

2266, 2268, 4583, 4634; title 15 sections 21, 45, 57a, 78y, 79x, 80a-42, 80b-13, 687e, 717r, 1193, 1262, 1474, 1710, 1825, 2060, 2618, 3416; title 16 sections 773f, 825f, 1536, 1858, 2437, 3142, 3373, 5010, 5507; title 19 sections 81r, 1677f; title 20 sections 1234g, 1412, 1416, 7372, 7711, 8896; title 21 sections 346a, 348, 355, 360g, 360kk, 371; title 22 section 1631f; title 25 section 4161; title 26 section 3310; title 27 section 204; title 29 sections 160, 210, 660, 667, 727, 1578, 2937; title 30 sections 816, 1462; title 31 section 1263; title 33 section 921; title 39 section 3628; title 40 section 333; title 42 sections 263a, 263b, 291h, 504, 1316, 1320a-7a, 1320a-8, 2022, 3027, 3785, 5311, 5405, 6029, 6306, 6869, 7525, 8412, 9152; title 43 sections 355, 1349; title 46 App. section 1181; title 47 section 402; title 49 section 46110.

§ 2113. Definition

For purposes of this chapter, the terms “State court”, “State courts”, and “highest court of a State” include the District of Columbia Court of Appeals.

(Added Pub. L. 91-358, title I, §172(a)(2)(A), July 29, 1970, 84 Stat. 590.)

EFFECTIVE DATE

Section effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

PART VI—PARTICULAR PROCEEDINGS

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151.	Declaratory Judgments	2201
153.	Habeas Corpus	2241
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SENATE REVISION AMENDMENT

Chapters 169, 171 and 173 were renumbered “167”, “169” and “171”, respectively, without change in their section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1998—Pub. L. 105-304, title IV, §406(b), Oct. 28, 1998, 112 Stat. 2905, added item for chapter 180.

¹ So in original.

1996—Pub. L. 104-331, §3(e), Oct. 26, 1996, 110 Stat. 4071, added item for chapter 179.

Pub. L. 104-132, title I, §107(b), Apr. 24, 1996, 110 Stat. 1226, as amended Pub. L. 104-294, title VI, §605(k), Oct. 11, 1996, 110 Stat. 3510, added item for chapter 154.

1995—Pub. L. 104-88, title III, §305(c)(2), Dec. 29, 1995, 109 Stat. 945, which directed amendment of the item for chapter 157 in the table of chapters of this title by substituting “Surface Transportation Board” for “Interstate Commerce Commission”, was executed by making the substitution in the table of chapters for this part to reflect the probable intent of Congress.

1992—Pub. L. 102-572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516, substituted “United States Court of Federal Claims” for “United States Claims Court” in item for chapter 165.

Pub. L. 102-559, §2(b), Oct. 28, 1992, 106 Stat. 4228, substituted “Procedure” for “Procedures” in item for chapter 176 and added item for chapter 178.

1990—Pub. L. 101-647, title XXXVI, §3302 [3612], Nov. 29, 1990, 104 Stat. 4964, added item for chapter 176.

1982—Pub. L. 97-164, title I, §§139(o)(1), 140, Apr. 2, 1982, 96 Stat. 44, substituted “United States Claims Court Procedure” for “Court of Claims Procedure” in item for chapter 165 and struck out item for chapter 167 “Court of Customs and Patent Appeals Procedure”.

1980—Pub. L. 96-417, title V, §501(25), Oct. 10, 1980, 94 Stat. 1742, substituted “Court of International Trade Procedure” for “Customs Court Procedure” in item for chapter 169.

1966—Pub. L. 89-793, title VI, §603, Nov. 8, 1966, 80 Stat. 1450, added item for chapter 175.

Pub. L. 89-554, §4(d), Sept. 6, 1966, 80 Stat. 621, added item for chapter 158.

1960—Pub. L. 86-682, §10, Sept. 2, 1960, 74 Stat. 708, added item for chapter 173.

CROSS REFERENCES

Arbitration proceedings, see section 3 et seq. of Title 9, Arbitration.

Bankruptcy proceedings, see Bankruptcy Rules and Official Bankruptcy Forms, Appendix to Title 11, Bankruptcy.

Labor disputes, procedure, see sections 159 and 160 of Title 29, Labor.

Railway labor disputes, court procedure after arbitration, see section 159 of Title 45, Railroads.

See, also, rule 81 of the Federal Rules of Civil Procedure, Appendix to this title.

CHAPTER 151—DECLARATORY JUDGMENTS

Sec.	
2201.	Creation of remedy.
2202.	Further relief.

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, §111, 63 Stat. 105; Aug. 28, 1954, ch. 1033, 68 Stat. 890; Pub. L. 85-508, §12(p), July 7, 1958, 72 Stat. 349; Pub. L. 94-455, title XIII, §1306(b)(8), Oct. 4, 1976, 90 Stat. 1719; Pub. L. 95-598, title II, §249, Nov. 6, 1978, 92 Stat. 2672; Pub. L. 98-417, title I, §106, Sept. 24, 1984, 98 Stat. 1597; Pub. L. 100-449, title IV, §402(c), Sept. 28, 1988, 102 Stat. 1884; Pub. L. 100-670, title I, §107(b), Nov. 16, 1988, 102 Stat. 3984; Pub. L. 103-182, title IV, §414(b), Dec. 8, 1993, 107 Stat. 2147.)

HISTORICAL AND REVISION NOTES
1948 ACT

Based on title 28, U.S.C., 1940 ed., §400 (Mar. 3, 1911, ch. 231, §274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, §405, 49 Stat. 1027).

This section is based on the first paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2202 of this title.

While this section does not exclude declaratory judgments with respect to State taxes, such suits will not ordinarily be entertained in the courts of the United States where State law makes provision for payment under protest and recovery back or otherwise affords adequate remedy in the State courts. See *Great Lakes Dredge & Dock Co. v. Huffman*, La. 1943, 63 S.Ct. 1070, 319 U.S. 293, 87 L.Ed. 1407. See also *Spector Motor Service v. McLaughlin*, Conn. 1944, 65 S.Ct. 152, 323 U.S. 101, 89 L.Ed. 101. See also section 1341 of this title forbidding district courts to restrain enforcements of State taxes where State courts afford plain, speedy, and efficient remedy.

Changes were made in phraseology.

1949 ACT

Section corrects a typographical error in section 2201 of title 28, U.S.C.

REFERENCES IN TEXT

Section 7428 of the Internal Revenue Code of 1986, referred to in subsec. (a), is classified to section 7428 of Title 26, Internal Revenue Code.

Section 516A(f)(10) of the Tariff Act of 1930, referred to in subsec. (a), is classified to section 1516A(f)(10) of Title 19, Customs Duties.

Sections 505 and 512 of the Federal Food, Drug, and Cosmetic Act, referred to in subsec. (b), are classified to sections 355 and 360b, respectively, of Title 21, Food and Drugs.

AMENDMENTS

1993—Subsec. (a). Pub. L. 103-182 substituted “merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930),” for “Canadian merchandise.”

1988—Subsec. (a). Pub. L. 100-449 substituted “1986,” for “1954 or” and inserted “or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority,” after “title 11.”

Subsec. (b). Pub. L. 100-670 inserted “or 512” after “505”.

1984—Pub. L. 98-417 designated existing provisions as subsec. (a) and added subsec. (b).

1978—Pub. L. 95-598 inserted reference to proceedings under section 505 or 1146 of title 11.

1976—Pub. L. 94-455 substituted “taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954” for “taxes”.

1958—Pub. L. 85-508 struck out provisions which related to District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Act Aug. 28, 1954, extended provisions to Alaska.

1949—Act May 24, 1949, corrected spelling of “or” in second sentence.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by Pub. L. 103-182 effective on the date the North American Free Trade Agreement enters into force with respect to the United States [Jan. 1, 1994], but not applicable to any final determination described in section 1516A(a)(1)(B) or (2)(B)(i), (ii), or (iii) of Title 19, Customs Duties, notice of which is published in the Federal Register before such date, or to a determination described in section 1516A(a)(2)(B)(vi) of Title 19, notice of which is received by the Government of Canada or Mexico before such date, or to any binational panel review under the United States-Canada Free-Trade Agreement, or to any extraordinary challenge arising out of any such review that was commenced before such date, see section 416 of Pub. L. 103-182, set out as an Effective Date note under section 3431 of Title 19.

EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Amendment by Pub. L. 100-449 effective on date United States-Canada Free-Trade Agreement enters into force (Jan. 1, 1989), and to cease to have effect on date Agreement ceases to be in force, see section 501(a), (c) of Pub. L. 100-449, set out in a note under section 2112 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(c) of Pub. L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-455 applicable with respect to pleadings filed with the United States Tax Court, the District Court of the United States for the District of Columbia, or the United States Court of Claims more than 6 months after Oct. 4, 1976, but only with respect to determinations (or requests for determinations) made after Jan. 1, 1976, see section 1306(c) of Pub. L. 94-455, set out as an Effective Date note under section 7428 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

EFFECT OF TERMINATION OF NAFTA COUNTRY STATUS

For provisions relating to effect of termination of NAFTA country status on sections 401 to 416 of Pub. L. 103-182, see section 3451 of Title 19, Customs Duties.

AMOUNT IN CONTROVERSY

Jurisdictional amount in diversity of citizenship cases, see section 1332 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 623; title 8 sections 1252, 1503; title 21 sections 355, 360b.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch. 646, 62 Stat. 964.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §400 (Mar. 3, 1911, ch. 231, §274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, §405, 49 Stat. 1027).

This section is based on the second paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2201 of this title.

Provision in said section 400 that the court shall require adverse parties whose rights are adjudicated to show cause why further relief should not be granted forthwith, were omitted as unnecessary and covered by the revised section.

Provisions relating to submission of interrogatories to a jury were omitted as covered by rule 49 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 623.

CHAPTER 153—HABEAS CORPUS

Sec.	
2241.	Power to grant writ.
2242.	Application.
2243.	Issuance of writ; return; hearing; decision.
2244.	Finality of determination.
2245.	Certificate of trial judge admissible in evidence.
2246.	Evidence; depositions; affidavits.
2247.	Documentary evidence.
2248.	Return or answer; conclusiveness.
2249.	Certified copies of indictment, plea and judgment; duty of respondent.
2250.	Indigent petitioner entitled to documents without cost.
2251.	Stay of State court proceedings.
2252.	Notice.
2253.	Appeal.
2254.	State custody; remedies in Federal courts.
2255.	Federal custody; remedies on motion attacking sentence.
[2256.	Omitted.]

SENATE REVISION AMENDMENT

Chapter catchline was changed by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1978—Pub. L. 95-598, title II, §250(b), Nov. 6, 1978, 92 Stat. 2672, directed the addition of item 2256 “Habeas corpus from bankruptcy courts”, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1966—Pub. L. 89-711, §3, Nov. 2, 1966, 80 Stat. 1106, substituted “Federal courts” for “State Courts” in item 2254.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1657 of this title.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, §112, 63 Stat. 105; Pub. L. 89-590, Sept. 19, 1966, 80 Stat. 811.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 451, 452, 453 (R.S. §§ 751, 752, 753; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 13, 1925, ch. 229, § 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words “for the purpose of an inquiry into the cause of restraint of liberty” in section 452 of title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts.

1949 ACT

This section inserts commas in certain parts of the text of subsection (b) of section 2241 of title 28, U.S.C., for the purpose of proper punctuation.

AMENDMENTS

1966—Subsec. (d). Pub. L. 89-590 added subsec. (d).

1949—Subsec. (b). Act May 24, 1949, inserted commas after “Supreme Court” and “any justice thereof”.

RULES OF THE SUPREME COURT

Procedure on petitions for writ, see rule 20, Appendix to this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 3006A.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 454 (R.S. § 754). Words "or by someone acting in his behalf" were added. This follows the actual practice of the courts, as set forth in *United States ex rel. Funaro v. Watchorn*, C.C. 1908, 164 F. 152; *Collins v. Traeger*, C.C.A. 1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See *Dorsey v. Gill* (App.D.C.) 148 F.2d 857, 865, 866. See also *Holiday v. Johnston*, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755-761).

Section consolidates sections 455-461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days "unless for good cause additional time, not exceeding 20 days is allowed" in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words "unless for good cause additional time is allowed" in the fourth paragraph, were substituted for words "unless the party petitioning requests a longer time" in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89-711, §1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104-132, title I, §§101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

HISTORICAL AND REVISION NOTES

This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress

by Chairman Hatton Summers of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See *Dorsey v. Gill*, 1945, 148 F.2d 857, 862, in which Miller, J., notes that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5."

SENATE REVISION AMENDMENTS

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application presented no new grounds, and to omit reference to rehearing in section catch line and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-132, §106(a), substituted "except as provided in section 2255." for "and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

Subsec. (b). Pub. L. 104-132, §106(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

Subsec. (d). Pub. L. 104-132, §101, added subsec. (d).

1966—Pub. L. 89-711 designated existing provisions as subsec. (a), struck out provision making the subsection's terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts, and added subsecs. (b) and (c).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2255, 2262, 2266 of this title.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It is declaratory of existing law and practice.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. At common law the return was conclusive and could not be controverted but it is now almost universally held that the return is not conclusive of the facts alleged therein. 39 C.J.S. pp. 664-666, §§ 98, 99.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice in habeas corpus proceedings.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 465 (R.S. § 766; Mar. 3, 1893, ch. 226, 27 Stat. 751; Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940; June 19, 1934, ch. 673, 48 Stat. 1177).

Provisions relating to proceedings pending in 1934 were deleted as obsolete.

A provision requiring an appeal to be taken within 3 months was omitted as covered by sections 2101 and 2107 of this title.

Changes were made in phraseology.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

(June 25, 1948, ch. 646, 62 Stat. 967.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 462 (R.S. § 762).

Section 462 of title 28, U.S.C., 1940 ed., was limited to alien prisoners described in section 453 of title 28, U.S.C., 1940 ed. The revised section extends to all cases of all prisoners under State custody or authority, leaving it to the justice or judge to prescribe the notice to State officers, to specify the officer served, and to satisfy himself that such notice has been given.

Provision for making due proof of such service was omitted as unnecessary. The sheriff's or marshal's return is sufficient.

Changes were made in phraseology.

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, §113, 63 Stat. 105; Oct. 31, 1951, ch. 655, §52, 65 Stat. 727; Pub. L. 104–132, title I, §102, Apr. 24, 1996, 110 Stat. 1217.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§463(a) and 466 (Mar. 10, 1908, ch. 76, 36 Stat. 40; Feb. 13, 1925, ch. 229, §§6, 13, 43 Stat. 940, 942; June 29, 1938, ch. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

AMENDMENTS

1996—Pub. L. 104–132 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows:

“In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

“There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

“An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who

rendered the order or a circuit justice or judge issues a certificate of probable cause.”

1951—Act Oct. 31, 1951, substituted “to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his” for “of removal issued pursuant to section 3042 of Title 18 or the” in second par.

1949—Act May 24, 1949, substituted “3042” for “3041” in second par.

FEDERAL RULES OF CRIMINAL PROCEDURE

Commitment to another district; removal, see Rule 40, Title 18, Appendix, Crimes and Criminal Procedure.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89-711, §2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104-132, title I, §104, Apr. 24, 1996, 110 Stat. 1218.)

HISTORICAL AND REVISION NOTES

This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

SENATE REVISION AMENDMENTS

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

“The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

“The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a ‘fair adjudication of the legality of his detention under the Constitution and laws of the United States.’ The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

“The third purpose is to substitute detailed and specific language for the phrase ‘no adequate remedy available.’ That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment.”

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104-132, §104(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: “An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.”

Subsec. (d). Pub. L. 104-132, §104(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 104-132, §104(4), amended subsec. (e) generally, substituting present provisions for provisions which stated that presumption of correctness existed unless applicant were to establish or it otherwise appeared or respondent were to admit that any of several enumerated factors applied to invalidate State determination or else that factual determination by State court was clearly erroneous.

Pub. L. 104-132, §104(2), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 104-132, §104(2), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

Subsecs. (h), (i). Pub. L. 104-132, §104(5), added subsecs. (h) and (i).

1966—Pub. L. 89-711 substituted “Federal courts” for “State Courts” in section catchline, added subsec. (a), designated existing paragraphs as subsecs. (b) and (c), and added subsecs. (d) to (f).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2244, 2261, 2262, 2263, 2264, 2266 of this title; title 18 section 3006A; title 21 section 848.

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94-426, §1, Sept. 28, 1976, 90 Stat. 1334, provided: “That the rules governing section 2254 cases in

the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(Effective February 1, 1977, as amended to January 23, 2000)

Rule	
1.	Scope of rules.
2.	Petition.
3.	Filing petition.
4.	Preliminary consideration by judge.
5.	Answer; contents.
6.	Discovery.
7.	Expansion of record.
8.	Evidentiary hearing.
9.	Delayed or successive petitions.
10.	Powers of magistrates.
11.	Federal Rules of Civil Procedure; extent of applicability.

APPENDIX OF FORMS

Model form for use in applications for habeas corpus under 28 U.S.C. § 2254.

Model form for use in 28 U.S.C. § 2254 cases involving a Rule 9 issue.

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules governing Section 2254 cases, and the amendments thereto by Pub. L. 94-426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note above.

Rule 1. Scope of Rules

(a) APPLICABLE TO CASES INVOLVING CUSTODY PURSUANT TO A JUDGMENT OF A STATE COURT. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) OTHER SITUATIONS. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

ADVISORY COMMITTEE NOTE

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (e.g., person in active military service, *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h) e is in custody in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In *Preiser v. Rodriguez*, *supra*, the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally v. Hill*, 293 U.S. 131 (1934). This was changed in *Peyton v. Rowe*, 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas v. LaVallee*, 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody. See also *Preiser v. Rodriguez*, 411 U.S. at 486 et seq.

Since *Carafas*, custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley v. Municipal Court*, 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, *Lefkowitz v. Newsome*, 95 S.Ct. 886 (1975). See also *United States v. Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); *Walker v. North Carolina*, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967) (recipient of a conditionally suspended sentence); *Burris v. Ryan*, 397 F.2d 553 (7th Cir. 1968); *Marden v. Purdy*, 409 F.2d 784 (5th Cir. 1969) (free on bail); *United States ex rel. Smith v. Dibella*, 314 F.Supp. 446 (D.Conn. 1970) (release on own recognizance); *Choung v. California*, 320 F.Supp. 625 (E.D.Cal. 1970) (federal stay of state court sentence); *United States ex rel. Meadows v. New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971) (subject to parole detainer warrant); *Capler v. City of Greenville*, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond); *Glover v. North Carolina*, 301 F.Supp. 364 (E.D.N.C. 1969) (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In *Morgan v. Thomas*, 321 F.Supp. 565 (S.D.Miss. 1970), the court noted:

It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint of one's

liberty is necessary before the right to apply for the writ comes into play. * * *

It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus.

321 F.Supp. at 573

Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about 28 U.S.C. §2241, the first section in the habeas corpus statutes, the court said:

While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," * * * the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." * * * And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." * * * "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."

398 F.2d at 710-711

There is, as of now, no final list of the situations which are appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. §1983 and other related statutes. In *Wilwording v. Swanson*, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. §1983, the Civil Rights Act. Compare *Johnson v. Avery*, 393 U.S. 483 (1969).

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser v. Rodriguez*, 411 U.S. 475 (1973), with *Clutchette v. Procnier*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

Rule 2. Petition

(a) APPLICANTS IN PRESENT CUSTODY. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) APPLICANTS SUBJECT TO FUTURE CUSTODY. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) FORM OF PETITION. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a

form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) PETITION TO BE DIRECTED TO JUDGMENTS OF ONE COURT ONLY. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) RETURN OF INSUFFICIENT PETITION. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

(As amended Pub. L. 94-426, §2(1), (2), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Rule 2 describes the requirements of the actual petition, including matters relating to its form, contents, scope, and sufficiency. The rule provides more specific guidance for a petitioner and the court than 28 U.S.C. §2242, after which it is patterned.

Subdivision (a) provides that an applicant challenging a state judgment, pursuant to which he is presently in custody, must make his application in the form of a petition for a writ of habeas corpus. It also requires that the state officer having custody of the applicant be named as respondent. This is consistent with 28 U.S.C. §2242, which says in part, "[Application for a writ of habeas corpus] shall allege * * * the name of the person who has custody over [the applicant] * * *." The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated (*Sanders v. Bennett*, 148 F.2d 19 (D.C.Cir. 1945)) or the chief officer in charge of state penal institutions.

Subdivision (b) prescribes the procedure to be used for a petition challenging a judgment under which the petitioner will be subject to custody in the future. In this event the relief sought will usually not be released from present custody, but rather for a declaration that the judgment being attacked is invalid. Subdivision (b) thus provides for a prayer for "appropriate relief." It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party.

Since the concept of "custody" requisite to the consideration of a petition for habeas corpus has been enlarged significantly in recent years, it may be worthwhile to spell out the various situations which might

arise and who should be named as respondent(s) for each situation.

(1) The applicant is in jail, prison, or other actual physical restraint due to the state action he is attacking. The named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).

(2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.

(3) The applicant is in custody in any other manner differing from (1) and (2) above due to the effects of the state action he seeks relief from. The named respondent should be the attorney general of the state wherein such action was taken.

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

(5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises. The named respondent(s) shall be the attorney general of the state whose action subjects the petitioner to future custody, as well as the government officer who has present official custody of the petitioner if there is such an officer and his identity is ascertainable.

In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

As seen in rule 1 and paragraphs (4) and (5) above, these rules contemplate that a petitioner currently in federal custody will be permitted to apply for habeas relief from a state restraint which is to go into effect in the future. There has been disagreement in the courts as to whether they have jurisdiction of the habeas application under these circumstances (compare *Piper v. United States*, 306 F.Supp. 1259 (D.Conn. 1969), with *United States ex rel. Meadows v. New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971)). This rule seeks to make clear that they do have such jurisdiction.

Subdivision (c) provides that unless a district court requires otherwise by local rule, the petition must be in the form annexed to these rules. Having a standard prescribed form has several advantages. In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient. In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them. For example, in *Passic v. Michigan*, 98 F.Supp. 1015, 1016 (E.D.Mich. 1951), the court dismissed a petition for habeas corpus, describing it as "two thousand pages of irrational, prolix and redundant pleadings * * *."

Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form. Judge Hubert L. Will briefly described the experience with the use of a standard form in the Northern District of Illinois:

Our own experience, though somewhat limited, has been quite satisfactory. * * *

In addition, [petitions] almost always contain the necessary basic information * * *. Very rarely do we get the kind of hybrid federal-state habeas corpus petition with civil rights allegations thrown in which were not uncommon in the past. * * * [W]hen a real constitutional issue is raised it is quickly apparent * * *.

Approximately 65 to 70% of all districts have adopted forms or local rules which require answers to essentially the same questions as contained in the standard form annexed to these rules. All courts using forms have indicated the petitions are time-saving and more legible. The form is particularly helpful in getting information about whether there has been an exhaustion of state remedies or, at least, where that information can be obtained.

The requirement of a standard form benefits the petitioner as well. His assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported. The inclusion in the form of the ten most frequently raised grounds in habeas corpus petitions is intended to encourage the applicant to raise all his asserted grounds in one petition. It may better enable him to recognize if an issue he seeks to raise is cognizable under habeas corpus and hopefully inform him of those issues as to which he must first exhaust his state remedies.

Some commentators have suggested that the use of forms is of little help because the questions usually are too general, amounting to little more than a restatement of the statute. They contend the blanks permit a prisoner to fill in the same ambiguous answers he would have offered without the aid of a form. See Comment, *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1177-1178 (1970). Certainly, as long as the statute requires factual pleading, the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him. On balance, however, the use of forms has contributed enough to warrant mandating their use.

Giving the petitioner a list of often-raised grounds may, it is said, encourage perjury. See Comment, *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1178 (1970). Most inmates are aware of, or have access to, some common constitutional grounds for relief. Thus, the risk of perjury is not likely to be substantially increased and the benefit of the list for some inmates seems sufficient to outweigh any slight risk that perjury will increase. There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it.

Legal assistance is increasingly available to inmates either through paraprofessional programs involving law students or special programs staffed by members of the bar. See Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan.L.Rev. 493 (1970). In these situations, the prescribed form can be filled out more competently, and it does serve to ensure a degree of uniformity in the manner in which habeas corpus claims are presented.

Subdivision (c) directs the clerk of the district court to make available to applicants upon request, without charge, blank petitions in the prescribed form.

Subdivision (c) also requires that all available grounds for relief be presented in the petition, including those grounds of which, by the exercise of reasonable diligence, the petitioner should be aware. This is reinforced by rule 9(b), which allows dismissal of a second petition which fails to allege new grounds or, if new grounds are alleged, the judge finds an inexcusable failure to assert the ground in the prior petition.

Both subdivision (c) and the annexed form require a legibly handwritten or typewritten petition. As required by 28 U.S.C. § 2242, the petition must be signed and sworn to by the petitioner (or someone acting in his behalf).

Subdivision (d) provides that a single petition may assert a claim only against the judgment or judgments of a single state court (*i.e.*, a court of the same county or judicial district or circuit). This permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days

by the same court. A claim against a judgment of a court of a different political subdivision must be raised by means of a separate petition.

Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court. Any failure to comply with the requirements of rule 2 or 3 is grounds for insufficiency. In situations where there may be arguable noncompliance with another rule, such as rule 9, the judge, not the clerk, must make the decision. If the petition is returned it must be accompanied by a statement of the reason for its return. No petitioner should be left to speculate as to why or in what manner his petition failed to conform to these rules.

Subdivision (e) also provides that the clerk shall retain one copy of the insufficient petition. If the prisoner files another petition, the clerk will be in a better position to determine the sufficiency of the new petition. If the new petition is insufficient, comparison with the prior petition may indicate whether the prisoner has failed to understand the clerk's prior explanation for its insufficiency, so that the clerk can make another, hopefully successful, attempt at transmitting this information to the petitioner. If the petitioner insists that the original petition was in compliance with the rules, a copy of the original petition is available for the consideration of the judge. It is probably better practice to make a photocopy of a petition which can be corrected by the petitioner, thus saving the petitioner the task of completing an additional copy.

1982 AMENDMENT

Subdivision (c). The amendment takes into account 28 U.S.C. §1746, enacted after adoption of the §2254 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir. 1980). The §2254 forms have been revised accordingly.

AMENDMENTS

1976—Subd. (c). Pub. L. 94-426, §2(1), inserted "substantially" after "The petition shall be in", and struck out requirement that the petition follow the prescribed form.

Subd. (e). Pub. L. 94-426, §2(2), inserted "substantially" after "district court does not", and struck out provision which permitted the clerk to return a petition for noncompliance without a judge so directing.

Rule 3. Filing Petition

(a) PLACE OF FILING; COPIES; FILING FEE. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. §1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) FILING AND SERVICE. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

Rule 3 sets out the procedures to be followed by the petitioner and the court in filing the petition. Some of its provisions are currently dealt with by local rule or practice, while others are innovations. Subdivision (a) specifies the petitioner's responsibilities. It requires that the petition, which must be accompanied by two conformed copies thereof, be filed in the office of the clerk of the district court. The petition must be accompanied by the filing fee prescribed by law (presently \$5; see 28 U.S.C. §1914(a)), unless leave to prosecute the petition in forma pauperis is applied for and granted. In the event the petitioner desires to prosecute the petition in forma pauperis, he must file the affidavit required by 28 U.S.C. §1915, together with a certificate showing the amount of funds in his institutional account.

