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**A CASE OF STATUTORY  
MISINTERPRETATION: AN 1839 STATUTE  
OF LIMITATION ON A FORM OF DEBT  
ACTION IS BEING MISAPPLIED TO LIMIT  
MODERN REGULATORY PROCEEDINGS**

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## INTRODUCTION

The five-year statute of limitation on an “action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise,” which now appears at 28 U.S.C. § 2462, was adopted in its current form as part of the 1948 revision and reenactment of Title 28 of the United States Code, concerning the “Judicial Code and Judiciary” (the “1948 Act”).<sup>1</sup> The 1948 Act made only non-substantive changes in “phraseology” to a provision adopted in 1839, as part of a statute concerning the “Judicial System of the United States,” which stated “no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States” unless the suit or prosecution “shall be commenced within five years from the time when the penalty or forfeiture accrued.”<sup>2</sup> The 1839 statute, in turn, was based on a criminal statute adopted by the First Congress in 1790.<sup>3</sup>

As discussed in this Article, until at least the late nineteenth century, what we now would call regulatory statutes commonly prescribed the forfeiture of a specific sum of money or specific property as the mandatory consequence for a violation.<sup>4</sup> All

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1. Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising, codifying, and enacting Title 28 into law).

2. Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322. As discussed in Part I.B.3, minor changes in the wording of the 1839 Act were made in 1874, but they were non-substantive and the provision has remained essentially unchanged since 1839. See Appendix A (providing texts of current § 2462, the 1874 version, and the 1839 version).

3. As discussed in Part I.B.3, the original ancestor of the 1839 Act was the Act of April 30, 1790, ch. 9, § 32, 1 Stat. 119.

4. See, e.g., Act of June 30, 1834, ch. 161, § 11, 4 Stat. 730 (codified as amended at 25 U.S.C. § 180 (1994)) (providing that a person who makes a settlement on land owned by any Indian tribe “shall forfeit and pay the sum of one thousand dollars”). Until the twentieth century, all “public wrongs” were grouped together as criminal offenses. See 4 WILLIAM BLACKSTONE, COMMENTARIES 1 (1769). “Civil matters” were “private wrongs” to individuals. See 3 WILLIAM BLACKSTONE, COMMENTARIES 1 (1768). See generally *Huntington v. Attrill*, 146 U.S. 657, 667-68 (1892) (describing historical differences between public and private actions). The modern concept of civil regulatory violations had not yet been developed. The Supreme Court’s decision in *Helvering v. Mitchell*, 303 U.S. 391 (1938), is generally regarded as having created the concept of a “civil” penalty. See Harvey J. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 913-14 (1972) (citing *Helvering* as “the leading case” on when monetary penalties may be characterized as “civil” in nature); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934, 939 (N.D.W. Va. 1975) (citing *Helvering* in discussing the difference between civil and criminal penalties imposed by Congress). Before *Helvering*, any form of “penalty” had been viewed by the Court as a form of criminal punishment, even if the penalty could be recovered in a civil proceeding. See, e.g., *Lees v. United States*, 150 U.S. 476, 479 (1893) (“[T]he recovery of a penalty is a proceeding criminal in its nature, yet . . . it may be enforced in a civil action.”).

infractions of such “penal statutes” were considered to be criminal in nature. A criminal proceeding, however, was not the only way to collect the prescribed penalty. Pecuniary penalties could be recovered in a civil debt action and forfeitures of property could be recovered in a libel proceeding in admiralty or similar proceeding. Under most penal statutes, the penalties could be collected in a *qui tam* action by a private citizen—a “common informer”—who, by statute, received part or all of the penalty or forfeiture. As demonstrated in this Article, Congress intended to time-limit debt actions and libel or similar proceedings when it enacted the 1839 statute. Congress intended no change in meaning when it made revisions in language in the 1948 Act, and there is no basis for applying the limitation to proceedings other than those to which it applied in 1839.

In *3M Co. v. Browner*,<sup>5</sup> the District of Columbia Circuit decided that § 2462 of Title 28 barred an administrative proceeding initiated by the Environmental Protection Agency (“EPA”) more than five years after the conduct at issue<sup>6</sup> to determine whether the 3M Company had violated the Toxic Substances Control Act (“TSCA”),<sup>7</sup> and if so, whether civil monetary penalties should be assessed against the company, and the amount of any penalties up to a statutory maximum.<sup>8</sup> The TSCA set no time limit on the initiation of the administrative proceeding, nor did the TSCA set any time limit on the civil action it authorized to be brought in court to “recover” the penalty if it was not paid voluntarily. The 3M court, purporting to survey the history and background of § 2462, held that the time limitation applies “to the entire federal government in all civil penalty cases” and concluded that the initiation of the EPA

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5. 17 F.3d 1453 (D.C. Cir. 1994) (applying § 2462’s five-year statute of limitation to administrative proceeding to assess civil penalties).

6. *See id.* at 1455.

7. 15 U.S.C. §§ 2601-2629 (1994). The overall purpose of the TSCA was to set measures to “protect humans and the environment from the dangers of toxic substances.” *Rollins Env’tl. Servs., Inc. v. Parish of St. James*, 775 F.2d 627, 632 (5th Cir. 1985).

8. *See 3M*, 17 F.3d at 1455 (describing the scope of the EPA administrative proceeding). The TSCA provides that a violator “shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each violation.” 15 U.S.C. § 2615(a)(1) (1994). The alleged violator has a right to a hearing before the EPA Administrator assesses the penalty. *See id.* § 2615(a)(2)(A). The Administrator has broad discretion as to the penalty amount and may find that no violation occurred or may “mitigate” the penalty in its entirety in appropriate circumstances, even if there was a violation. *See id.* § 2615(a)(2)(C). The Administrator’s decision is subject only to limited review in the federal courts of appeals. *See id.* § 2615(a)(3). If the violator fails to pay a penalty assessment that has become final, the EPA may refer the case to the Justice Department, which may bring an action in federal district court to collect the penalty. *See id.* § 2615(a)(4).

administrative proceeding was untimely.<sup>9</sup> In *dicta*, the court suggested that § 2462 might also apply to the court action the TSCA authorized to be brought by the Justice Department to collect an unpaid penalty.<sup>10</sup>

Since the *3M* decision, federal agencies, with one exception, have failed to challenge the interpretation that § 2462 applies to the initiation of administrative proceedings. In *Johnson v. SEC*,<sup>11</sup> the Securities and Exchange Commission (“SEC” or “Commission”) did not dispute that § 2462 applied to administrative proceedings, but instead argued that the statute did not apply to that particular proceeding because the sanctions imposed were not “penalties.” *Johnson* involved violations by a securities industry professional of professional standards under the Securities Exchange Act of 1934<sup>12</sup> (“Exchange Act”).<sup>13</sup> The SEC had imposed a censure and a six-month suspension from supervisory functions on the violator (two of several sanctions the agency could have chosen) and argued that these remedial sanctions served to protect the public from harm, were not punitive, and did not constitute “penalties” within the meaning of § 2462.<sup>14</sup> The D.C. Circuit rejected this argument, stating that the suspension met the “common” definition of “penalty”—that is, “the suffering in person, rights or property which is annexed by law or judicial decision to the commission of a crime or public offense.”<sup>15</sup> In several subsequent cases, federal agencies have failed to dispute the *3M* holding that § 2462 applies to the initiation of administrative proceedings.<sup>16</sup> In one of those cases, however, a

9. See *3M*, 17 F.3d at 1461.

10. See *id.* at 1459 & n.8 (citing support for applying time limitation to collection of penalties).

11. 87 F.3d 484, 492 (D.C. Cir. 1996) (subjecting SEC sanctions to § 2462 statute of limitation).

12. See 15 U.S.C. § 78a-78mm (1994 & Supp. IV 1998).

13. See *Johnson*, 87 F.3d at 485-86.

14. See *id.* at 490. The SEC proceeding was brought under section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b), which is part of the regulatory scheme under the securities laws that the Supreme Court has recognized as designed to protect the investing public by ensuring that “the highest ethical standards prevail in every facet of the securities industry.” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963) (internal quotations omitted). Section 15(b) provides for disciplinary proceedings against broker-dealers and persons associated with broker-dealers who commit misconduct, see Exchange Act, 15 U.S.C. § 78o(b)(6)(A)(i), including committing any violation of the securities laws, see *id.* § 78o(b)(4)(D), and failing “reasonably to supervise” a subordinate “with a view to preventing violations” of the securities laws. See *id.* § 78o(b)(4)(E).

15. See *Johnson*, 87 F.3d at 487 (internal quotation omitted) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1668 (1976)).

16. In *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), the Federal Deposit Insurance Corporation (“FDIC”) did not challenge the application of § 2462 to the agency’s administrative proceedings. Instead, the FDIC argued unsuccessfully that

federal agency appearing as *amicus curiae* argued that § 2462 does not apply to administrative proceedings and urged the D.C. Circuit to reconsider its holding in *3M*.<sup>17</sup> The court declined to consider the argument.<sup>18</sup>

the sanction it imposed on the petitioner for his misconduct while he was a director of a bank—a permanent prohibition on participation in the banking industry—was not a “penalty” within the meaning of § 2462. *See id.* at 861-62. The FDIC prevailed in the case, however, successfully arguing that the proceeding was timely even though it was commenced more than five years after the misconduct occurred because under the statute authorizing imposition of the sanction, *see* Section 8(e) of the Federal Insurance Deposit Act, 12 U.S.C. § 1818(e) (1994), the five-year period did not automatically begin to run when the misconduct occurred, but rather when an additional factor was satisfied, i.e., when the “effect” of the misconduct—the bank’s financial loss—was manifested. *See Proffitt*, 200 F.3d at 862-65.

In *Interamericas Investments, Ltd. v. Board of Governors of the Federal Reserve System*, 111 F.3d 376, 382 (5th Cir. 1997), the Board of Governors of the Federal Reserve System assumed, for the purposes of the appeal, that § 2462 applied to a proceeding before it in which the Board had imposed civil monetary penalties pursuant to the Bank Holding Company Act. The agency successfully argued more narrowly that § 2462 did not bar the particular proceeding there because continuing violations were involved, and the last violations had occurred less than five years before the administrative proceeding commenced. *See id.* at 382-83. In *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669 (4th Cir. 1997), the Office of Surface Mining Reclamation and Enforcement (“OSM”) argued that the action it proposed to take did not constitute a penalty and, therefore, § 2462 did not apply. OSM sought to list a corporation in a database as the successor to a bankrupt business, which would have resulted in the corporation being held responsible for unpaid civil penalties imposed more than five years earlier on the predecessor business under the Surface Mining Control and Reclamation Act. *See id.* at 663. OSM argued that its action was a determination of ownership or control, not a penalty within the meaning of § 2462. *See id.* at 669. The court relied on both the *3M* and *Johnson* decisions when it held that because the result of the action would be to impose civil monetary penalties on the company, the action was barred by § 2462. *See id.*

17. In *Proffitt*, the Office of the Comptroller of the Currency (“OCC”) filed an *amicus* brief in which it argued that administrative proceedings under the FDI Act are not governed by the time limitation in § 2462 because the plain language of § 2462 is inconsistent with its application to administrative proceedings in general and to FDI Act proceedings, specifically. *See* Brief for the OCC, *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (No. 98-1534). The OCC brief referred to the statutory context of § 2462, *id.* at 17-19, and to its historic background, *id.* at 19-20 & n.18, but did not rely on many of the authorities and subsidiary arguments made in this Article. The OCC urged that, to the extent its argument regarding the nonapplicability of § 2462 to administrative proceedings could not be reconciled with the D.C. Circuit’s previous holdings in the *3M* and *Johnson* cases, the court should reconsider those holdings. The OCC contended that two Supreme Court cases decided after *3M* and *Johnson* called into question the reasoning the D.C. Circuit had applied in its analysis of § 2462. *See* OCC Brief at 22-24. Those cases were *Hudson v. United States*, 522 U.S. 93, 95-96 (1997) (overruling the reasoning of *United States v. Halper*, 490 U.S. 435 (1989), which had held that a civil sanction might constitute punishment and so bar a subsequent criminal prosecution under double jeopardy principles), and *Beach v. Ocwen Federal Bank*, 118 S. Ct. 1408 (1998) (reaffirming the distinction between statutes of limitation, which bar access to the courts, and other statutes that withdraw agency authority after the passage of time).

18. In its decision in *Proffitt*, the D.C. Circuit did not discuss all of the OCC’s arguments but, in a footnote, the court rejected the OCC’s contention that the decision in *Hudson*, concerning double jeopardy principles, warranted reconsideration of the analysis the court had applied in *Johnson* to determine the

This Article argues that *3M* and subsequent decisions improperly have applied the time limitation of § 2462 to the initiation of administrative proceedings.<sup>19</sup> This Article demonstrates that, interpreted under established principles of statutory construction, § 2462 does not apply to proceedings before federal administrative agencies at all, whatever the meaning of the word “penalty,” but only to proceedings before the federal courts.<sup>20</sup> Judicial proceedings are the only proceedings to which the plain language of the statute applies.<sup>21</sup> Moreover, when the 1839 version was enacted and well into the twentieth century, the amount of fines, penalties and forfeitures were almost always fixed by statute, and the courts determined liability in “suits for penalties and forfeitures.”<sup>22</sup> Even when administrative officers had a role in imposing penalties, court involvement almost always was required, as it is now, to compel payment.<sup>23</sup>

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meaning of the word “penalty” in § 2462. *See Proffitt*, 200 F.3d at 860 n.5.

