two-year limitations period is jurisdictional) and *Johnston*, 85 F.3d at 218 n.2 (same) and *MacMillan v. United States*, 46 F.3d 377, 380 n.3 (5th Cir. 1995) (same).

In the Sixth Circuit compare *Miller v. United States Postal Serv.*, 995 F.2d 1067, 1993 WL 64144, at *1 (6th Cir. 1993) (unpublished table decision) (holding that the FTCA's limitations periods are jurisdictional), *Willis v. United States*, 972 F.2d 350, 1992 WL 180181, at *2 (6th Cir. 1992) (unpublished table decision) (same), *Horten v. United States*, 961 F.2d 1577, 1992 WL 102719, at *1 (6th Cir. 1992) (unpublished table decision) (affirming dismissal for lack of subject matter jurisdiction where plaintiff did not comply with FTCA's two-year limitations period), with *Glamer*, 30 F.3d at 701 (holding that FTCA's limitations periods are not jurisdictional).

In the Seventh Circuit compare *Kanar*, 118 F.3d at 530-31 (opinion by Easterbrook, J.) (holding that the Act's limitations periods are not jurisdictional), with *Goodhand*, 40 F.3d at 214 (opinion by Posner, C.J.) (holding that the limitations periods in the FTCA are jurisdictional), and *State Farm Ins. Co. v. United States*, 6 F. Supp. 2d 985, 987 (N.D. Ill. 1998) (same), and *Burns v. United States Dept. of Justice*, 864 F. Supp. 80, 81 (N.D. Ill. 1994) (same), and *Willis v. United States*, 879 F. Supp. 889 (C.D. Ill. 1994), *aff'd*, 65 F.3d 171 (7th Cir. 1995) (unpublished table decision) (Posner, C.J. & Easterbrook, J. on panel) (“We express no opinion on whether *Irwin* transformed the statute of limitations from a jurisdictional prerequisite to an affirmative defense . . .”).

²⁰⁷ See *Parker & Colella*, *supra* note 3, at 898, 902-04 (reasoning that limitations periods can be jurisdictional and subject to equitable tolling).

find a clear statement from Congress that “equitable tolling is impermissible” or that “there shall be no equitable tolling.” Indeed, there were no such statements in the history accompanying the statutes in *Beggerly* and *Brockamp*. Such a statement from Congress would surely provide the simplest, most certain, and most legitimate answer to the *Beggerly-Brockamp* question; however, this is not the case in the FTCA context. For the textualist, the process of answering the equitable tolling question is sure to be an uncomfortable one. *Irwin* uses a judicially-crafted presumption—a dice-loading rule in Justice Scalia’s eyes²⁰⁸—to speak for Congress in all waiver-of-sovereign-immunity statutes. Perhaps it is time for the Court to reconsider the rebuttable-presumption rule altogether,²⁰⁹ or to limit the rule to waiver-of-sovereign-immunity statutes (like Title VII) that treat private parties and the United States the same for statute of limitations purposes.²¹⁰ If the Court decides to limit *Irwin* in this way, such a decision would certainly shrink the ranks of “hapless law clerk[s],”²¹¹ and hapless trial attorneys for that matter, who must present legislative history as evidence that the presumption favoring equitable tolling has been rebutted.

With that said, we have concluded that when Congress originally considered the limitations periods that should apply to tort claims brought against the United States, a number of prior bills contained equitable tolling provisions, but those provisions never made it into the Act as passed. Claimants were left, therefore, with a private bill of relief in inequitable circumstances. Moreover, each time Congress amended the FTCA’s statute of limitations (in 1949, 1966, and again in 1988), equitable tolling was on the legislative table, and each time Congress either chose not to incorporate it into the Act, or did so by specifying the circumstances in

²⁰⁸ See SCALIA, *supra* note 51, at 28.

²⁰⁹ See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-81 (1999) (overruling prior case that permitted constructive waiver of State’s sovereign immunity because implied waivers of sovereign immunity are invalid).

²¹⁰ Compare *Bailey v. West*, 160 F.3d 1360, 1363-68 (Fed. Cir. 1998) (en banc) (holding that *Irwin*’s rebuttable-presumption rule applies to time limit for appealing decision of Board of Veterans’ Appeals), *with id.* at 1369-70 (Michel, J., concurring) (holding that *Irwin* is “narrow” and interpreting *Irwin* as allowing equitable tolling only because equitable tolling was permitted in private Title VII suits), *and id.* at 1371 (Bryson, J., joined by Lourie, Rader & Schall, JJ., dissenting) (reasoning that *Irwin* did not control because “[t]he statutory procedure in [Title VII] cases involving government employees is essentially the same as the procedure in cases involving private employees, and the Court had previously held in private sector cases that the statutory time limits in Title VII are nonjurisdictional and thus subject to equitable tolling”).