Requiring that the petition be filed in the office of the clerk of the district court provides an efficient and uniform system of filing habeas corpus petitions.

Subdivision (b) requires the clerk to file the petition. If the filing fee accompanies the petition, it may be filed immediately, and, if not, it is contemplated that prompt attention will be given to the request to proceed in forma pauperis. The court may delegate the issuance of the order to the clerk in those cases in which it is clear from the petition that there is full compliance with the requirements to proceed in forma pauperis.

Requiring the copies of the petition to be filed with the clerk will have an impact not only upon administrative matters, but upon more basic problems as well. In districts with more than one judge, a petitioner under present circumstances may send a petition to more than one judge. If no central filing system exists for each district, two judges may independently take different action on the same petition. Even if the action taken is consistent, there may be needless duplication of effort.

The requirement of an additional two copies of the form of the petition is a current practice in many courts. An efficient filing system requires one copy for use by the court (central file), one for the respondent (under 3(b), the respondent receives a copy of the petition whether an answer is required or not), and one for petitioner's counsel, if appointed. Since rule 2 provides that blank copies of the petition in the prescribed form are to be furnished to the applicant free of charge, there should be no undue burden created by this requirement.

Attached to copies of the petition supplied in accordance with rule 2 is an affidavit form for the use of petitioners desiring to proceed in forma pauperis. The form requires information concerning the petitioner's financial resources.

In forma pauperis cases, the petition must also be accompanied by a certificate indicating the amount of funds in the petitioner's institution account. Usually the certificate will be from the warden. If the petitioner is on probation or parole, the court might want to require a certificate from the supervising officer. Petitions by persons on probation or parole are not numerous enough, however, to justify making special provision for this situation in the text of the rule.

The certificate will verify the amount of funds credited to the petitioner in an institution account. The

district court may by local rule require that any amount credited to the petitioner, in excess of a stated maximum, must be used for the payment of the filing fee. Since prosecuting an action in forma pauperis is a privilege (see *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be granted when the petitioner has sufficient resources.

Subdivision (b) details the clerk's duties with regard to filing the petition. If the petition does not appear on its face to comply with the requirements of rules 2 and 3, it may be returned in accordance with rule 2(e). If it appears to comply, it must be filed and entered on the docket in the clerk's office. However, under this subdivision the respondent is not required to answer or otherwise move with respect to the petition unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. § 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1178 (1970). However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in

determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, e.g., *Allen*, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. § 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 U.S.C. § 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

ADVISORY COMMITTEE NOTE

Rule 5 details the contents of the "answer". (This is a change in terminology from "return," which is still used below when referring to prior practice.) The answer plays an obviously important role in a habeas proceeding:

The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.

Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R. 17(B)), under 28 U.S.C. § 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 U.S.C. § 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and transcripts of any post-conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the court's own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 U.S.C. § 2248, is no longer applicable. The meaning of the section, with its exception to the assumption "to the extent that the judge finds from the evidence that they (the allegations) are not true," has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; *Stewart v. Overholser*, 186 F.2d 339 (D.C. Cir. 1950).

We read § 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true. This

contemplates that where the petition and return or answer do present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause.

186 F.2d at 342, n. 5

In actual practice, the traverse tends to be a mere pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one). The number of copies of the answer required is left to the court's discretion. Although the rule requires only a copy of petitioner's brief on appeal, respondent is free also to file a copy of respondent's brief. In practice, courts have found it helpful to have a copy of respondent's brief.

Rule 6. Discovery

(a) LEAVE OF COURT REQUIRED. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

(b) REQUESTS FOR DISCOVERY. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) EXPENSES. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule prescribes the procedures governing discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (rules 26-37) if, and to the extent that, the judge allows. It also provides for the appointment of counsel for a petitioner who qualifies for this when counsel is necessary for effective utilization of discovery procedures permitted by the judge.

Subdivision (a) is consistent with *Harris v. Nelson*, 394 U.S. 286 (1969). In that case the court noted,

[I]t is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions * * * of the new [Federal Rules of Civil Procedure].

394 U.S. at 295

However, citing the lack of methods for securing information in habeas proceedings, the court pointed to an alternative.

Clearly, in these circumstances * * * the courts may fashion appropriate modes of procedure, by analogy

to existing rules or otherwise in conformity with judicial usage. * * * Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

The court concluded that the issue of discovery in habeas corpus cases could best be dealt with as part of an effort to provide general rules of practice for habeas corpus cases:

In fact, it is our view that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and §2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and §2255 proceedings would promise much benefit.

394 U.S. at 301 n. 7

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing:

We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles."

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed. Several commentators have suggested that at least some discovery should be permitted without leave of court. It is argued that the courts will be burdened with weighing the propriety of requests to which the discovered party has no objection. Additionally, the availability of protective orders under Fed.R.Civ.R., Rules 30(b) and 31(d) will provide the necessary safeguards. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1186-87 (1970); *Civil Discovery in Habeas Corpus*, 67 Colum.L.Rev. 1296, 1310 (1967).

Nonetheless, it is felt the requirement of prior court approval of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. Such an approach was advocated in *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969), where the opinion stated the trial court could permit interrogatories, provide for deposing witnesses, "and take such other prehearing steps as may be appropriate." While this was an action under §2255, the reasoning would apply equally well to petitions by state prisoners. Such pre-hearing discovery may show an evidentiary hearing to be unnecessary, as when there are "no disputed issues of law or fact." 83 Harv. L.Rev. 1038, 1181 (1970). The court in *Harris* alluded to such a possibility when it said "the court may * * * authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts * * *." [emphasis added] 394 U.S. at 300. Such pre-hearing discovery, like all discovery under rule 6, requires leave of court. In addition, the provisions in rule 7 for the use of an expanded record may eliminate much of the need for this

type of discovery. While probably not as frequently sought or granted as discovery in conjunction with a hearing, it may nonetheless serve a valuable function.

In order to make pre-hearing discovery meaningful, subdivision (a) provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage (see rule 8(b) and advisory committee note), but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition (see rule 9 and advisory committee note) or to demonstrate that an evidentiary hearing is necessary. Thus, if the judge grants a petitioner's request for discovery prior to making a decision as to the necessity for an evidentiary hearing, he should determine whether counsel is necessary for the effective utilization of such discovery and, if so, appoint counsel for the petitioner if the petitioner qualifies for such appointment.

This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases. When the results of such experience are available it would be desirable to consider whether further, more specific codification should take place.

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of any documents sought to be produced, must accompany a request for discovery. This is to advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

Subdivision (c) refers to the situation where the respondent is granted leave to take the deposition of the petitioner or any other person. In such a case the judge may direct the respondent to pay the expenses and fees of counsel for the petitioner to attend the taking of the deposition, as a condition granting the respondent such leave. While the judge is not required to impose this condition subdivision (c) will give the court the means to do so. Such a provision affords some protection to the indigent petitioner who may be prejudiced by his inability to have counsel, often court-appointed, present at the taking of a deposition. It is recognized that under 18 U.S.C. §3006A(g), court-appointed counsel in a §2254 proceeding is entitled to receive up to \$250 and reimbursement for expenses reasonably incurred. (Compare Fed.R. Crim.P. 15(c).) Typically, however, this does not adequately reimburse counsel if he must attend the taking of depositions or be involved in other pre-hearing proceedings. Subdivision (c) is intended to provide additional funds, if necessary, to be paid by the state government (respondent) to petitioner's counsel.

Although the rule does not specifically so provide, it is assumed that a petitioner who qualifies for the appointment of counsel under 18 U.S.C. §3006A(g) and is granted leave to take a deposition will be allowed witness costs. This will include recording and transcription of the witness's statement. Such costs are payable pursuant to 28 U.S.C. §1825. See Opinion of Comptroller General, February 28, 1974.

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision. See 83 Harv.L.Rev. 1038, 1183-84 (1970).

Rule 7. Expansion of Record

(a) DIRECTION FOR EXPANSION. If the petition is not dismissed summarily the judge may direct

that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) MATERIALS TO BE ADDED. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) SUBMISSION TO OPPOSING PARTY. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) AUTHENTICATION. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 § 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (*e.g.*, expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time-consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a-245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in *Raines v. United States*, 423 F.2d 526, 529-530 (4th Cir. 1970):

Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. *United States v. Carlino*, 400 F.2d 56 (2nd Cir. 1968); *Mirra v. United States*, 379 F.2d 782 (2nd Cir. 1967); *Accardi v. United States*, 379 F.2d 312 (2nd Cir. 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In *Harris v. Nelson*, 394 U.S. 286, 300 (1969), the court said:

At any time in the proceedings * * * either on [the court's] own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * before or in conjunction with the hearing of the facts * * * [emphasis added]

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation,

letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 U.S.C. §§ 2246 and 2247 and the decision in *Raines* with regard to types of material that may be considered upon application for a writ of habeas corpus. See *United States v. Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), and *Machibroda v. United States*, 368 U.S. 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

Rule 8. Evidentiary Hearing

(a) DETERMINATION BY COURT. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) FUNCTION OF THE MAGISTRATE.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) APPOINTMENT OF COUNSEL; TIME FOR HEARING. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

(As amended Pub. L. 94-426, § 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub. L. 94-577, § 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

This rule outlines the procedure to be followed by the court immediately prior to and after the determination of whether to hold an evidentiary hearing.

The provisions are applicable if the petition has not been dismissed at a previous stage in the proceeding [including a summary dismissal under rule 4; a dismissal pursuant to a motion by the respondent; a dismissal

after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record].

If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record. As the United States Supreme Court noted in *Townsend v. Sam*, 372 U.S. 293, 319 (1963):

Ordinarily [the complete state-court] record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings.

Subdivision (a) contemplates that all of these materials, if available, will be taken into account. This is especially important in view of the standard set down in *Townsend* for determining when a hearing in the federal habeas proceeding is mandatory.

The appropriate standard * * * is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.

372 U.S. at 312

The circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. § 2254(d). The 1966 amendment clearly places the burden on the petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing for one or more of the specifically enumerated reasons, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact (372 U.S. at 309), such a hearing is unnecessary when only issues of law are raised. See, e.g., *Yeaman v. United States*, 326 F.2d 293 (9th Cir. 1963).

In situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable:

The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge.

372 U.S. at 318

If the judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as justice shall require." Most habeas petitions are dismissed before the prehearing conference stage (see Director of the Administrative Office of the United States Courts, Annual Report 245a-245c (table C4) (1970)) and of those not dismissed, the majority raise factual issues that necessitate an evidentiary hearing. If no hearing is required, most petitions are dismissed, but in unusual cases the court may grant the relief sought without a hearing. This includes immediate release from custody or nullification of a judgment under which the sentence is to be served in the future.

Subdivision (b) provides that a magistrate, when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided he gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing. This provision is not inconsistent with the holding in *Wingo v. Wedding*, 418 U.S. 461 (1974), that the Federal Magistrates Act did not change the requirement of the habeas corpus statute that federal judges personally conduct habeas evidentiary hearings, and that consequently a local district court rule was invalid insofar

as it authorized a magistrate to hold such hearings. 28 U.S.C. § 636(b) provides that a district court may by rule authorize any magistrate to perform certain additional duties, including preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

As noted in *Wingo*, review "by Magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings."

Utilization of the magistrate as specified in subdivision (b) will aid in the expeditious and fair handling of habeas petitions.

A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.

S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967)

Under subdivision (c) there are two provisions that differ from the procedure set forth in 28 U.S.C. § 2243. These are the appointment of counsel and standard for determining how soon the hearing will be held.

If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding. See, e.g., *United States ex rel. Marshall v. Wilkins*, 338 F.2d 404 (2d Cir. 1964). Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. See, e.g., D.N.M.R. 21(f), E.D. N.Y.R. 26(d). Appointment of counsel at this stage is mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory.

Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel. The presence of counsel at the prehearing conference may help to expedite the evidentiary hearing or make it unnecessary, and counsel will be able to make better use of available prehearing discovery procedures. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.4, p. 66 (Approved Draft 1968). At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel.

Under 18 U.S.C. § 3006A(g), payment is allowed counsel up to \$250, plus reimbursement for expenses reasonably incurred. The standards of indigency under this section are less strict than those regarding eligibility to prosecute a petition in forma pauperis, and thus many who cannot qualify to proceed under 28 U.S.C. § 1915 will be entitled to the benefits of counsel under 18 U.S.C. § 3006A(g). Under rule 6(c), the court may order the respondent to reimburse counsel from state funds for fees and expenses incurred as the result of the utilization of discovery procedures by the respondent.

Subdivision (c) provides that the hearing shall be conducted as promptly as possible, taking into account "the need of counsel for both parties for adequate time for investigation and preparation." This differs from the language of 28 U.S.C. § 2243, which requires that the day for the hearing be set "not more than five days after the return unless for good cause additional time

is allowed." This time limit fails to take into account the function that may be served by a prehearing conference and the time required to prepare adequately for an evidentiary hearing. Although "additional time" is often allowed under § 2243, subdivision (c) provides more flexibility to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare.

While the rule does not make specific provision for a prehearing conference, the omission is not intended to cast doubt upon the value of such a conference:

The conference may limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise. * * * [S]uch conferences may also disclose that a hearing is unnecessary * * *.

ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.6, commentary pp. 74-75. (Approved Draft, 1968.) See also Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

The rule does not contain a specific provision on the subpoenaing of witnesses. It is left to local practice to determine the method for doing this. The implementation of 28 U.S.C. § 1825 on the payment of witness fees is dealt with in an opinion of the Comptroller General, February 28, 1974.

AMENDMENTS

1976—Subd. (b). Pub. L. 94-577, § 2(a)(1), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subd. (c). Pub. L. 94-577, § 2(b)(1), substituted "and the hearing shall be conducted" for "and shall conduct the hearing".

Pub. L. 94-426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 2(c) of Pub. L. 94-577 provided that: "The amendments made by this section [amending subdvs. (b) and (c) of this rule and Rule 8(b), (c) of the Rules Governing Proceedings Under Section 2255 of this title] shall take effect with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Rule 9. Delayed or Successive Petitions

(a) DELAYED PETITIONS. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the

merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(As amended Pub. L. 94-426, § 2(7), (8), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies § 2.4 (c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In *McMann v. Richardson*, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.]

397 U.S. at 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed

which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity §112, p. 19. Also, the language of the subdivision, "a petition *may* be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies §2.4, commentary at 48 (Approved Draft, 1968). Additionally, in *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court noted:

Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. at 438

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law §1606(25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies §3.1, pp. 49-50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. §2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to al-

lege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In *Sanders v. United States*, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

Controlling weight *may* be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. at 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. §2244(b) and has been reiterated in many cases since *Sanders*. See *Gains v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *Hutchinson v. Craven*, 415 F.2d 278 (9th Cir. 1969); *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *

Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 U.S.C. §2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See *Sanders v. United States*, 373 U.S. 1, 10 (1963); *Dixon v. Jacobs*, 427 F.2d 589, 596 (D.C.Cir. 1970); cf. *Johnson v. Copinger*, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In *Price v. Johnston*, 334 U.S. 266, 292 (1948), the court said:

[I]f the Government chooses * * * to claim that the prisoner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U.S. at

1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.

83 Harv.L.Rev. at 1153-1154

See also ABA Standards Relating to Post-Conviction Remedies §6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of §2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with *Johnson v. Copinger*, 420 F.2d 395 (4th Cir. 1969), where the court stated:

[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

420 F.2d at 399

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

AMENDMENTS

1976—Subd. (a). Pub. L. 94-426, §2(7), struck out provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subd. (b). Pub. L. 94-426, §2(8), substituted "constituted an abuse of the writ" for "is not excusable".

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. §636.

(As amended Pub. L. 94-426, §2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Under this rule the duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a magistrate if and to the extent he is empowered to do so by a rule of the district court. However, when such duties involve the making of an order under rule 4 disposing of the petition, that order must be made by the court. The magistrate in such instances must submit to the court his report as to the facts and his recommendation with respect to the order.

The Federal Magistrates Act allows magistrates, when empowered by local rule, to perform certain functions in proceedings for post-trial relief. See 28 U.S.C. §636(b)(3). The performance of such functions, when authorized, is intended to "afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications under 28 U.S.C. §2255." Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

Under 28 U.S.C. §636(b), any district court, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate * * * may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.

The proposed rule recognizes the limitations imposed by 28 U.S.C. §636(b) upon the powers of magistrates to act in federal postconviction proceedings. These limitations are: (1) that the magistrate may act only pursuant to a rule passed by the majority of the judges in the district court in which the magistrate serves, and (2) that the duties performed by the magistrate pursuant to such rule be consistent with the Constitution and laws of the United States.

It has been suggested that magistrates be empowered by law to hold hearings and make final decisions in habeas proceedings. See Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L.Rev. 1147, 1158 (1969). However, the Federal Magistrates Act does not authorize such use of magistrates. *Wingo v. Wedding*, 418 U.S. 461 (1974). See advisory committee note to rule 8. While the use of magistrates can help alleviate the strain imposed on the district courts by the large number of unmeritorious habeas petitions, neither 28 U.S.C. §636(b) nor this rule contemplate the abdication by the court of its decision-making responsibility. See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1188 (1970)

Where a full-time magistrate is not available, the duties contemplated by this rule may be assigned to a part-time magistrate.

1979 AMENDMENT

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the

duties which may be assigned to a magistrate, 18 U.S.C. § 636, as amended in 1976 by Pub. L. 94-577. To the extent that rule 10 is more restrictive than § 636, the limitations are of no effect, for the statute expressly governs “[n]otwithstanding any provision of law to the contrary.”

The reference to particular rules is stricken, as under § 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e.g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to “established standards and criteria” is stricken, as § 636(4) requires each district court to “establish rules pursuant to which the magistrates shall discharge their duties.” The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in § 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e.g., determination of a need for an evidentiary hearing under rule 8; dismissal of a delayed or successive petition under rule 9).

AMENDMENTS

1976—Pub. L. 94-426 inserted “, and to the extent the district court has established standards and criteria for the performance of such duties” after “rule of the district court”.

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of this title.

Rule 11. Federal Rules of Civil Procedure;
Extent of Applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

ADVISORY COMMITTEE NOTE

Habeas corpus proceedings are characterized as civil in nature. See *e.g.*, *Fisher v. Baker*, 203 U.S. 174, 181 (1906). However, under Fed.R.Civ.P. 81(a)(2), the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See *Harris v. Nelson*, 394 U.S. 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court’s approach in the *Harris* case. There the court was dealing with the petitioner’s contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to “dispose of the matter as law and justice require” 28 U.S.C. § 2243.

394 U.S. at 290

The court then went on to consider the contention that the “conformity” provision of Rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

Although there is little direct evidence, relevant to the present problem, of the purpose of the “conform-

ity” provision of Rule 81(a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the “civil” rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the “specified” proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

394 U.S. at 294

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with *Harris*. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in *Pitchess v. Davis*, 95 S.Ct. 1748 (1975), holding that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254.

APPENDIX OF FORMS

MODEL FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name _____
Prison number _____

Place of confinement _____
United States District Court _____ District of _____

Case No. _____
(To be supplied by Clerk of U.S. District Court)
_____, PETITIONER
(Full name)

v.

_____, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF _____,
ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or type-written, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
(3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$____, you must pay the filing fee as required by the rule of the district court.
(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____.
(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

- 1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____
5. What was your plea? (Check one)
(a) Not guilty
(b) Guilty
(c) Nolo contendere
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____
6. Kind of trial: (Check one)
(a) Jury
(b) Judge only
7. Did you testify at the trial?
Yes No
8. Did you appeal from the judgment of conviction?
Yes No
9. If you did appeal, answer the following:
(a) Name of court _____
(b) Result _____
(c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed

any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes No

- 11. If your answer to 10 was "yes," give the following information:
(a) (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
(5) Result _____
(6) Date of result _____
(b) As to any second petition, application or motion give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
(5) Result _____
(6) Date of result _____
(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
(5) Result _____
(6) Date of result _____
(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes No
(2) Second petition, etc. Yes No
(3) Third petition, etc. Yes No
(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____
12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.
Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.
For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all

available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

- 13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

- 14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No

- 15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

- 16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

- 17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

(Petitioner)

v.

(Respondent(s))

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of

said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes No
a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes No

b. Rent payments, interest or dividends? Yes No

c. Pensions, annuities or life insurance payments? Yes No

d. Gifts or inheritances? Yes No

e. Any other sources? Yes No
If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

Yes No (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No
If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____, (date)

Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of \$ _____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

Authorized Officer of Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. §2254 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court,

District of _____

Case No. _____

_____, PETITIONER

v.

_____, RESPONDENT

and

_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions.

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9() for the following reason(s):

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the facts which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered? Yes No

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.

3. Describe the nature of the assistance, including the names of those who rendered it to you.

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Petitioner

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, §114, 63 Stat. 105; Pub. L. 104-132, title I, §105, Apr. 24, 1996, 110 Stat. 1220.)

HISTORICAL AND REVISION NOTES

1948 ACT

This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the

United States. Its principal provisions are incorporated in H.R. 4233, Seventy-ninth Congress.

1949 ACT

This amendment conforms language of section 2255 of title 28, U.S.C., with that of section 1651 of such title and makes it clear that the section is applicable in the district courts in the Territories and possessions.

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

AMENDMENTS

1996—Pub. L. 104-132 inserted at end three new undesignated paragraphs beginning “A 1-year period of limitation”, “Except as provided in section 408 of the Controlled Substances Act”, and “A second or successive motion must be certified” and struck out second and fifth undesignated pars. providing, respectively, that “A motion for such relief may be made at any time.” and “The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.”

1949—Act May 24, 1949, substituted “court established by Act of Congress” for “court of the United States” in first par.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 753, 1825, 2244, 2253, 2266 of this title; title 18 section 3006A; title 21 section 848.

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94-426, §1, Sept. 28, 1976, 90 Stat. 1334, provided: “That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled ‘An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court’ (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977.”

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES AND FORMS GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

(Effective February 1, 1977, as amended to January 23, 2000)

Rule	
1.	Scope of rules.
2.	Motion.
3.	Filing motion.
4.	Preliminary consideration by judge.
5.	Answers; contents.
6.	Discovery.
7.	Expansion of record.

Rule	
8.	Evidentiary hearing.
9.	Delayed or successive motions.
10.	Powers of magistrates.
11.	Time for appeal.
12.	Federal Rules of Criminal and Civil Procedure; extent of applicability.

APPENDIX OF FORMS

Model form for motions under 28 U.S.C. § 2255.
Model form for use in 28 U.S.C. § 2255 cases involving a Rule 9 issue.

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules, and the amendments thereto by Pub. L. 94-426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note above.

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

ADVISORY COMMITTEE NOTE

The basic scope of this postconviction remedy is prescribed by 28 U.S.C. § 2255. Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state prisoner. Also, habeas corpus is available to the person in federal custody if his “remedy by motion is inadequate or ineffective to test the legality of his detention.”

Whereas sections 2241-2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge “issuing the writ” as the operative remedy, section 2255 provides that, if the judge finds the movant’s assertions to be meritorious, he “shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” This is possible because a motion under § 2255 is a further step in the movant’s criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U.S.C. as § 2255. In reporting S. 20 favorably the Senate Judiciary Committee said (Sen. Rep. 1526, 80th Cong. 2d Sess., p. 2):

The two main advantages of such motion remedy over the present habeas corpus are as follows:

First, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner

is sentenced (*Ex parte Tom Tong*, 108 U.S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute “to dispose of the party as law and justice require” (28 U.S.C.A., sec. 461), the court or judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see *Medley*, petitioner, 134 U.S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to “discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”

The fact that a motion under §2255 is a further step in the movant’s criminal case rather than a separate civil action has significance at several points in these rules. See, e.g., advisory committee note to rule 3 (re no filing fee), advisory committee note to rule 4 (re availability of files, etc., relating to the judgment), advisory committee note to rule 6 (re availability of discovery under criminal procedure rules), advisory committee note to rule 11 (re no extension of time for appeal), and advisory committee note to rule 12 (re applicability of federal criminal rules). However, the fact that Congress has characterized the motion as a further step in the criminal proceedings does *not* mean that proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial regarding such matters as counsel, presence, confrontation, self-incrimination, and burden of proof.

The challenge of decisions such as the revocation of probation or parole are not appropriately dealt with under 28 U.S.C. §2255, which is a continuation of the original criminal action. Other remedies, such as habeas corpus, are available in such situations.

Although rule 1 indicates that these rules apply to a motion for a determination that the judgment was imposed “in violation of the . . . laws of the United States,” the language of 28 U.S.C. §2255, it is not the intent of these rules to define or limit what is encompassed within that phrase. See *Davis v. United States*, 417 U.S. 333 (1974), holding that it is not true “that every asserted error of law can be raised on a §2255 motion,” and that the appropriate inquiry is “whether the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice,” and whether [i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.”

For a discussion of the “custody” requirement and the intended limited scope of this remedy, see advisory committee note to §2254 rule 1.

Rule 2. Motion

(a) NATURE OF APPLICATION FOR RELIEF. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) FORM OF MOTION. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify

all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) MOTION TO BE DIRECTED TO ONE JUDGMENT ONLY. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) RETURN OF INSUFFICIENT MOTION. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

(As amended Pub. L. 94-426, §2(3), (4), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Under these rules the application for relief is in the form of a motion rather than a petition (see rule 1 and advisory committee note). Therefore, there is no requirement that the movant name a respondent. This is consistent with 28 U.S.C. §2255. The United States Attorney for the district in which the judgment under attack was entered is the proper party to oppose the motion since the federal government is the movant’s adversary of record.

If the movant is attacking a federal judgment which will subject him to future custody, he must be in present custody (see rule 1 and advisory committee note) as the result of a state or federal governmental action. He need not alter the nature of the motion by trying to include the government officer who presently has official custody of him as a pseudo-respondent, or third-party plaintiff, or other fabrication. The court hearing his motion attacking the future custody can exercise jurisdiction over those having him in present custody without the use of artificial pleading devices.

There is presently a split among the courts as to whether a person currently in state custody may use a §2255 motion to obtain relief from a federal judgment under which he will be subjected to custody in the future. Negative, see *Newton v. United States*, 329 F.Supp. 90 (S.D. Texas 1971); affirmative, see *Desmond v. The United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968), cert. denied, 393 U.S. 919 (1968); and *Paalino v. United States*, 314 F.Supp. 875 (C.D. Cal. 1970). It is intended that these rules settle the matter in favor of the prisoner’s being able to file a §2255 motion for relief under those circumstances. The proper district in which to file such a motion is the one in which is situated the court which rendered the sentence under attack.

Under rule 35, Federal Rules of Criminal Procedure, the court may correct an illegal sentence or a sentence imposed in an illegal manner, or may reduce the sentence. This remedy should be used, rather than a motion under these §2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty.

The movant should not be barred from an appropriate remedy because he has misstyped his motion. See *United States v. Morgan*, 346 U.S. 502, 505 (1954). The court should construe it as whichever one is proper under the circumstances and decide it on its merits.

For a § 2255 motion construed as a rule 35 motion, see *Heflin v. United States*, 358 U.S. 415 (1959); and *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968). For writ of error coram nobis treated as a rule 35 motion, see *Hawkins v. United States*, 324 F.Supp. 223 (E.D.Texas, Tyler Division 1971). For a rule 35 motion treated as a § 2255 motion, see *Moss v. United States*, 263 F.2d 615 (5th Cir. 1959); *Jones v. United States*, 400 F.2d 892 (8th Cir. 1968), cert. denied 394 U.S. 991 (1969); and *United States v. Brown*, 413 F.2d 878 (9th Cir. 1969), cert. denied, 397 U.S. 947 (1970).