19. As discussed in Part I.B.5 of this Article, the *3M* decision is inconsistent with a considerable body of earlier case law. Five different federal courts of appeals had held that it is the administrative assessment or imposition of civil penalties that triggers the running of the five-year period in § 2462, a holding that supports the interpretation that § 2462 does not apply to the initiation of administrative proceedings. *See infra* Part I.B.5 and accompanying notes.

20. *See infra* Part II.B. The fact that several agencies have, in the circumstances of particular cases, conceded that § 2462 applies to administrative proceedings should not preclude the government from making the arguments outlined in this Article in a subsequent case. Nonmutual collateral estoppel is not available against the government. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting that nonmutual collateral estoppel against the government would “thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue”); *cf. Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-21 (1990) (holding that equitable estoppel does not lie against the government unless government officials commit some kind of “affirmative misconduct,” the nature of which is not clear because the Court has never found such misconduct to be present in a case). Further, one agency has filed an *amicus* brief arguing that § 2462 applies only to judicial, not administrative, proceedings. *See supra* note 17 and accompanying text.

21. *See infra* Part I.B.2.

22. *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (giving federal district courts exclusive jurisdiction of “suits for penalties and forfeitures”); *see also infra* Part I.B.3.

23. Exceptions to the courts’ ultimate authority to collect penalties have always existed in certain statutes that authorize the government to determine liability for and to collect penalties in summary procedures without any involvement of the courts. These usually are tax and revenue statutes that give the executive the authority summarily to determine liability for, and take possession of, monies owed to the government. For example, in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 278-86 (1855), the Court discussed the “warrant of distress,” a summary means available to the government to secure monies due from tax and customs collectors without any court involvement. The power of “distrain” is available in some tax provisions that authorize the IRS to seize taxes due from citizens without a court determination of liability. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 401-02 (1938) (noting that under the 1928 tax code provision at issue “collection of the 50 per centum addition, like that of the primary tax itself, may be

Further, this Article demonstrates that the *Johnson* decision is wrong in concluding that the term “penalty,” as used in § 2462, extends to sanctions other than the payment of money and property.<sup>24</sup> As discussed below, other provisions in the 1948 statute use the phrase “fine, penalty or forfeiture, pecuniary or otherwise” to refer to money and property.<sup>25</sup> Moreover, a well-known meaning of “penalty” in the eighteenth and nineteenth centuries was a forfeiture of money or property set by statute as the consequence for a violation of law.<sup>26</sup> Together, these indications compel the conclusion that the term “penalty” in § 2462 refers to a monetary penalty or forfeiture of property.

Finally, Part III of this Article urges that § 2462 should not be applied to all court actions that could result in a judgment for a civil monetary penalty. Construed in context, § 2462 should apply only to a narrow class of proceedings and actions in the federal courts to recover fines, penalties and forfeitures specifically set by statute or assessed by an administrative agency.<sup>27</sup>

The extent to which § 2462’s time limitation applies to proceedings brought by federal regulators before agencies and in the federal courts is important. Agencies must conduct investigations before they may initiate administrative or judicial proceedings against alleged violators. It may require years to uncover the evidence

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made ‘by distraint’ as well as ‘by a proceeding in court’”) (quoting Revenue Act of 1928, ch. 852, §§ 276, 293, 45 Stat. 791, 857-58). There may be other examples, particularly in the customs and immigration areas, where an administrative officer can compel payment of penalties without the need for court involvement because the officer has physical possession of property of the person assertedly liable for the penalty and can withhold the property until payment is made. In *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 342 (1909), the Court upheld a provision of the Alien Immigration Act of 1903 that imposed a penalty for transporting to the United States immigrants afflicted with certain diseases. The Alien Immigration Act prohibited the customs collector from granting clearance to the ship until the penalty for that particular infraction was paid, although other penalties imposed in the Act could be collected only by bringing a court action. *See id.* at 321-22.

24. *See infra* Part I.B.2-3; Part II.B.

25. *See infra* Part I.B.2.

26. *See infra* Part I.B.3; Part II.B.

27. This conclusion calls into question the holdings in some decisions that, relying on the *3M* decision, have applied § 2462 to bar the imposition of some or all relief sought by a federal agency in a civil action in court, including discretionary civil monetary penalties and injunctive relief. *See* *FEC v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996) (holding that § 2462 applied to a district court action by the Federal Election Commission against violators of the Federal Election Campaign Act, whether the agency sought as a remedy a civil monetary penalty or an injunction against future violations), *cert. denied*, 522 U.S. 1015 (1997); *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997) (holding, without analysis, that in an action under the Clean Water Act, § 2462 applied to the imposition of civil penalties on a violator but that § 2462 did not apply insofar as the action sought injunctive relief), *cert. denied*, 522 U.S. 1075, *reh’g denied*, 523 U.S. 1041 (1998).

needed to support the charges in a case.<sup>28</sup> If, as the *3M* court held, the five-year limitation applies “to the entire federal government in all civil penalty cases”—all civil cases, before an administrative agency or in a federal court, in which a monetary penalty or other sanction deemed to be a “penalty,” as construed in the *Johnson* decision, might be imposed by the court or agency—then § 2462 requires federal agencies to bring charges within the period, irrespective of the completeness of their investigations, or not at all. If, as held in *3M*, the five-year period is triggered by the underlying regulatory violation,<sup>29</sup> without regard to whether the agency knew or should have known of the violation, the entire period may expire before regulators even have the opportunity to investigate. The foregoing results may conflict with Congress’s intent to impose sanctions on violators of particular regulatory statutes—statutes in which Congress did not set time limits on the initiation of proceedings.<sup>30</sup> Such results should not be lightly assumed or imposed without careful consideration of the context and history of § 2462 that is explored in this Article. As discussed below, most of the context and history of the statute has not been considered by courts that have construed § 2462,<sup>31</sup> including the *3M* court.<sup>32</sup>

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28. For example, it has been recognized that investigations of federal securities law violations may be complex and lengthy. In determining that no statute of limitation applies to SEC enforcement actions, at least to those seeking the equitable remedy of disgorgement, in *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993), the Ninth Circuit noted that “securities fraud may involve multiple parties and transactions of mind-boggling complexity,” and that “[p]lacing strict time limits on [the initiation of] Commission enforcement actions would ‘frustrate or interfere with the implementation of national policies.’” *Id.* at 1492 (citation omitted). The investigation necessary to uncover evidence to support bringing an administrative proceeding against a regulated securities professional, such as the proceeding at issue in the *Johnson* case, may be just as complex and time-consuming. Similarly, courts recognize that violations of environmental laws may not be discovered at the time they occur—the consequences (such as the effects of the dumping of toxic substances) do not necessarily manifest themselves immediately. *Cf. Riehl v. Travelers Ins. Co.*, 772 F.2d 19, 23 (3d Cir. 1985) (noting that the event that might “trigger liability in a toxic wastes case” might be the dumping of the waste, the leaching of the wastes into the environment, or the discovery of the pollution).

29. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994).

30. The question of § 2462’s applicability arises only when Congress has not provided a limitation period in the statute that creates or authorizes the fine, penalty, or forfeiture. *See* 28 U.S.C. § 2462 (1994) (“Except as otherwise provided by Act of Congress . . .”).

31. To the author’s knowledge, the Supreme Court has never considered whether § 2462 applies to the initiation of administrative proceedings, nor has the Supreme Court ever determined when the five-year limitation period in the statute is triggered.

32. Further, none of the following articles, all of which have either advocated, discussed, or assumed the application of § 2462 to various government actions, have considered the language, context, and history of § 2462 that is developed in this Article. *See generally* Edward Brodsky, *Statute of Limitations and Civil Enforcement*,

I. SECTION 2462 APPLIES ONLY TO PROCEEDINGS IN THE FEDERAL COURTS

A. *Section 2462 Applies Only to Proceedings Congress Clearly Intended to Limit*

Statutes of limitation do not apply to proceedings initiated by the federal government when acting in its sovereign capacity to vindicate a public right or interest “in the absence of congressional enactment clearly imposing it.”<sup>33</sup> This principle was well established in the common law long before the Constitution was adopted. As the Supreme Court explained in an 1878 case, *United States v. Thompson*:<sup>34</sup>

The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. . . . [W]hen the national Constitution was adopted, [these prerogatives] were imparted to the new

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210 N.Y. L.J. 3, 6, 7 (1993) (stating that without clear congressional guidance to the contrary, the SEC should be limited by the five-year statute of limitation of 28 U.S.C. § 2462); Christopher R. Dollase, *The Appeal of Rind: Limitations of Actions in Securities and Exchange Commission Civil Enforcement Actions*, BUS. LAW., Aug. 1994, at 1793, 1821 (supporting the Ninth Circuit’s holding that no time limitation applies to SEC civil enforcement actions and recommending that when Congress wishes to limit such actions it enact specific legislation); Jonathan Eisenberg & Benjamin Haskin, *Statute of Limitations Made Applicable to SEC Actions*, 8 INSIGHTS, July 1994, at No. 7 (analyzing § 2462’s application in the *3M* decision and suggesting that the limitation should apply to administrative proceedings); Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 ALB. L. REV. 5, 52 & n.310 (1994) (evaluating the effect of the SEC’s civil money penalty authority under the Remedies Act of 1990 and assuming, without discussion, that § 2462 applies to any proceeding seeking a money penalty); Gary P. Naftalis & Mark J. Headley, *SEC Actions Seeking to Bar Securities Professionals*, 213 N.Y. L.J. 1, 4, 5 (1995) (discussing application of § 2462 and concluding that the SEC’s avoidance of the statutory limitation is “neither good law nor good policy”); John F.X. Peloso & Stuart M. Sarnoff, *The Statute of Limitations for Actions Brought by the SEC*, 213 N.Y. L.J. 1, 3, 4 (1995) (examining the statute of limitation for SEC actions and asserting that such limitations and other safeguards are needed to protect alleged violators of securities regulations); Richard L. Stone & Aron Jaroslawicz, *Statute of Limitations of Actions Brought by SEC*, 212 N.Y. L.J. 1, 4 (1994) (looking at the application of § 2462 and believing the SEC falls within the time limitation imposed by § 2462 in both court and administrative settings); Teresa A. Holderer, Note, *Enforcement of TSCA and the Federal Five-Year Statute of Limitations for Penalty Actions*, 91 MICH. L. REV. 1023 (1993) (examining the statute of limitation of § 2462 and concluding that its application is appropriate in TSCA administrative penalty proceedings and federal court collection actions); Catherine E. Maxson, Note, *The Applicability of Section 2462’s Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 MICH. L. REV. 512 (1995) (arguing that § 2462 applies to all SEC civil suits for monetary fines, but does not apply to SEC proceedings for equitable relief).

33. *E.I. du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (emphasis added).

34. 98 U.S. 486 (1878).

government as incidents of [its] sovereignty thus created.<sup>35</sup>

The principle was recognized by Blackstone,<sup>36</sup> who wrote that “no time runs against the king,” and has been reiterated by the Supreme Court numerous times.<sup>37</sup>

As the Court further explained in *Costello v. United States*,<sup>38</sup> the reason for this rule is “to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.”<sup>39</sup> Thus, the fact that some public officials have not yet discovered violations, or have failed to enforce the law, should not bar others from doing so later. This principle does not apply when the government is acting to vindicate private interests,<sup>40</sup> but there is no reason to suspend the principle in

35. *Id.* at 489-90.

36. 1 WILLIAM BLACKSTONE, COMMENTARIES 247 (1765).

37. *See* *Block v. North Dakota*, 461 U.S. 273, 290 (1983) (explaining that a sovereign is generally exempt from statutes of limitation in order to protect the public against negligent state officials who fail to comply with such time limitations); *Costello v. United States*, 365 U.S. 265, 281 (1961) (adhering to the policy that laches is not a defense against sovereign action because of public policy reasons); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (restating the well-settled rule that “the United States is not bound by state statutes of limitation” nor “subject to the defense of laches in enforcing its rights”); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (observing that “where the royal privilege no longer exists” to justify sovereign exemption from statutes of limitation, “continuing vitality” is now found “in the public policy”); *United States v. Verdier*, 164 U.S. 213, 218-19 (1896) (emphasizing that public policy demands that the sovereign occupies a “favored position” over individuals, and therefore, the statute of limitation could not be plead against the sovereign); *United States v. Beebe*, 127 U.S. 338, 344 (1888) (holding that the sovereign is not bound by statutes of limitation in an action brought by it to protect public interests and that that this policy “is established past all controversy or doubt”); *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125 (1886) (stating the “great principle of public policy” that the United States “[is] not bound by any statute of limitations unless Congress has clearly manifested its intention that they should be so bound”).

A well-known law review article advocated that this principle be abandoned as outdated. *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1252-53 (1950) (asserting “little justification for the sovereign exemption”). That article, however, failed to consider the important policy reasons for the rule and, in any event, the Supreme Court has not taken its advice.

38. 365 U.S. 265 (1961) (quoting *United States v. Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.)).

39. *Id.* at 281 (quoting *Hoar*, 26 F. Cas. at 329-30). The government is treated differently than private litigants in other respects for similar reasons. It is well settled that “equitable estoppel will not lie against the Government as it lies against private litigants.” *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990). Similarly, nonmutual collateral estoppel is not available against the government. *See United States v. Alaska*, 521 U.S. 1 (1997); *United States v. Mendoza*, 464 U.S. 154, 160-63 (1984) (believing that the development of important legal questions would otherwise be thwarted).