²¹¹ See *Conroy v. Aniskoff*, 507 U.S. 511, 527 (1993) (Scalia, J., concurring) (“I confess that I have not personally investigated the entire legislative history—or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task.”).

which the time periods would be extended. At the same time, Congress has repeatedly expressed its intent to facilitate the prompt presentation of tort claims against the United States. Thus, because Congress has historically assumed the role of modifying the FTCA's limitations periods to cure inequities in its application, and because Congress has consistently highlighted the importance of timely compliance with the Act's limitations periods, there is very good reason to believe that Congress did not want judicially crafted rules of equitable tolling to extend the FTCA's limitations periods. There is more than sufficient evidence in the legislative history to overcome any presumption that equitable tolling should apply to the FTCA's limitations periods. To ignore this legislative history or to discount its significance transforms *Irwin's* rebuttable presumption into a conclusive presumption.

Finally, our conclusion is fully consistent with a broader view of the historical relationship between Congress and Article III courts when it comes to tort compensation. The Act does not, and never did, replace the private-bill mechanism. Since the passage of the FTCA, there are numerous examples of Congress entertaining private bills of relief when tort compensation could not be obtained in an Article III court.²¹² This

²¹² See, e.g., H.R. 998, 105th Cong. (1997) (private bill of relief for Lloyd B. Gamble, whose tort claim would have been barred by the FTCA's statute of limitations); H.R. 1009, 104th Cong. (1996) (same); H.R. 4862, 103d Cong. (1994) (private bill of relief for INSLAW, Inc., William A. Hamilton, and Nancy Hamilton, which would confer jurisdiction on the Court of Federal Claims to adjudicate the claim and waive jurisdictional defenses, such as statute of limitations); H.R. 3344, 103d Cong. (1994) (private bill of relief for Lloyd B. Gamble, whose tort claim would have been barred by the FTCA's statute of limitations); H.R. 808, 103d Cong. (1993) (private bill of relief for James B. Stanley, whose tort claim was barred under the *Feres* doctrine in the case of *United States v. Stanley*, 483 U.S. 669 (1987)); H.R. 572, 103d Cong. (1993) (private bill of relief for Melissa Johnson, whose tort claim was barred by the assault and battery exception of the FTCA); H.R. 5164, 102d Cong. (1992) (private bill of relief for Craig B. Sorensen and Nita M. Sorensen, whose tort claims would have been barred under the FTCA's two-year statute of limitations); H.R. 455, 102d Cong. (1992) (private bill of relief for Melissa Johnson, whose tort claim was barred by the assault and battery exception of the FTCA); H.R. 2345, 102d Cong. (1992) (private bill of relief for William A. Kubrick, whose tort claim was held time-barred under the two-year limitations period in the case of *United States v. Kubrick*, 444 U.S. 111 (1979)); H.R. 1759, 102d Cong. (1992) (private bill of relief for James B. Stanley, whose tort claim was barred under the *Feres* doctrine in the case of *United States v. Stanley*, 483 U.S. 669 (1987)); H.R. 760, 102d Cong. (1992) (private bill of relief for Willie D. Harris, whose tort claim would have been barred by the *Feres* doctrine and the FTCA's statute of limitations, that would have permitted claimant to sue in federal court); H.R. 238, 102d Cong. (1991) (private bill of relief for Craig A. Klein, whose tort claim would have been barred by the customs exception in 28 U.S.C. § 2680(c)); H.R. 2937, 101st Cong. (1990) (private bill of relief for Rodney E. Hoover, whose claim would have been time-barred, that would have permitted Hoover to proceed in the United States District Court for the Eastern District of California); H.R. 4356, 101st Cong. (1990) (private bill of relief for John Barren, whose tort claim was adjudicated to be time-barred under the FTCA's two-year statute of limitations in *Barren ex rel. Barren v. United States*, 839 F.2d 987 (3d Cir.), cert. denied, 488 U.S. 827 (1988)); H.R. 308, 101st

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relationship between two co-equal branches of the federal government explains why the United States is unlike any other private tort defendant when it comes to equitable tolling. Congress has enacted a limited waiver of sovereign immunity in tort, reserving for itself the responsibility of compensating those whose claims do not come within the strict waiver of immunity. That necessarily includes those who do not comply with the Act's limitations periods.

Cong. (1990) (private bill of relief for Banfi Products Corp., whose tort claim was barred by the discretionary function exception, that would permit the Court of Claims to adjudicate the claim); S. 1077, 84th Cong. (1955) (private bill of relief to compensate victims of the Texas City Disaster, whose tort claims were barred by the discretionary function exception in *Dalehite v. United States*, 346 U.S. 15 (1953)).