One area of difference between § 2255 and rule 35 motions is that for the latter there is no requirement that the movant be “in custody.” *Heflin v. United States*, 358 U.S. 415, 418, 422 (1959); *Duggins v. United States*, 240 F.2d 479, 483 (6th Cir. 1957). Compare with rule 1 and advisory committee note for § 2255 motions. The importance of this distinction has decreased since *Peyton v. Rowe*, 391 U.S. 54 (1968), but it might still make a difference in particular situations.

A rule 35 motion is used to attack the sentence imposed, not the basis for the sentence. The court in *Gilinsky v. United States*, 335 F.2d 914, 916 (9th Cir. 1964), stated, “a Rule 35 motion presupposes a valid conviction. * * * [C]ollateral attack on errors allegedly committed at trial is not permissible under Rule 35.” By illustration the court noted at page 917: “a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction. * * * [J]urisdictional defects * * * involve a collateral attack, they must ordinarily be presented under 28 U.S.C. § 2255.” In *United States v. Semet*, 295 F.Supp. 1084 (E.D. Okla. 1968), the prisoner moved under rule 35 and § 2255 to invalidate the sentence he was serving on the grounds of his failure to understand the charge to which he pleaded guilty. The court said:

As regards Defendant’s Motion under Rule 35, said Motion must be denied as its presupposes a valid conviction of the offense with which he was charged and may be used only to attack the sentence. It may not be used to examine errors occurring prior to the imposition of sentence.

295 F.Supp. at 1085

See also: *Moss v. United States*, 263 F.2d at 616; *Duggins v. United States*, 240 F. 2d at 484; *Migdal v. United States*, 298 F.2d 513, 514 (9th Cir. 1961); *Jones v. United States*, 400 F.2d at 894; *United States v. Coke*, 404 F.2d at 847; and *United States v. Brown*, 413 F.2d at 879.

A major difficulty in deciding whether rule 35 or § 2255 is the proper remedy is the uncertainty as to what is meant by an “illegal sentence.” The Supreme Court dealt with this issue in *Hill v. United States*, 368 U.S. 424 (1962). The prisoner brought a § 2255 motion to vacate sentence on the ground that he had not been given a Fed.R.Crim. P. 32(a) opportunity to make a statement in his own behalf at the time of sentencing. The majority held this was not an error subject to collateral attack under § 2255. The five-member majority considered the motion as one brought pursuant to rule 35, but denied relief, stating:

[T]he narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

368 U.S. at 430

The four dissenters felt the majority definition of “illegal” was too narrow.

[Rule 35] provides for the correction of an “illegal sentence” without regard to the reasons why that sentence is illegal and contains not a single word to support the Court’s conclusion that only a sentence

illegal by reason of the punishment it imposes is “illegal” within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not—would be recognized as an “illegal sentence” under any normal reading of the English language.

368 U.S. at 431–432

The 1966 amendment of rule 35 added language permitting correction of a sentence imposed in an “illegal manner.” However, there is a 120-day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to § 2255.

The courts have been flexible in considering motions under circumstances in which relief might appear to be precluded by *Hill v. United States*. In *Peterson v. United States*, 432 F.2d 545 (8th Cir. 1970), the court was confronted with a motion for reduction of sentence by a prisoner claiming to have received a harsher sentence than his codefendants because he stood trial rather than plead guilty. He alleged that this violated his constitutional right to a jury trial. The court ruled that, even though it was past the 120-day time period for a motion to reduce sentence, the claim was still cognizable under rule 35 as a motion to correct an illegal sentence.

The courts have made even greater use of § 2255 in these types of situations. In *United States v. Lewis*, 392 F.2d 440 (4th Cir. 1968), the prisoner moved under § 2255 and rule 35 for relief from a sentence he claimed was the result of the judge’s misunderstanding of the relevant sentencing law. The court held that he could not get relief under rule 35 because it was past the 120 days for correction of a sentence imposed in an illegal manner and under *Hill v. United States* it was not an illegal sentence. However, § 2255 was applicable because of its “otherwise subject to collateral attack” language. The flaw was not a mere trial error relating to the finding of guilt, but a rare and unusual error which amounted to “exceptional circumstances” embraced in § 2255’s words “collateral attack.” See 368 U.S. at 444 for discussion of other cases allowing use of § 2255 to attack the sentence itself in similar circumstances, especially where the judge has sentenced out of a misapprehension of the law.

In *United States v. McCarthy*, 433 F.2d 591, 592 (1st Cir. 1970), the court allowed a prisoner who was past the time limit for a proper rule 35 motion to use § 2255 to attack the sentence which he received upon a plea of guilty on the ground that it was induced by an unfulfilled promise of the prosecutor to recommend leniency. The court specifically noted that under § 2255 this was a proper collateral attack on the sentence and there was no need to attack the conviction as well.

The court in *United States v. Malcolm*, 432 F.2d 809, 814, 818 (2d Cir. 1970), allowed a prisoner to challenge his sentence under § 2255 without attacking the conviction. It held rule 35 inapplicable because the sentence was not illegal on its face, but the manner in which the sentence was imposed raised a question of the denial of due process in the sentencing itself which was cognizable under § 2255.

The flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which rule 35 and § 2255 appear to overlap. For a further discussion of this problem, see C. Wright, *Federal Practice and Procedure; Criminal* §§ 581–587 (1969, Supp. 1975).

See the advisory committee note to rule 2 of the § 2254 rules for further discussion of the purposes and intent of rule 2 of these § 2255 rules.

1982 AMENDMENT

Subdivision (b). The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2255 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed

within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir. 1980). The §2255 forms have been revised accordingly.

AMENDMENTS

1976—Subd. (b). Pub. L. 94-426, §2(3), inserted "substantially" after "The motion shall be in", and struck out requirement that the motion follow the prescribed form.

Subd. (d). Pub. L. 94-426, §2(4), inserted "substantially" after "district court does not", and struck out provision which permitted the clerk to return a motion for noncompliance without a judge so directing.

Rule 3. Filing Motion

(a) PLACE OF FILING; COPIES. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) FILING AND SERVICE. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

There is no filing fee required of a movant under these rules. This is a change from the practice of charging \$15 and is done to recognize specifically the nature of a §2255 motion as being a continuation of the criminal case whose judgment is under attack.

The long-standing practice of requiring a \$15 filing fee has followed from 28 U.S.C. §1914(a) whereby "parties instituting any civil action * * * pay a filing fee of \$15, except that on an application for a writ of habeas corpus the filing fee shall be \$5." This has been held to apply to a proceeding under §2255 despite the rationale that such a proceeding is a motion and thus a continuation of the criminal action. (See note to rule 1.)

A motion under Section 2255 is a civil action and the clerk has no choice but to charge a \$15.00 filing fee unless by leave of court it is filed in forma pauperis.

McCune v. United States, 406 F.2d 417, 419 (6th Cir. 1969).

Although the motion has been considered to be a new civil action in the nature of habeas corpus for filing purposes, the reduced fee for habeas has been held not applicable. The Tenth Circuit considered the specific issue in *Martin v. United States*, 273 F.2d 775 (10th Cir. 1960), cert. denied, 365 U.S. 853 (1961), holding that the reduced fee was exclusive to habeas petitions.

Counsel for Martin insists that, if a docket fee must be paid, the amount is \$5 rather than \$15 and bases his contention on the exception contained in 28 U.S.C. §1914 that in habeas corpus the fee is \$5. This reads into §1914 language which is not there. While an application under §2255 may afford the same relief as that previously obtainable by habeas corpus, it is not a petition for a writ of habeas corpus. A change in §1914 must come from Congress.

273 F.2d at 778

Although for most situations §2255 is intended to provide to the federal prisoner a remedy equivalent to habeas corpus as used by state prisoners, there is a major distinction between the two. Calling a §2255 request for relief a motion rather than a petition militates toward charging no new filing fee, not an increased one. In the absence of convincing evidence to the contrary, there is no reason to suppose that Congress did not mean what it said in making a §2255 action a motion. Therefore, as in other motions filed in a criminal action, there is no requirement of a filing fee. It is appropriate that the present situation of docketing a §2255 motion as a new action and charging a \$15 filing fee be remedied by the rule when the whole question of §2255 motions is thoroughly thought through and organized.

Even though there is no need to have a forma pauperis affidavit to proceed with the action since there is no requirement of a fee for filing the motion the affidavit remains attached to the form to be supplied potential movants. Most such movants are indigent, and this is a convenient way of getting this into the official record so that the judge may appoint counsel, order the government to pay witness fees, allow docketing of an appeal, and grant any other rights to which an indigent is entitled in the course of a §2255 motion, when appropriate to the particular situation, without the need for an indigency petition and adjudication at such later point in the proceeding. This should result in a streamlining of the process to allow quicker disposition of these motions.

For further discussion of this rule, see the advisory committee note to rule 3 of the §2254 rules.

Rule 4. Preliminary Consideration by Judge

(a) REFERENCE TO JUDGE; DISMISSAL OR ORDER TO ANSWER. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) INITIAL CONSIDERATION BY JUDGE. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the procedure for assigning the motion to a specific judge of the district court and the options available to the judge and the government after the motion is properly filed.

The long-standing majority practice in assigning motions made pursuant to §2255 has been for the trial judge to determine the merits of the motion. In cases where the §2255 motion is directed against the sentence, the merits have traditionally been decided by the judge who imposed sentence. The reasoning for this

was first noted in *Currell v. United States*, 173 F.2d 348, 348-349 (4th Cir. 1949):

Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.

This case, and its reasoning, has been almost unanimously endorsed by other courts dealing with the issue.

Commentators have been critical of having the motion decided by the trial judge. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1206-1208 (1970).

[T]he trial judge may have become so involved with the decision that it will be difficult for him to review it objectively. Nothing in the legislative history suggests that "court" refers to a specific judge, and the procedural advantages of section 2255 are available whether or not the trial judge presides at the hearing.

The theory that Congress intended the trial judge to preside at a section 2255 hearing apparently originated in *Carvell v. United States*, 173 F.2d 348 (4th Cir. 1949) (per curiam), where the panel of judges included Chief Judge Parker of the Fourth Circuit, chairman of the Judicial Conference committee which drafted section 2255. But the legislative history does not indicate that Congress wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could sentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced.

83 Harv.L.Rev. at 1207-1208

The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See *Halliday v. United States*, 380 F.2d 270 (1st Cir. 1967).

There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge. And there are circumstances in which the trial judge will, on his own, disqualify himself. See, e.g., *Webster v. United States*, 330 F.Supp. 1080 (1972). However, there has been some questioning of the effectiveness of this procedure. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1200-1207 (1970).

Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify himself. A movant is not without remedy if he feels this is unfair to him. He can file an affidavit of bias. And there is the right to appellate review if the trial judge refuses to grant his motion. Because the trial judge is thoroughly familiar with the case, there is obvious administrative advantage in giving him the first opportunity to decide whether there are grounds for granting the motion.

Since the motion is part of the criminal action in which was entered the judgment to which it is directed, the files, records, transcripts, and correspondence relating to that judgment are automatically available to the judge in his consideration of the motion. He no longer need order them incorporated for that purpose.

Rule 4 has its basis in § 2255 (rather than 28 U.S.C. § 2243 in the corresponding habeas corpus rule) which

does not have a specific time limitation as to when the answer must be made. Also, under § 2255, the United States Attorney for the district is the party served with the notice and a copy of the motion and required to answer (when appropriate). Subdivision (b) continues this practice since there is no respondent involved in the motion (unlike habeas) and the United States Attorney, as prosecutor in the case in question, is the most appropriate one to defend the judgment and oppose the motion.

The judge has discretion to require an answer or other appropriate response from the United States Attorney. See advisory committee note to rule 4 of the § 2254 rules.

Rule 5. Answer; Contents

(a) CONTENTS OF ANSWER. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) SUPPLEMENTING THE ANSWER. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

ADVISORY COMMITTEE NOTE

Unlike the habeas corpus statutes (see 28 U.S.C. §§ 2243, 2248) § 2255 does not specifically call for a return or answer by the United States Attorney or set any time limits as to when one must be submitted. The general practice, however, is for the government to file an answer to the motion as well as counter-affidavits, when appropriate. Rule 4 provides for an answer to the motion by the United States Attorney, and rule 5 indicates what its contents should be.

There is no requirement that the movant exhaust his remedies prior to seeking relief under § 2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

We are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances.

Womack v. United States, 395 F.2d 630, 631 (D.C.Cir. 1968)

Also see *Masters v. Eide*, 353 F.2d 517 (8th Cir. 1965). The answer may thus cut short consideration of the motion if it discloses the taking of an appeal which was omitted from the form motion filed by the movant.

There is nothing in § 2255 which corresponds to the § 2248 requirement of a traverse to the answer. Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda v. United States*, 368 U.S. 487, 494, 495 (1962); *United States v. Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero v. United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott v. United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut v. United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano v. United States*, 362 F.2d 931,

932, 933 (3d Cir. 1966). None of these cases make any mention of a traverse by the movant to the government's answer. As under rule 5 of the §2254 rules, there is no intention here that such a traverse be required, except under special circumstances. See advisory committee note to rule 9.

Subdivision (b) provides for the government to supplement its answers with appropriate copies of transcripts or briefs if for some reason the judge does not already have them under his control. This is because the government will in all probability have easier access to such papers than the movant, and it will conserve the court's time to have the government produce them rather than the movant, who would in most instances have to apply in forma pauperis for the government to supply them for him anyway.

For further discussion, see the advisory committee note to rule 5 of the §2254 rules.

Rule 6. Discovery

(a) LEAVE OF COURT REQUIRED. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. §3006A(g).

(b) REQUESTS FOR DISCOVERY. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) EXPENSES. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule differs from the corresponding discovery rule under the §2254 rules in that it includes the processes of discovery available under the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a §2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

See the advisory committee note to rule 6 of the §2254 rules. The discussion there is fully applicable to discovery under these rules for §2255 motions.

Rule 7. Expansion of Record

(a) DIRECTION FOR EXPANSION. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) MATERIALS TO BE ADDED. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) SUBMISSION TO OPPOSING PARTY. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits

proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) AUTHENTICATION. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

It is less likely that the court will feel the need to expand the record in a §2255 proceeding than in a habeas corpus proceeding, because the trial (or sentencing) judge is the one hearing the motion (see rule 4) and should already have a complete file on the case in his possession. However, rule 7 provides a convenient method for supplementing his file if the case warrants it.

See the advisory committee note to rule 7 of the §2254 rules for a full discussion of reasons and procedures for expanding the record.

Rule 8. Evidentiary Hearing

(a) DETERMINATION BY COURT. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) FUNCTION OF THE MAGISTRATE.

(1) When designated to do so in accordance with 28 U.S.C. §636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) APPOINTMENT OF COUNSEL; TIME FOR HEARING. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. §3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. §3006A at any stage of the proceeding if the interest of justice so requires.

(d) PRODUCTION OF STATEMENTS AT EVIDENTIARY HEARING.

(1) IN GENERAL. Federal Rule of Criminal Procedure 26.2(a)–(d), and (f) applies at an evidentiary hearing under these rules.

(2) SANCTIONS FOR FAILURE TO PRODUCE STATEMENT. If a party elects not to comply

with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

(As amended Pub. L. 94-426, §2(6), Sept. 28, 1976, 90 Stat. 1335; Pub. L. 94-577, §2(a)(2), (b)(2), Oct. 21, 1976, 90 Stat. 2730, 2731; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTE

The standards for §2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue rather than the state's. Also §2255 does not set specific time limits for holding the hearing, as does §2243 for a habeas action. With these minor differences in mind, see the advisory committee note to rule 8 of §2254 rules, which is applicable to rule 8 of these §2255 rules.

1993 AMENDMENT

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal Procedure 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of Witness Statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a Section 2255 hearing, see, e.g., *United States v. White*, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8 grants explicit authority to do so. The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony.

AMENDMENTS

1976—Subd. (b). Pub. L. 94-577, §2(a)(2), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subd. (c). Pub. L. 94-577, §2(b)(2), substituted "and the hearing shall be conducted" for "and shall conduct the hearing."

Pub. L. 94-426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendments made by Pub. L. 94-577 effective with respect to motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 2(c) of Pub. L. 94-577, set out as a note under Rule 8 of the Rules Governing Cases Under Section 2254 of this title.

Rule 9. Delayed or Successive Motions

(a) DELAYED MOTIONS. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by

delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) SUCCESSIVE MOTIONS. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(As amended Pub. L. 94-426, §2(9), (10), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

Unlike the statutory provisions on habeas corpus (28 U.S.C. §§2241-2254), §2255 specifically provides that "a motion for such relief may be made at any time." [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of §2255 precludes any possible time bar to a motion brought under it. In *Heflin v. United States*, 358 U.S. 415 (1959), the concurring opinion noted:

The statute [28 U.S.C. §2255] further provides; "A motion * * * may be made at any time." This * * * simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata*, and that the doctrine of laches is inapplicable.

358 U.S. at 420

McKinney v. United States, 208 F.2d 844 (D.C.Cir. 1953) reversed the district court's dismissal of a §2255 motion for being too late, the court stating:

McKinney's present application for relief comes late in the day; he has served some fifteen years in prison. But tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined.

208 F.2d at 846, 847

In accord, see: *Juelich v. United States*, 300 F.2d 381, 383 (5th Cir. 1962); *Connors v. United States*, 431 F.2d 1207, 1208 (9th Cir. 1970); *Sturupp v. United States*, 218 F.Supp. 279, 281 (E.D.N.Car. 1963); and *Banks v. United States*, 319 F.Supp. 649, 652 (S.D.N.Y. 1970).

It has also been held that delay in filing a §2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

The statute [28 U.S.C. §2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.

Haier v. United States, 334 F.2d 441, 442 (10th Cir. 1964)

Other courts have recognized that delay may have a negative effect on the movant. In *Raines v. United States*, 423 F.2d 526 (4th Cir. 1970), the court stated:

[B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element * * * it may merit some consideration * * *."

423 F.2d at 531

In *Aiken v. United States*, 191 F.Supp. 43, 50 (M.D.N.Car. 1961), aff'd 296 F.2d 604 (4th Cir. 1961), the court said: "While motions under 28 U.S.C. § 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: *Parker v. United States*, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); *Le Clair v. United States*, 241 F.Supp. 819, 824 (N.D. Ind. 1965); *Malone v. United States*, 299 F.2d 254, 256 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962); *Howell v. United States*, 442 F.2d 265, 274 (7th Cir. 1971); and *United States v. Wiggins*, 184 F. Supp. 673, 676 (D.C.Cir. 1960).

There have been holdings by some courts that a delay in filing a § 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in *United States v. Bostic*, 206 F.Supp. 855 (D.C.Cir. 1962), are equitable in nature.

Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. § 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith.

206 F.Supp. at 856-857

See also *United States v. Wiggins*, 184 F.Supp. at 676.

A requirement that the movant display reasonable diligence in filing a § 2255 motion has been adopted by some courts dealing with delayed motions. The court in *United States v. Moore*, 166 F.2d 102 (7th Cir. 1948), cert. denied, 334 U.S. 849 (1948), did this, again for equitable reasons.

[W]e agree with the District Court that the petitioner has too long slept upon his rights. * * * [A]pparently there is no limitation of time within which * * * a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. * * *

The reasons which support the rule requiring diligence seem obvious. * * * Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time.

166 F.2d at 105

In accord see *Desmond v. United States*, 333 F.2d 378, 381 (1st Cir. 1964), on remand, 345 F.2d 225 (1st Cir. 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a § 2255 motion is that such delay is highly prejudicial to the prosecution. In *Desmond v. United States*, writing of a § 2255 motion alleging denial of effective appeal because of deception by movant's own counsel, the court said:

[A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney.

333 F.2d at 381

In a similar vein are *United States v. Moore* and *United States v. Bostic*, supra, and *United States v. Wiggins*, 184 F. Supp. at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from

withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or non-prejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of § 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the § 2254 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the § 2254 rules.

AMENDMENTS

1976—Subd. (a). Pub. L. 94-426, § 2(9), struck out provision which established a rebuttable presumption of prejudice to government if the petition was filed more than five years after conviction.

Subd. (b). Pub. L. 94-426, § 2(10), substituted "constituted an abuse of the procedure governed by these rules" for "is not excusable".

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

(As amended Pub. L. 94-426, § 2(12), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

See the advisory committee note to rule 10 of the § 2254 rules for a discussion fully applicable here as well.

1979 AMENDMENT

This amendment conforms the rule to 18 U.S.C. § 636. See Advisory Committee Note to rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

AMENDMENTS

1976—Pub. L. 94-426 inserted "and to the extent the district court has established standards and criteria for the performance of such duties," after "rule of the district court".

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of this title.

Rule 11. Time for Appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Rule 11 is intended to make clear that, although a § 2255 action is a continuation of the criminal case, the bringing of a § 2255 action does not extend the time.

1979 AMENDMENT

Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in ap-

pellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman v. United States*, 508 F.2d 648 (3d Cir. 1975). Because the new section 2255 rules are based upon the premise "that a motion under §2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to rule 11 in order to make it clear that this is not the case.

Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In *United States v. Hayman*, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited *Mercado v. United States*, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because §2255 proceedings are criminal in nature the time for appeal is only 10 days. The *Mercado* court concluded that the situation was governed by that part of 28 U.S.C. §2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in §2255 cases even though they are criminal in nature.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

ADVISORY COMMITTEE NOTE

This rule differs from rule 11 of the §2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a §2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

Since §2255 has been considered analogous to habeas as respects the restrictions in Fed.R.Civ.P. 81(a)(2) (see *Sullivan v. United States*, 198 F.Supp. 624 (S.D.N.Y. 1961)), rule 12 is needed. For discussion, see the advisory committee note to rule 11 of the §2254 rules.

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in text, are classified generally to the Appendix to Title 18, Crimes and Criminal Procedure.

The Federal Rules of Civil Procedure, referred to in text, are classified generally to the Appendix to this title.

APPENDIX OF FORMS

MODEL FORM FOR MOTIONS UNDER 28 U.S.C. § 2255

Name _____
Prison Number _____
Place of Confinement _____
United States District Court _____ District of _____
Case No. _____ (to be supplied by Clerk of U.S. District Court)
United States,

v.

(full name of movant)

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

- (1) This motion must be legibly handwritten or type-written, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.
(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.
(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.
(7) When the motion is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____
(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

- 1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____
5. What was your plea? (Check one)
(a) Not guilty
(b) Guilty
(c) Nolo contendere
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____
6. Kind of trial: (Check one)
(a) Jury
(b) Judge only
7. Did you testify at the trial?
Yes No
8. Did you appeal from the judgment of conviction?
Yes No
9. If you did appeal, answer the following:
(a) Name of court _____

- (b) Result _____
- (c) Date of result _____
- 10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes No
- 11. If your answer to 10 was "yes," give the following information:
 - (a) (1) Name of court _____
 - (2) Nature of proceeding _____
 - (3) Grounds raised _____
 - (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
 - (5) Result _____
 - (6) Date of result _____
 - (b) As to any second petition, application or motion give the same information:
 - (1) Name of court _____
 - (2) Nature of proceeding _____
 - (3) Grounds raised _____
 - (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
 - (5) Result _____
 - (6) Date of result _____
 - (c) As to any third petition, application or motion, give the same information:
 - (1) Name of court _____
 - (2) Nature of proceeding _____
 - (3) Grounds raised _____
 - (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
 - (d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
 - (1) First petition, etc. Yes No
 - (2) Second petition, etc. Yes No
 - (3) Third petition, etc. Yes No
 - (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing _____

CERTIFICATE

I hereby certify that the movant herein has the sum of \$ _____ on account to his credit at the _____ institution where he is confined.

I further certify that movant likewise has the following securities to his credit according to the records of said institution:

Authorized Officer of Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. §2255 CASES INVOLVING A RULE 9 ISSUE

Form No. 9 United States District Court

District of _____

Case No. _____

United States

v.

(Name of Movant)

Movant's Response as to Why His Motion Should Not be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or Successive Motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9() for the following reason(s):

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

(V) This response must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the facts which you rely upon in item

4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered? Yes No

2. If you checked "Yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.

3. Describe the nature of the assistance, including the names of those who rendered it to you.

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Movant

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

[§ 2256. Omitted]

CODIFICATION

Section, added Pub. L. 95-598, title II, §250(a), Nov. 6, 1978, 92 Stat. 2672, did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy. Section read as follows:

§ 2256. Habeas corpus from bankruptcy courts

A bankruptcy court may issue a writ of habeas corpus—

- (1) when appropriate to bring a person before the court—
 - (A) for examination;
 - (B) to testify; or
 - (C) to perform a duty imposed on such person under this title; or
- (2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

(A) such debtor was arrested or imprisoned on process in any civil action;

(B) such process was issued for the collection of a debt—

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.

PRIOR PROVISIONS

A prior section 2256, added Pub. L. 95-144, § 3, Oct. 28, 1977, 91 Stat. 1220, related to jurisdiction of proceedings relating to transferred offenders, prior to transfer to section 3244 of Title 18, Crimes and Criminal Procedure, by Pub. L. 95-598, title III, § 314(j), Nov. 6, 1978, 92 Stat. 2677.

CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.	
2261.	Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.
2262.	Mandatory stay of execution; duration; limits on stays of execution; successive petitions.
2263.	Filing of habeas corpus application; time requirements; tolling rules.
2264.	Scope of Federal review; district court adjudications.
2265.	Application to State unitary review procedure.
2266.	Limitation periods for determining applications and motions.

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

(Added Pub. L. 104-132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1221.)

EFFECTIVE DATE

Section 107(c) of Pub. L. 104-132 provided that: "Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act [Apr. 24, 1996]."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2262, 2265 of this title.

§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

(Added Pub. L. 104-132, title I, §107(a), Apr. 24, 1996, 110 Stat. 1222.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2265 of this title.

§ 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

(Added Pub. L. 104-132, title I, §107(a), Apr. 24, 1996, 110 Stat. 1223.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2262, 2265 of this title.

§ 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

(Added Pub. L. 104-132, title I, §107(a), Apr. 24, 1996, 110 Stat. 1223.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2265 of this title.

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a “unitary review” procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State “post-conviction review” and “direct review” in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to “an order under section 2261(c)” shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

(Added Pub. L. 104-132, title I, §107(a), Apr. 24, 1996, 110 Stat. 1223.)

§ 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

(Added Pub. L. 104-132, title I, §107(a), Apr. 24, 1996, 110 Stat. 1224.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2265 of this title.

CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

Sec.	
[2281.]	Repealed.]
[2282.]	Repealed.]
2283.	Stay of State court proceedings.
2284.	Three-judge district court; when required; composition; procedure. ¹

AMENDMENTS

1976—Pub. L. 94-381, § 4, Aug. 12, 1976, 90 Stat. 1119, struck out item 2281 “Injunction against enforcement of State statute; three-judge court required”, item 2282 “Injunction against enforcement of Federal statute; three-judge court required”, and inserted “when required” after “district court” in item 2284.

[§§ 2281, 2282. Repealed. Pub. L. 94-381, §§ 1, 2, Aug. 12, 1976, 90 Stat. 1119]

Section 2281, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court.

Section 2282, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality should not be granted unless the application therefor has been heard and determined by a three-judge district court.

EFFECTIVE DATE OF REPEAL

Repeal not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381 set out as an Effective Date of 1976 Amendment note under section 2284 of this title.

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

(June 25, 1948, ch. 646, 62 Stat. 968.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 379 (Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162).

An exception as to acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.