40. *See Beebe*, 127 U.S. at 344 (holding that the relevant statute of limitation applied against the government where the government, “although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person”); *accord United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (holding that absent clear intent a statute

government-initiated actions seeking civil penalties.<sup>41</sup> The courts have held that many actions by the federal government are not time limited and, therefore, may be brought at any time.<sup>42</sup> The inapplicability of any limitation period to an action brought by the government does not necessarily result in fundamental unfairness. If the defendant can demonstrate that sufficient prejudice results from the passage of time, due process principles presumably will preclude government prosecution.<sup>43</sup>

A rule of statutory construction related to the principle that no limitation period binds the government absent clear congressional intent is that “[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.”<sup>44</sup> Thus, even when there is a statute of

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of limitation applies against the government only when the government acts for private interests).

41. Indeed, under modern statutes, civil penalties are imposed only in regulatory actions brought to enforce public rights. Two important studies on the use of civil penalties have noted that such penalties are authorized in hundreds of federal statutes to secure compliance with regulatory requirements designed to protect the public interest, including public safety. Professor Colin S. Diver of Boston University Law School states in his 1979 study that at that time 348 statutes administered by 27 different departments and administrative agencies authorized civil penalties for violations of laws dealing with subjects such as safety standards for consumer products, prohibitions against fraud, liquidity requirements for banks, and pollution abatement. See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1438 (1979).

A similar study in 1972 by Professor Harvey J. Goldschmid of Columbia University Law School, see *supra* note 4, at 902-03, noted that civil penalties were at that time being imposed by seven executive departments and eight independent agencies under federal statutes concerning, among other things, marketing quotas for crops, health and safety standards for coal mines and other work sites, and consumer-oriented “safety, service and health” standards for businesses such as railroads, airlines, motor carriers and broadcasters.

42. See *Castello*, 365 U.S. at 281 (allowing denaturalization proceeding after lapse of 27 years); *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (holding that no limitation period applies to actions brought by the SEC to enforce the securities laws and collecting court of appeals cases holding that no time limit applies to other governmental actions in the public interest); *Dole v. Local 427, Int’l Union of Elec.*, 894 F.2d 607, 612-13 (3d Cir. 1990) (holding that no statute of limitation applies to action by the Secretary of Labor under sections 104 and 210 of the Labor-Management Reporting and Disclosure Act to enforce a union member’s right to access to union records).

43. In *Castello*, the Court considered whether the doctrine of laches might bar a denaturalization proceeding brought 27 years after the events at issue. See *Castello*, 365 U.S. at 282-83. The Court declined to decide whether laches might apply to denaturalization proceedings, finding that even if it did any harm from the delay in bringing the action was to the government’s case rather than to the defense. The Court implied, however, that if a defendant or respondent could demonstrate prejudice resulting from the passage of time, due process principles might preclude the action. See *id.* at 282-84.

44. *Badaracco v. United States*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)). See *United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993) (stating that “any statute of limitations sought to

limitation that applies to the government, it must be construed narrowly. Any ambiguity as to whether the limitation period applies to a particular governmental action must be resolved against applying the limitation.

Accordingly, when the government acts to protect public rights, as it does in all federal regulatory proceedings, the party seeking to apply the limitation period has the burden to identify an affirmative congressional intent to apply the time limit to that action. Because § 2462 applies only to actions and proceedings involving civil fines, penalties, and forfeitures, which are imposed only under federal regulatory statutes that protect public rights,<sup>45</sup> the five-year limitation period should be construed to apply only to actions and proceedings that Congress “clearly” intended to limit.<sup>46</sup> As discussed *infra* in Part II, the *3M* court failed to consider this fundamental principle when it decided that § 2462 applied to administrative proceedings and, instead, placed the burden on the government to demonstrate that § 2462 did *not* apply to administrative proceedings.<sup>47</sup> In the next section, this Article demonstrates that in § 2462, Congress “clearly” intended to limit only proceedings in federal court, not administrative proceedings.

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be applied against the United States must receive a strict construction in favor of the Government”) (quotation omitted); *United States v. Weaver*, 207 F.2d 796, 798 (5th Cir. 1953) (holding that § 2462 did not apply to an action under the Surplus Property Act because no federal statute specifically made the statute of limitation applicable to the action at bar).

45. *See supra* note 41 (citing two studies that examined civil penalty statutes in regulatory actions).

46. This Article assumes that § 2462 applies to at least some actions and proceedings initiated in federal court by the federal government. It should be noted, however, that an article co-authored by Professor William Wirt Blume of the University of Michigan Law School, published shortly after the 1948 Act was adopted, interpreted § 2462 to apply only to “[c]auses of action . . . created for the recovery of fines, penalties and forfeitures by a private individual aggrieved because of violations of federal law.” William Wirt Blume & B.J. George, Jr., *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 985 (1951). The 1951 article also stated that “relatively few non-criminal actions by the United States are subject to limitations” and described those time limitations the authors believed applied to civil actions brought by the federal government. *See id.* at 984. Section 2462 is not among them.

47. *See 3M Co. v. Browner*, 17 F.3d 1453, 1456-57 (D.C. Cir. 1994). The *3M* court seemed to believe that if the government action involved a civil penalty there was a presumption that some limitation period *must* apply. *See id.* at 1457. This belief, however, was incorrect. *See infra* Part II.A.2.

*B. Congress Did Not “Clearly” Intend § 2462 to Limit Administrative Proceedings—to the Contrary, Every Indication Is That the Provision Was Intended to Limit Only Court Proceedings*

*1. A statute must be construed as a whole*

The *3M* court also failed to adhere to another fundamental principle of statutory construction—that a statute must be construed as a whole, not as a collection of isolated provisions. The Supreme Court has emphasized repeatedly that courts must “follow the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.”<sup>48</sup> This well-established rule of statutory interpretation was expressed by the Supreme Court in 1804 when it held that “every part of an act is to be taken into view for the purpose of discovering the mind of the legislature.”<sup>49</sup> Moreover, in Blackstone’s time, this approach to statutory interpretation was axiomatic.<sup>50</sup> Accordingly, the meaning of § 2462 can be understood only by reading the section in conjunction with the rest of the statute of which it is a part, namely the 1948 revision of the judicial code.

*2. Nothing in the 1948 statute suggests that Congress intended § 2462 to apply to administrative proceedings or to anything other than “particular proceedings” in the federal courts*

*a. Overview of the 1948 Act*

The current version of § 2462 is part of the comprehensive revision of the judicial code enacted as a single statute in 1948. The plain language, the context of other sections of the 1948 Act, as well as the purpose of the 1948 Act, all compel the conclusion that § 2462

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48. *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (quoting *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991)) (citation omitted). *Accord* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”).

49. *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52 (1804) (proffering that “a law is the best expositor of itself”).

50. See 1 WILLIAM BLACKSTONE, COMMENTARIES 59-61 (1765) (stating that a statute is to be construed based on its plain language, as a whole, in context, and with reference to its subject matter and purpose).

pertains only to actions and proceedings in federal courts. As enacted in 1948, Title 28 includes three provisions other than § 2462 that pertain to actions and proceedings to recover “fines, penalties and forfeitures.”<sup>51</sup> When these three provisions are read together, it is clear that they refer to federal court actions and proceedings to obtain court judgments for pecuniary fines, penalties, and forfeitures of property. The addition of the word “proceeding” in the 1948 Act was not meant to broaden the scope of § 2462 to apply to administrative adjudicatory proceedings. In 1948, Congress did not intend to change the meaning of § 2462.<sup>52</sup>

The plain language of the 1948 Act demonstrates that, except where specified otherwise, its provisions apply to the federal courts and the federal judiciary. Section 1 of the 1948 Act states that “title 28 of the United States Code, entitled ‘Judicial Code and Judiciary’ is hereby revised, codified, and enacted into law, and may be cited as ‘Title 28, United States Code, section —.’”<sup>53</sup> Thereafter, the 1948 Act contains the verbatim text of Title 28, from § 1 through § 2680.<sup>54</sup> The purpose of the 1948 Act was to “codify and revise the laws relating to the Federal judiciary and judicial procedure.”<sup>55</sup>

The House Judiciary Committee Report that recommended the adoption of the 1948 Act emphasized that, far from being a random collection of provisions, the organization of the Act into six major parts, including the placement of § 2462 in Part VI, entitled “Particular Proceedings,” was deliberate.<sup>56</sup> Thus, the overall structure

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51. As discussed *infra*, the three provisions are 28 U.S.C. § 2461, § 1355, and § 1395, as adopted in 1948 at 62 Stat. 974, 934, and 936, respectively.

52. When § 2462 is read with other provisions of the 1948 Act, it seems apparent that Congress used the word “proceeding” in § 2462 to cover matters that are technically not “actions,” such as a “libel in admiralty” or a “proceeding by libel,” (proceedings used to recover property) to which predecessors of § 2462 had always applied. *See* 28 U.S.C. § 2461(b), as adopted in 1948 at 62 Stat. 974.

53. 62 Stat. 869. Section 1 of the 1948 Act was not codified but, in post-1948 codifications of Title 28, the text of the section is included in a note titled “Enactment Into Law; Citation” that appears after tabular materials and before 28 U.S.C. § 1 (1994).

54. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869-985 (codified as amended at 28 U.S.C. §§ 1-2680 (1994)).

55. S. REP. NO. 80-1559, at 1 (1948).

56. *See* H.R. REP. NO. 80-308, at 5 (1947). The House report states under the heading “Classification and Numbering”:

The first step in revision was the preparation of a preliminary analysis—the framework upon which to build the new title. In drafting this outline the old system of classification was discarded and modern *subject matter arrangement* was substituted. The material was divided into *six major categories*. Part I provides for organization of courts; part II treats of the attorneys and marshals; part III covers court officers and employees; part IV sets forth the provisions on jurisdiction and venue; part V deals with procedure; and *part VI takes up particular proceedings*.

of the 1948 Act and the internal placement of a particular section in a specified part of the Act are significant in interpreting the language of the Act. Furthermore, as the Supreme Court has recognized, “the title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.”<sup>57</sup> Section 33 of the 1948 Act, which was not codified, but is referred to in post-1948 editions of the United States Code in a note titled “Legislative Construction,” provides<sup>58</sup> that neither the “catchlines”<sup>59</sup> nor the particular chapter to which a section was assigned should be given significance in construing the 1948 Act.<sup>60</sup> There is no basis, however, for broadening this provision to override either the general rule that a statute should be read as a whole<sup>61</sup> or the principle that titles and the parts into which a statute is divided are tools to aid in its interpretation.<sup>62</sup>

As discussed below, the 1948 Act, read as a whole, indicates that its references to “actions or proceedings” for “fines, penalties and forfeitures” in § 2462 and elsewhere are references to actions and proceedings in federal courts.<sup>63</sup> Nothing in the 1948 Act suggests that § 2462 was intended to apply to matters outside the federal courts, such as administrative proceedings.<sup>64</sup>

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*Id.* (emphasis added).

57. *Alamendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947)). The Court in *Alamendarez-Torres* used these tools of statutory interpretation to discern the enacting Congress’s intent. *See id.*

58. 62 Stat. 991. Section 33 states: “No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of the Act, in which any any [sic] section is placed, nor by reason of the catchlines used in such title.” 28 U.S.C. “Legislative Construction,” note preceding § 1 (1994).

59. *Id.* The term “catchlines” is not defined. Presumably, the term refers to the headings given to the various subdivisions of the title.

60. *See id.*

61. *See supra* note 48 and accompanying text; *see also* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 323-25 (1994) (listing the Rehnquist Court’s canons of statutory interpretation, including the provision that “[e]ach statutory provision should be read by reference to the whole act”).

62. *See supra* note 57 and accompanying text.

63. *See, e.g.*, 62 Stat. 934 (adopting 28 U.S.C. § 1355). Section 1355, entitled “Fine, penalty or forfeiture,” provides that “[t]he district courts shall have original jurisdiction, *exclusive of the courts of the States*, of any action or proceeding for the recovery or enforcement of any fine, penalty or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.” *Id.* (emphasis added); *see also, e.g.*, 62 Stat. 974 (adopting 28 U.S.C. §§ 2461-2464) (providing guidelines for the recovery of civil fines or penalties imposed for violating an Act of Congress).

64. *See generally* 28 U.S.C. §§ 1-2680, as adopted in 1948, 62 Stat. 869-992 (1948). Nowhere in the statute is there an indication that any force other than federal courts have jurisdiction of proceedings for the enforcement of civil fines or penalties imposed for violations of Acts of Congress. *See id.*

*b. Specific provisions of the 1948 Act*

Part VI of Title 28, as enacted in 1948, is entitled “Particular Proceedings,” and in Chapter 163, “Fines, Penalties and Forfeitures,” provides:

§ 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 a violation of an Act of Congress* and the seizure takes place on the high seas . . . , 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.<sup>65</sup>

The language of § 2461 demonstrates that in subsection (a) Congress recognized and authorized a special form of civil action in federal court to “recover” a civil fine, penalty, or pecuniary forfeiture, and in subsection (b) Congress specified that forfeitures of property may be recovered in a libel proceeding in federal court.<sup>66</sup> Further, the plain language is consistent *only* with the interpretation that the “penalty” referred to in § 2461(a) is a monetary penalty. Subsection (a) refers to a penalty that can be “recovered.” Because money and property are the only penalties that can be “recovered,” any penalty

65. 62 Stat. 974 (emphasis added).