APPENDIX

THE LIMITATIONS AND EQUITABLE TOLLING PROVISIONS OF LEGISLATIVE
PROPOSALS CONSIDERED PRIOR TO THE ENACTMENT OF THE
FEDERAL TORT CLAIMS ACT

BILL NUMBER	LIMITATIONS PERIODS	EQUITABLE TOLLING
H.R. 12178, 68th Cong. (Feb. 5, 1925)	(1) One year for personal injury or death claims (§ 6) (2) No waiver of immunity for property damage claims	None
H.R. 12179, 68th Cong. (Feb. 5, 1925)	(1) Two years for personal injury and death claims (2) No waiver of immunity for property damage claims	None
H.R. 6716, 69th Cong. (Jan. 5, 1926)	(1) Six months for property damage (§ 2(c)) (2) Thirty days for personal injury (§ 202(c)) (3) Six months for wrongful death (§ 202(c))	(1) Time to file personal injury claims extended by six months if reasonable cause shown (§ 202(c)) (2) Period for minors under eighteen and incompetent does not begin to run until guardian or trustee obtained (§ 305)

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H.R. 8914, 69th Cong. (Feb. 4, 1926)	(1) Two years for personal injury or death claims (§ 5) (2) No waiver of immunity for property damage claims	None
S. 1912, 69th Cong. (Mar. 26, 1926)	(1) Six months for property damage claims accruing prior to Act (§ 5) (2) Six years for property damage (§ 5) (3) Sixty days for personal injury (§ 202(a)) (4) Six months for wrongful death (§ 202(a))	(1) Time to file personal injury claims extended by six months if reasonable cause shown (§ 202(a)) (2) Period for minors under eighteen and incompetents does not begin to run until guardian or trustee obtained (§ 304)
H.R. 9285, 70th Cong. (Jan. 13, 1928)	(1) One year for property damage claims accruing prior to Act (§ 5) (2) Six years for property damage (§ 5) (3) Six months for personal injury (§ 202(a)) (4) One year for wrongful death (§ 202(a))	(1) Time to file personal injury claims extended by one year if reasonable cause shown (§ 202(a)) (2) Period for minors under twenty-one, idiots, lunatics, insane persons, and persons at sea extended one year from time disability ceases (§ 304)
S. 4377, 71st Cong. (May 7, 1930)	(1) Ninety days for property damage (§ 1(d)) (2) Ninety days for personal injury and wrongful death claims (§ 202(a))	(1) Time to file personal injury claims extended by one year if reasonable cause shown (§ 202(a)) (2) Period for minors under twenty-one, idiots, lunatics, insane persons, and persons at sea extended one year from time disability ceases (§ 304)

<p>H.R. 15428, 71st Cong. (Dec. 18, 1930)</p>	<p>(1) Ninety days for property damage (§ 1(d))</p> <p>(2) Ninety days for personal injury and wrongful death claims (§ 202(a))</p>	<p>(1) Time to file personal injury claims extended by one year if reasonable cause shown (§ 202(a))</p> <p>(2) Period for minors under twenty-one, idiots, lunatics, insane persons, and persons at sea extended one year from time disability ceases (§ 304)</p>
<p>H.R. 16429, 71st Cong. (Jan. 21, 1931)</p>	<p>(1) Ninety days for property damage (§ 2)</p> <p>(2) Ninety days for personal injury (§ 23(a)(1))</p>	<p>Period for minors under twenty-one, idiots, lunatics, insane persons, and persons at sea extended one year from time disability ceases (§ 304)</p>
<p>H.R. 17168, 71st Cong. (Feb. 18, 1931)</p>	<p>(1) Ninety days to file with agency for property damage claim under \$1,000 (§ 2)</p> <p>(2) Ninety days for property damage claim over \$1,000 filed in court (§ 2)</p> <p>(3) Ninety days to file in court after agency decision (§ 2)</p> <p>(4) One year to file with agency for personal injury or death claims under \$1,000 (§ 202)</p> <p>(5) One year for personal injury or death claims over \$1,000 (§ 202)</p> <p>(6) Ninety days to file in court after agency decision (§ 202)</p>	<p>None</p>

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S. 211, 72d Cong. (Dec. 9, 1931)	(1) Thirty days to file property damage claim with agency (§ 2(d)) (2) Thirty days to file personal injury and death claims with agency (§ 202(a)) (3) One year to file suit after agency decision (§ 303(2))	None
H.R. 5065, 72d Cong. (Dec. 9, 1931)	(1) Thirty days to file property damage claim with agency (§ 1(d)) (2) Thirty days to file personal injury or death claim with agency (§ 202(a)) (3) One year to file suit after agency decision (§ 303(2))	None
S. 4567, 72d Cong. (May 4, 1932)	(1) Thirty days to file property damage claim with agency (§ 2(c)) (2) Thirty days to file personal injury or death claim with agency (§ 202(a)) (3) One year to file suit after agency decision (§ 304(2))	(1) Notice of property damage claim timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 2(c)) (2) Notice of personal injury or death claim timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 202(a))