The phrase “in aid of its jurisdiction” was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The exceptions specifically include the words “to protect or effectuate its judgments,” for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Insurance Co.*, 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts, of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).

Therefore the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision.

¹ So in original. Does not conform to section catchline.

Changes were made in phraseology.

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(June 25, 1948, ch. 646, 62 Stat. 968; Pub. L. 86-507, § 1(19), June 11, 1960, 74 Stat. 201; Pub. L. 94-381, § 3, Aug. 12, 1976, 90 Stat. 1119; Pub. L. 98-620, title IV, § 402(29)(E), Nov. 8, 1984, 98 Stat. 3359.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 47, 47a, 380, 380a, and 792 (Mar. 3, 1911, ch. 231, §§ 210, 266, 36 Stat. 1150, 1162; Mar. 4, 1943, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38 Stat. 220; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752; Apr. 6, 1942, ch. 210, § 3, 56 Stat. 199).

Provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to the Supreme Court's jurisdiction of direct appeals appear in section 1253 of this title.

Provisions of sections 47, 380, and 380a of title 28, U.S.C., 1940 ed., requiring applications for injunctions restraining the enforcement, operation or execution of Federal or State statutes or orders of the Interstate Commerce Commission to be heard and determined by three-judge district courts appear in sections 2281, 2282, and 2325 of this title.

The provision for notice to the United States attorney for the district where the action is pending was added because of the necessity of the United States attorney's preparation for hearing as soon as possible, to expedite such a case.

Provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., respecting time for direct appeal appear in section 2101 of this title.

This revised section represents an effort to provide a uniform method of convoking three-judge district courts, and for procedure therein. It follows recommendations of a committee appointed by the Judicial Conference of the United States, composed of Circuit Judges Evan A. Evans, Kimbrough Stone, Ori L. Phillips, and Albert B. Maris.

The committee pointed out that section 380a of title 28, U.S.C., 1940 ed., is the latest and "most carefully drawn expression by Congress on the subject." Consequently, this section follows closely such section 380a and eliminates the discrepancies between sections 47, 47a, 380, and 380a of such title.

This section governs only the composition and procedure of three-judge district courts. The requirement that applications for injunctions be heard and determined by such courts will appear in other sections of this and other titles of the United States Code as Congress may enact from time to time. For example, see sections 2281, 2282, and 2325 of this title, sections 1213, 1215, 1255 of title 11, U.S.C., 1940 ed., Bankruptcy, section 28 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 44 of title 49, U.S.C., 1940 ed., Transportation.

United States District Judge W. Calvin Chestnut, has referred to the provisions relating to enforcement or setting aside or orders of the Interstate Commerce Commission as unfortunately lengthy and prolix. He has urged revision to insure uniform procedure in the several classes of so-called three-judge cases.

The provision that such notice shall be given by the clerk by registered mail, and shall be complete on the mailing thereof follows, substantially, rules 4(d)(4) and 5(b) of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

REFERENCES IN TEXT

The rules of civil procedure, referred to in subsec. (b)(3), are set out in the Appendix to this title.

AMENDMENTS

1984—Subsec. (b)(2). Pub. L. 98-620 struck out provision that the hearing had to be given precedence and held at the earliest practicable day.

1976—Pub. L. 94-381 substituted "Three-judge court; when required" for "Three-judge district court" in section catchline, and generally revised section to alter the method by which three-judge courts are composed, the procedure used by such courts, and to conform its requirements to the repeal of sections 2281 and 2282 of this title.

1960—Pub. L. 86-507 substituted "by registered mail or by certified mail by the clerk and" for "by registered mail by the clerk, and".

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as an Effective Date note under section 1657 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 7 of Pub. L. 94-381 provided that: "This Act [amending this section and section 2403 of this title and repealing sections 2281 and 2282 of this title] shall not apply to any action commenced on or before the date of enactment [Aug. 12, 1976]."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 section 922; title 18 section 3626; title 26 sections 9010, 9011; title 42 sec-

tions 1973b, 1973c, 1973h, 1973aa-2, 1973bb; title 47 section 555.

CHAPTER 157—SURFACE TRANSPORTATION BOARD ORDERS; ENFORCEMENT AND REVIEW

Sec.

2321. Judicial review of Board's orders and decisions; procedure generally; process.
 2322. United States as party
 2323. Duties of Attorney General; intervenors.
 [2324, 2325. Repealed.]

AMENDMENTS

1995—Pub. L. 104-88, title III, § 305(c)(1)(A), (E), Dec. 29, 1995, 109 Stat. 944, 945, substituted "SURFACE TRANSPORTATION BOARD" for "INTERSTATE COMMERCE COMMISSION" in chapter heading and "Board's" for "Commission's" in item 2321.

1975—Pub. L. 93-584, § 8, Jan. 2, 1975, 88 Stat. 1918, substituted "Judicial Review of Commission's orders and decisions; procedure generally; process" for "Procedure generally; process" in item 2321 and struck out item 2324 "Stay of Commission's order" and item 2325 "Injunction; three-judge court required".

CROSS REFERENCES

Review of orders of Federal agencies, see section 701 et seq. of Title 5, Government Organization and Employees.

§ 2321. Judicial review of Board's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Surface Transportation Board other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

(June 25, 1948, ch. 646, 62 Stat. 969; May 24, 1949, ch. 139, § 115, 63 Stat. 105; Pub. L. 93-584, § 5, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95-473, § 2(a)(3)(B), Oct. 17, 1978, 92 Stat. 1465; Pub. L. 104-88, title III, § 305(c)(1)(B), (C), Dec. 29, 1995, 109 Stat. 945.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 44 (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

Word "actions" was substituted for "cases," in view of rule 2 of the Federal Rules of Civil Procedure.

The exception as to procedure in the infliction of criminal punishment was omitted as unnecessary, as Title 18, U.S.C., Crimes and Criminal Procedure, and the Federal Rules of Criminal Procedure govern procedure in criminal matters.

Changes were made in phraseology.

1949 ACT

This section corrects, in section 2321 of title 28, U.S.C., the reference to certain sections in title 49,

U.S.C. The provisions which were formerly set out as section 49 of such title 49, are now set out as section 23 of such title.

AMENDMENTS

1995—Pub. L. 104-88 substituted “Board’s” for “Commission’s” in section catchline and “Surface Transportation Board” for “Interstate Commerce Commission” in subssecs. (a) and (b).

1978—Subsec. (c). Pub. L. 95-473 substituted “enforcement actions and actions to collect civil penalties under subtitle IV of title 49” for “actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43)”.

1975—Subsec. (a). Pub. L. 93-584 designated existing provisions as subssecs. (b) and (c) and added subsec. (a).

Subsec. (b). Pub. L. 93-584 designated existing first par. as subsec. (b) and substituted “in whole or in part, any order of the Interstate Commerce Commission other than for”, for “suspend, enjoin, annual or set aside in whole or in part any order of the Interstate Commerce Commission other than for the”.

Subsec. (c). Pub. L. 93-584 designated existing second par. as subsec. (c), substituted reference to subsec. (b) of this section for reference to this section, and inserted references to the dates of enactment, statute citations and code references of sections 20, 23 and 43 of Title 49.

1949—Act May 24, 1949, substituted “20, 23, and 43” for “20, 43, and 49” in second par.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1975 AMENDMENT

Section 10 of Pub. L. 93-584 provided that: “This Act [amending this section, sections 1336, 1398, 2323, 2341, and 2342 of this title, and section 305 of former Title 49, Transportation, and repealing sections 2324 and 2325 of this title] shall not apply to any action commenced on or before the last day of the first month beginning after the date of enactment [Jan. 2, 1975]. However, actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced.”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2322, 2323, 2342 of this title.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

(June 25, 1948, ch. 646, 62 Stat. 969.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 48 (Mar. 3, 1911, ch. 231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219).

Word “actions” was substituted for “cases and proceedings”, in view of Rule 2 of the Federal Rules of Civil Procedure.

A provision authorizing intervention by the United States was omitted. The United States, under the provisions of this section, is a necessary and indispensable original party, and hence intervention is unnecessary. (See *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 1922, 42 S.Ct. 349, 258 U.S. 377, 66 L.Ed. 671.)

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321

of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49.

The Surface Transportation Board and any party or parties in interest to the proceeding before the Board, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Board, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or non-action of the Attorney General therein.

(June 25, 1948, ch. 646, 62 Stat. 970; May 24, 1949, ch. 139, § 116, 63 Stat. 105; Pub. L. 93-584, § 6, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95-473, § 2(a)(3)(C), Oct. 17, 1978, 92 Stat. 1465; Pub. L. 104-88, title III, § 305(c)(1)(C), (D), Dec. 29, 1995, 109 Stat. 945.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 45a (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220).

The provision in the second sentence of section 45a of title 28, U.S.C., 1940 ed., authorizing the Attorney General to employ and compensate special attorneys was omitted as covered by sections 503 and 508 [now 543 and 548] of this title. The provision in the same sentence authorizing the court to make rules for the conduct and procedure of actions under this section were omitted as covered by the Federal Rules of Civil Procedure and section 2071 of this title relating to authority of district courts to promulgate local rules of procedure.

The last paragraph of section 45a of title 28, U.S.C., 1940 ed., was omitted as merely repetitive of the language immediately following the first proviso.

Word “action” was substituted for “suit” in conformity with Rule 2 of the Federal Rules of Civil Procedure. Changes were made in phraseology.

1949 ACT

This section corrects, in section 2323 of title 28, U.S.C., the reference to certain sections in title 49, U.S.C. The provisions which were formerly set out as section 49 of such title 49 are now set out as section 23 of such title.

AMENDMENTS

1995—Pub. L. 104-88 substituted “Surface Transportation Board” for “Interstate Commerce Commission” and substituted “the Board” for “the Commission” in two places.

1978—Pub. L. 95-473 substituted “enforcement actions and actions to collect civil penalties under subtitle IV of title 49” for “actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43)” in first par.

1975—Pub. L. 93-584 struck out reference to the district courts and the Supreme Court of the United States upon appeal from the district courts as the courts in which the Attorney General can represent the United States in first par.

1949—Act May 24, 1949, substituted “20, 23, and 43” for “20, 43, and 49” in first par.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before last day of first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as a note under section 2321 of this title.

[[§ 2324, 2325. Repealed. Pub. L. 93-584, § 7, Jan. 2, 1975, 88 Stat. 1918]

Section 2324, act June 25, 1948, ch. 646, 62 Stat. 970, related to power of court to restrain or suspend operation of orders of Interstate Commerce Commission pending final hearing and determination of action.

Section 2325, act June 25, 1948, ch. 646, 62 Stat. 970, related to requirement of a three judge district court to hear and determine interlocutory or permanent injunctions restraining enforcement, operation or execution of orders of Interstate Commerce Commission.

EFFECTIVE DATE OF REPEAL

Repeal applicable to actions commenced on or before last day of first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this repeal becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

- Sec.
- 2341. Definitions.
- 2342. Jurisdiction of court of appeals.
- 2343. Venue.
- 2344. Review of orders; time; notice; contents of petitions; service.
- 2345. Prehearing conference.
- 2346. Certification of record on review.
- 2347. Petitions to review; proceedings.
- 2348. Representation in proceeding; intervention.
- 2349. Jurisdiction of the proceeding.
- 2350. Review in Supreme Court on certiorari or certification.
- 2351. Enforcement of orders by district courts. [2352, 2353. Repealed.]

AMENDMENTS

1982—Pub. L. 97-164, title I, §138, Apr. 2, 1982, 96 Stat. 42, struck out item 2353 “Decision of the Plant Variety Protection Office”.

1966—Pub. L. 89-773, §4, Nov. 6, 1966, 80 Stat. 1323, struck out item 2352 “Rules”.

Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 621, added chapter 158 and items 2341 to 2352.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 2321 of this title; title 2 sections 1220, 1407; title 7 sections 149, 150gg, 163; title 8 section 1252; title 21 sections 104, 117, 122, 127, 134e, 135a; title 31 section 755; title 39 section 3628; title 42 sections 2239, 2242, 3612; title 45 section 431; title 46 App. section 1712; title 47 section 402; title 49 sections 13907, 20114; title 50 section 167h.

§ 2341. Definitions

As used in this chapter—

(1) “clerk” means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) “petitioner” means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) “agency” means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; and

(E) the Board, when the order was entered by the Surface Transportation Board.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622; amended Pub. L. 93-584, §3, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 100-430, §11(b), Sept. 13, 1988, 102 Stat. 1635; Pub. L. 102-365, §5(c)(1), Sept. 3, 1992, 106 Stat. 975; Pub. L. 104-88, title III, §305(d)(1)-(4), Dec. 29, 1995, 109 Stat. 945.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1031.	Dec. 29, 1950, ch. 1189, §1, 64 Stat. 1129. Aug. 30, 1954, ch. 1073, §2(a), 68 Stat. 961.

Subsection (a) of former section 1031 of title 5 is omitted as unnecessary because the term “court of appeals” as used in title 28 means a United States Court of Appeals and no additional definition is necessary.

In paragraph (3), reference to the United States Maritime Commission is omitted because that Commission was abolished by 1950 Reorg. Plan No. 21, §306, eff. May 24, 1950, 64 Stat. 1277. Reference to “Federal Maritime Commission” is substituted for “Federal Maritime Board” on authority of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 75 Stat. 840.

REFERENCES IN TEXT

Section 812 of the Fair Housing Act, referred to in par. (3)(D), is classified to section 3612 of Title 42, The Public Health and Welfare.

AMENDMENTS

1995—Par. (3)(A). Pub. L. 104-88, §305(d)(1), struck out “the Interstate Commerce Commission,” after “Maritime Commission,”.

Par. (3)(E). Pub. L. 104-88, §305(d)(2)-(4), added subpar. (E).

1992—Par. (3)(B). Pub. L. 102-365 inserted “or the Secretary of Transportation” after “Secretary of Agriculture”.

1988—Par. (3)(D). Pub. L. 100-430 added subpar. (D).

1975—Par. (3)(A). Pub. L. 93-584 inserted reference to the Interstate Commerce Commission.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-430 effective on the 180th day beginning after Sept. 13, 1988, see section 13(a) of

Pub. L. 100-430, set out as a note under section 3601 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before last day of first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as a note under section 2321 of this title.

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42, The Public Health and Welfare. See, also, Transfer of Functions notes set out under those sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805.

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

- (1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;
- (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
- (3) all rules, regulations, or final orders of—
 - (A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a)¹ or pursuant to part B or C of subtitle IV of title 49; and
 - (B) the Federal Maritime Commission issued pursuant to—
 - (i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);
 - (ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or
 - (iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d))²;
- (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
- (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;
- (6) all final orders under section 812 of the Fair Housing Act; and
- (7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622; amended Pub. L. 93-584, §4, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95-454, title II, §206, Oct. 13,

1978, 92 Stat. 1144; Pub. L. 96-454, §8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub. L. 97-164, title I, §137, Apr. 2, 1982, 96 Stat. 41; Pub. L. 98-554, title II, §227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub. L. 99-336, §5(a), June 19, 1986, 100 Stat. 638; Pub. L. 100-430, §11(a), Sept. 13, 1988, 102 Stat. 1635; Pub. L. 102-365, §5(c)(2), Sept. 3, 1992, 106 Stat. 975; Pub. L. 103-272, §5(h), July 5, 1994, 108 Stat. 1375; Pub. L. 104-88, title III, §305(d)(5)-(8), Dec. 29, 1995, 109 Stat. 945; Pub. L. 104-287, §6(f)(2), Oct. 11, 1996, 110 Stat. 3399.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1032.	Dec. 29, 1950, ch. 1189, §2, 64 Stat. 1129. Aug. 30, 1954, ch. 1073, §2(b), 68 Stat. 961.

The words "have exclusive jurisdiction" are substituted for "shall have exclusive jurisdiction".

In paragraph (1), the word "by" is substituted for "in accordance with".

In paragraph (3), the word "now" is omitted as unnecessary. The word "under" is substituted for "pursuant to the provisions of". Reference to "Federal Maritime Commission" is substituted for "Federal Maritime Board" on authority of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 75 Stat. 840. Reference to the United States Maritime Commission is omitted because that Commission was abolished by 1950 Reorg. Plan No. 21, §306, eff. May 24, 1951, 64 Stat. 1277, and any existing rights are preserved by technical sections 7 and 8.

REFERENCES IN TEXT

Section 812 of the Fair Housing Act, referred to in par. (6), is classified to section 3612 of Title 42, The Public Health and Welfare.

AMENDMENTS

1996—Par. (3)(A). Pub. L. 104-287 amended Pub. L. 104-88, §305(d)(6). See 1995 Amendment note below.

1995—Par. (3)(A). Pub. L. 104-88, §305(d)(6), as amended by Pub. L. 104-287, inserted "or pursuant to part B or C of subtitle IV of title 49" before the semicolon.

Pub. L. 104-88, §305(d)(5), substituted "or 41" for "41, or 43".

Par. (3)(B). Pub. L. 104-88, §305(d)(7), redesignated cls. (ii), (iv), and (v) as (i), (ii), and (iii), respectively, and struck out former cls. (i) and (iii) which read as follows: "(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a); "(ii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);".

Par. (5). Pub. L. 104-88, §305(d)(8), added par. (5) and struck out former par. (5) which read as follows: "all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code;".

1994—Par. (7). Pub. L. 103-272 substituted "section 20114(c) of title 49" for "section 202(f) of the Federal Railroad Safety Act of 1970".

1992—Par. (7). Pub. L. 102-365, which directed the addition of par. (7) at end, was executed by adding par. (7) after par. (6) and before concluding provisions, to reflect the probable intent of Congress.

1988—Par. (6). Pub. L. 100-430 added par. (6).

1986—Par. (3). Pub. L. 99-336 amended par. (3) generally. Prior to amendment, par. (3) read as follows: "such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;".

1984—Par. (5). Pub. L. 98-554 substituted "11901(j)(2)" for "11901(i)(2)".

¹ So in original. The reference to "841a" probably should not appear.

² So in original. Probably should be followed by a closing parenthesis.

1982—Pub. L. 97-164 inserted “(other than the United States Court of Appeals for the Federal Circuit)” after “court of appeals” in provisions preceding par. (1), and struck out par. (6) which had given the court of appeals jurisdiction in cases involving all final orders of the Merit Systems Protection Board except as provided for in section 7703(b) of title 5. See section 1295(a)(9) of this title.

1980—Par. (5). Pub. L. 96-454 inserted “and all final orders of such Commission made reviewable under section 11901(i)(2) of title 49, United States Code” after “section 2321 of this title”.

1978—Par. (6). Pub. L. 95-454 added par. (6).

1975—Par. (5). Pub. L. 93-584 added par. (5).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 6(f) of Pub. L. 104-287 provided that the amendment made by that section is effective Dec. 29, 1995.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100-430, set out as a note under section 3601 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 5(b) of Pub. L. 99-336 provided that: “The amendment made by this section [amending this section] shall apply with respect to any rule, regulation, or final order described in such amendment which is issued on or after the date of the enactment of this Act [June 19, 1986].”

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as a note under section 1101 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before last day of first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as a note under section 2321 of this title.

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42, The Public Health and Welfare. See, also, Transfer of Functions notes set out under those sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 46 App. section 1710a.

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1033.	Dec. 29, 1950, ch. 1189, § 3, 64 Stat. 1130.

The section is reorganized for clarity and conciseness. The word “is” is substituted for “shall be”. The word “petitioner” is substituted for “party or any of the parties filing the petition for review” in view of the definition of “petitioner” in section 2341 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805.

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1034.	Dec. 29, 1950, ch. 1189, § 4, 64 Stat. 1130.

The section is reorganized, with minor changes in phraseology. The words “as prescribed by section 1033 of this title” are omitted as surplusage. The words “of the United States” following “Attorney General” are omitted as unnecessary.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2342 of this title; title 2 section 1407; title 7 sections 2149, 3804, 3805.

§ 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1035.	Dec. 29, 1950, ch. 1189, § 5, 64 Stat. 1130.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805.

§ 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1036.	Dec. 29, 1950, ch. 1189, §6, 64 Stat. 1130. Aug. 28, 1958, Pub. L. 85-791, §31(a), 72 Stat. 951.

The words “of the court of appeals in which the proceeding is pending” are omitted as unnecessary in view of the definition of “clerk” in section 2341 of this title, and by reason of the exclusive jurisdiction of the court of appeals set forth in section 2342 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805.

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

- (1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
- (2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
- (3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

- (1) the additional evidence is material; and
- (2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency

may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1037.	Dec. 29, 1950, ch. 1189, §7, 64 Stat. 1130. Aug. 28, 1958, Pub. L. 85-791, §31(b), 72 Stat. 951.

The headnotes of the subsections are omitted as unnecessary and to conform to the style of title 28.

In subsection (a), the words “the petition” following “on a motion to dismiss” are omitted as unnecessary. The word “are” is substituted for “shall be”. The words “in fact” following “when the agency has” are omitted as unnecessary.

In subsection (b)(3), the words “United States” preceding “district court” are omitted as unnecessary because the term “district court” as used in title 28 means a United States district court. See section 451 of title 28, United States Code. The words “or any petitioner” are omitted as unnecessary in view of the definition of “petitioner” in section 2341 of this title. In the last sentence, the word “is” is substituted for “shall be”.

In subsection (c), the words “applies” and “shows” are substituted for “shall apply” and “shall show”, respectively.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b)(3), are set out in the Appendix to this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805; title 8 section 1252.

§ 2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1038.	Dec. 29, 1950, ch. 1189, § 8, 64 Stat. 1131.

In the first sentence, the words “is responsible for and has control” are substituted for “shall be responsible for and have charge and control”.

In the last sentence, the word “may” is substituted for “shall”. The word “aforesaid” following “any party or intervenor” is omitted as unnecessary. The words “any intervenor” and “inaction” are substituted for “said intervenor or intervenors” and “nonaction”, respectively.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 section 1407; title 7 sections 2149, 3804, 3805.

§ 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days’ notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624; amended Pub. L. 98-620, title IV, §402(29)(F), Nov. 8, 1984, 98 Stat. 3359.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1039.	Dec. 29, 1950, ch. 1189, §9, 64 Stat. 1131. Sept. 13, 1961, Pub. L. 87-225, §1, 75 Stat. 497.

The headnotes of the subsections are omitted as unnecessary and to conform to the style of title 28.

In subsection (a), the words “has jurisdiction” and “has exclusive jurisdiction” are substituted for “shall have jurisdiction” and “shall have exclusive jurisdiction”, respectively. The words “previously granted” are substituted for “theretofore granted” as the preferred expression.

In subsection (b), the words “does not” are substituted for “shall not”. The words “of the United States” following “Attorney General” are omitted as unnecessary. The words “In a case in which” are substituted for “In cases where”. The word “result” is substituted for “ensue”. In the fourth sentence, the words “provided for above” following the last word “application” are omitted as unnecessary. In the last sentence, the word “applies” is substituted for “shall apply”.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98-620 struck out provisions that the hearing on an application for an interlocutory injunction be given preference and expedited and heard at the earliest practicable date after the expiration of the notice of hearing on the application, and that on the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition was to apply.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620 set out as an Effective Date note under section 1657 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2350 of this title; title 7 sections 2149, 3804, 3805.

§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(2) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624; amended Pub. L. 100-352, §5(e), June 27, 1988, 102 Stat. 663.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1040.	Dec. 29, 1950, ch. 1189, §10, 64 Stat. 1132.

The words “of the United States” following “Supreme Court” are omitted as unnecessary because the

term “Supreme Court” as used in title 28 means the Supreme Court of the United States.

The words “section 2101(f) of this title” are substituted for “section 2101(e) of Title 28” on authority of the Act of May 24, 1949, ch. 139, §106(b), 63 Stat. 104, which redesignated subsection (e) of section 2101 as subsection (f).

AMENDMENTS

1988—Subsec. (b). Pub. L. 100-352 substituted “1254(2)” for “1254(3)”.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 3804, 3805.

§ 2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

(Added Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1042.	Dec. 29, 1950, ch. 1189, §12, 64 Stat. 1132.

The words “United States” preceding “district court” are omitted as unnecessary because the term “district court” as used in title 28 means a United States district court. See section 451 of title 28, United States Code. The words “have jurisdiction” are substituted for “are vested with jurisdiction”. The words “heretofore or hereafter” following “order” are omitted as unnecessary and any existing rights and liabilities are preserved by technical sections 7 and 8.

[§ 2352. Repealed. Pub. L. 89-773, § 4, Nov. 6, 1966, 80 Stat. 1323]

Section, Pub. L. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624, directed the several courts of appeals to adopt and promulgate rules, subject to the approval of the Judicial Conference of the United States, governing the practice and procedure, including prehearing conference procedure, in proceedings to review orders under this chapter. See section 2072 of this title.

SAVINGS PROVISION

Section 4 of Pub. L. 89-773 provided in part that the repeal of this section shall not operate to invalidate or repeal rules adopted under the authority of this section prior to the enactment of Pub. L. 89-773, which rules shall remain in effect until superseded by rules prescribed under authority of section 2072 of this title as amended by Pub. L. 89-773.

[§ 2353. Repealed. Pub. L. 97-164, title I, § 138, Apr. 2, 1982, 96 Stat. 42]

Section, added Pub. L. 91-577, title III, §143(c), Dec. 24, 1970, 84 Stat. 1559, gave the court of appeals non-exclusive jurisdiction to hear appeals under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461). See section 1295(a)(8) of this title.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

CHAPTER 159—INTERPLEADER

Sec. 2361. Process and procedure.

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

(June 25, 1948, ch. 646, 62 Stat. 970; May 24, 1949, ch. 139, §117, 63 Stat. 105.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §41(26) (Mar. 3, 1911, ch. 231, §24, par. 26, as added Jan. 20, 1936, ch. 13, §1, 49 Stat. 1096).

Jurisdiction and venue provisions of section 41(26) of title 28, U.S.C., 1940 ed., appear in sections 1335 and 1397 of this title.

Subsection (e) of section 41(26) of title 28, U.S.C., 1940 ed., relating to defense in nature of interpleader and joinder of additional parties, was omitted as unnecessary, such matters being governed by the Federal Rules of Civil Procedure.

Words, “Notwithstanding any provision of part I of this title to the contrary” were omitted as unnecessary, since the revised title contains no “contrary provisions.”

Changes were made in phraseology.

1949 ACT

This section makes clear that section 2361 of title 28, U.S.C., applies only to statutory actions and not to general equity interpleader suits in which the jurisdictional amount and diversity of citizenship requirements are the same as in other diversity cases.

AMENDMENTS

1949—Act May 24, 1949, substituted “In any civil action of interpleader or in the nature of interpleader under section 1335 under this title” for “In any interpleader action,” and inserted “or prosecuting” between “instituting” and “any proceeding”.

CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec. 2401. Time for commencing action against United States.
 2402. Jury trial in actions against United States.
 2403. Intervention by United States or a State; constitutional question.

Sec.	
2404.	Death of defendant in damage action.
2405.	Garnishment.
2406.	Credits in actions by United States; prior disallowance.
2407.	Delinquents for public money; judgment at return term; continuance.
2408.	Security not required of United States.
2409.	Partition actions involving United States.
2409a.	Real property quiet title actions.
2410.	Actions affecting property on which United States has lien.
2411.	Interest.
2412.	Costs and fees.
2413.	Executions in favor of United States.
2414.	Payment of judgments and compromise settlements.
2415.	Time for commencing actions brought by the United States.
2416.	Time for commencing actions brought by the United States—Exclusions.