66. *See id.* The Reviser’s Notes to § 2461, U.S.C., Cong. Serv. 1919 (1948), state that subsection (a) was added

to clarify a serious ambiguity in existing law and is based on 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.

*Id.*, reprinted in “Historical and Revision Notes” following 28 U.S.C. § 2461 (1994).

The examples given are all statutes that impose a mandatory monetary penalty for proscribed conduct. For example, 25 U.S.C. § 180 (1940) states that “[e]very person who makes a settlement on any lands belonging . . . to any Indian tribe [or surveys or marks off any such lands] is liable to a penalty of \$1,000.” *Id.*

The Notes go on to state that “[a] civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action,” citing two Supreme Court cases that had so held: *Hepner v. United States*, 213 U.S. 103 (1909), which discusses the practice of both American and English courts in the eighteenth century (and earlier) of “recogniz[ing] the right of the government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense” and might also be recovered in a criminal action initiated by information, and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which included a similar discussion of the government right. *Id.*

obtained under § 2461(a) must take one of these two forms and could not include other sanctions, such as the revocation or suspension of a license.<sup>67</sup> Because subsection (b) specifies that when the “penalty” is a “forfeiture of property,” a libel proceeding is the procedural means to obtain the recovery, the “penalty” referred to in subsection (a) must be a monetary one, the only form of penalty other than property that can be “recovered.”

Special jurisdiction and venue provisions, separate from other civil jurisdiction and venue provisions, are made for proceedings “for the recovery or enforcement” of a “fine, penalty or forfeiture” and confirm that the “proceedings” referred to are proceedings in the federal courts. Part IV of enacted Title 28, “Jurisdiction and Venue,” Chapter 85, “District Courts; Jurisdiction,” provides:

§ 1355. Fine, penalty or forfeiture

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of *any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress*, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.<sup>68</sup>

Subsections (b), (c), and (d) of § 1355, respectively, specify details regarding jurisdiction of “[a] forfeiture action or proceeding,” “an action or proceeding for forfeiture,” “a civil forfeiture action or proceeding,” and “a forfeiture action.”<sup>69</sup>

In addition, Part IV of the enacted Title 28, “Jurisdiction and Venue,” Chapter 87, “District Courts; Venue[,]” provides:

§ 1395. Fine, penalty or forfeiture

(a) *A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture* may be prosecuted in the district where it accrues or the defendant is found.

(b) *A civil proceeding for the forfeiture of property* may be prosecuted in any district where such property is found.<sup>70</sup>

Subsections (c), (d), and (e) of § 1395, respectively, pertain to “proceedings” for the forfeiture of property seized outside any judicial district, the enforcement of a fine, penalty, or forfeiture

67. *Cf. S & S Realty Corp. v. Kleer-Vu Indus., Inc.*, 575 F.2d 1040, 1043-44 (2d Cir. 1978) (“The word ‘recoverable’ implies the existence of a tangible asset or a fund.”).

68. 62 Stat. 934 (emphasis added).

69. *Id.* The Reviser’s Notes to the 1948 Act state that the “[w]ords ‘pecuniary or otherwise’ were added to make this section expressly applicable to both *pecuniary and property forfeitures*.” U.S.C., Cong. Serv. 1844 (1948), *reprinted in* “Historical and Revision Notes” following 28 U.S.C. § 1355 (1994).

70. 62 Stat. 936 (emphasis added).

against a vessel, and for the forfeiture of vessels, vehicles, or cargo.<sup>71</sup>

Section 2462, like § 2461, is included in Part VI, entitled “Particular Proceedings[,]” and states:

§ 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.<sup>72</sup>

Read in the context of the 1948 Act as a whole, it is clear that the kinds of actions, suits, and proceedings to which § 2462 applies are those referred to in §§ 2461, 1355, and 1395—that is, proceedings in the federal courts to recover, by reducing to a court judgment, penalties, and forfeitures of money and property.<sup>73</sup> Nothing in the 1948 Act suggests that the § 2462 limitation period applies to proceedings before administrative agencies.<sup>74</sup> Certainly, it cannot be

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71. *See id.* (noting the circumstances under which such proceedings would be permissible).

72. 62 Stat. 974 (emphasis added).

73. *See supra* notes 65-70 and accompanying text (discussing indications in the 1948 Act that §§ 2461, 1355, and 1395 apply to proceedings in federal court and to penalties composed of money and property); *see also* Blume & George, *supra* note 46, at 85-86 (opining that §§ 2461 and 2462 should “be construed as coextensive” because, among other reasons, “the descriptive language is identical in both sections”); Brief for the OCC, at 17-18, *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (No. 98-1534) (arguing that § 2462 limits the judicial actions and proceedings to recover money and property that are provided for in § 2461).

74. *See generally* 28 U.S.C. §§ 1-2680, as adopted in 1948, 62 Stat. 869-992 (1948).

The only sections of the 1948 Act that do not directly pertain to the judicial system and the judiciary (sections 2 through 32, which were not codified) are executing provisions and amendments to sections in other titles of the Code to make those titles consistent with the new Title 28 adopted in the 1948 Act. *See* Act of June 25, 1948, ch. 646, 62 Stat. 985-91. The inclusion of these provisions does not affect the basic purpose of the 1948 Act, which is to clarify and organize statutory provisions applicable to the federal courts and the judiciary. The only references in the 1948 Act to administrative agencies are 28 U.S.C. §§ 601-610, 62 Stat. 913-915, which creates the Administrative Office of the United States Courts, and 28 U.S.C. §§ 2231-2325, 62 Stat. 969, which prescribes procedures for federal district court review of orders of the Interstate Commerce Commission. These references do not support an inference that in other sections general language refers to both agency and court proceedings.

Nothing cited in the *3M* decision demonstrates that Congress intended any provision of the 1948 Act to apply to proceedings before administrative agencies. *See 3M Co. v. Browner*, 17 F.3d 1453, 1456 (D.C. Cir. 1994). Two sections of Title 28 of the U.S.C. referred to in the *3M* decision, § 2344(1) and § 2347, pertain to court review of agency proceedings and, in any event, were added in 1966 and not included in the 1948 Act. *See* 28 U.S.C. §§ 2344(1), 2347 (1994) (noting that these provisions were added by Pub. L. No. 89-554, § 4(e), 80 Stat. 622, 623 (1966)). A section of Title 31 of the United States Code referred to by the *3M* court, which

said that Congress “clearly” expressed in the language of the 1948 Act an intent that the § 2462 time limitation apply to administrative proceedings.

An analysis of the plain language of the 1948 Act supports the position that § 2462 applies only to proceedings in federal court and, as the Supreme Court has emphasized, “we do not resort to legislative history to cloud a statutory text that is clear.”<sup>75</sup> Nevertheless, as demonstrated *infra* in Part I.B.3, the legislative history and historic context of § 2462 further support the interpretation that § 2462 applies only to federal court proceedings to recover fines, forfeitures, and penalties consisting of money and property.

3. *Construing § 2462 to apply only to federal court proceedings is consistent with both the legislative history and historic context of § 2462*

a. *The context of the Administrative Procedure Act*

It would be anomalous if any provision of the 1948 Act revising Title 28 applied to proceedings before administrative agencies because only two years before its enactment, in 1946, Congress adopted the Administrative Procedure Act (“APA”).<sup>76</sup> The APA is a comprehensive statute designed to “prescribe uniform standards for the conduct of formal rule making . . . and adjudicatory proceedings” before federal agencies.<sup>77</sup> It seems more likely that Congress would have placed a uniform statute of limitation on agency proceedings to determine and assess penalties in the APA than in the 1948 revision of the judicial code. At the very least, it seems that had Congress believed that 28 U.S.C. § 791 (1940), the last pre-APA codification of old R.S. § 1047, the five-year statute of limitation on actions for a “penalty or forfeiture,” applied to administrative adjudications of penalties Congress would have referred to the limitation period in the APA or its history.

Yet, neither the Attorney General’s Manual on the APA, published

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pertains to False Claims Act suits, is an indirect reference to administrative proceedings and was adopted in 1982. *See* 3M, 17 F.3d at 1456; *see also* 28 U.S.C. § 3730(e)(3) (1994) (noting that this provision was adopted by Pub. L. No. 97-258, 96 Stat. 978 (1982)).

75. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

76. Pub. L. No. 106-73, ch. 324, 60 Stat. 237-44 (1946) (codified in scattered sections of 15 U.S.C.). *See* ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 1 (2d ed. 1992) [hereinafter ADMINISTRATIVE SOURCEBOOK].

77. *See* ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947) (explaining basic purposes of the APA), *reprinted in* ADMINISTRATIVE SOURCEBOOK, *supra* note 76, at 75.

in 1947, nor the text of the APA, mentions § 791 as applying to agency adjudicatory proceedings seeking penalties. Further, in the early 1940s, in preparation for the drafting of the APA, the Attorney General's Committee on Administrative Procedure studied existing procedures in all federal agencies, but reports issued by the Committee do not mention § 791 or any requirement that agency penalty assessments be commenced within five years of alleged statutory violations.<sup>78</sup>

*b. The legislative history and other historic context of § 2462*

The legislative history of the 1948 Act contains no discussion of § 2462, other than a cryptic statement referring to § 2462's immediate predecessor in the 1874 Revised Statutes and stating that “[c]hanges were made in phraseology.”<sup>79</sup> When the notes accompanying a revision in a statute “describe the alterations as changes in phraseology, the well-established canon of construction is that the revised statute means only what it meant before [the revision].”<sup>80</sup> Thus, as the *3M* court correctly ruled, the controlling language to interpret when construing § 2462 is that of its 1839 predecessor<sup>81</sup> because the slight changes in the 1874 version that appeared in the Revised Statutes were also non-substantive changes.<sup>82</sup>

78. See *infra* note 164 and accompanying text.

79. *3M*, 17 F.3d at 1458 (quoting H.R. REP. NO. 80-308, at A191 (1947)).

80. *Id.* (citing *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993)).

81. *Id.* at 1461-62; *cf. id.* at 1458 n.7 (noting that the 1874 version was “slightly different” from the 1839 version).

82. The version included in the 1874 and 1878 editions of the Revised Statutes, R.S. § 1047, was a nonsubstantive revision of the 1839 Act. See *id.* at 1458 n.7 (reprinting both versions); See Appendix A (quoting 1874 and 1839 versions). The 1874 version moved the phrase “shall be maintained,” which in the 1839 version immediately followed the first use of the word “prosecution,” to later in the sentence, added the phrase “except in cases where it is otherwise specially provided,” and edited the clause beginning with “unless” by deleting the words “suit or prosecution.” See *id.* As explained by Hicks, the 1874 edition of the Revised Statutes was the work of a commission appointed in 1867 to revise all the laws of the United States by eliminating those that were obsolete or “of merely private interest,” and “by arranging the general and permanent laws under headings by which related subjects were brought together.” F. HICKS, LEGAL RESEARCH 87 (3d ed. 1942). When it was discovered that some unauthorized substantive changes had been made in 1874, a second edition, published in 1878, corrected those changes. See *id.* R.S. § 1047 was not among those provisions that had been substantively changed in 1874 and the 1874 and 1878 versions are identical. Section 1047 was grouped in the Revised Statutes with other provisions of the judicial code, and stated:

No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided*, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the

The plain language of the 1839 version of the statute<sup>83</sup> compels the conclusion that § 2462's statute of limitation applies only to actions in the federal courts. The 1839 version is one of eight sections in an act entitled "An Act in amendment of the acts respecting the Judicial System of the United States," (the "1839 Act") adopted on Feb. 28, 1839.<sup>84</sup> Section 1 provides for diversity jurisdiction in the federal courts.<sup>85</sup> Section 2 authorizes federal courts to appoint their own clerks.<sup>86</sup> Section 3 of the 1839 Act provides:

[A]ll pecuniary penalties and forfeitures accruing under the laws of the United States *may be sued for and recovered in any court of competent jurisdiction* in the State or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found.<sup>87</sup>

Section 4 of the 1839 Act then provides:

*[N]o suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued; Provided The person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.*<sup>88</sup>

In an 1855 decision, a federal court interpreted the 1839 Act and held that it "first enacts that [actions for pecuniary penalties and forfeitures] may be brought, and then limits the time within which they may be brought."<sup>89</sup> The court stated that the third and fourth sections "must be taken together, as much as if the fourth was merely a proviso to the third."<sup>90</sup> The court further observed that "in effect, they declare the will of the legislature that these actions may be brought, *in the competent court*, within five years."<sup>91</sup> In 1870, another

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United States; so the proper process therefor may be instituted and served against such person or property.

*Id.*

83. See Act of Feb. 28, 1839, ch. 36, §§ 1-4, 5 Stat. 321-22.

84. *Id.*

85. See *id.* § 1.

86. See *id.* § 2.

87. *Id.* § 3.

88. *Id.* § 4 (emphasis added, except in the word "Provided," where emphasis is in original).

89. *Stimpson v. Pond*, 23 F. Cas. 101, 102 (C.C.D. Mass. 1855) (No. 13,455) (holding that in an action to recover penalties for falsely marking an item "patented," the 1839 Act controlled and established the statute of limitation, which ran for five years from the time the penalty "accrue[d]").

90. *Id.* at 102.