<p>H.R. 129, 73d Cong. (March 9, 1933)</p>	<p>(1) Two years to file all claims under \$1,000 with agency (§ 2(e))</p> <p>(2) Two years to file all claims over \$1,000 in Court of Claims (§ 2(e)(1))</p> <p>(3) Ninety days from agency denial, or, if 1 year passes without agency decision, 90 days after expiration of 1 year (§ 2(e)(2))</p>	<p>None</p>
<p>S. 1833, 73d Cong. (May 29, 1933)</p>	<p>(1) Thirty days to file property damage claim with agency (§ 1(b), (c))</p> <p>(2) Thirty days to file personal injury or death claim with agency (§ 202(a), (b))</p> <p>(3) If no agency action within 6 months, suit may be filed (§ 304(1))</p> <p>(4) One year to file suit after agency denial (§ 304(2))</p>	<p>(1) Notice of property damage claim timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 1(c))</p> <p>(2) Notice of personal injury or death claims timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 202(a))</p>
<p>H.R. 8561, 73d Cong. (Mar. 9, 1934)</p>	<p>Three years for all tort claims (§ 10)</p>	<p>None</p>
<p>H.R. 2028, 74th Cong. (Jan. 3, 1935)</p>	<p>(1) Two years to file all claims under \$1,000 with agency (§ 2(e))</p> <p>(2) Two years to file all claims over \$1,000 in Court of Claims (§ 2(e)(1))</p> <p>(3) Ninety days from agency denial, or, if 1 year passes without agency decision, 90 days after expiration of 1 year (§ 2(e)(2))</p>	<p>None</p>

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S. 1043, 74th Cong. (Jan. 14, 1935)	<p>(1) Thirty days to file property damage claim with agency (§ 1(b), (c))</p> <p>(2) Thirty days to file personal injury or death claim with agency (§ 202(a), (b))</p> <p>(3) If no agency action within 6 months, suit may be filed (§ 304(1))</p> <p>(4) One year to file suit after agency denial (§ 304(2))</p>	<p>(1) Notice of property damage claim timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 1(c))</p> <p>(2) Notice of personal injury or death claims timely if filed with agency within ninety days and reasonable cause and no prejudice to the United States shown (§ 202(a))</p>
H.R. 7236, 76th Cong. (July 14, 1939)	<p>(1) One year to file all claims under \$1,000 with agency (§ 301)</p> <p>(2) One year to file suit for all claims over \$1,000 (§ 301)</p> <p>(3) Six months to file suit after agency denial (§ 301)</p>	None
S. 2690, 76th Cong. (June 24, 1939)	<p>(1) One year to file all claims under \$1,000 with agency (§ 301)</p> <p>(2) One year to file suit for all claims over \$1,000 (§ 301)</p> <p>(3) Six months to file suit after agency denial (§ 301)</p>	None
H.R. 5185, 77th Cong. (June 26, 1941)	One year to file all claims under \$1,000 with agency	None

H.R. 5299, 77th Cong. (July 14, 1941)	(1) One year to file all claims under \$1,000 with agency (§ 301) (2) One year to file suit for all claims over \$1,000 (§ 301) (3) Six months to file suit after agency denial (§ 301)	None
S. 1743, 77th Cong. (July 14, 1941)	(1) One year to file personal injury and property damage claims with agency (2) No provision for death claims	None
H.R. 5373, 77th Cong. (July 21, 1941)	(1) One year to file all claims under \$1,000 with agency (§ 301) (2) One year to file suit for all claims over \$1,000 (§ 301) (3) Six months to file suit after agency denial (§ 301) (4) Six months to file suit after claim withdrawn from agency (§ 301)	None
S. 2207, 77th Cong. (Jan. 16, 1942)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None

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S. 2221, 77th Cong. (Jan. 23, 1942)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None
H.R. 6463, 77th Cong. (Jan. 26, 1942)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None
H.R. 817, 78th Cong. (Jan. 7, 1943)	(1) One year to file all claims under \$1,000 with agency (§ 301) (2) One year to file suit for all claims over \$1,000 (§ 301) (3) Six months to file suit after agency denial (§ 301)	None
H.R. 1356, 78th Cong. (Jan. 20, 1943)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None

S. 1114, 78th Cong. (May 17, 1943)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None
H.R. 181, 79th Cong. (Jan. 3, 1945)	(1) One year to file all claims under \$1,000 with agency (§ 401) (2) One year to file suit for all claims over \$1,000 (§ 401) (3) Six months to file suit after agency denial (§ 401) (4) Six months to file suit after claim withdrawn from agency (§ 401)	None