HISTORICAL AND REVISION NOTES
1949 ACT

This section amends the analysis of chapter 161 of title 28, U.S.C., to conform item 2411 therein with the catch line of section 2411 of such title as amended by another section of this bill.

AMENDMENTS

1980—Pub. L. 96-481, title II, §204(b), Oct. 21, 1980, 94 Stat. 2329, substituted “Costs and fees” for “Costs” in item 2412.

1976—Pub. L. 94-381, §6, Aug. 12, 1976, 90 Stat. 1120, inserted “or a State” after “United States” in item 2403.

1972—Pub. L. 92-562, §3(b), Oct. 25, 1972, 86 Stat. 1177, added item 2409a.

1966—Pub. L. 89-505, §2, July 18, 1966, 80 Stat. 305, added items 2415 and 2416.

1961—Pub. L. 87-187, §2, Aug. 30, 1961, 75 Stat. 416, substituted “and compromise settlements” for “against the United States” in item 2414.

1954—Act July 30, 1954, ch. 648, §2(b), 68 Stat. 589, struck out “denied” in item 2402.

1949—Act May 24, 1949, ch. 139, §118, 63 Stat. 105, substituted “Interest” for “Interest on judgments against United States” in item 2411.

CROSS REFERENCES

Third party tort liability to United States for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 12 sections 209, 4621.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) 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.

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, §1, 63 Stat. 62; Pub. L. 86-238, §1(3), Sept. 8, 1959, 73 Stat. 472; Pub. L. 89-506, §7, July 18, 1966, 80 Stat. 307; Pub. L. 95-563, §14(b), Nov. 1, 1978, 92 Stat. 2389.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§41(20), 942 (Mar. 3, 1911, ch. 231, §24, part 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §420, 60 Stat. 845).

Section consolidates provision in section 41(20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States under section 1346(a) of this title, with section 942 of said title 28.

Words “or within one year after the date of enactment of this Act whichever is later”, in section 942 of title 28, U.S.C., 1940 ed., were omitted as executed.

Provisions of section 41(20) of title 28, U.S.C., 1940 ed., relating to jurisdiction of district courts and trial by the court of actions against the United States are the basis of sections 1346(a) and 2402 of this title.

Words in subsec. (a) of this revised section, “person under legal disability or beyond the seas at the time the claim accrues” were substituted for “claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim.” (See reviser’s note under section 2501 of this title.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., “nor shall any of the said disabilities operate cumulatively” were omitted. (See reviser’s note under section 2501 of this title.)

A provision in section 41(20) of title 28, U.S.C., 1940 ed., that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous.

Subsection (b) of the revised section simplifies and restates said section 942 of title 28, U.S.C., 1940 ed., without change of substance.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding \$1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

AMENDMENTS

1978—Subsec. (a). Pub. L. 95-563 inserted Contract Disputes Act of 1978 exception.

1966—Subsec. (b). Pub. L. 89-506 struck out provisions dealing with a tort claim of \$2,500 or under as a special category of tort claim requiring preliminary administrative action and substituted provisions requiring presentation of all tort claims to the appropriate Federal agency in writing within two years after the claim accrues and commencement of an action within six months of the date of mailing of notice of final denial of the claim by the agency to which it was presented for provisions requiring commencement of an action within two years after the claim accrues.

1959—Subsec. (b). Pub. L. 86-238 substituted “\$2,500” for “\$1,000” in two places.

1949—Subsec. (b). Act Apr. 25, 1949, the time limitation on bringing tort actions from 1 year to 2 years.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a note under section 2672 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2671, 2679 of this title; title 30 section 1724; title 41 section 113; title 42 section 2212; title 45 section 1203; title 49 section 44309.

§ 2402. Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

(June 25, 1948, ch. 646, 62 Stat. 971; July 30, 1954, ch. 648, §2(a), 68 Stat. 589; Pub. L. 104-331, §3(b)(3), Oct. 26, 1996, 110 Stat. 4069.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§41(20), 931(a) (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §410(a), 60 Stat. 843).

Section consolidates non-jury provisions of sections 41(20) and 931(a) of title 28, U.S.C., 1940 ed. For other provisions of said section 931(a) relating to tort claims, see Distribution Table.

Word “actions” was substituted for “suits”, in view of Rule 2 of the Federal Rules of Civil Procedure.

Provisions of title 28, U.S.C., 1940 ed., §41(20) relating to jurisdiction of district courts and time for bringing actions against the United States are the basis of sections 1346 and 2401 of this title.

AMENDMENTS

1996—Pub. L. 104-331 substituted “Subject to chapter 179 of this title, any action” for “Any action”.

1954—Act July 30, 1954, permitted a jury trial at the request of either party in actions under section 1346(a)(1) of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-331 effective Oct. 1, 1997, see section 3(d) of Pub. L. 104-331, set out as an Effective Date note under section 1296 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 41 section 113; title 42 section 2212.

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any

Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(June 25, 1948, ch. 646, 62 Stat. 971; Pub. L. 94-381, §5, Aug. 12, 1976, 90 Stat. 1120.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §401 (Aug. 24, 1937, ch. 754, §1, 50 Stat. 751).

Word “action” was added before “suit or proceeding”, in view of Rule 2 of the Federal Rules of Civil Procedure.

Since this section applies to all Federal courts, the word “suit” was not required to be deleted by such rule.

“Court of the United States” is defined in section 451 of this title. Direct appeal from decisions invalidating Acts of Congress is provided by section 1252 of this title.

Changes were made in phraseology.

AMENDMENTS

1976—Pub. L. 94-381, §5(b), inserted “or a State” after “United States” in section catchline.

Subsecs. (a), (b). Pub. L. 94-381, §5(a), designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-381 not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381, set out as a note under section 2284 of this title.

§ 2404. Death of defendant in damage action

A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

(June 25, 1948, ch. 646, 62 Stat. 971.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §780a (June 16, 1933, ch. 103, 48 Stat. 311).

Substitution of parties, see rule 25(a) of the Federal Rules of Civil Procedure.

Changes in phraseology were made.

§ 2405. Garnishment

In any action or suit commenced by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees. Any person so summoned shall appear in open court and depose in writing to the amount of his indebtedness to the corporation at the time of the service of the summons and at the time of making the deposition, and judgment may be entered in favor of the United States for the sum admitted by the garnishee to be due the corporation as if it had been due the United States. A judgment shall not be entered against any garnishee until after judgment has been rendered against the corporation, nor until the sum in which the garnishee is indebted is actually due.

When any garnishee deposes in open court that he is not and was not at the time of the service of the summons indebted to the corporation, an issue may be tendered by the United States upon such deposition. If, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs.

Any garnishee who fails to appear at the term to which he is summoned shall be subject to attachment for contempt.

(June 25, 1948, ch. 646, 62 Stat. 971.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§748, 749, and 750 (R.S. §§935, 936, 937).

Changes were made in phraseology.

§ 2406. Credits in actions by United States; prior disallowance

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident.

(June 25, 1948, ch. 646, 62 Stat. 972.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §774 (R.S., §§236, 951; June 10, 1921, ch. 18, §§304, 305, 42 Stat. 24).

Word "action" was substituted for "suits", in view of Rule 2 of the Federal Rules of Civil Procedure.

Section 774 of title 28, U.S.C., 1940 ed., provided that "no claim for a credit shall be admitted, upon trial", etc. This was changed to "evidence supporting the defendant's claim for a credit shall not be admitted", to clarify the meaning of the section. The case of *U.S. v. Heard*, D.C.Va. 1940, 32 F.Supp. 39, reviews the conflicting decisions on the question whether compliance with the section must be pleaded, and offers persuasive argument that it need not be, and that the section was designed as a rule of evidence. The wording of the remainder of the section also supports this conclusion, as pointed out by Judge Learned Hand in *U.S. v. Standard*

Aircraft Corp., D.C.N.Y. 1926, 16 F.2d 307, followed in the Heard case.

Changes in phraseology were made.

CROSS REFERENCES

Third party tort liability for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.

§ 2407. Delinquents for public money; judgment at return term; continuance

In an action by the United States against any person accountable for public money who fails to pay into the Treasury the sum reported due the United States, upon the adjustment of his account the court shall grant judgment upon motion unless a continuance is granted as specified in this section.

A continuance may be granted if the defendant, in open court and in the presence of the United States attorney, states under oath that he is equitably entitled to credits which have been disallowed by the General Accounting Office prior to the commencement of the action, specifying each particular claim so rejected, and stating that he cannot safely come to trial.

A continuance may also be granted if such an action is commenced on a bond or other sealed instrument and the court requires the original instrument to be produced.

(June 25, 1948, ch. 646, 62 Stat. 972.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §781 (R.S. §957; June 10, 1921, ch. 18, §304, 42 Stat. 24).

Word "action" was substituted for "suit", in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "court requires the original instrument to be produced" were substituted for "defendant pleads non est factum, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit". The plea of non est factum is obsolete under Rule 7(c) of the Federal Rules of Civil Procedure. Furthermore, the words deleted are superfluous, since a court would not require the production of an original instrument unless the proper procedure were taken to require such production.

Changes were made in phraseology.

§ 2408. Security not required of United States

Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.

Costs taxable, under other Acts of Congress, against the United States or any such department, agency or party shall be paid out of the contingent fund of the department or agency which directed the proceedings to be instituted.

(June 25, 1948, ch. 646, 62 Stat. 972.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §870 (R.S. §1001; Mar. 3, 1911, ch. 231, §§117, 289, 36 Stat. 1131, 1167; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; June 19, 1934, ch. 653, §7, 48 Stat. 1109).

Section 870 of title 28, U.S.C., 1940 ed., applied only to the Supreme Court and district courts. The revised section applies to all courts.

Words "process or the institution or prosecution of any proceeding" were substituted for "appeal, or other process in law, admiralty, or equity."

Word “agency” was substituted for “any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly”, in view of the creation of many independent governmental agencies since the enactment of the original law on which this section is based.

Changes were made in phraseology.

§ 2409. Partition actions involving United States

Any civil action by any tenant in common or joint tenant owning an undivided interest in lands, where the United States is one of such tenants in common or joint tenants, against the United States alone or against the United States and any other of such owners, shall proceed, and be determined, in the same manner as would a similar action between private persons.

Whenever in such action the court orders a sale of the property or any part thereof the Attorney General may bid for the same in behalf of the United States. If the United States is the purchaser, the amount of the purchase money shall be paid from the Treasury upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney General.

(June 25, 1948, ch. 646, 62 Stat. 972.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 766 (May 17, 1898, ch. 339, §§ 1, 2, 30 Stat. 416).

Provisions relating to service or commencement of the action and duty of United States attorneys to appear, defend, and file answer were omitted as surplusage and covered by Rules 2, 3, and 4 of the Federal Rules of Civil Procedure and section 507 of this title.

Words “shall proceed, and be determined, in the same manner as would a similar action between private persons” were substituted for “shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity, in partition proceedings between private persons.” in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term “tide or submerged lands” means “lands beneath navigable waters” as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State’s intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub. L. 92-562, §3(a), Oct. 25, 1972, 86 Stat. 1176; amended Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

REFERENCES IN TEXT

Section 208 of the Act of July 10, 1952, referred to in subsec. (a), is section 208(a) to (d) of act July 10, 1952, ch. 651, 66 Stat. 560. Section 208(a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) is not classified to the Code.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99-514 substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”.

Subsecs. (c) to (n). Pub. L. 99-598 added subsecs. (c) and (h) to (m), redesignated former subsecs. (c), (d), (e), (f), and (g) as (d), (e), (f), (g), and (n), respectively, and inserted “, except for an action brought by a State,” in subsec. (g).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1346, 1402 of this title.

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

- (1) to quiet title to,
- (2) to foreclose a mortgage or other lien upon,
- (3) to partition,
- (4) to condemn, or
- (5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits in-

volving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 3720 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises. In any case where the United States is a bidder at the judicial sale, it may credit the amount determined to be due it against the amount it bids at such sales.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1986, the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer may issue a certificate releasing the property from such lien.

(June 25, 1948, ch. 646, 62 Stat. 972; May 24, 1949, ch. 139, §119, 63 Stat. 105; Pub. L. 85-508, §12(h), July 7, 1958, 72 Stat. 348; Pub. L. 86-507, §1(20), June 11, 1960, 74 Stat. 201; Pub. L. 89-719, title II, §201, Nov. 2, 1966, 80 Stat. 1147; Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 101-647, title XXXVI, §3630, Nov. 29, 1990, 104 Stat. 4966; Pub. L. 102-83, §5(c)(2), Aug. 6, 1991, 105 Stat. 406; Pub. L. 104-316, title I, §114, Oct. 19, 1996, 110 Stat. 3834.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§901, 902, 904, 905 (Mar. 4, 1931, ch. 515, §§1, 2, 4, 5, 46 Stat. 1528, 1529; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921; June 6, 1940, ch. 242, 54 Stat. 234; Dec. 2, 1942, ch. 656, §§1-3, 56 Stat. 1026).

Provisions including the districts of Hawaii and Puerto Rico, and the District Court of the United States for the District of Columbia, in section 901 of title 28, U.S.C., 1940 ed., were omitted as covered by "any district court." See section 451 of this title.

Provisions in section 902 of title 28, U.S.C., 1940 ed., relating to process, were omitted as covered by Rule 4 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

1949 ACT

This amendment confirms the language of section 2410(b) of title 28, U.S.C., with that of the prior law with respect to service of process and complaint upon the United States in suits brought in State courts. This is provided for by rule 4(d)(4) of the Federal Rules of Civil Procedure with respect to such suits in United States district courts.

REFERENCES IN TEXT

The internal revenue laws, referred to in subsec. (b), are classified generally to Title 26, Internal Revenue Code.

Section 7425 of the Internal Revenue Code of 1986, referred to in subsec. (d), is classified to section 7425 of Title 26.

AMENDMENTS

1996—Subsec. (e). Pub. L. 104-316 struck out "shall so report to the Comptroller General who" after "unenforceable, such officer" in second sentence.

1991—Subsec. (c). Pub. L. 102-83 substituted "section 3720 of title 38" for "section 1820 of title 38".

1990—Subsec. (c). Pub. L. 101-647 inserted at end "In any case where the United States is a bidder at the judicial sale, it may credit the amount determined to be due it against the amount it bids at such sales."

1986—Subsec. (d). Pub. L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1966—Subsec. (a). Pub. L. 89-719 substituted "subject matter—

"(1) to quiet title to,

"(2) to foreclose a mortgage or other lien upon,

"(3) to partition,

"(4) to condemn, or

"(5) of interpleader or in the nature of interpleader with respect to,"

for "subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon".

Subsec. (b). Pub. L. 89-719 substituted "complaint or pleading shall set forth" for "complaint shall set forth", and inserted sentence requiring the complaint or pleading, in actions or suits involving liens arising under the internal revenue laws, to include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed.

Subsec. (c). Pub. L. 89-719 substituted "judgment or decree in such action" for "judicial sale in such action", "discharge of the property from the mortgage or other lien" for "discharge of the property from liens and encumbrances", and "place where the court is situated" for "place where the property is situated", and inserted provisions requiring an action to foreclose a mortgage or other lien, in which the United States is named as a party under this section, to seek a judicial sale, providing that the period of redemption where a sale is made with respect to a lien arising under the internal revenue laws is 120 days or the period allowable for redemption under State law, whichever is longer, and prohibiting the right of redemption in any case which, under the provisions of section 1701k of Title 12 and section 1820(d) of Title 38, the right to redeem does not arise.

Subsecs. (d), (e). Pub. L. 89-719 added subsec. (d) and redesignated former subsec. (d) as (e).

1960—Subsec. (b). Pub. L. 86-507 inserted "or by certified mail," after "registered mail,".

1958—Subsec. (a). Pub. L. 85-508 struck out provisions which extended section to District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1949—Subsec. (b). Act May 24, 1949, conformed section with that of prior law with respect to service of process and complaint upon the United States in suits brought in State courts.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-647 effective 180 days after Nov. 29, 1990, see section 3631 of Pub. L. 101-647, set out as an Effective Date note under section 3001 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-719 applicable after Nov. 2, 1966, see section 203 of Pub. L. 89-719, set out as a note under section 1346 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc.

No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

FEDERAL RULES OF CIVIL PROCEDURE

Pleas and demurrers abolished, see rule 7, Appendix to this title.

CROSS REFERENCES

Right of redemption under subsec. (c), exclusion where subordinate lien of United States derives from insurance under National Housing Act or Servicemen's Readjustment Act of 1944, see section 1701k of Title 12, Banks and Banking.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1444, 2409a of this title; title 12 section 1017k; title 26 sections 6327, 7424, 7425, 7437, 7810; title 38 section 3720.

§ 2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(June 25, 1948, ch. 646, 62 Stat. 973; May 24, 1949, ch. 139, §120, 63 Stat. 106; Pub. L. 93-625, §7(a)(2), Jan. 3, 1975, 88 Stat. 2115; Pub. L. 97-164, title III, §302(b), Apr. 2, 1982, 96 Stat. 56; Pub. L. 99-514, §2, title XV, §1511(c)(18), Oct. 22, 1986, 100 Stat. 2095, 2746.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§765, 931(a), 932, Mar. 3, 1877, ch. 359, §10, 24 Stat. 507; Feb. 13, 1925, ch. 229, §8, 43 Stat. 940; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; Aug. 2, 1946, ch. 753, §§410(a), 411, 60 Stat. 843, 844).

Section consolidates section 765 with provisions of sections 931(a) and 932, all of title 28, U.S.C., 1940 ed., relating to interest on judgments, the latter two sections being applicable to judgments in tort claims cases. For other provisions of said sections 931(a) and 932, see Distribution Table. Said section 932 made the provisions of said section 765 applicable to such judgments, therefore the provisions of said section 931(a) that "the United States shall not be liable for interest prior to judgment" was omitted as covered by the language of said section 765 providing that interest shall be computed from the date of the judgment.

Provisions of section 765 of title 28, U.S.C., 1940 ed., that when the findings of fact and the law applicable thereto have been filed in any case as provided in "section 763" [764] of title 28, U.S.C., 1940 ed., and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the

Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same, that, whereupon, the Attorney General shall determine and direct whether an appeal shall be taken or not, and that, when so directed, the district attorney shall cause an appeal to be perfected in accordance with the terms of the statutes and rules of practice governing the same were omitted as unnecessary and covered by section 507 of this title which provides for supervision of United States attorneys by the Attorney General.

Words of section 765 of title 28, U.S.C., 1940 ed., "Until the time when an appropriation is made for the payment of the judgment or decree" were omitted and words "up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for payment of the judgment" were substituted. Substituted words clarify meaning and are in accord with congressional procedure in annual deficiency appropriation acts for payment of judgments against the United States. The substituted words will obviate necessity of repeating such provisions in appropriation acts.

Changes were made in phraseology.

1949 ACT

This section amends section 2411 of title 28, U.S.C., by restoring the provisions of section 177 of the former Judicial Code for the payment of interest on tax refunds.

REFERENCES IN TEXT

Section 6621 of the Internal Revenue Code of 1986, referred to in text, is classified to section 6621 of Title 26, Internal Revenue Code.

AMENDMENTS

1986—Pub. L. 99-514, §1511(c)(18), substituted "the overpayment rate established under section 6621" for "an annual rate established under section 6621".

Pub. L. 99-514, §2, substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1982—Pub. L. 97-164 struck out "(a)" before "In any judgment" and struck out subsec. (b) which provided that, except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest was to be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

1975—Subsec. (a). Pub. L. 93-625 substituted "an annual rate established under section 6621 of the Internal Revenue Code of 1954" for "the rate of 6 per centum per annum".

1949—Act May 24, 1949, restored provisions relating to payment of interest on tax refunds.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-514 applicable for purposes of determining interest for periods after Dec. 31, 1986, see section 1511(d) of Pub. L. 99-514, set out as a note under section 6621 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 sections 6612, 6622, 7437; title 31 section 1304.

§ 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated

in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an

itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) “fees and other expenses” includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party’s case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) “party” means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined

in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) “United States” includes any agency and any official of the United States acting in his or her official capacity;

(D) “position of the United States” means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) “civil action brought by or against the United States” includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) “court” includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) “final judgment” means a judgment that is final and not appealable, and includes an order of settlement;

(H) “prevailing party”, in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) “demand” means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the pre-

ceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

(June 25, 1948, ch. 646, 62 Stat. 973; Pub. L. 89-507, § 1, July 18, 1966, 80 Stat. 308; Pub. L. 96-481, title II, § 204(a), (c), Oct. 21, 1980, 94 Stat. 2327, 2329; Pub. L. 97-248, title II, § 292(c), Sept. 3, 1982, 96 Stat. 574; Pub. L. 99-80, §§ 2, 6, Aug. 5, 1985, 99 Stat. 184, 186; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102-572, title III, § 301(a), title V, §§ 502(b), 506(a), title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4511-4513, 4516; Pub. L. 104-66, title I, § 1091(b), Dec. 21, 1995, 109 Stat. 722; Pub. L. 104-121, title II, § 232, Mar. 29, 1996, 110 Stat. 863; Pub. L. 105-368, title V, § 512(b)(1)(B), Nov. 11, 1998, 112 Stat. 3342.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 258, 931(a) (Mar. 3, 1911, ch. 231, § 152, 36 Stat. 1138; Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section consolidates the last sentence of section 931(a) of title 28, U.S.C., 1940 ed., with section 258 of said title 28. For other provisions of said section 931(a), see Distribution Table.

Subsection (a) is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent.

Many enactments of Congress relating to fees and costs contain specific exceptions as to the liability of the United States. (See, for example, section 548 of title 28, U.S.C., 1940 ed.) A uniform rule, embodied in this section, will make such specific exceptions unnecessary.

Subsection (b) incorporates section 258 of title 28, U.S.C., 1940 ed.

Subsection (c) incorporates the costs provisions of section 931(a) of title 28, U.S.C., 1940 ed.

Words “and for summoning the same,” after “witnesses,” were omitted from subsection (b) as covered by “those actually incurred for witnesses.”

Changes were made in phraseology.

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsection (d)(2)(E), (3), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§ 601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Section 7430 of the Internal Revenue Code of 1986, referred to in subsec. (e), is classified to section 7430 of Title 26, Internal Revenue Code.

AMENDMENTS

1998—Subsec. (d)(2)(F). Pub. L. 105-368 substituted “Court of Appeals for Veterans Claims” for “Court of Veterans Appeals”.

1996—Subsec. (d)(1)(D). Pub. L. 104-121, § 232(a), added subpar. (D).

Subsec. (d)(2)(A)(ii). Pub. L. 104-121, §232(b)(1), substituted "\$125" for "\$75".

Subsec. (d)(2)(B). Pub. L. 104-121, §232(b)(2), inserted before semicolon at end "or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5".

Subsec. (d)(2)(I). Pub. L. 104-121, §232(b)(3)-(5), added subpar. (I).

1995—Subsec. (d)(5). Pub. L. 104-66 struck out par. (5) which read as follows: "The Attorney General shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards."

1992—Subsec. (a). Pub. L. 102-572, §301(a), designated existing provisions as par. (1) and added par. (2).

Subsec. (d)(2)(F). Pub. L. 102-572, §902(b)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Pub. L. 102-573, §506(a), inserted before semicolon at end "and the United States Court of Veterans Appeals".

Subsec. (d)(5). Pub. L. 102-572, §502(b), substituted "The Attorney General shall report annually to the Congress on" for "The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title."

1986—Subsecs. (d)(2)(B), (e). Pub. L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1985—Subsecs. (a), (b). Pub. L. 99-80, §2(a)(1), substituted "or any agency or any official of the United States" for "or any agency and any official of the United States".

Subsec. (d). Pub. L. 99-80, §6, repealed amendment made by Pub. L. 96-481, §204(c), and provided that subsec. (d) was effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c). See 1980 Amendment note and Revival of Previously Repealed Provisions note below.

Subsec. (d)(1)(A). Pub. L. 99-80, §2(a)(2), inserted ", including proceedings for judicial review of agency actions," after "in tort".

Subsec. (d)(1)(B). Pub. L. 99-80, §2(b), inserted provisions directing that whether or not the position of the United States was substantially justified must be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action was based) which is made in the civil action for which fees and other expenses are sought.

Subsec. (d)(2)(B). Pub. L. 99-80, §2(c)(1), substituted "\$2,000,000" for "\$1,000,000" in cl. (i), and substituted "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;" for "(i) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed \$5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association,

or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and".

Subsec. (d)(2)(D) to (H). Pub. L. 99-80, §2(c)(2), added subpars. (D) to (H).

Subsec. (d)(4). Pub. L. 99-80, §2(d), amended par. (4) generally. Prior to amendment, par. (4) read as follows:

"(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years."

Subsec. (f). Pub. L. 99-80, §2(e), added subsec. (f).

1982—Subsec. (e). Pub. L. 97-248 added subsec. (e).

1980—Pub. L. 96-481, §204(a), designated existing provisions as subsec. (a), struck out provision that payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States, and added subsecs. (b) to (d). Pub. L. 96-481, §204(c), repealed subsec. (d) eff. Oct. 1, 1984. See Effective Date of 1980 Amendment note below.

1966—Pub. L. 89-507 empowered a court having jurisdiction to award judgment for costs, except as otherwise specifically provided by statute, to the prevailing party in any action brought by or against the United States or any agency or official of the United States acting in his official capacity, limited the judgment for costs when taxed against the Government to reimbursing in whole or in part the prevailing party for costs incurred by him in the litigation, required the payment of a judgment for costs to be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States and eliminated provisions which limited the liability of the United States for fees and costs to those cases in which liability was expressed provided for by Act of Congress, permitted the district court or the Court of Claims, in an action under section 1346(a) or 1491 of this title if the United States put in issue plaintiff's right to recover, to allow costs to the prevailing party from the time of joining such issue, and which authorized the allowance of costs to the successful claimant in an action under section 1346(b) of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-368 effective on first day of first month beginning more than 90 days after Nov. 11, 1998, see section 513 of Pub. L. 105-368, set out as a note under section 7251 of Title 38, Veterans' Benefits.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-121 applicable to civil actions and adversary adjudications commenced on or after Mar. 29, 1996, see section 233 of Pub. L. 104-121, set out as a note under section 504 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 506(b) of Pub. L. 102-572 provided that: "The amendment made by subsection (a) [amending this section] shall apply to any case pending before the United States Court of Veterans Appeals [now United States Court of Appeals for Veterans Claims] on the date of the enactment of this Act [Oct. 29, 1992], to any appeal filed in that court on or after such date, and to any appeal from that court that is pending on such date in the United States Court of Appeals for the Federal Circuit."

Section 506(d) of Pub. L. 102-572 provided that: "This section [amending this section and enacting provisions

set out under this section], and the amendment made by this section, shall take effect on the date of the enactment of this Act [Oct. 29, 1992].”

Amendment by section 902(b)(1) of Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

Amendment by sections 301(a) and 502(b) of Pub. L. 102-572 effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102-572, set out as a note under section 905 of Title 2, The Congress.

EFFECTIVE DATE OF 1985 AMENDMENT

Amendment by Pub. L. 99-80 applicable to cases pending on or commenced on or after Aug. 5, 1985, but with provision for additional applicability to certain prior cases and to prior board of contracts appeals cases, see section 7 of Pub. L. 99-80, set out as a note under section 504 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-248 applicable to civil actions or proceedings commenced after Feb. 28, 1983, see section 292(e)(1) of Pub. L. 97-248, set out as an Effective Date note under section 7430 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by section 204(a) of Pub. L. 96-481 effective Oct. 1, 1981, and applicable to any adversary adjudication, as defined in section 504(b)(1)(C) of Title 5, Government Organization and Employees, and any civil action or adversary adjudication described in this section which is pending on, or commenced on or after, such date, see section 208 of Pub. L. 96-481, set out as an Effective Date note under section 504 of Title 5.

