

The FTCA and equitable tolling: Why the 'Wong' decision matters

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This spring, a divided U.S. Supreme Court held in *United States v. Wong* that the limitations statute in the Federal Tort Claims Act is subject to equitable tolling. 135 S. Ct. 1625 (2015). The majority's opinion paves the way for late-filed claims to proceed against the government, provided that circumstances in a particular case warrant application of equitable tolling.

FTCA and equitable tolling

The FTCA is a waiver of sovereign immunity, which traditionally shielded the government from tort liability. It permits anyone injured by an act or omission of the United States to sue the government on any tort theory normally available to other claimants in the jurisdiction in which the injury occurred. The FTCA's limitations statute, however, requires a claimant *both* to present an administrative claim within two years of accrual of the cause of action *and* to file a complaint in federal court within six months of an agency denial of that administrative claim. 28 U.S.C. § 2401(b).

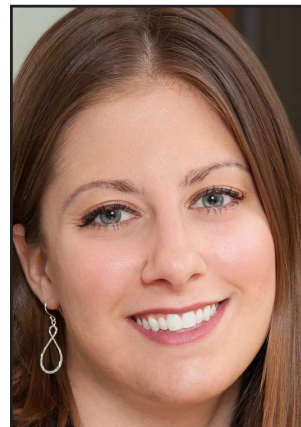
Because late-filed claims are subject to dismissal, injured parties that miss one or both deadlines often argue that the limitations statute should be "tolled" for equitable reasons — that is, suspended until circumstances fairly permitted the claimant to present a claim or file a complaint. Courts of appeals technically have been divided on whether equitable tolling is available on FTCA claims, though most have found that it may be available in certain circumstances.



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Divided court

The Supreme Court resolved that issue in *Wong*. There, extenuating circumstances prevented the plaintiff from filing her FTCA claim (that the Immigration and Naturalization Service falsely imprisoned her) within six months of agency denial. Ironically, the extenuating circumstances were judicial in origin: The six-month deadline expired while Wong's timely motion to amend her pending suit asserting various non-FTCA claims was under advisement.

Similarly, in *United States v. June*, a companion case that was argued and decided together with *Wong*, the plaintiff failed to present her FTCA claim (that the Federal Highway Administration negligently approved a median barrier that resulted in a deadly car accident) to the agency within two years after accrual. In *June*, the plaintiff did not discover the FHA's negligence until two years into a state-court action for wrongful death, more than five years after the accident.

In both *Wong* and *June*, the district

courts ruled that the limitations statute could not be equitably tolled, no matter the circumstances that prevented a timely claim. But, in both cases, the 9th Circuit reversed, holding that equitable tolling was available in appropriate circumstances. And, in both cases, the Supreme Court granted the government's petitions for certiorari and affirmed the 9th Circuit.

Justice Elena Kagan, writing for the majority, held that the FTCA is subject to equitable tolling. Under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), statutes of limitations are "jurisdictional," and thus immune from equitable tolling, only when Congress explicitly says so. This is sometimes referred to as the "clear statement rule." Because the FTCA's limitations statute did not contain such a clear statement, Justice Kagan held that it is merely a claims-processing rule that courts could toll when equity requires.

In so holding, Justice Kagan rejected the government's argument that the limitations statute's language — "shall be forever barred" — precluded

equitable tolling. That formulation, she reasoned, was “an utterly unremarkable phrase” that was “commonplace in federal limitations statutes for many decades.” It “had no talismanic power to render time bars jurisdictional.” Similarly, Justice Kagan rejected the government’s argument that every limitations statute applying to suits against the United States was jurisdictional because waivers of sovereign immunity must be construed “strictly.” She reasoned that the government’s argument was irreconcilable with the Court’s decision in *Irwin*, and that Congress could make the FTCA limitations statute jurisdictional at any time by adding a clear statement to its text.

Four justices dissented. Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas, would have held that the FTCA’s statute of limitations was jurisdictional and therefore not subject to equitable tolling. According to the dissent, the phrase “shall be forever barred” is “absolute” and “brooks no exceptions.” That, together with “130 years” of case law marred only by the Court’s dalliance in *Irwin*, precluded equitable tolling in cases brought under the FTCA.

Significance of the holding

The most obvious significance of the Court’s holding is the breadth of its application. FTCA litigants are a diverse group ranging from prisoners and detainees suing the Bureau of Prisons

or other agencies (in *Wong’s* case, the INS), to military personnel and other federal employees suing the Department of Defense or other agencies that employ them, to companies suing the agencies responsible for regulating them or for other torts, such as airplane crashes, environmental contamination, or disclosure of trade secrets. Indeed, the plaintiff in *June* sued the FHA for a death that resulted from its regulatory oversight of median barriers. Equitable tolling is now in play for all of these cases.

That raises the question of whether Congress will legislatively overturn *Wong*. As Justice Kagan recognized, all Congress needs to do is say that the limitations statute is jurisdictional, and it will be so. The Department of Justice, as the agency responsible for defending the United States in FTCA cases, is the most logical constituency to seek legislative action. *Wong* rejected the Department of Justice’s longstanding litigation position that the FTCA’s limitations statute was jurisdictional and therefore not subject to equitable tolling. But it may be unlikely that Congress would choose to act at this point. In the 25 years since the clear statement rule was enunciated in *Irwin*, Congress has not seen fit to modify the FTCA limitations statute in that way.

If equitable tolling is here to stay, courts will need to refine when it is warranted in a given FTCA case. Much of the framework is already in place, given the robust body of law applying

equitable tolling in other contexts and the cases (though fewer) that have done so in the FTCA context. Indeed, although technically split prior to *Wong*, most courts of appeals that have decided the issue in recent years have held or suggested that equitable tolling could apply in appropriate FTCA cases. The 1st Circuit, for example, on several occasions has assumed (without deciding) that equitable tolling could apply if a factual basis for tolling existed. *E.g.*, *Sanchez v. United States*, 740 F.3d 47, 53-54 (1st Cir. 2014). And, judges in the District of Massachusetts have applied equitable tolling when egregious circumstances, demonstrated through targeted discovery, prevented the timely filing of claims. *E.g.*, *Black v. United States*, No. 07-10794-MLW (D. Mass.) (Hr’g Tr. dated Oct. 5, 2012, and Order dated Oct. 9, 2012).

What these cases teach is that equitable tolling is a rare remedy warranted only in exceptional circumstances. Thus, for most claimants who find themselves outside of the FTCA limitations period, *Wong* will be cold comfort. **MLW**

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