91. *Id.* (emphasis added).

federal court interpreted the 1839 Act,<sup>92</sup> stating:

Section 3 confers jurisdiction upon the *state courts, concurrent with the federal courts*, of suits for the recovery of ‘all pecuniary penalties and forfeitures accruing under the laws of the United States’ . . . . No suit or prosecution can be brought . . . under section 3 in a state court for the recovery of a forfeiture in rem; and yet all suits or prosecutions are clearly covered by section 4.<sup>93</sup>

Other references in the 1839 version of what became 28 U.S.C. § 2462, and in the 1874 non-substantive revision of the statute, confirm that both versions pertained to proceedings in the courts. Both provided that “process” must be “instituted” and “served” on the person or property against whom the action was brought.<sup>94</sup> Each version provided that the action to which the time limitation applied was one in which a “penalty or forfeiture” had already “accrued” and for which a specific person or persons, or property, was “liable.”<sup>95</sup> Taken together, these references further support the interpretation that the 1839 version of § 2462 was directed at two kinds of court proceedings to collect a penalty or forfeiture—a debt action, which presupposed a specific or calculable pecuniary penalty or forfeiture, and an in rem forfeiture proceeding.<sup>96</sup>

Furthermore, as discussed *infra*, all the forebears of the 1839 Act imposed limitations on *court actions* to recover fines, penalties, and forfeitures. The original ancestor of the 1839 statute was § 32 of the Act of Apr. 30, 1790, entitled “An Act for the Punishment of Certain Crimes Against the United States,” (the “1790 Act”)<sup>97</sup>—a criminal statute that provided for prosecution of offenses in court. Although the *3M* court stated that “[i]t is unclear, and unimportant, whether the ancestor of the Act of 1839 was the [1790 Act] . . . , or a 1799

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92. See *In re Landsberg*, 14 F. Cas. 1065, 1067-68 (C.C.E.D. Mich. 1870) (No. 8,041) (applying the five-year statute of limitation established in the 1839 Act to prohibit a prosecution for whiskey smuggling).

93. *Id.* at 1067-68 (emphasis added). Later, the concurrent jurisdiction of state courts was eliminated. See 28 U.S.C. § 1355 (1994).

94. See Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322; Act of June 22, 1874, ch. 19, § 1047, 18 Stat. 193.

95. See Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322; Act of June 22, 1874, ch. 19, § 1047, 18 Stat. 193.

96. See *Hepner v. United States*, 213 U.S. 103, 105-09 (1909) (noting that “actions for penalties” were considered debt actions *because* they were actions to recover a sum certain or a sum that could be calculated; this was true because the statute usually specified the amount of the penalty, or the means of calculating it); accord *Tull v. United States*, 481 U.S. 412, 426 (1987) (“[I]n the United States, the action to recover civil penalties usually seeks the amount fixed by Congress.”); see also 14 Op. Att’y Gen. 81, 83 (1872) (interpreting the 1839 version of § 2462 then in effect to apply to “all proceedings for the recovery of fines, penalties, and forfeitures” under the revenue laws and others) (emphasis added).

97. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119.

statute pertaining to the collection of duties on imports and tonnage,<sup>98</sup> the court also observed that “[e]arly cases gave the nod to the 1790 law” as the ancestor.<sup>99</sup> The 1872 Revisers’ Notes to the Revised Statutes appear to be dispositive on this point, as they establish the 1790 Act as the ancestor of the 1839 statute. In describing the 1839 statute, the Revisers’ Notes refer to the 1790 Act and state that the 1839 statute “applied a new limitation” of five years to the same prosecutions for “any fine or forfeiture under any penal statute” to which the 1790 Act had applied a two-year limitation.<sup>100</sup>

The 1790 Act, after providing a limitation of three years on prosecutions for “treason or other capital offence,” except murder or forgery, also specified that no person be “*prosecuted, tried or punished* for any offence, not capital, *nor for any fine or forfeiture under any penal statute*, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid . . . .”<sup>101</sup> By its terms, this limitation applied only to criminal proceedings initiated by indictment or information,<sup>102</sup> which, of course, could be brought only in court.

When Congress adopted the 1790 Act, however, a civil debt action had long been an alternative means to collect a monetary penalty prescribed for a violation of a “penal statute,”<sup>103</sup> and the 1790 Act applied to these debt actions as well as to criminal proceedings.<sup>104</sup>

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98. 3M Co. v. Browner, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994).

99. See *id.* (citing Stimpson v. Pond, 23 F. Cas. 101, 101-02 (C.C.D. Mass. 1855) (No. 13,455) (supporting the 1790 Act as the ancestor)); United States v. Platt, 27 F. Cas. 546, 550 (C.C.S.D.N.Y. 1840) (No. 16,054) (same); 14 Op. Att’y Gen. 81 (1872) (same).

100. See 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 546-47 (1872) [hereinafter DRAFT]; see also JOHN M. GOULD & GEORGE F. TUCKER, NOTES ON THE REVISED STATUTES 349 (1889) (quoting a phrase from the Draft and discussing the effect of the 1839 Act amendment to the 1790 Act).

101. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 (emphasis added).

102. See *id.*

103. The term “penal statute” is used here in the same sense in which Blackstone used the term. See 3 WILLIAM BLACKSTONE, COMMENTARIES 159 (1768) (defining penal statute as a statute “whereby a forfeiture is inflicted for transgressing the provisions therein enacted”). Debt actions for penalties have a long history under English law. See *id.* at 159-60. In 1768, Blackstone explained that an “[a]ction of debt for penalties” could be maintained to collect a “forfeiture” due under “all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted.” *Id.* at 159. This was because by virtue of “an implied original contract to submit to the rules of the community, whereof we are members,” such a provision for a forfeiture was deemed to “immediately create a debt in the eye of the law.” *Id.* See generally 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 349, 425 (1923).

104. See Adams, *qui tam* v. Woods, 6 U.S. (2 Cranch) 336 (1805).

Debt actions to recover penalties under federal penal statutes were civil actions brought in court. The Judiciary Act of September 24, 1789 (the “1789 Judiciary Act”),<sup>105</sup> had given the federal district courts “exclusive original cognizance . . . of all *suits for penalties and forfeitures* incurred, under the laws of the United States.”<sup>106</sup> At that time, penal statutes usually included a *qui tam*<sup>107</sup> provision that authorized any private citizen or “common informer” who brought suit to receive all or part of the penalty or forfeiture.<sup>108</sup> These *qui tam* provisions were

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105. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77.

106. *See id.* (emphasis added); *see also* United States v. Mooney, 116 U.S. 104, 107-08 (1885) (holding that a circuit court lacked jurisdiction of an action for a penalty under the customs laws because the 1789 Judiciary Act “conferred exclusive jurisdiction on the district courts of suits for penalties and forfeitures incurred under the laws of the United States”).

107. “*Qui tam*” is shorthand for “*qui tam pro domino rege quam pro se imposito sequitur*,” which means in essence “who brings the action for the king as well as himself.” *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 n.1 (1989) (defining *qui tam*).

A leading eighteenth century law dictionary lists eight major topics under the word “action,” one of which is “[a]ctions popular, or actions *qui tam*.” *See* CUNNINGHAM’S LAW DICTIONARY (2d ed. 1771) (unpaginated). Such *qui tam* actions are defined as follows:

Actions *qui tam* are such as are given by act of parliament, which give a penalty and create a forfeiture for the neglect of some duty or commission of some crime, to be recovered by action or information, at the suit of him who prosecutes as well in the King’s name as in his own. It is sometimes called a popular action, when the penalty or part of it is given to any one who will sue for the same.

*Id.*

108. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 159-60 (1768). Blackstone stated that these forfeitures were often given to the person “aggrieved” by the offense, but that “more usually, these forfeitures created by [penal] statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called *popular* actions.” *Id.* at 160. “Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action.” *Id.* “If the king . . . himself commences this suit, he shall have the whole forfeiture.” *Id.*

Blackstone further explained that *qui tam* criminal prosecutions, as well as debt actions, could be initiated by common informers to collect the same penalties. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 303-04 (1769). A statute enacted under Elizabeth I in 1588 set a very short limitation period for any prosecution, civil or criminal, on any penal statute—if the statute gave part of the penalty to a common informer and part to the king, the informer had only one year from the “commission of the offense”; suit could be brought to recover the penalty for the king within an additional two years from the expiration of that year; if the penalty went only to the king, prosecution could be brought within two years from the commission of the offense. *See id.* The 1588 statute is entitled “An Act Concerning Informers” (the “1588 Act”) and appears to be concerned primarily with protecting citizens from nonmeritorious suits by “common informers.” *See* 31 Eliz., ch. 5 (1588), *reprinted in* 4 STATUTES OF THE REALM 801-02 (1993). The 1588 Act states that it was enacted “[f]or that diverse of the Queen’s Majesty’s subjects be daily unjustly vexed and disquieted by diverse common informers upon penal statutes.” *Id.* (spelling modified). The 1588 Act also states that it does not apply to “any such officer of record as have in respect of their offices heretofore lawfully used to exhibit

common because prior to the twentieth-century development of a strong executive branch, the government relied primarily on private citizens, rather than government officials, to enforce public rights through both criminal prosecutions and debt actions for penalties.<sup>109</sup> In *Adams, qui tam v. Woods*,<sup>110</sup> the Supreme Court expressly construed the 1790 Act, ancestor to § 2462, to limit not only a criminal proceeding but also an action for debt—an action in court<sup>111</sup>—brought *qui tam* by an informer to collect a statutorily prescribed monetary penalty.<sup>112</sup> By statute, the informer would receive one-half of the penalty as a sort of “bounty” for bringing the action.<sup>113</sup>

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information or sue upon penal laws” and that such officers may continue to “inform and pursue” on penal laws “as they might have done before the making of this act.” *See id.* (spelling modified). Thus, it appears that the statute of limitation in the 1588 Act did not apply to prosecutions brought by government officials.

109. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 291-303 (1989) (explaining the role of *qui tam* actions both in eighteenth-century England and in the United States, up until the early twentieth century, as a common means by which private individuals were empowered to enforce the criminal laws); see also Caminker, *supra* note 107, at 388 (noting that “prior to the growth of the modern executive, the responsibility for enforcing legal obligations necessarily fell to private citizens [through *qui tam* actions] rather than public officers”).

The “informer” could initiate either a criminal proceeding or a civil debt action and would collect his “statutory bounty” portion of the penalty either way. See Krent, *supra*, at 297 (citing as an early example of a statute under which Congress authorized private individuals “to sue under criminal statutes to help enforce the law” a 1791 act that made criminal the willful failure to pay required duties on liquor, and under which the informer was to collect one-half of “all penalties and forfeitures incurred” by the violator; the penalties could be collected either through civil or criminal procedures—i.e., “by action of debt” or “by information”) (citing Imported Spirits Tax Repeal Act of March 3, 1791, ch. 15 § 4, 1 Stat. 199, 209); see also *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 321-22 (1819) (noting that penalties imposed by a Maryland statute on any bank that operated without state authorization were “to be recovered by indictment, or action of debt, in the county court . . . where the offence [was] committed, one-half to the informer, and the other half to . . . the state”).

110. 6 U.S. (2 Cranch) 336, 340-41 (1805) (holding that the words “nor shall any person be prosecuted” related to both criminal actions and actions for debt).

111. See *Tull v. United States*, 481 U.S. 412, 418 (1987) (noting that in the eighteenth century, “[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law,” as opposed to courts of equity).

112. See *Adams*, 6 U.S. (2 Cranch) at 340-41 (applying the statute of limitation to bar an action for debt).

113. See Krent, *supra* note 109, at 297 (discussing the “bounty” aspect of *qui tam* actions, under which an informer may collect a portion of the statutory penalty).

There can be no serious question that the 1790 Act and other forbears of § 2462 pertained only to penalties of money and property. It is immaterial that some predecessors of § 2462 used the phrase “any fine or forfeiture,” e.g., the 1790 Act version of § 2462, while others used “any penalty or forfeiture,” e.g., the 1839 version of § 2462. The terms “fine,” “penalty” and “forfeiture” have long been used interchangeably to refer to the payment of a sum of money for an infraction of law. See *Austin v. United States*, 509 U.S. 602, 614 & n.7 (1993) (noting that “forfeit” was the word used for “fine” in a 1789 statute and that “[d]ictionaries of the time

In 1839, terms like “action for a penalty” or “suit for penalties and forfeitures” were still understood to refer to these substantively criminal, but procedurally civil, penalty actions in the federal courts, often brought by a private party to collect part or all of the penalty for himself.<sup>114</sup> Thus, Congress can be said to have “clearly” intended the 1839 version of § 2462 to limit only those kinds of proceedings—judicial proceedings of the same type the 1790 statute had limited.

Like the 1790 Act, all other predecessors of § 2462 set limitations on actions in the courts to collect or “recover” penalties.<sup>115</sup> The 1799 statute regulating customs duties collection, referred to by the 3M court as the alternative possible ancestor of § 2462,<sup>116</sup> provided that “all penalties accruing by any breach of this act, *shall be sued for, and recovered with costs of suit . . . in any court* competent to try the same.”<sup>117</sup> All of the other statutes listed in the margin notes to the 1874 and 1878 versions of what is now § 2462, R.S. §§ 1047, also provided time limits on suits or prosecutions *in court* to collect or “recover” penalties.<sup>118</sup>

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confirm that ‘fine’ was understood to include ‘forfeiture’ and vice versa”); *see also* United States v. Maillard, 26 F. Cas. 1140, 1142 (C.C.S.D.N.Y. 1871) (No. 15,709) (treating fines, penalties and forfeitures in antecedents of § 2462 as encompassing only money and property); *In re* Landsberg, 14 F. Cas. 1065, 1067 (C.C.E.D. Mich. 1870) (No. 8,041) (holding that the term “penalty” in the 1839 Act version of § 2462 meant a “fixed pecuniary mulct incurred by the violation of some law”); *Ex parte* Marquand, 16 F. Cas. 776 (C.C.D. Mass. 1815) (No. 9,100) (treating all fines, penalties and forfeitures under the 1799 Customs Act as money or property that could be received and distributed by a collector of customs duties); United States v. Mann, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (discussing the various meanings given in different contexts to the words “penalty” and “forfeiture” and observing that in one of the narrower senses, these words refer to pecuniary mulcts).