Section 204(c) of Pub. L. 96-481 which provided in part that effective Oct. 1, 1984, subsec. (d) of this section is repealed, except that the provisions of subsec. (d) shall continue to apply through final disposition of any adversary adjudication initiated before the date of repeal, was repealed by Pub. L. 99-80, §6(b)(2), Aug. 5, 1985, 99 Stat. 186.

EFFECTIVE DATE OF 1966 AMENDMENT

Section 3 of Pub. L. 89-507 provided that: “These amendments [amending this section and section 2520 of this title] shall apply only to judgments entered in actions filed subsequent to the date of enactment of this Act [July 18, 1966]. These amendments shall not authorize the reopening or modification of judgments entered prior to the enactment of this Act.”

REVIVAL OF PREVIOUSLY REPEALED PROVISIONS

For revival of subsec. (d) of this section effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c) of Pub. L. 96-481, and repeal of section 204(c) of Pub. L. 96-481, see section 6 of Pub. L. 99-80, set out as a note under section 504 of Title 5, Government Organization and Employees.

SAVINGS PROVISION

Section 206 of Pub. L. 96-481, as amended by Pub. L. 99-80, §3, Aug. 5, 1985, 99 Stat. 186, provided that:

“(a) Except as provided in subsection (b), nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

“(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant’s attorney receives fees for

the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant’s attorney refunds to the claimant the amount of the smaller fee.”

NONLIABILITY OF JUDICIAL OFFICERS FOR COSTS

Pub. L. 104-317, title III, §309(a), Oct. 19, 1996, 110 Stat. 3853, provided that: “Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney’s fees, in any action brought against such officer for an act or omission taken in such officer’s judicial capacity, unless such action was clearly in excess of such officer’s jurisdiction.”

FEE AGREEMENTS

Section 506(c) of Pub. L. 102-572 provided that: “Section 5904(d) of title 38, United States Code, shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 5904(d) of title 38, United States Code, shall not apply with respect to any such award but only if, where the claimant’s attorney receives fees for the same work under both section 5904 of title 38, United States Code, and section 2412(d) of title 28, United States Code, the claimant’s attorney refunds to the claimant the amount of the smaller fee.”

FEDERAL RULES OF CIVIL PROCEDURE

Liability of United States for costs, see rule 54, Appendix to this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1931 of this title; title 5 section 504; title 10 section 2321; title 11 section 106; title 15 section 2060; title 18 section 293; title 25 section 450m-1; title 26 section 7430; title 31 section 3730; title 41 section 253d; title 42 sections 3612, 3614, 9606.

§ 2413. Executions in favor of United States

A writ of execution on a judgment obtained for the use of the United States in any court thereof shall be issued from and made returnable to the court which rendered the judgment, but may be executed in any other State, in any Territory, or in the District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §839 (R.S. §986).

Words “or in the District of Columbia” were added on the authority of 14 Op. Atty. Gen. 384, declaring that, under this section, a writ of execution in favor of the United States, obtained from a Federal court in any State, could be executed in the District of Columbia. (See, also, section 1963 of this title.)

Changes in phraseology were made.

§ 2414. Payment of judgments and compromise settlements

Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the Secretary of the Treasury after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment

or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

(June 25, 1948, ch. 646, 62 Stat. 974; Pub. L. 87-187, §1, Aug. 30, 1961, 75 Stat. 415; Pub. L. 95-563, §14(d), Nov. 1, 1978, 92 Stat. 2390; Pub. L. 96-417, title V, §512, Oct. 10, 1980, 94 Stat. 1744; Pub. L. 104-316, title II, §202(k), Oct. 19, 1996, 110 Stat. 3843.)

HISTORICAL AND REVISION NOTES

Based on section 228 of title 31, U.S.C., 1940 ed., Money and Finance (Feb. 18, 1904, ch. 160, §1, 33 Stat. 41; June 10, 1921, ch. 18, §304, 42 Stat. 24).

Similar provisions of section 228 of title 31, U.S.C., 1940 ed., relating to judgments of the court of claims are incorporated in section 2517 of this title.

The second paragraph was added to make clear that the payment of judgments not appealed may be expedited by certificate to that effect.

Changes were made in phraseology.

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in first paragraph, is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

AMENDMENTS

1996—Pub. L. 104-316 in first par. substituted “Secretary of the Treasury” for “General Accounting Office” in two places.

1980—Pub. L. 96-417 provided for payment of final judgments rendered by the Court of International Trade against the United States on settlements by the General Accounting Office.

1978—Pub. L. 95-563 inserted Contract Disputes Act of 1978 exception.

1961—Pub. L. 87-187 provided for payment of final judgments rendered by a State or foreign court against the United States, its agencies or officials and compromise settlements and substituted “and compromise settlements” for “against the United States” in section catchline.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96-417, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

CROSS REFERENCES

Appropriations for payments of judgments against the United States, computation of interest time, see section 1304 of Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2412 of this title; title 7 section 136m; title 16 sections 79g, 460bb-2; title 31 section 1304.

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought

within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

(i) The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31.

(Added Pub. L. 89-505, §1, July 18, 1966, 80 Stat. 304; amended Pub. L. 92-353, July 18, 1972, 86 Stat. 499; Pub. L. 92-485, Oct. 13, 1972, 86 Stat. 803; Pub. L. 95-64, July 11, 1977, 91 Stat. 268; Pub. L. 95-103, Aug. 15, 1977, 91 Stat. 842; Pub. L. 96-217, §1, Mar. 27, 1980, 94 Stat. 126; Pub. L. 97-365, §9, Oct. 25, 1982, 96 Stat. 1754; Pub. L. 97-394, title I, §2, Dec. 30, 1982, 96 Stat. 1976; Pub. L. 97-452, §2(d)(2), Jan. 12, 1983, 96 Stat. 2478; Pub. L. 98-250, §4(a), Apr. 3, 1984, 98 Stat. 118.)

REFERENCES IN TEXT

The date of enactment of this Act, referred to in subssecs. (a), (b), and (g), means the date of enactment of Pub. L. 89-505, which was approved July 18, 1966.

The Indian Claims Limitation Act of 1982, referred to in subssecs. (a) and (b), is Pub. L. 97-394, title I, §§2-6, Dec. 30, 1982, 96 Stat. 1976-1978, which amended this section and enacted provisions set out as notes below. For complete classification of this Act to the Code, see Short Title of 1982 Amendment note set out below and Tables.

This Act, referred to in subsec. (h), probably means Pub. L. 89-505, July 18, 1966, 80 Stat. 304, which enacted this section and section 2416 of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

1984—Subsecs. (a), (b), Pub. L. 98-250 substituted "Indian Claims Limitation Act of 1982" for "Indian Claims Act of 1982" wherever appearing.

1983—Subsec. (i), Pub. L. 97-452 substituted "section 3716 of title 31" for "section 5 of the Federal Claims Collection Act of 1966".

1982—Subsec. (a), Pub. L. 97-394, §2(a), substituted "sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim" for "after December 31, 1982" in third proviso.

Subsec. (b), Pub. L. 97-394, §2(b), substituted "sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim" for "December 31, 1982" at end of proviso.

Subsec. (i), Pub. L. 97-365 added subsec. (i).

1980—Subsec. (a), Pub. L. 96-217, §1(a), substituted "December 31, 1982" for "April 30, 1980".

Subsec. (b). Pub. L. 96-217, §1(b), substituted "December 31, 1982" for "April 1, 1980".

1977—Subsec. (a). Pub. L. 95-103, §1(a), substituted "after April 1, 1980" for "after August 18, 1977".

Pub. L. 95-64, §1(a), substituted "unless the complaint is filed after August 18, 1977" for "unless the complaint is filed more than eleven years after the right of action accrued" in proviso covering actions for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status based upon rights of action which accrued on July 18, 1966, in accordance with subsec. (g).

Subsec. (b). Pub. L. 95-103, §1(b), substituted "on or before April 1, 1980" for "on or before August 18, 1977".

Pub. L. 95-64, §1(b), substituted "may be brought on or before August 18, 1977" for "may be brought within eleven years after the right of action accrues" in proviso covering actions for or on behalf of recognized tribes, bands, or groups of American Indians, including actions related to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status based upon rights of action which accrued on July 18, 1966, in accordance with subsec. (g).

1972—Subsec. (a). Pub. L. 92-485, §1(a), inserted proviso relating to actions for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub. L. 92-353, §1(a), inserted proviso that an action for money damages brought by the United States on behalf of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued.

Subsec. (b). Pub. L. 92-485, §1(b), inserted exception relating to actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub. L. 92-353, §1(b), increased the period of limitation to six years and ninety days for actions brought by the United States under the subsection for or on behalf of American Indians.

SHORT TITLE OF 1982 AMENDMENT

Section 1 of Pub. L. 97-394, as amended by Pub. L. 98-250, §4(b), Apr. 3, 1984, 98 Stat. 119, provided that: "Sections 2 through 6 of this Act [amending this section and enacting provisions set out below] may be cited as the 'Indian Claims Limitation Act of 1982'."

PUBLICATION OF LIST OF INDIAN CLAIMS; ADDITIONAL CLAIMS; TIME TO COMMENCE ACTION; REJECTION OF CLAIMS; CLAIMS RESOLVED BY LEGISLATION

Sections 3 to 6 of Pub. L. 97-394 provided that:

"SEC. 3. (a) Within ninety days after the enactment of this Act [Dec. 30, 1982], the Secretary of the Interior (hereinafter referred to as the 'Secretary') shall publish in the Federal Register a list of all claims accruing to any tribe, band or group of Indians or individual Indian on or before July 18, 1966, which have at any time been identified by or submitted to the Secretary under the 'Statute of Limitation Project' undertaken by the Department of the Interior and which, but for the provisions of this Act [see Short Title of 1982 Amendment note above], would be barred by the provisions of section 2415 of title 28, United States Code: *Provided*, That the Secretary shall have the discretion to exclude from such list any matter which was erroneously identified as a claim and which has no legal merit whatsoever.

"(b) Such list shall group the claims on a reservation-by-reservation, tribe-by-tribe, or State-by-State basis, as appropriate, and shall state the nature and geographic location of each claim and only such other additional information as may be needed to identify specifically such claims.

"(c) Within thirty days after the publication of this list, the Secretary shall provide a copy of the Indian Claims Limitation Act of 1982 [see Short Title of 1982 Amendment note above] and a copy of the Federal Register containing this list, or such parts as may be pertinent, to each Indian tribe, band or group whose rights or the rights of whose members could be affected by the provisions of section 2415 of title 28, United States Code.

"SEC. 4. (a) Any tribe, band or group of Indians or any individual Indian shall have one hundred and eighty days after the date of the publication in the Federal Register of the list provided for in section 3 of this Act to submit to the Secretary any additional specific claim or claims which such tribe, band or group of Indians or individual Indian believes may be affected by section 2415 of title 28, United States Code, and desires to have considered for litigation or legislation by the United States.

"(b) Any such claim submitted to the Secretary shall be accompanied by a statement identifying the nature of the claim, the date when the right of action allegedly accrued, the names of the potential plaintiffs and defendants, if known, and such other information needed to identify and evaluate such claim.

"(c) Not more than thirty days after the expiration of the one hundred and eighty day period provided for in subsection (a) of this section, the Secretary shall publish in the Federal Register a list containing the additional claims submitted during such period: *Provided*, That the Secretary shall have the discretion to exclude from such list any matter which has not been sufficiently identified as a claim.

"SEC. 5. (a) Any right of action shall be barred sixty days after the date of the publication of the list required by section 4(c) of this Act for those pre-1966 claims which, but for the provisions of this Act [see Short Title of 1982 Amendment note above], would have been barred by section 2415 of title 28, United States Code, unless such claims are included on either of the lists required by section 3 or 4(c) of this Act.

"(b) If the Secretary decides to reject for litigation any of the claims or groups or categories of claims contained on either of the lists required by section 3 or 4(c) of this Act, he shall send a report to the appropriate tribe, band, or group of Indians, whose rights or the rights of whose members could be affected by such rejection, advising them of his decision. The report shall identify the nature and geographic location of each rejected claim and the name of the potential plaintiffs and defendants if they are known or can be reasonably ascertained and shall, briefly, state the reasons why such claim or claims were rejected for litigation. Where the Secretary knows or can reasonably ascertain the identity of any of the potential individual Indian plaintiffs and their present addresses, he shall provide them with written notice of such rejection. Upon the request of any Indian claimant, the Secretary shall, without undue delay, provide to such claimant any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim.

"(c) The Secretary, as soon as possible after providing the report required by subsection (b) of this section, shall publish a notice in the Federal Register identifying the claims covered in such report. With respect to any claim covered by such report, any right of action shall be barred unless the complaint is filed within one year after the date of publication in the Federal Register.

"SEC. 6. (a) If the Secretary determines that any claim or claims contained in either of the lists as provided in sections 3 or 4(c) of this Act is not appropriate for litigation, but determines that such claims may be appropriately resolved by legislation, he shall submit to the Congress legislation to resolve such claims or shall submit to Congress a report setting out options for legislative resolution of such claims.

"(b) Any right of action on claims covered by such legislation or report shall be barred unless the complaint is filed within 3 years after the date of submis-

sion of such legislation or legislative report to Congress.”

LEGISLATIVE PROPOSALS RESPECTING APPROPRIATENESS OF RESOLUTION BY LITIGATION OF UNRESOLVED INDIAN CLAIMS

Section 2 of Pub. L. 96-217 provided that: “Not later than June 30, 1981, the Secretary of the Interior, after consultation with the Attorney General, shall submit to the Congress legislative proposals to resolve those Indian claims subject to the amendments made by the first section of this Act [amending this section] that the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation.”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2416 of this title; title 30 section 1724.

§ 2416. Time for commencing actions brought by the United States—Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) 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; or

(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

(Added Pub. L. 89-505, §1, July 18, 1966, 80 Stat. 305.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2415 of this title; title 30 section 1724.

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

Sec.	
2461.	Mode of recovery.
2462.	Time for commencing proceedings.
2463.	Property taken under revenue law not repleviable.
2464.	Security; special bond.
2465.	Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure.

§ 2461. Mode of recovery

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel

in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. Numerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, section 567 of title 12, U.S.C., 1940 ed., Banks and Banking, section 64 of title 14, U.S.C., 1940 ed., Coast Guard, and section 180 of title 25, U.S.C., 1940 ed., Indians. Compare section 1 (21) of title 49, U.S.C., 1940 ed., Transportation.

A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus v. Hess* et al., 1943, 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 433, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163; *Hepner v. United States*, 1909, 29 S.Ct. 474, 213 U.S. 103, 53 L.Ed. 720, and cases cited therein.

Forfeiture of bail bonds in criminal cases are enforceable by procedure set out in Rule 46 of the Federal Rules of Criminal Procedure.

If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure, after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5), but enforcement of a criminal fine imposed in a criminal case may be had by execution on the judgment rendered in such case, as in civil actions. (See section 569 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure, incorporated in section 3565 of H.R. 1600, 80th Congress, for revision of the Criminal Code. See also Rule 69 of Federal Rules of Civil Procedure and Advisory Committee Note thereunder, as to execution in civil actions.)

Subsection (b) was drafted to cover the subject of forfeiture of property generally. Sections in the United States Code specifically providing a mode of enforcement of forfeiture of property for their violation and other procedural matters will, of course, govern and subsection (b) will not affect them. It will only cover cases where no mode of recovery is prescribed.

Words “Unless otherwise provided by enactment of Congress” were inserted at the beginning of subsection (b) to exclude from its application instances where a libel in admiralty is not required. For example, under sections 1607, 1609, and 1610 of title 19, U.S.C., 1940 ed., Customs Duties, the collector of customs may, by summary procedure, sell at public auction, without previous declaration of forfeiture or libel proceedings, any vessel, etc., under \$1,000 in value in cases where no claim for the same is filed or bond given as required by customs laws.

Rule 81 of the Federal Rules of Civil Procedure makes such rules applicable to the appeals in cases of seizures on land. (See also *443 Cans of Frozen Egg Product v. United States*, 1912, 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174, and *Eureka Productions v. Mulligan*, C.C.A. 1940, 108 F.2d 760.) The proceeding, which resembles a suit in admiralty in that it is begun by a libel, is, strictly speaking, an “action at law” (*The Sarah*, 1823, 8 Wheat. 391, 21 U.S. 391, 5 L.Ed. 644; *Morris’s Cotton*, 1869, 8 Wall. 507, 75 U.S. 507, 19 L.Ed. 481; *Confiscation cases*, 1873, 20 Wall. 92, 87 U.S. 92, 22 L.Ed. 320; *Eureka Productions v. Mulligan*, supra), even though the statute may direct that the proceedings conform to admiralty as near as may be. *In re Graham*, 1870, 10 Wall. 541, 19 L.Ed. 981, and *443 Cans of Frozen Egg Product v. United States*, supra.

Subsection (b) is in conformity with Rule 21 of the Supreme Court Admiralty Rules, which recognizes that a libel may be filed upon seizure for any breach of any

enactment of Congress, whether on land or on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States. Such rule also permits an information to be filed, but is rarely, if ever, used at present. Consequently, “information” has been omitted from the text and only “libel” is incorporated.

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

Pub. L. 101-410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104-134, title III, §31001(s)(1), Apr. 26, 1996, 110 Stat. 1321-373; Pub. L. 105-362, title XIII, §1301(a), Nov. 10, 1998, 112 Stat. 3293, provided that:

“SHORT TITLE

“SECTION 1. This Act may be cited as the ‘Federal Civil Penalties Inflation Adjustment Act of 1990’.

“FINDINGS AND PURPOSE

“SEC. 2. (a) FINDINGS.—The Congress finds that—

“(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

“(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

“(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

“(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

“(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

“(1) allow for regular adjustment for inflation of civil monetary penalties;

“(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

“(3) improve the collection by the Federal Government of civil monetary penalties.

“DEFINITIONS

“SEC. 3. For purposes of this Act, the term—

“(1) ‘agency’ means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

“(2) ‘civil monetary penalty’ means any penalty, fine, or other sanction that—

“(A)(i) is for a specific monetary amount as provided by Federal law; or

“(ii) has a maximum amount provided for by Federal law; and

“(B) is assessed or enforced by an agency pursuant to Federal law; and

“(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

“(3) ‘Consumer Price Index’ means the Consumer Price Index for all-urban consumers published by the Department of Labor.

“CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

“SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

“(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and

“(2) publish each such regulation in the Federal Register.

“COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

“SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

“(1) multiple of \$10 in the case of penalties less than or equal to \$100;

“(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

“(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

“(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

“(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

“(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

“(b) DEFINITION.—For purposes of subsection (a), the term ‘cost-of-living adjustment’ means the percentage (if any) for each civil monetary penalty by which—

“(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

“(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

“SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.”

[Pub. L. 104-134, title III, §31001(s)(2), Apr. 26, 1996, 110 Stat. 1321-373, provided that: “The first adjustment of a civil monetary penalty made pursuant to the amendment made by paragraph (1) [amending Pub. L. 101-410, set out above] may not exceed 10 percent of such penalty.”]

[For authority of the Director of the Office of Management and Budget to consolidate reports required under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, set out above, to be submitted between Jan. 1, 1995, and Sept. 30, 1997, or to adjust their frequency and due dates, see section 404 of Pub. L. 103-356, set out as a note under section 501 of Title 31, Money and Finance.]

FEDERAL RULES OF CIVIL PROCEDURE

Admiralty and maritime rules of practice (which included libel procedures) were superseded, and civil and admiralty procedures in United States district courts were unified, effective July 1, 1966, see rule 1 and Supplemental Rules for Certain Admiralty and Maritime Claims, Appendix to this title.

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §791 (R.S. §1047). Changes were made in phraseology.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 6533; title 30 section 1724; title 42 section 7413; title 49 section 21303.

§ 2463. Property taken under revenue law not releivable

All property taken or detained under any revenue law of the United States shall not be releivable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §747 (R.S. §934). Changes were made in phraseology.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 7437.

§ 2464. Security; special bond

(a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such case. Such bond or stipulation shall be returned to the court, and judgment or decree thereon, against both the principal and sureties, may be secured at the time of rendering the decree in the original case. The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel. Similar judgments or decrees and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such suits.

(b) The court may make necessary orders to carry this section into effect, particularly in giving proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed. Further security may be required by the court at any time.

(c) If a special bond or stipulation in the particular case is given under this section, the liability as to said case on the general bond or stipulation shall cease. The parties may stipulate the amount of the bond or stipulation for the release of a vessel or other property to be not more than the amount claimed in the libel,

with interest, plus an allowance for libellant's costs. In the event of the inability or refusal of the parties to so stipulate, the court shall fix the amount, but if not so fixed then a bond shall be required in the amount prescribed in this section.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §754 (R.S. §941; Mar. 3, 1899, ch. 441, 30 Stat. 1354; Aug. 3, 1935, ch. 431, §3, 49 Stat. 513).

Changes were made in phraseology.

TRANSFER OF FUNCTIONS

All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise of Bureau of Customs of Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, with such offices to be terminated not later than Dec. 31, 1966, by Reorg. Plan No. 1, of 1965, eff. May 25, 1965, 30 F.R. 7035, 79 Stat. 1317, set out in the Appendix to Title 5, Government Organization and Employees. All functions of the offices eliminated were already vested in the Secretary of the Treasury by Reorg. Plan No. 26 of 1950, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to Title 5.

FEDERAL RULES OF CIVIL PROCEDURE

Admiralty and maritime rules of practice (which included libel procedures) were superseded, and civil and admiralty procedures in United States district courts were unified, effective July 1, 1966, see rule 1 and Supplemental Rules for Certain Admiralty and Maritime Claims, Appendix to this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 16 sections 916g, 958, 959, 971f, 972g.

§ 2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure

Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

(June 25, 1948, ch. 646, 62 Stat. 975.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§818, 827 (R.S. §§970, 979).

Section consolidates sections 818 and 827 of title 28, U.S.C., 1940 ed., with changes of phraseology necessary to effect the consolidation.

The words "in any proceeding to condemn or forfeit property" were inserted in conformity with the uniform course of judicial decisions. See *Hammel v. Little*, App.D.C. 1936, 87 F.2d 907, and cases there cited.

The qualifying language of section 827 of title 28, U.S.C., 1940 ed., requiring the claimant to pay his own costs before the return of his property was omitted as unnecessary and involving a matter more properly for regulation by rule of court. (See sections 1913, 1914, and 1925 of this title.)

(See also section 2006 of this title with respect to actions against internal revenue officers and their liability for acts in the performance of official duties.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 7328.

CHAPTER 165—UNITED STATES COURT OF FEDERAL CLAIMS PROCEDURE

Sec.	
2501.	Time for filing suit.
2502.	Aliens' privilege to sue.
2503.	Proceedings generally.
2504.	Plaintiff's testimony.
2505.	Trial before judges.
2506.	Interest of witness.
2507.	Calls and discovery.
2508.	Counterclaim or set-off. ¹
2509.	Congressional reference cases.
2510.	Referral of cases by Comptroller General.
2511.	Accounts of officers, agents or contractors.
2512.	Disbursing officers; relief.
2513.	Unjust conviction and imprisonment.
2514.	Forfeiture of fraudulent claims.
2515.	New trial, stay of judgment. ¹
2516.	Interest on claims and judgments.
2517.	Payment of judgments.
[2518.	Repealed.]
2519.	Conclusiveness of judgment.
2520.	Fees.
2521.	Subpoenas and incidental powers.
2522.	Notice of appeal.

AMENDMENTS

1992—Pub. L. 102-572, title IX, §§902(a)(1), 910(b), Oct. 29, 1992, 106 Stat. 4516, 4520, substituted "UNITED STATES COURT OF FEDERAL CLAIMS" for "UNITED STATES CLAIMS COURT" in chapter heading and inserted "and incidental powers" in item 2521.

1982—Pub. L. 97-164, title I, §139(b)(2), (i)(2), (l), (n)(4), (o)(2), (q)(2), Apr. 2, 1982, 96 Stat. 42-44, substituted "UNITED STATES CLAIMS COURT" for "COURT OF CLAIMS" in chapter heading, substituted "Proceedings generally" for "Proceedings before commissioners generally" in item 2503, substituted "Referral of cases by Comptroller General" for "Referral of cases by the Comptroller General or the head of an executive department or agency" in item 2510, struck out item 2518 "Certification of judgments for appropriation", substituted "Fees" for "Fees; cost of printing record" in item 2520, and added item 2522.

1978—Pub. L. 95-563, §14(h)(2)(B), Nov. 1, 1978, 92 Stat. 2390, inserted "or the head of an executive department or agency" after "Comptroller General" in item 2510.

1954—Act Sept. 3, 1954, ch. 1263, §§46, 54(c), 55(d), 59(b), 68 Stat. 1243, 1247, 1248, substituted "Trial before judges" for "Place of taking evidence" in item 2505, and "Calls and discovery," for "Calls on departments for information" in item 2507, rephrased item 2510, and added item 2521.

§ 2501. Time for filing suit

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

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

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

¹ So in original. Does not conform to section catchline.

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

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, §52, 68 Stat. 1246; Pub. L. 97-164, title I, §139(a), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§250(2), 250a, and 262 (Mar. 3, 1911, ch. 231, §§145, 156, 36 Stat. 1136, 1139; June 10, 1921, ch. 18, §304, 42 Stat. 24; Aug. 30, 1935, ch. 831, §13, 49 Stat. 1049; July 13, 1943, ch. 231, 57 Stat. 553).

Section consolidates limitation provisions of sections 250(2), 250a, and 262 of title 28, U.S.C., 1940 ed.

Words "a person under legal disability or beyond the seas at the time the claim accrues" were substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued; entitled to the claim." The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.

Words "nor shall any of the said disabilities operate cumulatively" were omitted, in view of the elimination of the reference to specific disabilities. Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue. Similar sections of the U.S. Code do not contain any such provision. (For example, see section 502 of title 28, U.S.C., 1940 ed., incorporated in section 544 of this title.)

The section was extended to include claims referred by the head of an executive department in conformity with section 2510 of this title.

AMENDMENTS

1992—Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims".

1954—Act Sept. 3, 1954, struck out "or the claim is referred by the Senate or House of Representatives, or by the head of an executive department" in first par.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 41 section 114.

§ 2502. Aliens' privilege to sue

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

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

(June 25, 1948, ch. 646, 62 Stat. 976; Pub. L. 89-713, §3(b), Nov. 2, 1966, 80 Stat. 1108; Pub. L. 97-164, title I, §139(a), Apr. 2, 1982, 96 Stat. 42; Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §261 (Mar. 3, 1911, ch. 231, §155, 36 Stat. 1139).

Changes were made in phraseology.

REFERENCES IN TEXT

Section 7422(f) of the Internal Revenue Code of 1986, referred to in subsec. (b), is classified to section 7422(f) of Title 26, Internal Revenue Code.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1986—Subsec. (b). Pub. L. 99-514 substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”.

1982—Subsec. (a). Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims”.

1966—Pub. L. 89-713 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-713 applicable to suits brought against officers, employees, or personal representatives instituted 90 days or more after Nov. 2, 1966, see section 3(d) of Pub. L. 89-713, set out as a note under section 7422 of Title 26, Internal Revenue Code.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 7422.

§ 2503. Proceedings generally

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

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

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

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

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, §53, 68 Stat. 1246; Pub. L. 97-164, title I, §139(b)(1), Apr. 2, 1982, 96 Stat. 42; Pub. L.

