

HISTORICAL AND REVISION NOTES—CONTINUED

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
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| | | 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.

§ 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.

§ 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.)

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| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
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| | 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.

§ 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 de-

termining 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.)

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| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
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| | 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.

§ 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.)

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| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
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| | 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.

§ 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.)

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| <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