114. In 1839, penalty actions still retained their hybrid nature of civil procedural means to recover criminal punishment, and penal statutes still most often provided for *qui tam* actions by “common informers.” *See* Caminker, *supra* note 107, at 342 & n.4 (noting that “as late as the turn of [the twentieth] century, the Supreme Court recognized that the ‘right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer’”) (quoting Marvin v. Trout, 199 U.S. 212, 225 (1905)); Krent, *supra* note 109, at 297 (noting that *qui tam* penalty actions “were long considered quasi-criminal”).

In *Lees v. United States*, 150 U.S. 476 (1893), the Court stated that “the recovery of a penalty is a proceeding criminal in nature, yet . . . it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts.” *Id.* at 479. As late as 1909, the Supreme Court noted that the debt action was an alternative means of collecting a penalty, in addition to a “technically criminal” proceeding initiated by indictment or information. *See* Hepner v. United States, 213 U.S. 103, 109 (1909) (cited in the Revisers’ Notes to 28 U.S.C. § 2461 as adopted in the 1948 Act).

115. *See* JOHN M. GOULD & GEORGE F. TUCKER, NOTES ON THE REVISED STATUTES 347-51 (1889) (discussing the history of R.S. § 1047).

116. *See* 3M Co. v. Browner, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994).

117. Act of Mar. 2, 1799, ch. 128, § 89, 1 Stat. 627, 695 (emphasis added).

118. *See infra* Appendix B (demonstrating that each of the earlier statutes on

Moreover, there is no indication that any antecedent of § 2462 applied to any kind of administrative proceeding that might have occurred prior to the initiation of a court action to recover the penalty or forfeiture. Indeed, studies by respected academics establish that well into the twentieth century the vast majority of statutes that provided some administrative role in the assessment of penalties restricted that role to an informal non-adjudicatory process which was followed by a *de novo* determination of liability in district court.<sup>119</sup> Because Congress did not intend to change the meaning of § 2462 in 1948, the current version of § 2462 must be construed consistently with its legislative history, which coincides with the plain language of the 1948 Act, to apply only to proceedings in the courts “for any penalty or forfeiture,” that is, proceedings to recover specific sums and property.<sup>120</sup>

4. *The five-year period does not begin to run until the penalty or forfeiture itself has accrued*

The interpretation that § 2462 does not apply to administrative agencies’ proceedings but does apply to federal court proceedings is buttressed by the controlling language of the 1839 Act predecessor of § 2462, which stated, without reference to the occurrence of the underlying offense, that the five-year limitation period began to run “from the time when the *penalty or forfeiture accrued*.”<sup>121</sup> Thus, a specific penalty deemed to be due and payable, and collectible in a debt action or libel proceeding in court, triggered the limitation period.<sup>122</sup> A specific or calculable penalty was a prerequisite to

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which R.S. § 1047 was based pertained to actions in court to recover penalties).

119. As late as 1979, Professor Diver stated that under most statutes providing for monetary penalties, the agency’s role was an informal one and that “civil penalties are, by express provision or by implication, subject to ultimate collection in a civil action to be brought in a United States district court.” *See* Diver, *supra* note 41, at 1446; *see also* Goldschmid, *supra* note 4, at 907-08 (finding that, as of 1971, the vast majority of federal agencies did not have the power to adjudicate liability for and impose monetary penalties, but used informal assessment procedures followed by *de novo* adjudication in a court action unless the respondent paid voluntarily). It is noteworthy that in discussing the administrative role in the civil penalty assessment process neither of these comprehensive treatments even mentions § 2462 or any other time limitation on the administrative assessment of civil money penalties.

120. *See* Tull v. United States, 481 U.S. 412, 418 (1987). As previously noted, a prosecution for “any penalty or forfeiture” in the nineteenth century was a phrase commonly understood to refer to actions and proceedings in court to recover penalties composed of money and property. *See supra* note 113.

121. *See* Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 (emphasis added).

122. “Accrue” means to become “due.” *See* BOUVIER’S LAW DICTIONARY 51 (1848). An action “accrues” when the plaintiff has a right “to commence a suit thereon.” *Id.*; *see also* BLACK’S LAW DICTIONARY 18 (1st ed. 1891) (a right of action “accrues” when it “come[s] into force or existence”). A debt action could not “accrue” until there was a specific or calculable sum that was due and payable; an *in rem* forfeiture proceeding

bringing a debt action.<sup>123</sup> As discussed earlier, it was generally accepted before 1948 that an “action for penalties” or “an action . . . to recover a penalty” could be brought as a debt action *because* it was an action to collect “a sum certain . . . , or a sum which can readily be reduced to a certainty.”<sup>124</sup> As discussed more fully below, actions before administrative agencies under most modern statutes are not of this nature because no penalty “accrues” and no action can be brought in court until after the agency has made its determination.<sup>125</sup> Thus, administrative proceedings are fundamentally different than the proceedings Congress clearly intended to limit when it enacted the predecessors of § 2462, i.e., debt actions in court.<sup>126</sup>

The 1839 version of § 2462 chose “the time when the penalty or forfeiture accrued” as the trigger date, rather than the date the offense was committed.<sup>127</sup> Pre-1839 versions of § 2462 had made a distinction between the date of the offense and the date the fine or forfeiture was “incurred.” Both the 1790 criminal statute<sup>128</sup> and an 1804 statute concerning crimes under the revenue laws<sup>129</sup> distinguished between when the offense occurred and when the fine, penalty, or forfeiture was “incurr[ed].”<sup>130</sup> Thus, these predecessor statutes recognized that the date on which the violation of law occurred and the date the penalty or forfeiture became actionable in court could differ. The plain language of the 1839 Act version of § 2462 provided that the five-year limitation period was triggered when a specific “penalty or forfeiture accrued,” that is, was deemed to

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similarly could not be initiated until specific property was forfeitable.

123. *See, e.g.*, *Hepner v. United States*, 213 U.S. 103, 106 (1908) (explaining that a debt action is by its nature an action for a sum certain or a sum that may be calculated).

124. *See id.*

125. *See, e.g.*, *United States Dep’t of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (agreeing with previous courts that an action for a penalty did not accrue until the agency made its decision and ruled that the penalty was owed).

126. *Cf. id.* (reasoning that if a penalty accrues upon violation and prior to the administrative agency’s assessment, the assessment would be rendered superfluous).

127. *See* Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322.

128. *See* Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119.

129. *See* Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290-91; *see also* Appendix B (discussing this statute in further detail).

130. Under the 1790 statute, any prosecution “for any offence, not capital” or “for any fine or forfeiture under any penal statute” must be commenced within two years “from the time of committing the offence, *or* incurring the fine or forfeiture.” *See* Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119 (emphasis added). Under the 1804 statute,

any person . . . guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offence *or* incurring the fine or forfeiture  
Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290-91 (emphasis added).

be actionable in court, and Congress intended no change in meaning when it revised the judicial code in 1948.<sup>131</sup> Therefore, the current wording of § 2462, which provides that the five-year limitation period commences on “the date when the claim first accrued,” must refer to the *claim for an “accrued” penalty or forfeiture*, not to the “claim” that there has been a violation of a statute that may give rise to a penalty.<sup>132</sup>

Prior to the twentieth century, courts may have deemed most statutory penalties to accrue simultaneously with the violation.<sup>133</sup> But when the penalty or forfeiture was deemed to “accrue” depended on the wording of the statute that created the forfeiture itself.<sup>134</sup>

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131. See *supra* notes 80-82 and accompanying text.

132. See *infra* Part I.B.5 and cases cited therein; see also *United States v. Serfilco Ltd.*, No. 98-C-2490, 1998 WL 641367, at \*2 (N.D. Ill. Sept. 11, 1998) (holding that for purposes of § 2462 a claim for penalties under the Export Administration Act did not accrue until the agency had a right to bring the action, which was after the agency had assessed the penalties and the defendants had failed to pay them).

133. See, e.g., *Adams, qui tam v. Woods*, 6 U.S. (2 Cranch) 336, 340-41 (1805) (holding that under the 1790 Act the action was barred because the offense was committed more than two years before the action was commenced). The 1790 Act interpreted in *Adams* provided that prosecution must be brought “within two years from the time of committing the offence, or incurring the fine or forfeiture,” so the result in *Adams* is not helpful in interpreting the 1839 Act’s trigger date of when the “penalty or forfeiture accrued.” See *id.* (emphasis added). Interpreting the 1790 Act, the *Adams* Court held the action was barred because “the offence was not committed within two years previous to the institution of the suit” See *id.* at 340. There is no discussion in the decision of whether the penalty might have been “incurr[ed]” on a different date because that issue was not raised in the case. See *id.* at 336, 340 (discussing only when the offense occurred and when the suit was instituted).

134. Cf. *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-05 (1814) (holding, in a case not involving a statute of limitation, that because the “wording of the act” provided that whenever prohibited articles were imported into the country the articles “shall be forfeited,” the forfeiture “shall take place upon the commission of the offence”); *Pennington v. Coxe*, 6 U.S. 33, 53 (1804) (holding that “duties on refined sugars . . . had not then accrued” because the operative event under the statute had not yet occurred) (emphasis added); Cf. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (holding that there can be no single, all-purpose determination of when a cause of action first “accrues” and that accrual must be determined in each case in the context of the wording, context and purposes of the statute creating the action).

The 3M court misinterpreted three district court cases to support its conclusion that under § 2462 the date of the violation is *always* the date the claim “accrues” and, therefore, the date the statute of limitation begins to run. See *3M v. Browner*, 17 F.3d 1453, 1462 (1994) (stating that “since then,” apparently referring to the three district court decisions, the term “accrued” in § 2462 has meant that the five-year period began in every instance when the violation occurred). A careful reading of the three cases shows that they do not support the 3M court’s strong statement. In *United States v. Maillard*, 26 F. Cas. 1140, 1143 (C.C.S.D.N.Y. 1871) (No. 15,709), the court ruled that under a statute that provided the penalty “shall be forfeited” upon occurrence of the violation the penalty accrued upon violation. Thus, the specific language of the statute that created the penalty compelled the conclusion that the penalty accrued at the time of the violation. See *id.* In *In re Landsberg*, 14 F. Cas. 1065, 1067 (C.C.E.D. Mich. 1870) (No. 8,041), the court focused primarily on which of several possible statutes of limitation applied; the court stated, without discussion, that the case was

Congress used a simplistic “transitive” legislative style in early statutes—identifying in great detail required or proscribed conduct and setting a mandatory penalty or penalties for each infraction.<sup>135</sup> These statutes often stated that upon the infraction the violator “shall forfeit” a particular amount of money or that particular property “shall be forfeited,” and under such provisions the penalty probably “accrued”—became actionable in court—simultaneously with the violation.<sup>136</sup>

Even in early statutes, however, some penalties did not accrue until the occurrence of another event that necessarily, or almost necessarily, took place after the violation. For example, in *Parker v. United States*,<sup>137</sup> a federal court held that under a statute that provided as the penalty the forfeiture of a ship *or* double its value, the forfeiture of the ship accrued immediately upon the occurrence of the violation but the double value forfeiture “accrue[s] . . . whenever the forfeiture of the property cannot be made effectual by seizure.”<sup>138</sup> In the circumstances of that case, the court held that the double value forfeiture accrued when the ship reached foreign waters and so was no longer subject to seizure, and that the accrual of the double value penalty extinguished any right to seize the ship itself.<sup>139</sup> Furthermore, some statutes provided that a penalty arose not upon a violation, but upon the discovery of certain facts in an inspection.<sup>140</sup>

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barred because more than five years had “elapsed since the offence was committed and the forfeiture accrued.” *See id.* *United States v. Hatch*, 26 F. Cas. 220, 224 (C.C.D.N.Y. 1824) (No. 15,325), is not apposite because it involved a “penalty” in the sense of liquidated damages for failure to meet the conditions of a bond, which is a contractual matter, rather than a penalty in the sense of a forfeiture for an infraction of a penal statute. *See id.*

135. *See* Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427-30 (1989) (contrasting the “transitive” legislative style used in an 1893 statute, which specified in detail “what technologies [the railroads] were to employ” and “declared the sanctions that were to apply in the event of failure,” with the “intransitive” style used in a 1966 statute on the same subject, which gave authority to an agency within the Department of Commerce to make such decisions); *see also* Diver, *supra* note 41, at 1438-39 (observing that historically early penalties were fixed by statute).

136. *See supra* note 134 and accompanying text (discussing penalties and when the statute of limitation begins to run).

137. 18 F. Cas. 1179 (C.C.D. Pa. 1809) (No. 10,751).