102-572, title IX, §§902(a), 909, Oct. 29, 1992, 106 Stat. 4516, 4519.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§269, 276, and 278 (Mar. 3, 1911, ch. 231, §§168, 170, 36 Stat. 1140; Feb. 24, 1925, ch. 301, §1, 43 Stat. 964; June 23, 1930, ch. 573, §2, 46 Stat. 799).

Section consolidates provisions relating to proceedings before commissioners and reporter-commissioners contained in sections 269, 276, and 278 of title 28, U.S.C., 1940 ed.

Provisions of section 269 of title 28, U.S.C., 1940 ed., relating to appointment and compensation of commissioners are incorporated in section 792 of this title.

Words “including reporter-commissioners” after “commissioners” were inserted to clarify meaning and conform to Rule 54(a) of the Court of Claims authorizing oaths before reporter-commissioners.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

The Senate amended this section by inserting “and when directed by the court his recommendations for conclusions of law” following “commissioner” in the second paragraph. This amendment authorizes the Court to direct its commissioners to report recommendations for conclusions of law as well as findings of fact in cases assigned to them. 80th Congress Senate Report No. 1559, Amendment No. 50.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subsec. (b), are set out in the Appendix to this title.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-572, §902(a)(1), substituted “United States Court of Federal Claims” for “United States Claims Court”.

Subsecs. (b), (c). Pub. L. 102-572, §902(a)(2), substituted “Court of Federal Claims” for “Claims Court” wherever appearing.

Subsec. (d). Pub. L. 102-572, §909, added subsec. (d).

1982—Pub. L. 97-164 substituted “Proceedings generally” for “Proceedings before commissioners generally” in section catchline.

Subsec. (a). Pub. L. 97-164 substituted “Parties to any suit in the United States Claims Court may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses” for “Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses” and redesignated as subsec. (c) provisions that, in accordance with rules and orders of the court, commissioners would fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact, that when directed by the court, commissioners would report their recommendations for conclusions of law in cases assigned to them, and that hearings would, if convenient, be held in the counties where the witnesses resided.

Subsec. (b). Pub. L. 97-164 substituted “The proceedings of the Claims Court shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Claims Court may prescribe and in accordance with the Federal Rules of Evidence” for “The rules of the court shall provide for the filing in court of the commissioner’s report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time” and struck out provision that this section did not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner.

Subsec. (c). Pub. L. 97-164 redesignated provisions in second and third sentences of former subsec. (a) as (c) and substituted “The judges of the Claims Court” for

“In accordance with rules and orders of the court, commissioners” and “enter dispositive judgments” for “report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them”.

1954—Act Sept. 3, 1954, designated former first par. subsec. (a), and former second par. subsec. (b), and incorporated in one place provisions relating to function of Commissioners.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 798 of this title.

§ 2504. Plaintiffs testimony

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

(June 25, 1948, ch. 646, 62 Stat. 976; Pub. L. 97-164, title I, § 139(c), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 274 (Mar. 3, 1911, ch. 231, § 166, 36 Stat. 1140).

Words “Attorney General” were substituted for “attorney or solicitor appearing in behalf of the United States,” in view of section 309 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims”, and “judge” for “commissioner” wherever appearing.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2505. Trial before judges

Any judge of the United States Court of Federal Claims may sit at any place within the

United States to take evidence and enter judgment.

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, § 54(a), (b), 68 Stat. 1246; Pub. L. 97-164, title I, § 139(d), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 275 and 275a (Mar. 3, 1911, ch. 231, § 167, 36 Stat. 1140; Feb. 24, 1925, ch. 301, § 2, 43 Stat. 965; June 23, 1930, ch. 573, § 1, 46 Stat. 799; Oct. 16, 1941, ch. 443, 55 Stat. 741).

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims” and “enter judgment” for “report findings”.

1954—Act Sept. 3, 1954, substituted “Trial before judges” for “Place of taking evidence” in section catchline and repealed second par. relating to taking of testimony.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2506. Interest of witness

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

(June 25, 1948, ch. 646, 62 Stat. 977; Pub. L. 97-164, title I, § 139(e), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 274 (Mar. 3, 1911, ch. 231, § 186, 36 Stat. 1143; Feb. 5, 1912, ch. 28, 37 Stat. 61).

A provision that a witness should not be disqualified by color was omitted as obsolete and unnecessary, since no such disqualification could be invoked in absence of statutory authority.

A provision that the United States could examine any plaintiff or party interested is covered by the word “exempt” in the revised section, and by section 2504 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims”.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2507. Calls and discovery

(a) The United States Court of Federal Claims may call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence. The head of any department or agency may refuse to comply with a call issued pursuant to this subsection when, in his opinion, compliance will be injurious to the public interest.

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

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

(June 25, 1948, ch. 646, 62 Stat. 977; Sept. 3, 1954, ch. 1263, §55(a)–(c), 68 Stat. 1247; Pub. L. 97–164, title I, §139(f), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102–572, title IX, §902(a), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §272 (Mar. 3, 1911, ch. 231, §164, 36 Stat. 1140).

Words “or agency” were added. (See reviser’s note under section 1345 of this title.)

Changes were made in phraseology.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102–572, §902(a)(1), substituted “United States Court of Federal Claims” for “United States Claims Court”.

Subsec. (c). Pub. L. 102–572, §902(a)(2), substituted “Court of Federal Claims” for “Claims Court”.

1982—Subsec. (a). Pub. L. 97–164, §139(f)(1), substituted “United States Claims Court” for “Court of Claims”.

Subsec. (c). Pub. L. 97–164, §139(f)(2), substituted “Claims Court” for “Court of Claims”.

1954—Act Sept. 3, 1954, substituted “Calls and discovery” for “Calls on departments for information” in section catchline, designated existing provisions as subsec. (a), and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

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

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

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

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

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, §10, 67 Stat. 227; Sept. 3, 1954, ch. 1263, §47(a), 68 Stat. 1243; Pub. L. 97–164, title I, §139(g), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102–572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §252 (Mar. 3, 1911, ch. 231, §146, 36 Stat. 1137).

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102–572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97–164 substituted “United States Claims Court” for “Court of Claims”.

1954—Act Sept. 3, 1954, struck out “United States” from name of Court of Claims in first par.

1953—Act July 28, 1953, substituted “United States Court of Claims” for “Court of Claims” in first par., and substituted “shall be enforceable as other judgments” for “be a judgment of such district court and enforceable as such” in third par.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

§ 2509. Congressional reference cases

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Court of Federal Claims pursuant to section 1492 of this title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

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

(c) The hearing officer to whom a congressional reference case is assigned by the chief judge shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions

sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitable due from the United States to the claimant.

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

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

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

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

(June 25, 1948, ch. 646, 62 Stat. 977; Pub. L. 89-681, § 2, Oct. 15, 1966, 80 Stat. 958; Pub. L. 97-164, title I, § 139(h), Apr. 2, 1982, 96 Stat. 42; Pub. L. 102-572, title IX, § 902(a), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 257 (Mar. 3, 1911, ch. 231, § 151, 36 Stat. 1138).

Jurisdiction provisions of section 257 of title 28, U.S.C., 1940 ed., appear in section 1492 of this title.

A provision as to the court's power to render judgment on a referred claim and its duty to report thereon to Congress, was omitted from this section as covered by sections 791(c) and 1492 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-572, § 902(a)(1), substituted “United States Court of Federal Claims” for “United States Claims Court”.

Subsecs. (b), (f), (g). Pub. L. 102-572, § 902(a)(2), substituted “Court of Federal Claims” for “Claims Court”.

1982—Subsec. (a). Pub. L. 97-164, § 139(h)(1), substituted “chief judge” for “chief commissioner” wherever appearing, “United States Claims Court” for “Court of Claims”, “judge as hearing officer” for “trial commissioner”, “judges” for “commissioners”, and “presiding officer” for “presiding commissioner”.

Subsec. (b). Pub. L. 97-164, § 139(h)(2)(A)–(C), substituted “chief judge” for “chief commissioner”, “Claims Court” for “Court of Claims”, and “hearing officer” for “trial commissioner”.

Subsec. (c). Pub. L. 97-164, § 139(h)(2)(A), (B), substituted “hearing officer” for “trial commissioner” and “chief judge” for “chief commissioner”.

Subsec. (d). Pub. L. 97-164, § 139(h)(2)(A), (D), substituted “hearing officer” for “trial commissioner” wherever appearing and struck out “of commissioners” after “review panel”.

Subsec. (e). Pub. L. 97-164, § 139(h)(2)(B), substituted “chief judge” for “chief commissioner”.

Subsec. (f). Pub. L. 97-164, § 139(h)(2)(A), (C), substituted “Claims Court” for “Court of Claims”, and “hearing officer” for “trial commissioner” wherever appearing.

Subsec. (g). Pub. L. 97-164, § 139(h)(2)(C), (E), substituted “Claims Court” for “Court of Claims” and “judges serving as hearing officers” for “commissioners serving as trial commissioners”.

1966—Pub. L. 89-681 substituted provisions for reference of bills to the chief commissioner of the Court of Claims pursuant to section 1492 of this title for provisions calling simply for reference to the Court of Claims, substituted provisions naming the trial commissioner to whom a reference case is assigned by the chief commissioner for provisions simply naming the Court of Claims as the agency by which findings and conclusions are made, and inserted provisions for the designation of a trial commissioner and reviewing body consisting of three other commissioners, the promulgation of rules and regulations for Congressional reference cases by the chief commissioner, the procedure to be followed, and the supplying of facilities and personnel for the dispatch of Congressional reference cases.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1492 of this title.

§ 2510. Referral of cases by Comptroller General

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

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

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, § 11, 67 Stat. 227; Sept. 3, 1954, ch. 1263, § 47(b), 68 Stat. 1243; Pub. L. 95-563, § 14(h)(1), (2)(A), Nov. 1, 1978, 92 Stat. 2390; Pub. L. 97-164, title I, § 139(i)(1), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, § 902(a), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 254 and 255 (Mar. 3, 1911, ch. 231, §§ 148, 149, 36 Stat. 1137, 1138; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Section consolidates procedural provisions of sections 254 and 255 of title 28, U.S.C., 1940 ed., relating to departmental reference cases.

Jurisdiction provisions of such section 254 appear in section 1493 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court” and “Court of Federal Claims” for “Claims Court” wherever appearing.

1982—Pub. L. 97-164 substituted “Referral of cases by Comptroller General” for “Referral of cases by the Comptroller General or the head of an executive department or agency” in section catchline.

Subsec. (a). Pub. L. 97-164 substituted “transmit to the United States Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction” for “transmit to the Court of Claims for trial and adjudication any claim or matter of which the Court of Claims might take jurisdiction” in first sentence of subsec. (a). The second sentence of subsec. (a) was redesignated (b).

Subsec. (b). Pub. L. 97-164 designated as subsec. (b) the former second sentence of subsec. (a) and substituted “The Claims Court” for “The Court of Claims” and “Court” for “court”. Former subsec. (b), which provided that the head of any executive department or agency could, with the prior approval of the Attorney General, refer to the Court of Claims for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which such head of such department or agency had concluded was not entitled to finality pursuant to the review standards specified in section 10(b) of the Contracts Disputes Act of 1978, with the head of each executive department or agency to make any referral under this section within 120 days of the receipt of a copy of the final appeal decision, that the Court of Claims was to review the matter referred in accordance with the standards specified in section 10(b) of the Contracts Disputes Act of 1978, and that the court was to proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, determine the issue of finality of the appeal decision, and render judgment thereon, take additional evidence, or remand the matter pursuant to the authority specified in section 1491 of this title was struck out.

1978—Pub. L. 95-563, inserted “or the head of an executive department or agency” in section catchline, designated existing provisions as subsec. (a), and added subsec. (b).

1954—Act Sept. 3, 1954, substituted “Referral of cases by Comptroller General” for “Departmental reference cases” in section catchline.

1953—Act July 28, 1953, struck out provisions relating to procedure in connection with departmental reference cases provided for by former section 1493 of this title; and, in connection with trial and adjudication of cases referred by the Comptroller General, inserted provision for rendering judgment, and struck out requirement that such cases be transmitted through the Secretary of the Treasury.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978,

and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

§ 2511. Accounts of officers, agents or contractors

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

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

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

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, §12, 67 Stat. 227; Pub. L. 97-164, title I, §139(j), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §287 (Mar. 3, 1911, ch. 231, §180, 36 Stat. 1141; Feb. 13, 1925, ch. 229, §3, 43 Stat. 939).

Words “The Attorney General shall represent the United States at the hearing of said cause” were omitted as covered by sections 309 and 310 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Jurisdiction provisions of section 287 of title 28, U.S.C., 1940 ed., appear in section 1494 of this title.

A provision for continuances was omitted as unnecessary, in view of the inherent power of the court to grant continuances in any suit.

A provision in section 287 of title 28, U.S.C., 1940 ed., that section 274 of title 28, U.S.C., 1940 ed., should apply to cases under such section 287 was omitted as covered by section 2504 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97-164 substituted “The judgment of the United States Claims Court in such suit shall be conclusive” for “The judgment of the Court of Claims in such suit, or of the Supreme Court upon review, shall be conclusive”.

1953—Act July 28, 1953, inserted “to the Comptroller General,” in first par., struck out third par. which provided for accrual to the United States of a right of action upon the judgment, with a limitation period extending to three years after judgment, and inserted provisions for filing and recording the transcript of such judgment in the clerk's office of any district court and for enforcement thereof.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2512. Disbursing officers; relief

Whenever the United States Court of Federal Claims finds that any loss by a disbursing offi-

cer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts.

(June 25, 1948, ch. 646, 62 Stat. 978; Pub. L. 97-164, title I, § 139(j)(2), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 253 (Mar. 3, 1911, ch. 231, § 147, 36 Stat. 1137; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Words "paymaster, quartermaster, commissary of subsistence, or other" were omitted as covered by words "disbursing officer of the United States". (See reviser's note under section 1496 of this title.)

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2513. Unjust conviction and imprisonment

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

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

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

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

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

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

(e) The amount of damages awarded shall not exceed the sum of \$5,000.

(June 25, 1948, ch. 646, 62 Stat. 978; Sept. 3, 1954, ch. 1263, § 56, 68 Stat. 1247; Pub. L. 97-164, title I, § 139(j)(2), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on sections 729-732 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure (May 24, 1938, ch. 266, §§ 1-4, 52 Stat. 438.)

Sections 729-732 of title 18, U.S.C., 1940 ed., were consolidated and completely rewritten in order to clarify ambiguities which made the statute unworkable as enacted originally. Jurisdictional provisions of section 729 of title 18, U.S.C., 1940 ed., are incorporated in section 1495 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Subsec. (c). Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Subsec. (c). Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims".

1954—Subsec. (c). Act Sept. 3, 1954, substituted "considered by" for "filed with".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2514. Forfeiture of fraudulent claims

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

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

(June 25, 1948, ch. 646, 62 Stat. 978; Pub. L. 97-164, title I, § 139(j)(2), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 279 and 280 (Mar. 3, 1911, ch. 231, §§ 172, 173, 36 Stat. 1141).

A provision of section 279 of title 28, U.S.C., 1940 ed., that a judgment of forfeiture shall forever bar the prosecution of the claim was omitted as covered by section 2518 of this title.

A provision of section 280 of title 28, U.S.C., 1940 ed., barring allowance by accounting officers of fraudulent claims under Act June 16, 1874, 18 Stat. 75, was omitted as obsolete.

A provision of section 280 of title 28, U.S.C., 1940 ed., barring allowance of fraudulent claims by Congress was omitted as unnecessary and superfluous.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Pub. L. 97-164 substituted "United States Claims Court" for "Court of Claims".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2515. New trial; stay of judgment

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

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

(June 25, 1948, ch. 646, 62 Stat. 978; Pub. L. 97-164, title I, §139(j)(2), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§281 and 282 (Mar. 3, 1911, ch. 231, §§174, 175, 36 Stat. 1141).

Words “but until an order is made staying the payment of a judgment, the same shall be payable and paid as on March 3, 1911, was provided by law,” in section 282 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

Changes were made in phraseology.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Subsec. (a). Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims”.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2516. Interest on claims and judgments

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

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of the judgment.

(June 25, 1948, ch. 646, 62 Stat. 978; Sept. 3, 1954, ch. 1263, §57, 68 Stat. 1248; Pub. L. 97-164, title I, §139(j)(2), title III, §302(d), Apr. 2, 1982, 96 Stat. 43, 56; Pub. L. 97-258, §2(g)(5), (m)(3), Sept. 13, 1982, 96 Stat. 1061, 1062; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §284 and section 226 of title 31, U.S.C., 1940 ed., Money and Finance (Sept. 30, 1890, ch. 1126, §1, 26 Stat. 537; Mar. 3, 1911, ch. 231, §177, 36 Stat. 1141; Nov. 23, 1921, ch. 136, §1324(b), 42 Stat. 316; June 2, 1924, ch. 234, §1020, 43 Stat. 346; Feb. 13, 1925, ch. 229, §3(c), 43 Stat. 939; Feb. 26, 1926, ch. 27, §§1117, 1200, 44 Stat. 119, 125; May 29, 1928, ch. 852, §615(a), 45 Stat. 877; June 22, 1936, ch. 690, §808, 49 Stat. 1746).

Subdivision (b) of section 284 of title 28, U.S.C., 1940 ed., was omitted as covered by section 3771 of title 26, U.S.C., 1940 ed., Internal Revenue Code. Such omission required the exception in subdivision (a) of such section 284, reading: “except as provided in subdivision (b)”, to be changed to read: “or Act of Congress expressly providing for payment thereof.”

Subsection (b) of this section is based on the last sentence of section 226 of title 31, U.S.C., 1940 ed., Money and Finance.

Changes were made in phraseology.

1982 ACT

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
28:2516(b)	28:2516(b)(1st sentence words before “from the date”).	

Section 2(g)(5) of the bill restates 28:2516(b) because the provisions in 28:2516(b) on the periods for computing interest were superseded by the source provisions restated in section 1304 of the revised title 31.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Subsec. (a). Pub. L. 97-164, §139(j)(2), substituted “United States Claims Court” for “Court of Claims”.

Subsec. (b). Pub. L. 97-258 substituted provisions that interest on a judgment against the United States is paid at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of judgment for provisions that such interest would be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of mandate of affirmance by the Supreme Court and that the interest would not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed, and repealed the amendment made by Pub. L. 97-164, §302(d), eff. Oct. 1, 1982. See, also, section 1304(b) of Title 31, Money and Finance.

Pub. L. 97-164, §§302(d), 402, eff. Oct. 1, 1982, struck out “at the rate of four percent per annum” and all that follows through “affirmance” and inserted in lieu thereof “, from the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of the affirmance, at a rate of interest equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment”.

1954—Subsec. (b). Act Sept. 3, 1954, inserted “for any period” after “allowed” in last sentence.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 2(g)(5) of Pub. L. 97-258 provided that the amendment made by that section is effective Oct. 1, 1982.

REPEAL

Section 302(d) of Pub. L. 97-164, cited as a credit to this section, was repealed by Pub. L. 97-258, §2(m)(3), Sept. 13, 1982, 96 Stat. 1062, eff. Oct. 1, 1982.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1961 of this title; title 31 section 1304.

§ 2517. Payment of judgments

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

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

(June 25, 1948, ch. 646, 62 Stat. 979; Pub. L. 95-563, §14(e), (f), Nov. 1, 1978, 92 Stat. 2390; Pub. L. 97-164, title I, §139(k), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104-316, title II, §202(l), Oct. 19, 1996, 110 Stat. 3843.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §285, and sections 225, 228, of title 31, U.S.C., 1940 ed., Money and Finance, (R.S. §§236, 1089; Feb. 18, 1904, ch. 160, §1, 33 Stat. 41; Mar. 3, 1911, ch. 231, §178, 36 Stat. 1141; June 10, 1921, ch. 18, §§304, 305, 42 Stat. 24; Feb. 13, 1925, ch. 229, §3(c), 43 Stat. 939).

Section consolidates section 285 of title 28, U.S.C., 1940 ed., and sections 225 and 228 of title 31, U.S.C., 1940 ed., Money and Finance.

Words “chief judge” were substituted for “the chief justice, or, in his absence, by the presiding judge of said court” in section 225 of title 31, U.S.C., 1940 ed., Money and Finance, in conformity with chapter 7 of this title.

Words “or, on review, by the Supreme Court, where the same are affirmed in favor of the claimant” in section 225 of title 31, U.S.C., 1940 ed., were omitted as unnecessary.

Provisions of section 228 of title 31, U.S.C., 1940 ed., for payment of district court judgments are incorporated in section 2414 of this title.

Changes were made in phraseology.

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-316 substituted “Secretary of the Treasury” for “General Accounting Office”.

1992—Subsec. (a). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Subsec. (a). Pub. L. 97-164, §139(k)(1), substituted “United States Claims Court” for “Court of Claims”.

Subsec. (b). Pub. L. 97-164, §139(k)(2), struck out the comma after “shall be discharged” thereby correcting

a technical error in the directory language in Pub. L. 95-563 which placed both a comma and a period after “shall be discharged”.

1978—Subsec. (a). Pub. L. 95-563, §14(e), inserted Contract Disputes Act of 1978 exception.

Subsec. (b). Pub. L. 95-563, §14(f), inserted provision relating to discharge of partial judgments.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

CROSS REFERENCES

Appropriations for payments of judgments against the United States, computation of interest time, see section 1304 of Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2412 of this title; title 16 section 460bb-2; title 25 sections 640d-27, 1300i-11; title 31 section 1304.

[§ 2518. Repealed. Pub. L. 97-164, title I, § 139(l), Apr. 2, 1982, 96 Stat. 43]

Section, act June 25, 1948, ch. 646, 62 Stat. 979, related to certification of Court of Claims judgments for appropriation.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

§ 2519. Conclusiveness of judgment

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

(June 25, 1948, ch. 646, 62 Stat. 979; Pub. L. 97-164, title I, §139(m), Apr. 2, 1982, 96 Stat. 43; Pub. L. 102-572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §286 (Mar. 3, 1911, ch. 231, §179, 36 Stat. 1141).

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1982—Pub. L. 97-164 substituted “United States Claims Court” for “Court of Claims”.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

§ 2520. Fees

The United States Court of Federal Claims shall by rules impose a fee not exceeding \$120, for the filing of any petition.

(June 25, 1948, ch. 646, 62 Stat. 979; Sept. 3, 1954, ch. 1263, § 58, 68 Stat. 1248; Pub. L. 89-507, § 2, July 18, 1966, 80 Stat. 308; Pub. L. 97-164, title I, § 139(n)(1)-(3), Apr. 2, 1982, 96 Stat. 43, 44; Pub. L. 100-702, title X, § 1012(a)(1), Nov. 19, 1988, 102 Stat. 4668; Pub. L. 102-572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 283 and 283a (Mar. 3, 1911, ch. 231, § 176, 36 Stat. 1141; Mar. 3, 1933, ch. 212, title II, § 19, 47 Stat. 1519).

This section consolidates section 283, with a part of section 283a, of title 28, U.S.C., 1940 ed.

The last subsection of section 283a of title 28, U.S.C., 1940 ed., appears in section 793 of this title.

Language in section 283a of title 28, U.S.C., 1940 ed., referring to cases instituted after March 3, 1933, was omitted as executed.

For liability of the United States for costs, both in actions in district courts and in suits in the Court of Claims, see section 2412 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

1988—Pub. L. 100-702 substituted “\$120” for “\$60”.

1982—Pub. L. 97-164 substituted “Fees” for “Fees; cost of printing record” as section catchline, struck out designation “(a)” at beginning of section, in the resulting undesignated first sentence substituted “United States Claims Court” for “Court of Claims” and “\$60” for “\$10”, and struck out subsecs. (b) and (c) which directed the clerk to collect a fee of 10 cents a folio for preparing and certifying a transcript of the record for the purpose of a writ of certiorari sought by the plaintiff and for furnishing certified copies of judgments or other documents, with not less than \$5 to be charged for each certified copy of findings of fact and opinion of the court to be filed in the Supreme Court, and which also directed the clerk to collect for each certified copy of the court’s findings of fact and opinion a fee of 25 cents for five pages or less, 35 cents for those over five and not more than ten pages, 45 cents for those over ten and not more than twenty pages, and 50 cents for those of more than twenty pages.

1966—Subsec. (d). Pub. L. 89-507 repealed subsec. (d) which required the cost of printing the record in every pending case to be taxed against the losing party except when the judgment is against the United States. See section 2412 of this title.

1954—Subsec. (a). Act Sept. 3, 1954, struck out “and the hearing of any case before the court, a judge, or a commissioner” after “petition”.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Section 1012(a)(2) of Pub. L. 100-702 provided that: “The amendment made by this subsection [amending this section] shall take effect 30 days after the date of enactment of this title [Nov. 19, 1988].”

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-507 applicable only to judgments in actions filed subsequent to July 18, 1966, and such amendment not to authorize the reopening or modification of judgments entered prior to July 18, 1966, see section 3 of Pub. L. 89-507, set out as a note under section 2412 of this title.

§ 2521. Subpoenas and incidental powers

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

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

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

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

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

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

(Added Sept. 3, 1954, ch. 1263, § 59(a), 68 Stat. 1248; amended Pub. L. 102-572, title IX, § 910(a), Oct. 29, 1992, 106 Stat. 4519.)

AMENDMENTS

1992—Pub. L. 102-572 inserted “and incidental powers” in section catchline, designated existing provisions as subsec. (a), and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

§ 2522. Notice of appeal

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

(Added Pub. L. 97-164, title I, § 139(q)(1), Apr. 2, 1982, 96 Stat. 44; amended Pub. L. 102-572, title IX, § 902(a), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992—Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court” and “Court of Federal Claims” for “Claims Court”.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE

Section effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

[CHAPTER 167—REPEALED]**[[§§ 2601 to 2604. Repealed. Pub. L. 97-164, title I, § 140, Apr. 2, 1982, 96 Stat. 44]**

Section 2601, acts June 25, 1948, ch. 646, 62 Stat. 979; June 2, 1970, Pub. L. 91-271, title I, §103, 84 Stat. 275; Oct. 10, 1980, Pub. L. 96-417, title IV, §403(a)–(d), title V, §501(27), (28), 94 Stat. 1740–1742, provided for appeals to the Court of Customs and Patent Appeals from final judgments or orders of the Court of International Trade and for the procedures to be followed in such appeals. See section 1295(a)(5) of this title.

Section 2602, acts June 25, 1948, ch. 646, 62 Stat. 980; Oct. 14, 1966, Pub. L. 89-651, §8(c)(3), 80 Stat. 902; June 2, 1970, Pub. L. 91-271, title I, §104, 84 Stat. 276; Oct. 10, 1980, Pub. L. 96-417, title IV, §403(e)(1), 94 Stat. 1741, provided for the precedence of enumerated civil actions in the Court of Customs and Patent Appeals. See section 1296 of this title.

Section 2603, added Pub. L. 96-417, title IV, §404(a), Oct. 10, 1980, 94 Stat. 1741, provided that, except as provided in section 2639 or 2641(b) of this title or in the rules prescribed by the court, the Federal Rules of Evidence would apply in the Court of Customs and Patent Appeals in any appeal from the Court of International Trade.

