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LITIGATION

A JURISPRUDENTIAL DIVIDE IN *U.S. v. WONG* & *U.S. v. JUNE*

By Richard J. Peltz-Steele*

On April 22, the Supreme Court decided two consolidated cases construing the Federal Tort Claims Act, *U.S. v. Kwai Fun Wong* and *U.S. v. June, Conservator*.¹ The Court majority, 5-4, per Justice Kagan, ruled in favor of the claimants and against the Government in both cases.

On the face of the majority opinion, *Wong* and *June* come off as straightforward matters of statutory construction. But there's more going on under the surface. The cases gave the Court a chance to wrestle with fundamental questions of statutory interpretation. And the 5-4 split reflected a familiar but always intriguing jurisprudential divide.

Let's start with some basics. Like any government, including the monarchy before the Revolution, the United States enjoys sovereign immunity. It can be sued only when it says it can, which it does by statute. Early in our history, claims went to Congress directly. In 1855, Congress created the U.S. Claims Court. The 1887 Tucker Act, named for Virginian legislator John Randolph Tucker, sent contract claims to that court. Slightly expanded, the Tucker Act is still around today.

It wasn't until the Federal Tort Claims Act of 1946 (FTCA) that Congress waived federal sovereign immunity for tort claims. FTCA bills had been around for years, but it was after a B-25 bomber in heavy fog crashed into the Empire State Building that Congress was motivated to grant tort relief to victims.

Fast forward a half century to the facts of our consolidated cases. In 1999, Kwai Fun Wong was detained by the Immigration and Naturalization Service in Oregon on suspicion of illegal entry into the country. Wong is a Hong Kong native and British citizen, and a minister of an East Asian universalist faith. She alleged in a lawsuit that INS officials violated her rights by strip searching her and denying her vegetarian meals before she was deported. About the same time she filed her lawsuit, in May of 2001, she filed an FTCA negligence claim with the INS.

Under the FTCA, a person has two years in which to file a claim for relief and has to file first with the allegedly offending administrative agency. Wong did that.

A claimant then has six months from the agency's denial or failure to act to file a claim in federal district court. There things became knotty. The INS denied her claim in December of 2001. She already had a civil rights case going in court. So four months after the denial, she asked the federal district court for leave to amend her complaint, to add the FTCA claim. The district court granted leave, but by then, six months had come and gone. Wong filed, but the Government later asserted the essence of its position in these cases: *that the limitations periods of the FTCA are jurisdictional and are not subject to equitable*

tolling. Nevertheless, the district court sided with Wong.

Wong's companion case, *June*, dealt with the initial two-year limitations period of the FTCA. In 2005, Andrew Booth was killed in a fatal car crash in Arizona. June was conservator for Booth's minor son in a wrongful death action against the state and its contractor, alleging negligent installation of highway barriers. According to June, it was four years after the accident, in the course of litigating the state lawsuit, that she discovered the Federal Highway Administration (FHWA) had concealed its negligence in approving the barriers without proper crash-testing. So June filed her claim with the FHWA in 2010, by then five years after the accident. In June's case, the district court agreed with the Government that the FTCA period had run.

The Ninth Circuit *en banc* held that the FTCA limitations are not jurisdictional, and are subject to equitable tolling, affirming *Wong*, reversing *June*, and giving both claimants the green light. So the Government went to the Supreme Court. Solicitors argued that Congress intended the FTCA limitations to be jurisdictional and not subject to equitable tolling. After all, the Government reasoned, the FTCA is a waiver of sovereign immunity. It's strictly construed to minimize Government exposure, so any ambiguity should be resolved in the Government's favor. Moreover, the 1946 statute copied the earlier Tucker Act, declaring claims after limitations to be "forever barred."

But throwing a wrench into the Government's argument was a 1990 case called *Irwin v. Department of Veterans Affairs*² under the 1964 Civil Rights Act. The *Irwin* Court opined that law-by-law adjudication of the congressional intent behind limitations was generating inconsistency and uncertainty. Instead, the Court would have a new rule, a rebuttable presumption: limitations periods in federal law are not jurisdictional—so can be tolled—unless Congress makes a clear statement to the contrary. Accordingly, Wong's and June's lawyers argued that there is no clear statement in the FTCA, so its limitations are subject to tolling.

Kagan led the majority, joined by Kennedy, Ginsburg, Breyer, and Sotomayor. The Court, 5-4, affirmed the Ninth Circuit, siding with Wong and June. *Irwin* controlled. FTCA limitations are non-jurisdictional for want of a clear statement, so claimants are entitled to equitable tolling.