138. *See id.* at 1180. Parker was a case under the first embargo law, which prohibited the sailing of any ship from a port of the United States to any foreign port. *See id.* A violation consisted of a ship departing from a U.S. port without a permit, with the intention of proceeding to a foreign port, or of departing from one U.S. port to another without first giving bond to re-land cargo within the United States. *See id.* at 1179. It was not necessary to establish a violation that the ship actually reach a foreign port and the court held that the forfeiture of the ship accrued immediately upon its sailing for the foreign port. *Id.* at 1180.

139. *See id.*

140. *See, e.g.*, Act of Apr. 20, 1818, ch. 79, § 22, 3 Stat. 438 (requiring that customs

In any event, Congress gradually replaced the transitive legislative style with the familiar modern style in which it does not set a specific penalty amount (although it usually sets an upper limit per violation), but rather delegates to an administrative agency or a court both the authority to adjudicate liability for a penalty and the power to determine the amount of the penalty.<sup>141</sup> This shift in style, associated with the development of the administrative state, was not complete until the Supreme Court resolved lingering doubts about congressional authority to delegate legislative power.<sup>142</sup> In his 1979 government-wide study of the civil penalty process, Professor Diver concluded that of 348 civil penalty statutes in effect at that time, 141 expressly gave an administrative agency the authority to “assess” the penalty, while the other 207 statutes he deemed to provide for “court-assessment” of penalties.<sup>143</sup>

Administrative “assessment” encompasses both agency adjudication after trial-type proceedings subject to substantial evidence review in a court of appeals, such as was provided under the statute at issue in the *3M* case,<sup>144</sup> and less formal, even summary, agency action.<sup>145</sup>

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collectors inspect “at least one package out of every invoice,” that if any package were found to contain any article not described in the invoice “the whole package shall be forfeited,” and that if the goods were consequently subject to additional duties then “penalties shall be incurred”).

141. See Strauss, *supra* note 135, at 427-30. Professor Davis in his *Administrative Law Treatise* also recognizes this shift in regulatory method that occurred gradually as society became more complex and the sheer volume of regulation needed required Congress to delegate more authority to administrative agencies. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4, at 8-9, § 2.6, at 66 (3d ed. 1994) (stating that the size of the administrative state grew out of the needs of an increasingly complex society and that Congress could not manage without delegating considerable authority to administrative agencies.).

Another fundamental change in Congress’s legislative style in the post-nineteenth century period has been that the use of *qui tam* provisions has been discontinued, except under the False Claims Act. See Caminker, *supra* note 107, at 388 (tracing the history of *qui tam* provisions). Virtually all *qui tam* statutes had been repealed or become dormant by the mid-twentieth century. See *id.* at 342 n.5 (stating in 1989 that “[m]ost early *qui tam* statutes have long been repealed; of those remaining, most lie essentially dormant.”)

142. See DAVIS & PIERCE, *supra* note 141, § 2.6, at 66 (citing and contrasting the Supreme Court’s statements that endorsed the nondelegation doctrine in *Field v. Clark*, 143 U.S. 649, 692 (1892) and *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) with the Court’s statement in *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). The Court in *Mistretta* stated: “[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta*, 488 U.S. at 372.

143. See Diver, *supra* note 41, at 1440-41 (explaining that to assess a penalty means to make an initial determination that a person has violated a law and then initiate a formal claim on that individual for a statutorily mandated or permitted specific amount of money).

144. See generally *3M Co. v. Browner*, 17 F.3d 1453, 1457-62 (D.C. Cir. 1994)

Under “agency-assessment” provisions, civil penalties cannot reasonably be said to have “accrued” until after the agency has “assessed” the penalty because until such time there is no sum certain to be recovered in court.<sup>146</sup> In other words, the informal or formal administrative penalty assessment processes in modern statutes occur *before* the triggering event that begins the five-year limitation period in § 2462, that is, before the penalty “accrues” and is actionable in court.<sup>147</sup>

Both Professor Diver’s 1979 study and Professor Goldschmid’s 1972 study observed that regardless of whether the agency’s assessment was binding and subject only to substantial evidence review in a court of appeals, or whether the agency’s assessment was tentative and subject to *de novo* determination in court,<sup>148</sup> ultimate enforcement or collection had to occur in the federal courts.<sup>149</sup> The reason is apparent: agencies have no contempt power and cannot compel payment, except in the rare situation where the agency has possession of either money or property of the person liable for payment and therefore can collect payment without any court involvement.<sup>150</sup>

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(discussing the EPA’s assessment of civil penalties for violation of the TSCA); *see also* Diver, *supra* note 41, at 1441-42 (construing an agency’s or court’s role in the assessment of penalties).

145. In *National Indep. Coal Operators’ Ass’n v. Kleppe*, 433 U.S. 388 (1976), the Supreme Court held that formal findings of fact are not required by the Secretary of the Interior to “assess” a penalty for safety violations in mines under the Federal Coal Mine Health and Safety Act of 1969. *See id.* at 398 (determining that using the reports of trained and experienced inspectors who find violations provides sufficient background to make an assessment); *see also* Action For Children’s Television v. FCC, 59 F.3d 1249, 1253-54 (D.C. Cir. 1995) (involving FCC practice of informal assessment of monetary “forfeitures” for airing indecent materials).

146. *See* Diver, *supra* note 41, at 1442 n.39 (asserting that an agency’s role in penalty assessment will at a minimum prevent judicial enforcement action from beginning until the agency first assesses the penalty).

147. *See id.*

148. *See id.* at 1439 & n.25 (noting that with certain exceptions, civil penalties are “subject to ultimate collection” in a civil action in district court, where a trial is had of “contested factual issues not foreclosed by a previous binding judgment” such as “[a]n adjudication of facts by an agency on the record of an evidentiary hearing”); Goldschmid, *supra* note 4, at 899, 907, 936 (finding that the vast majority of federal administrative agencies must be successful in a *de novo* proceeding in a federal district court before a civil money penalty may be imposed); *see also* *Kleppe*, 423 U.S. at 393 (stating that if a mine operator does not pay the penalty the statute requires the Secretary of the Interior to petition the court to enforce the assessment and that the court must determine the amount of the penalty in a *de novo* proceeding).

149. *See* Diver, *supra* note 41, at 1439 (explaining that, except for maritime statutes, jurisdiction over civil penalties is found in the district court); Goldschmid, *supra* note 4, at 944-45 (noting that when necessary ultimate collection of civil money penalties “may be enforced” in federal district courts).

150. *See* Goldschmid, *supra* note 4, at 945 (mentioning the collection technique available to the Immigration and Naturalization Service (“INS”), which can deny clearance to a ship if any penalty imposed on it remains unpaid). The unusual type of summary collection procedure granted to the INS, which completely avoids any

Professor Goldschmid's 1972 study concluded that at that time the majority of statutes providing for monetary penalties gave the agency only an informal role in penalty assessment and that, if voluntary payment by the violator could not be negotiated, the agency was required to prevail in a *de novo* court proceeding brought by the Justice Department after referral by the agency, except where the agency had independent litigating authority.<sup>151</sup> Most often, however, penalty assessments by these agencies were resolved through voluntary payment<sup>152</sup> without having to resort to Justice Department referral.<sup>153</sup> Both studies noted that the need to involve the Justice Department could impede effective enforcement of regulatory statutes because the Justice Department was overburdened and gave low priority to penalty actions.<sup>154</sup>

The Goldschmid study observed that few statutes permitted agencies to make binding determinations of liability for penalties.<sup>155</sup> These agencies' decisions were subject only to substantial evidence review in the courts of appeals.<sup>156</sup> The 1972 report advocated that more agencies be given the power to impose civil penalties as an alternative to more drastic sanctions, such as license revocation or denials of contracts or grants, which were seen as an "economic death sentence."<sup>157</sup> The 1972 report also recommended that additional

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court involvement, was noted earlier, *see supra* note 23. Obviously, few agencies have available this means of collecting penalties and, therefore, must resort to court action if payment is not made voluntarily. *See* Goldschmid, *supra* note 4, at 945 n.15.

151. *See* Goldschmid, *supra* note 4, at 899, 919, 920 (describing how agencies seldom bring actions in court because the agencies are able to obtain voluntary payment of an agreed amount in over ninety percent of the cases).

152. *See id.* at 919-21 (finding that offenders usually volunteer to pay a negotiated penalty and only a handful of cases reach the district court). These administrative agencies would notify an alleged violator that the agency considered him to be liable for a penalty in a certain amount. *See id.* at 919. Various informal procedures (e.g., letters, meetings, and hearings) were available through which the respondent could contest his liability for and/or the amount of the penalty. *See id.* at 920. Most often, the matter would be resolved through such means. *See id.*

153. *See id.* at 919-22 (noting that the majority of administrative agencies "mitigate," i.e., lower, the amount of penalties far below the statutory amount and thereby obtain voluntary payment without requesting the Justice Department to bring an action in district court).

154. *See id.* at 900 (suggesting that agencies are accepting inadequate settlements because the Department of Justice is an obstacle to agency administrators' efforts to take their cases to federal court); Diver, *supra* note 41, at 1459 (referring to the limitations on what administrative agencies can demand due to the need to convince the Justice Department to prosecute penalty cases and the need to succeed in a trial *de novo* in district court).

155. *See* Goldschmid, *supra* note 4, at 907-08 (finding that only four statutory schemes allow for agency ability to determine liability).

156. *See id.*

157. *See id.* at 898, 908 (advocating for statutes to provide administrative agencies a greater amount of control over penalties).

agencies be given the authority to determine liability for penalties subject only to limited review, rather than requiring that a *de novo* determination of liability be made in court.<sup>158</sup>

The Diver study found that although the 1972 Goldschmid report's recommendations resulted in more penalty provisions and in several more agencies acquiring the authority to adjudicate liability for penalties in a formal trial-type hearing, in 1979, statutes of that kind still accounted for only fourteen percent of penalty assessment provisions.<sup>159</sup> The remainder of the statutes still used the system of informal, often unilateral, administrative assessments later followed by a *de novo* court determination, if necessary.<sup>160</sup>

It is difficult to determine when statutes began to provide for informal or formal administrative agency assessment of penalties subsequent to the occurrence of the violation. A 1938 Second Circuit Court of Appeals case suggests that such processes had begun by that time.<sup>161</sup> The date the court assumed the penalty "accrued" in that case was not the date of the violation, but rather the date the agency issued to the respondent a notice of violation and demand for payment.<sup>162</sup> Certainly, the informal agency assessment procedures, found in the Diver and Goldschmid studies to be so common, had become well established no later than the 1940s. The Attorney

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158. *See id.* at 936-47. Professor Goldschmid's 1972 report discusses in exhaustive detail the possible consequences of, and impediments to, expanding the role of civil monetary penalties in federal regulatory schemes, including giving agencies the authority to determine liability for penalties. *See id.* Yet, the study makes no mention of any possibility that § 2462 might apply to administrative proceedings. *See id.* at 919-23. Nor does Professor Goldschmid's discussion of how agency assessment processes worked at the time of the report mention a need to comply with § 2462. *See id.* Thus, one can infer that at that time it was not widely believed that § 2462 applied to administrative proceedings to assess penalties.

159. *See Diver, supra* note 41, at 1445-46 (describing how the great majority of administrative agencies provided for informal hearings and statements of reasons in assessing penalties).

160. *See id.* at 1439 & n.23. Professor Diver's report also makes no mention of § 2462 or any other time limitation applicable to these administrative proceedings, but does mention § 2461 as authorizing a civil action to collect a penalty. *See id.*

161. *See Lancashire Shipping Co. v. Durning*, 98 F.2d 751, 753 (2d Cir. 1938) (discussing the administrative action in relation to when the penalty accrued).

162. *See id.* at 752-53 (upholding a fine for failure of a ship's master to detain on board the ship and to deport Chinese crew members after notice given). The "penalty accrued on March 12, 1931," but this was *not* the date of the violation. *See id.* at 753. Rather, this was the date of a subsequent notification of liability for the penalty, as stated in an earlier decision based on the same events. *See Lancashire Shipping Co. v. Elting*, 70 F.2d 699, 700 (2d Cir. 1934) (stating that on March 11, 1931, the police raided the ship and discovered that the ship's master had violated an earlier order to detain on board and to deport Chinese crew members). March 12, 1931 was the date of "a notice of liability for fine" under the immigration laws that was served on the ship's agent after the violation had been discovered. *See id.*; *see also infra* Appendix C ¶ 6 (discussing further the two *Lancashire Shipping* cases).

General's Committee on Administrative Procedure (the "APA Committee") studied the practices of all administrative agencies in existence in 1940 and 1941 in preparation for drafting the APA.<sup>163</sup> The practices described by the APA Committee in civil penalty assessments were informal procedures, subject to *de novo* review in court.<sup>164</sup> No mention is made of the pre-1948 version of § 2462 in any of these materials, or anywhere else in the legislative history of the APA.<sup>165</sup> This lack of reference to § 2462's predecessor, coupled with the fact that the two studies conducted in the 1970s did not discuss § 2462 as relevant to administrative proceedings, suggests that for many years § 2462 was believed to pertain only to proceedings in court.<sup>166</sup>

5. *Five federal courts of appeals have held that under statutes providing for agency assessment of a penalty, the five-year period in § 2462 begins when the assessment has been made*

Decisions of five different federal courts of appeals<sup>167</sup> support the conclusion that § 2462 applies only to actions in federal court for accrued fines, penalties, and forfeitures and not to administrative proceedings to determine or assess penalties.<sup>168</sup> In all of these cases,

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163. See *supra* notes 76 & 77 and accompanying text.