Section 2604, added Pub. L. 96-417, title IV, §405(a), Oct. 10, 1980, 94 Stat. 1741, authorized the chief judge of the Court of Customs and Patent Appeals to summon annually the judges of the court to a judicial conference for the purpose of considering the business of the court and improvements in the administration of justice of the court.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

CHAPTER 169—COURT OF INTERNATIONAL TRADE PROCEDURE

Sec.	
2631.	Persons entitled to commence a civil action.
2632.	Commencement of a civil action.
2633.	Procedure and fees.
2634.	Notice.
2635.	Filing of official documents.
2636.	Time for commencement of action.
2637.	Exhaustion of administrative remedies.
2638.	New grounds in support of a civil action.
2639.	Burden of proof; evidence of value.
2640.	Scope and standard of review.
2641.	Witnesses; inspection of documents.
2642.	Analysis of imported merchandise.
2643.	Relief.
2644.	Interest.
2645.	Decisions.
2646.	Retrial or rehearing.
[2647.]	Repealed.]

AMENDMENTS

1984—Pub. L. 98-620 title IV, §402(29)(G), Nov. 8, 1984, 98 Stat. 3359, struck out item 2647 “Precedence of cases”.

1980—Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1730, substituted “COURT OF INTERNATIONAL TRADE PROCEDURE” for “CUSTOMS COURT PROCEDURE” in chapter heading, “Persons entitled to commence a civil action” for “Time for commencement of action” in item 2631, “Commencement of a civil action” for “Customs Court procedures and fees” in item 2632, “Procedure and fees” for “Precedence of cases” in item 2633, “Filing of official documents” for “Burden of proof; evidence of value” in item 2635, “Time for commencement of action” for “Analysis of imported merchandise” in item 2636, “Exhaustion of administrative remedies” for “Witnesses; inspection of documents” in item 2637, “New grounds in support of a civil action” for “Decisions; findings of fact and conclusions of law; effect of opinions” in item 2638, “Burden of proof; evidence of value” for “Retrial or rehearing” in item 2639, and added items 2640 to 2647.

1979—Pub. L. 96-39, title X, §1001(b)(4)(F), July 26, 1979, 93 Stat. 306, substituted “Precedence of cases” for “Precedence of American manufacturer, producer, or wholesaler cases” in item 2633.

1970—Pub. L. 91-271, title I, §123(e), June 2, 1970, 84 Stat. 282, substituted “Time for commencement of action” for “Appeal for reappraisal; assignment to single judge; hearing” in item 2631, “Customs Court procedures and fees” for “Notice” in item 2632, “Precedence of American manufacturer, producer, or wholesaler cases” for “Evidence of value, upon reappraisal; burden of proof” in item 2633, “Notice” for “Witnesses; inspection of documents” in item 2634, “Burden of proof; evidence of value” for “Decision of single judge in reappraisal appeal” in item 2635, “Analysis of imported merchandise” for “Review of single judge’s decision; disqualification of judges; remand; presumption” in item 2636, “Witnesses; inspection of documents” for “Review of decisions of divisions” in item 2637, “Decisions; findings of fact and conclusions of law; effect of opinions” for “Precedence of classification cases” in item 2638, and “Retrial or rehearing” for “Analysis of imported merchandise” in item 2639, and struck out item 2640 “Rehearing or retrial”, item 2641 “Fruivolous protest or appeal”, and item 2642 “Amendment of protests, appeals, and pleadings”.

1949—Act May 24, 1949, ch. 139, §121, 63 Stat. 106, substituted “Amendment of protests, appeals, and pleadings” for “Disqualification of judge” in item 2642.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 19 sections 1499, 1514, 1516, 1516a.

§ 2631. Persons entitled to commence a civil action

(a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed such petition.

(c) A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose.

(d)(1) A civil action to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assist-

ance under such Act may be commenced in the Court of International Trade by a worker, group of workers, certified or recognized union, or authorized representative of such worker or group that applies for assistance under such Act and is aggrieved by such final determination.

(2) A civil action to review any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act may be commenced in the Court of International Trade by a firm or its representative that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(3) A civil action to review any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act may be commenced in the Court of International Trade by a community that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(e) A civil action to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 may be commenced in the Court of International Trade by any person who was a party-at-interest with respect to such determination.

(f) A civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party whose application for disclosure of such confidential information was denied under section 777(c)(1) of such Act.

(g)(1) A civil action to review any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke such license or permit under section 641(b)(5) or (c)(2) of such Act, may be commenced in the Court of International Trade by the person whose license or permit was denied or revoked.

(2) A civil action to review any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit or impose a monetary penalty in lieu thereof under section 641(d)(2)(B) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person against whom the decision was issued.

(3) A civil action to review any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose accreditation was denied, suspended, or revoked.

(h) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade by the person who would

have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or in part, under section 515 of the Tariff Act of 1930.

(i) Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)–(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—

(A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930;

(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right; and

(C) in a civil action under section 777(c)(2) of the Tariff Act of 1930, only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.

(2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(k) In this section—

(1) “interested party” has the meaning given such term in section 771(9) of the Tariff Act of 1930; and

(2) “party-at-interest” means—

(A) a foreign manufacturer, producer, or exporter, or a United States importer, of merchandise which is the subject of a final determination under section 305(b)(1) of the Trade Agreements Act of 1979;

(B) a manufacturer, producer, or wholesaler in the United States of a like product;

(C) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product;

(D) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States,¹ and

(E) an association composed of members who represent parties-at-interest described in subparagraph (B), (C), or (D).

(Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1730; amended Pub. L. 98-573, title II, §212(b)(3), title VI, §612(b)(3), Oct. 30, 1984, 98 Stat. 2983, 3034; Pub. L. 103-182, title VI, §684(a)(2), Dec. 8, 1993, 107 Stat. 2219.)

REFERENCES IN TEXT

Section 515 of the Tariff Act of 1930, referred to in subsecs. (a), (h), (j)(1)(A), is classified to section 1515 of Title 19, Customs Duties.

¹ So in original. The comma probably should be a semicolon.

Section 514 of the Tariff Act of 1930, referred to in subsec. (a), is classified to section 1514 of Title 19.

Section 516 of the Tariff Act of 1930, referred to in subsecs. (b), (j)(1)(A), is classified to section 1516 of Title 19.

Section 516A of the Tariff Act of 1930, referred to in subsecs. (c), (j)(1)(B), is classified to section 1516a of Title 19.

The Trade Act of 1974, referred to in subsec. (d)(1) to (3), is Pub. L. 93-618, Jan. 3, 1975, 88 Stat. 1978, as amended, which is classified principally to chapter 12 (§2101 et seq.) of Title 19. Sections 223, 251, and 271 of the Trade Act of 1974 are classified to sections 2273, 2341, and 2371, respectively, of Title 19. For complete classification of this Act to the Code, see References in Text note set out under section 2101 of Title 19 and Tables.

Section 305(b)(1) of the Trade Agreements Act of 1979, referred to in subsecs. (e), (k)(2)(A), is classified to section 2515(b)(1) of Title 19.

Section 777 of the Tariff Act of 1930, referred to in subsecs. (f), (j)(1)(C), is classified to section 1677f of Title 19.

Section 641 of the Tariff Act of 1930, referred to in subsec. (g), is classified to section 1641 of Title 19.

Section 499(b) of the Tariff Act of 1930, referred to in subsec. (g)(3), is classified to section 1499(b) of Title 19.

Section 771(9) of the Tariff Act of 1930, referred to in subsec. (k)(1), is classified to section 1677(9) of Title 19.

PRIOR PROVISIONS

A prior section 2631, acts June 25, 1948, ch. 646, 62 Stat. 980; May 24, 1949, ch. 139, §122, 63 Stat. 106; June 2, 1970, Pub. L. 91-271, title I, §112, 84 Stat. 278; Jan. 3, 1975, Pub. L. 93-618, title III, §321(f)(2), 88 Stat. 2048, related to time for commencement of action, prior to the general revision of this chapter by Pub. L. 96-417. See section 2636 of this title.

AMENDMENTS

1993—Subsec. (g)(3). Pub. L. 103-182 added par. (3).

1984—Subsec. (g). Pub. L. 98-573, §212(b)(3), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows:

“(1) A civil action to review any decision of the Secretary of the Treasury to deny or revoke a custom-house broker's license under section 641(a) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was denied or revoked.

“(2) A civil action to review any order of the Secretary of the Treasury to revoke or suspend a custom-house broker's license under section 641(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was revoked or suspended.”

Subsec. (k)(2)(E). Pub. L. 98-573, §612(b)(3), added subpar. (E).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 212(b)(3) of Pub. L. 98-573 effective on close of 180th day after Oct. 30, 1984, see section 214(d) of Pub. L. 98-573, set out as a note under section 1304 of Title 19, Customs Duties.

Amendment by section 612(b)(3) of Pub. L. 98-573 applicable with respect to investigations initiated by petition or by the administering authority under subtitle A or B of title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq., 1673 et seq.), and to reviews begun under section 751 of that Act (19 U.S.C. 1675), on or after Oct. 30, 1984, see section 626(b)(1) of Pub. L. 98-573, as amended, set out as a note under section 1671 of Title 19.

EFFECTIVE DATE

Chapter effective Nov. 1, 1980, unless otherwise provided, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

Subsecs. (d) and (g) to (j) of this section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(1)(B) of Pub. L. 96-417.

APPLICATION OF 1993 AMENDMENT

For purposes of applying amendment by Pub. L. 103-182, any decision or order of Customs Service denying, suspending, or revoking accreditation of a private laboratory on or after Dec. 8, 1993, and before regulations to implement 19 U.S.C. 1499(b) are issued to be treated as having been denied, suspended, or revoked under such section 1499(b), see section 684(b) of Pub. L. 103-182, set out as a note under section 1581 of this title.

§ 2632. Commencement of a civil action

(a) Except for civil actions specified in subsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court.

(b) A civil action in the Court of International Trade under section 515 or section 516 of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons, with the content and in the form, manner, and style prescribed by the rules of the court.

(c) A civil action in the Court of International Trade under section 516A of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such section, with the content and in the form, manner, and style prescribed by the rules of the court.

(d) The Court of International Trade may prescribe by rule that any summons, pleading, or other paper mailed by registered or certified mail properly addressed to the clerk of the court with the proper postage affixed and return receipt requested shall be deemed filed as of the date of mailing.

(Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1732.)

REFERENCES IN TEXT

Sections 515 and 516 of the Tariff Act of 1930, referred to in subsec. (b), are classified to sections 1515 and 1516, respectively, of Title 19, Customs Duties.

Section 516A of the Tariff Act of 1930, referred to in subsec. (c), is classified to section 1516a of Title 19.

PRIOR PROVISIONS

A prior section 2632, acts June 25, 1948, ch. 646, 62 Stat. 980; June 2, 1970, Pub. L. 91-271, title I, §113, 84 Stat. 279; Jan. 3, 1975, Pub. L. 93-618, title III, §321(f)(3), 88 Stat. 2048; July 26, 1979, Pub. L. 96-39, title X, §1001(b)(4)(C), 93 Stat. 306, related to Customs Court procedure and fees, prior to the general revision of this chapter by Pub. L. 96-417. See section 2633 of this title.

EFFECTIVE DATE

Subsec. (a) of this section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(1)(B) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

§ 2633. Procedure and fees

(a) A filing fee shall be payable to the clerk of the Court of International Trade upon the commencement of a civil action in such court. The amount of the fee shall be prescribed by the

rules of the court, but shall be not less than \$5 nor more than the filing fee for commencing a civil action in a district court of the United States. The court may fix all other fees to be charged by the clerk of the court.

(b) The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters.

(c) All summons, pleadings, and other papers filed in the Court of International Trade shall be served on all parties in accordance with rules prescribed by the court. When the United States, its agencies, or its officers are adverse parties, service of the summons shall be made upon the Attorney General and the head of the Government agency whose action is being contested. When injunctive relief is sought, the summons, pleadings, and other papers shall also be served upon the named officials sought to be enjoined. (Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1732.)

PRIOR PROVISIONS

A prior section 2633, acts June 25, 1948, ch. 646, 62 Stat. 980; June 2, 1970, Pub. L. 91-271, title I, §114, 84 Stat. 279; July 26, 1979, Pub. L. 96-39, title X, §1001(b)(4)(D), 93 Stat. 306, related to precedence of cases, prior to the general revision of this chapter by Pub. L. 96-417. See section 2647 of this title.

SCHEDULE OF FEES

(Effective November 1, 1988, as amended to July 1, 1998)

As provided by 28 U.S.C. §2633(a) and the Rules of the United States Court of International Trade, the clerk of the court shall collect the fees set forth below. No fees are to be charged for services rendered on behalf of the United States, with the exception of those specifically prescribed in items 2, 4 and 12 of Additional Fees. No fees under this schedule shall be charged to federal agencies or programs, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. §3006A, and Bankruptcy Administrator programs.

Filing Fees—USCIT R. 3(b)

1. For filing an action other than one commenced under 28 U.S.C. §1581(a) or (d)(1), \$150.00.

2. For filing an action commenced under 28 U.S.C. §1581(a), \$120.00.

3. For filing an action commenced under 28 U.S.C. §1581(d)(1), \$25.00.

4. For filing a complaint in an action commenced under 28 U.S.C. §1581(a) or (b) prior to March 1, 1987, \$25.00.

5. For filing a complaint in an action commenced under 28 U.S.C. §1581(a) on or after November 1, 1997, \$30.00.

Attorney Admission Fees—USCIT R. 74(b)(3)

For the original admission of an attorney to practice, including a certificate of admission, \$50.00.

Additional Fees—USCIT R. 80(g)

The clerk shall collect in advance from the parties fees for miscellaneous services as are consistent with the "Judicial Conference Schedule of Additional Fees for the United States District Courts." The additional fees that are applicable to the court are as follows:

1. For filing or indexing any paper not in a case or proceeding for which a case filing fee has been paid (e.g., filing a petition to perpetuate testimony pursuant to Rule 27, the filing of letters rogatory or letters of request, and the registering of a judgment pursuant to 28 U.S.C. §1963), \$20.00.

2. For every search of the records of the court for each case searched, \$15.00. This fee shall apply to services rendered on behalf of the United States if the information requested is available through electronic access. The court has adopted guidelines consistent with those promulgated by the Judicial Conference of the United States to provide guidance in the application of this fee.

3. For certification of any document or paper, whether the certification is made directly on the document or by separate instrument, \$5.00.

4. For exemplification of any document or paper, \$10.00.

5. For reproducing any record or paper, including paper copies made from either original documents; or microfiche or microfilm reproductions of the original records, \$.50 per page. This fee shall apply to services rendered on behalf of the United States if the record or paper requested is available through electronic access.

6. For reproduction of magnetic tape recordings, either cassette or reel-to-reel (including the cost of materials), \$15.00.

7. For each microfiche sheet of film or microfilm jacket copy of any court record, where available, \$3.00.

8. For retrieval of a record from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, \$25.00.

9. For a check paid into the court which is returned for lack of funds, \$25.00.

10. For a duplicate certificate of admission or certificate of good standing, \$15.00.

11. For handling registry funds, a charge shall be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts, 3%.

12. For usage of electronic access to court data for each minute of usage, \$.60. The court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. This fee shall apply to the United States. The court has adopted an advisory note consistent with that approved by the Judicial Conference of the United States clarifying the policy with respect to exemptions from this fee.

PRACTICE COMMENT: Any reference in the Schedule of Fees pertaining to electronic access or an automated database will apply only as of the date on which the Clerk's Office has an automated database that is available to the public. As of July 1, 1998, that automated database is not available.

§ 2634. Notice

Reasonable notice of the time and place of trial or hearing before the Court of International Trade shall be given to all parties to any civil action, as prescribed by the rules of the court.

(Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1733.)

PRIOR PROVISIONS

A prior section 2634, acts June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, §115, 84 Stat. 280, related to notice, prior to the general revision of this chapter by Pub. L. 96-417. See section 2634 of this title.

§ 2635. Filing of official documents

(a) In any action commenced in the Court of International Trade contesting the denial of a protest under section 515 of the Tariff Act of 1930 or the denial of a petition under section 516 of

such Act, the Customs Service, as prescribed by the rules of the court, shall file with the clerk of the court, as part of the official record, any document, paper, information or data relating to the entry of merchandise and the administrative determination that is the subject of the protest or petition.

(b)(1) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, within forty days or within such other period of time as the court may specify, after the date of service of a complaint on the administering authority established to administer title VII of the Tariff Act of 1930 or the United States International Trade Commission, the administering authority or the Commission shall transmit to the clerk of the court the record of such action, as prescribed by the rules of the court. The record shall, unless otherwise stipulated by the parties, consist of—

(A) a copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be maintained by section 777(a)(3) of the Tariff Act of 1930; and

(B)(i) a copy of the determination and the facts and conclusions of law upon which such determination was based, (ii) all transcripts or records of conferences or hearings, and (iii) all notices published in the Federal Register.

(2) The administering authority or the Commission shall identify and transmit under seal to the clerk of the court any document, comment, or information that is accorded confidential or privileged status by the Government agency whose action is being contested and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, comment, or information shall be accompanied by a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine the confidential or privileged material in camera and may make such material available under such terms and conditions as the court may order.

(c) Within fifteen days, or within such other period of time as the Court of International Trade may specify, after service of a summons and complaint in a civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the administering authority or the Commission shall transmit under seal to the clerk of the Court of International Trade, as prescribed by its rules, the confidential information involved, together with pertinent parts of the record. Such information shall be accompanied by a nonconfidential description of the nature of the information being transmitted. The confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may make such information available under a protective order consistent with section 777(c)(2) of the Tariff Act of 1930.

(d)(1) In any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency, the agency shall, within forty days or within such other period of time as the court may specify, after the date of service of the summons and complaint upon the agency, transmit to the clerk of the court, as prescribed by its rules—

(A) a copy of the contested determination and the findings or report upon which such determination was based;

(B) a copy of any reported hearings or conferences conducted by the agency; and

(C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

(2) The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, comment, or information shall include a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order.

(3) The parties may stipulate that fewer documents, comments, or other information than those specified in paragraph (1) of this subsection shall be transmitted to the clerk of the court.

(Added Pub. L. 96-417, title III, § 301, Oct. 10, 1980, 94 Stat. 1733; amended Pub. L. 103-182, title VI, § 684(d), Dec. 8, 1993, 107 Stat. 2219.)

REFERENCES IN TEXT

The Tariff Act of 1930, referred to in subsecs. (a), (b)(1), and (c), is act June 17, 1930, ch. 497, 46 Stat. 590, as amended. Title VII of the Tariff Act of 1930 is classified generally to subtitle IV (§1671 et seq.) of chapter 4 of Title 19, Customs Duties. Sections 515, 516, 516A, and 777 of the Tariff Act of 1930 are classified to sections 1515, 1516, 1516a, and 1677f, respectively, of Title 19. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables.

PRIOR PROVISIONS

A prior section 2635, acts June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, §116, 84 Stat. 280, related to burden of proof and evidence of value, prior to the general revision of this chapter by Pub. L. 96-417. See section 2639 of this title.

AMENDMENTS

1993—Subsec. (a). Pub. L. 103-182 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows:

“(1) Upon service of the summons on the Secretary of the Treasury in any civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 or the denial of a petition under section 516 of such Act, the appropriate customs officer shall forthwith transmit to the clerk of the Court of International Trade, as prescribed by its rules, and as a part of the official record—

“(A) the consumption or other entry and the entry summary;

“(B) the commercial invoice;
 “(C) the special customs invoice;
 “(D) a copy of the protest or petition;
 “(E) a copy of the denial, in whole or in part, of the protest or petition;
 “(F) the importer’s exhibits;
 “(G) the official and other representative samples;
 “(H) any official laboratory reports; and
 “(I) a copy of any bond relating to the entry.
 “(2) If any of the items listed in paragraph (1) of this subsection do not exist in a particular civil action, an affirmative statement to that effect shall be transmitted to the clerk of the court.”

EFFECTIVE DATE

Section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701 (b)(1)(B) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 section 1641.

§ 2636. Time for commencement of action

(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or

(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 515(b) of such Act.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of mailing of a notice pursuant to section 516(c) of such Act.

(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section.

(d) A civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or a final determination of the Secretary of Commerce under section 251 or section 271 of such Act is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination.

(e) A civil action contesting a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

(f) A civil action involving an application for the issuance of an order making confidential information available under section 777(c)(2) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within ten days after the date of the denial of the request for such confidential information.

(g) A civil action contesting the denial or revocation by the Secretary of the Treasury of a

customs broker’s license or permit under subsection (b) or (c) of section 641 of the Tariff Act of 1930, or the revocation or suspension of such license or permit or the imposition of a monetary penalty in lieu thereof by such Secretary under section 641(d) of such Act, is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of the entry of the decision or order of such Secretary.

(h) A civil action contesting the denial, suspension, or revocation by the Customs Service of a private laboratory’s accreditation under section 499(b) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within 60 days after the date of the decision or order of the Customs Service.

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

(Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1734; amended Pub. L. 98-573, title II, §212(b)(4), title VI, §623(b)(1), Oct. 30, 1984, 98 Stat. 2984, 3041; Pub. L. 103-182, title VI, §684(a)(3), Dec. 8, 1993, 107 Stat. 2219.)

REFERENCES IN TEXT

Section 515 of the Tariff Act of 1930, referred to in subsec. (a), is classified to section 1515 of Title 19, Customs Duties.

Section 516 of the Tariff Act of 1930, referred to in subsec. (b), is classified to section 1516 of Title 19.

Section 516A of the Tariff Act of 1930, referred to in subsec. (c), is classified to section 1516a of Title 19.

Sections 223, 251, and 271 of the Trade Act of 1974, referred to in subsec. (d), are classified to sections 2273, 2341, and 2371, respectively, of Title 19.

Section 305(b)(1) of the Trade Agreements Act of 1979, referred to in subsec. (e), is classified to section 2515(b)(1) of Title 19.

Section 777(c)(2) of the Tariff Act of 1930, referred to in subsec. (f), is classified to section 1677f(c)(2) of Title 19.

Section 641 of the Tariff Act of 1930, referred to in subsec. (g), is classified to section 1641 of Title 19.

Section 499(b) of the Tariff Act of 1930, referred to in subsec. (h), is classified to section 1499(b) of Title 19.

PRIOR PROVISIONS

A prior section 2636, acts June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, §117, 84 Stat. 280, related to analysis of imported merchandise, prior to the general revision of this chapter by Pub. L. 96-417. See section 2642 of this title.

AMENDMENTS

1993—Subsecs. (h), (i). Pub. L. 103-182 added subsec. (h) and redesignated former subsec. (h) as (i).

1984—Subsec. (c). Pub. L. 98-573, §623(b)(1)(A), amended subsec. (c) generally, striking out “, other than a determination under section 703(b), 703(c), 733(b), or 733(c) of such Act,” and substituting “within the time specified in such section” for “within thirty days after the date of the publication of such determination in the Federal Register”.

Subsec. (d). Pub. L. 98-573, §623(b)(1)(B), redesignated subsec. (e) as (d). Former subsec. (d), which provided that civil actions contesting certain determinations by the administering authority under sections 703(b), (c), and 733(b), (c), of the Tariff Act of 1930 were barred un-

less commenced in accordance with the rules of the Court of International Trade within 10 days after publication of the determination in the Federal Register, was struck out.

Subsecs. (e) to (g). Pub. L. 98-573, § 623(b)(1)(B), redesignated subsecs. (f) to (h) as (e) to (g), respectively. Former subsec. (e) redesignated (d).

Subsec. (h). Pub. L. 98-573, § 623(b)(1)(B), redesignated subsec. (i) as (h). Former subsec. (h) redesignated (g).

Pub. L. 98-573, § 212(b)(4), amended subsec. (h) generally, substituting “customs broker’s license or permit under subsection (b) or (c) of section 641 of the Tariff Act of 1930, or the revocation or suspension of such license or permit or the imposition of a monetary penalty in lieu thereof by such Secretary under section 641(d) of such Act,” for “customhouse broker’s license under section 641(a) of the Tariff Act of 1930 or the revocation or suspension by such Secretary of a customhouse broker’s license under section 641(b) of such Act”.

Subsec. (i). Pub. L. 98-573, § 623(b)(1)(B), redesignated subsec. (i) as (h).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 212(b)(4) of Pub. L. 98-573 effective on close of 180th day after Oct. 30, 1984, see section 214(d) of Pub. L. 98-573, set out as a note under section 1304 of Title 19, Customs Duties.

Amendment by section 623(b)(1) of Pub. L. 98-573 applicable with respect to civil actions pending on, or filed on or after, Oct. 30, 1984, see section 626(b)(2) of Pub. L. 98-573, set out as a note under section 1671 of Title 19.

EFFECTIVE DATE

Section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(1)(B) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

APPLICATION OF 1993 AMENDMENT

For purposes of applying amendment by Pub. L. 103-182, any decision or order of Customs Service denying, suspending, or revoking accreditation of a private laboratory on or after Dec. 8, 1993, and before regulations to implement 19 U.S.C. 1499(b) are issued to be treated as having been denied, suspended, or revoked under such section 1499(b), see section 684(b) of Pub. L. 103-182, set out as a note under section 1581 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 sections 1514, 1515.

§ 2637. Exhaustion of administrative remedies

(a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety’s obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

(c) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

(d) In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

(Added Pub. L. 96-417, title III, § 301, Oct. 10, 1980, 94 Stat. 1735.)

REFERENCES IN TEXT

Section 515 of the Tariff Act of 1930, referred to in subsec. (a), is classified to section 1515 of Title 19, Customs Duties.

Section 516 of the Tariff Act of 1930, referred to in subsec. (b), is classified to section 1516 of Title 19.

PRIOR PROVISIONS

A prior section 2637, acts June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, § 118, 84 Stat. 280; July 26, 1979, Pub. L. 96-39, title X, § 1001(b)(4)(E), 93 Stat. 306, related to witnesses and inspection of documents, prior to the general revision of this chapter by Pub. L. 96-417. See section 2641 of this title.

EFFECTIVE DATE

Subsec. (c) of this section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(1)(B) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

§ 2638. New grounds in support of a civil action

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

(Added Pub. L. 96-417, title III, § 301, Oct. 10, 1980, 94 Stat. 1736.)

REFERENCES IN TEXT

Section 515 of the Tariff Act of 1930, referred to in text, is classified to section 1515 of Title 19, Customs Duties.

Section 514 of the Tariff Act of 1930, referred to in par. (2), is classified to section 1514 of Title 19.

PRIOR PROVISIONS

A prior section 2638, acts June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, § 119, 84 Stat. 281, related to decisions, findings of fact and conclusions of law, and effect of opinions, prior to the general revision of this chapter by Pub. L. 96-417. See section 2645 (a) and (c) of this title.

§ 2639. Burden of proof; evidence of value

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

(2) The provisions of paragraph (1) of this subsection shall not apply to any civil action com-

menced in the Court of International Trade under section 1582 of this title.

(b) In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence.

(c) Where the value of merchandise or any of its components is in issue in any civil action in the Court of International Trade—

(1) reports or depositions of consuls, customs officers, and other officers of the United States, and depositions and affidavits of other persons whose attendance cannot reasonably be had, may be admitted into evidence when served upon the opposing party as prescribed by the rules of the court; and

(2) price lists and catalogs may be admitted in evidence when duly authenticated, relevant, and material.

(Added Pub. L. 96-417, title III, §301, Oct. 10, 1980, 94 Stat. 1736.)

REFERENCES IN TEXT

Sections 515, 516, and 516A of the Tariff Act of 1930, referred to in subsec. (a)(1), are classified to sections 1515, 1516, and 1516a, respectively, of Title 19, Customs Duties.

PRIOR PROVISIONS

A prior section 2639, acts June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, §120, 84 Stat. 281, provided for retrial or rehearing, prior to the general revision of this chapter by Pub