The *Irwin* rule of rebuttable presumption is a "realistic assessment of legislative intent," Kagan wrote, better than the old rule of *ad hoc* fidelity to Congress. Usually a limitations period is just a claims processing rule, so Congress has to "do something special . . . to tag a statute of limitations as jurisdictional." The FTCA uses "ordinary, run-of-the-mill" language, so doesn't do anything special. There is no clear statement in legislative history, and Congress never added a clear statement by amendment.

Kagan explained as mere "legal rhetoric" the coincidence

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of language in the Tucker Act and the FTCA. And anyway, she wrote, when the Court reaffirmed Tucker limitations as jurisdictional, it did so because of *stare decisis*, not because of the *Irwin* rule. Quoting Justice Brandeis: “[I]t [wa]s more important that the rule ‘be settled than that it be settled right.’”³

Kagan also rejected the Government’s argument of strict construction of sovereign immunity waiver. That the FTCA was enacted in a different era, when Congress might have had different expectations, is still not a clear statement. The FTCA’s own history and language can be read to support equitable tolling. Limitations and jurisdiction are in different sections. The also FTCA expressly likens the United States to “a private person” for purpose of tort liability. Kagan wrote, “[T]he FTCA treats the United States more like a commoner than like the Crown.”

Justice Alito dissented, joined by Roberts, Scalia, and Thomas. According to Alito, the text of the statute, its history, and more than a century of precedent all pointed in the opposite direction.

On the text of the statute, Congress plainly intended a strictly limited waiver of immunity, fearful of open-ended tort liability. Causes such as defamation, and remedies such as punitive damages, are disallowed. Nine of thirty-one FTCA bills in Congress expressly authorized equitable tolling, and Congress passed a bill that did not. The FTCA used Tucker language, which has been construed invariably as jurisdictional. And lower courts caught on to the likeness, construing the FTCA likewise. *Irwin* doesn’t even come into play, Alito reasoned, when the court lacks jurisdiction to begin with.

Alternatively, Alito argued, Congress still intended no equitable tolling. That’s clear in the “forever barred” commandment. What Kagan found “run-of-the-mill,” Alito found “no weak kneed command.” Pointing to grammar, Alito opined that limitations usually direct themselves to claimants, such as “A person shall [or may] file.” “Forever barred” is a passive structure, focusing on the defendant Government.

The conventional takeaway from *Wong* and *June* is that it’s now easier to sue the Government. If you have a case that’s late under the two-year or six-month limitations, and you would be entitled to equitable tolling in a private civil action, you can now get equitable tolling against the Government. Congress can always change that rule if it wants to.

But under the surface of *Wong* and *June*, there’s more going on. The oral argument in the case sometimes delved into a surreal level of abstraction, revealing powerful currents in jurisprudence.

The deeper question surfaced in Justice Kagan’s point about fidelity to Congress. Both sides on the Court agree in principle that legislative intent controls. But the Court created a problem for itself in *Irwin* when it changed the rule to a convenient facsimile of intent. The majority does not reject the argument that Congress legislated in 1946 against a backdrop of strict construction and jurisdictional limitations. But the Court decided that in the absence of a clear line of precedent, *Irwin* controls regardless of whether the statute in question came before or after *Irwin* in 1990.

The Court’s position runs headlong into a declaration by Justice Alito: that the “meaning [of the FTCA], of course,

cannot change over time.”

It’s worth noting that the Court’s opinion in *Irwin* was authored by Chief Justice Rehnquist and joined by both Kennedy and Scalia. But Scalia here sides with Alito. Scalia quipped in oral argument that the claimants seemed to want “a living [FTCA].”

So this case about statutory interpretation reverberates with broader ideas about the role of the courts. *Wong* and *June* ask, what happens when the Court changes the rules of the interpretive game? Can a legal context *later in time* be dropped in behind an *earlier* Congress, even when everyone knows that’s a fiction?

Scalia bought into rebuttable presumption twenty-five years ago in *Irwin*. But he refused to apply *Irwin* when it seemed to defy legislative intent.

So on the surface, *Wong* and *June* are straightforward, applying the *Irwin* rule to construe FTCA limitations in favor of claimants. But at a deeper level, the divide in *Wong* and *June* concerns the role of the courts vis-à-vis Congress—one side on the Court more willing to wield judicial prerogative and challenge Congress to keep pace; the other side on the Court more determined to cast itself as mere umpire, calling balls and strikes.

Endnotes

- 1 United States v. Kwai Fun Wong, No. 13-1074, slip op. (Apr. 22, 2015), available at http://www.supremecourt.gov/opinions/14pdf/13-1074_09m1.pdf.
- 2 498 U.S. 89 (1990).
- 3 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