164. See, e.g., *Monograph of the Attorney General's Committee on Administrative Procedure*, S. DOC. NO. 10, at 45-46 (1st Sess. 1941) (describing the civil penalty assessment process under the Civil Aeronautics Act of 1938); *Monograph of the Attorney General's Committee on Administrative Procedure*, S. DOC. NO. 186, at 24-28 (3d Sess. 1940) (describing the civil penalty assessment process of the Department of Commerce, Bureau of Marine Inspection and Navigation). Neither description of the civil penalty process mentions the predecessor of § 2462 or any time limitation on the initiation of agency procedures.

165. See *supra* note 164 and accompanying text (finding no discussion of § 2462).

166. The EPA, the agency involved in the *3M* case, was not the only agency that had decided in a formal adjudication that § 2462 did not apply to the initiation of administrative actions. For years prior to the *Johnson* decision, the SEC held the same view. See, e.g., *Thompson & McKinnon*, No. 7-12769 (Aug. 11, 1952) (unpublished memorandum order) (holding that § 2462 did not apply to administrative proceedings); *In re Baird & Co.*, 52 SEC Docket 25 (Sept. 6, 1966) (following *McKinnon* holdings). A noted academic authority cited with approval the SEC's decision in *McKinnon*, stating that the holding that § 2462 did not apply to the Commission's administrative actions and that SEC administrative sanctions are not penalties "seems sound." See LOUIS LOSS, *SECURITIES REGULATION* 1174 n.10 (2d ed. 1961). The Commodity Futures Trading Commission ("CFTC") had ruled that 28 U.S.C. § 2462 did not apply to non-monetary sanctions imposed by that agency and, without deciding the question, expressed doubt that § 2462 applied at all to administrative proceedings. See *In re Segal*, CFTC No. 89-27, Comm. Fut. L. Rep. ¶ 25,162 (Nov. 5, 1991) (relying on an earlier CFTC opinion to the same effect, *In re Nelson Bunker Hunt*, CFTC No. 85-12 (Nov. 6, 1987)).

167. Specifically, the First, Second, Sixth, Seventh, and Eighth Circuits.

168. See *Capozzi v. United States*, 980 F.2d 872, 874 (2d Cir. 1992) (rejecting the argument that § 2462 should apply to administrative proceedings of the IRS); *Lamb v. United States*, 977 F.2d 1296, 1297 (8th Cir. 1992) (holding that the lower court

the courts construed the language of the 1948 Act version of § 2462, providing that the five-year limitation is triggered when the “claim first accrued,” and did not consider the controlling 1839 Act language “from the time when the penalty or forfeiture accrued.”<sup>169</sup> Yet, the decisions reached a result consistent with the 1839 Act language—i.e., that an assessed penalty had to exist for the five-year limitation period to begin to run.<sup>170</sup> Because it is apparent that a penalty can accrue only once, the above conclusion forecloses the possibility that the five-year limitation period begins at the time of the violation, before the agency has assessed the penalty.

In *Capozzi v. United States*,<sup>171</sup> *Lamb v. United States*,<sup>172</sup> and *Mullikin v. United States*,<sup>173</sup> the federal courts of appeals squarely held that § 2462 does not apply to the administrative assessment of a penalty, and determined that the five-year limitation period is triggered when the penalty is imposed, not when the violation occurs. In *Capozzi*, the court considered the argument that § 2462 barred IRS “assessment” of tax penalties later than five years after the violation that gave rise to the tax liability.<sup>174</sup> The court found that an administrative assessment is not the equivalent of an action, suit, or proceeding. The court held that it “is the collection of amounts owed, not the assessment of them, that may be properly termed ‘enforcement’” under § 2462 because “[n]o legal liability arises until the IRS assesses the penalty. Therefore, there is nothing to enforce until after the assessment is made.”<sup>175</sup> *Mullikin* and *Lamb* likewise held that § 2462

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erred by applying § 2462 to the administrative assessment of penalties under the Internal Revenue Code); *Mullikin v. United States*, 952 F.2d 920, 928 (6th Cir. 1991) (finding that the five-year statute of limitation of § 2462 did not apply to the administrative assessment of tax penalties); *United States v. Meyer*, 808 F.2d 912, 914 (1st Cir. 1987) (holding that § 2462 cannot logically apply to the Commerce Department’s administrative assessment of penalties under the Export Administration Act); *United States Dep’t of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (construing the statute’s language and holding that if § 2462 applied, the claim did not “accrue” until the agency’s decision had been made).

169. See, e.g., *Meyer*, 808 F.2d at 914 (finding that unless there is a penalty to enforce, a claim for enforcement of an administrative penalty cannot possibly accrue); *Old Ben*, 676 F.2d at 261 (interpreting § 2462’s language to mean accrual begins when the agency has finally ruled on the claim).

170. See, e.g., *Lamb*, 977 F.2d at 1296-97 (holding that § 2462 did not apply to the administrative assessment of tax penalties because, *inter alia*, Congress did not expressly so provide); *Meyer*, 808 F.2d at 915 (reiterating that the agency’s assessment triggers the five-year statute of limitation).

171. 980 F.2d 872, 875 (2d Cir. 1992).

172. 977 F.2d 1296, 1297 (8th Cir. 1992).

173. 952 F.2d 920, 925 (6th Cir. 1991).

174. See *Capozzi*, 980 F.2d at 874-75.

175. See *id.* The 3<sup>rd</sup> court dismissed the holding in *Capozzi* on the ground that the *Capozzi* court failed to consider that the word “enforcement” had been added to the statute in 1948; the 3<sup>rd</sup> court reasoned that if it accepted the *Capozzi* court’s view of

did not bar the assessment of tax penalties by the agency and that such penalties could be assessed at any time.<sup>176</sup> Moreover, all three decisions found that Congress had provided a different limitation period to apply to a court action to collect the penalties at issue once penalties were assessed.<sup>177</sup>

In *United States v. Meyer*<sup>178</sup> and *Department of Labor v. Old Ben Coal Co.*,<sup>179</sup> the courts considered situations in which the administrative proceedings that assessed penalties had commenced less than five years after the violations.<sup>180</sup> In each case, the penalties were not paid voluntarily, collection actions were brought more than five years after the violations, and the defendants contended that § 2462 barred the court proceedings.<sup>181</sup> In *Old Ben*, the court first held that § 2462 did not apply to the district court proceeding because liability had been

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“enforcement,” then § 2462 “would not apply even to federal court actions to determine penalties.” *3M Co. v. Browner*, 17 F.3d 1453, 1459 (D.C. Cir. 1994). Moreover, the *3M* court found that the assessment of tax penalties was materially different from penalty assessments under other statutes because the IRS assessment process was not a formal proceeding. *See id.* at 1459 n.11. The reasoning of the *3M* court is flawed. As demonstrated earlier, *supra* Part I.B.4, the *3M* court failed to consider that the 1839 Act version measured the five-year limitation period from “when the penalty or forfeiture accrued,” which implies that the penalty must exist and be due and owing in order for the claim to “accrue.” *See id.* at 1462. Furthermore, holding that § 2462 applies only to actions for previously assessed penalties does not necessarily mean that § 2462 would not apply to *any* federal court action to determine liability for penalties. *See id.* at 1459. As discussed in Part III of this Article, § 2462 would apply to such actions if they were like debt actions, that is, if they sought penalties that had been assessed by an agency or if the statute provided no agency role and the penalties were fixed by statute. Finally, if § 2462 applied to administrative proceedings, there would be no basis for limiting it to formal ones, so the *Capozzi* decision and others holding that § 2462 does not apply to administrative assessment of tax penalties may not be distinguished on that basis. The APA, which had recently been enacted when the 1948 Act was adopted, *see* Part I.B.3.a, defined “agency proceeding” to include “any agency process defined” in other subsections as rulemaking, adjudication or licensing proceedings. *See* 5 U.S.C. § 551(12) (1994). Furthermore, the APA includes both “formal and informal proceedings” within the category of adjudication. *See* ADMINISTRATIVE SOURCEBOOK, *supra* note 76, at 3 (noting that the APA provides for both formal and informal adjudication by federal agencies and that “informal adjudication” is “by far the most prevalent form of governmental action”).

176. *See Mullikin*, 952 F.2d at 929 (finding that the district court erred by applying § 2462 to the administrative assessment of penalties); *Lamb*, 977 F.2d at 1297 (noting the lack of any congressionally expressed limitation period).

177. None of these three cases was concerned with the procedures of distraint or distress under which penalties could be assessed and collected without any court involvement.

178. 808 F.2d 912 (1st Cir. 1987).

179. 676 F.2d 259 (7th Cir. 1982).

180. *See Meyer*, 808 F.2d at 913 (stating that the violations occurred in 1978 and the administrative proceeding was initiated in 1981); *Old Ben*, 676 F.2d at 260 (stating that the violations had occurred in 1973 and the administrative proceeding was commenced in 1974).

181. *See Meyer*, 808 F.2d at 913; *Old Ben*, 676 F.2d. at 260.

determined administratively.<sup>182</sup> In an alternative holding, however, the court concluded that *if* § 2462 applied to the proceeding the five-year period was triggered by the administrative decision imposing the penalty, not by the violation.<sup>183</sup>

In *Meyer*, the court noted in *dicta* that the government had stipulated that § 2462 applied to the initiation of the underlying administrative proceeding (to impose penalties on the respondent under the Export Administration Act for furnishing boycott information to Saudi Arabia) and conceded that the administrative proceeding would have been barred if it had not been brought within five years of the occurrence of the regulatory violations.<sup>184</sup> The court expressed doubt about the government's concession, stating that "the analytical underpinnings of this interpretation seem somewhat wobbly."<sup>185</sup> The court noted, however, that the issue did not need to be resolved because the administrative proceeding had been initiated within five years of the violation.<sup>186</sup> The *Meyer* court then analyzed the plain language of § 2462 and concluded that: (1) a claim to "enforce" an administrative penalty cannot be brought until there is a penalty and "a suit may be maintained thereon"<sup>187</sup> and (2) that the five-year limitation period was triggered by the administrative imposition of the penalty.<sup>188</sup>

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182. The court proceeding was a petition filed by the Department of Labor under a provision of the Federal Coal Mine Health and Safety Act of 1969 "for enforcement" of an administrative order assessing Old Ben Coal Company \$4200 in penalties for violations of the Act. *See Old Ben*, 676 F.2d at 260 (explaining the background of the proceedings). The court held that § 2462 did not apply at all to the proceedings because the agency's petition was in the nature of a collection action. *See id.* at 261 (believing that the only issue in the district court was the amount of the penalty and therefore, that § 2462 did not apply).

183. *See id.* at 261 (concluding that even if § 2462 were applicable, the district court was still in error because the statute of limitation cannot commence until the agency has the right to bring an action and that a claim has not accrued until the administrative proceeding is over, the penalty is assessed, and the violator has not paid within the time prescribed). Because the administrative proceeding had been brought less than five years after the violations, the *Old Ben* court had no reason to consider specifically whether § 2462 applied to the initiation of the administrative proceeding in which the penalties had been assessed.

184. *See Meyer*, 808 F.2d at 914.

185. *Id.*

186. *See id.* The government's stipulation in *Meyer* regarding § 2462 is not binding on the government in other cases and should not preclude a government agency from litigating the issue in another case. *See supra* note 20 and accompanying text (citing cases standing for the proposition that the government is not estopped from making in subsequent cases arguments it failed to raise or conceded away in earlier ones).

187. *See Meyer*, 808 F.2d at 914 (quoting BLACK'S LAW DICTIONARY 19 (5th ed. 1979)).

188. *See id.* at 915 (reasoning that it would be illogical for a claim to accrue prior to the time a penalty could be enforced, meaning collected in a court action).

In making this determination, the *Meyer* court considered and rejected<sup>189</sup> the reasoning behind the contrary holding of the Fifth Circuit in *United States v. Core Laboratories, Inc.*<sup>190</sup> In *Core*, the court held that § 2462 barred the government's action in district court to enforce a civil penalty, previously imposed administratively under the Export Administration Act, which the defendant had refused to pay.<sup>191</sup> The administrative proceeding had commenced a little over a year after the statutory violations.<sup>192</sup> The Fifth Circuit barred the court action to compel payment because the action was commenced more than five years after the violations had occurred.<sup>193</sup> In other words, *Core* required that the agency discover the violations, initiate an administrative action, complete deliberation, issue an administrative decision, and bring suit in court to collect any penalties—all within five years from the date of the offense.<sup>194</sup> The *Meyer* court concluded that the reasoning in *Core* was unpersuasive and “created a wretched sort of anomaly” in which the statute of limitation could expire before the right to sue arose.<sup>195</sup> The *Meyer* court also relied on the Supreme Court's decision in *Crown Coat Front Co. v. United States*,<sup>196</sup> which held that a claim subject to mandatory administrative proceedings before court action could be initiated did not accrue until the conclusion of the administrative proceedings.<sup>197</sup> Accordingly, the *Meyer* court concluded that the *Crown Coat* opinion, by analogy, supported its holding that the claim under § 2462 first would accrue when the administrative decision assessing the penalties was final and the penalties were actionable in court.<sup>198</sup>

189. See *id.* at 914-22 (discussing the legislative history of § 2462 and various cases upon which the court relied to reach its determination).

190. 759 F.2d 480 (5th Cir. 1985).

191. See *id.* at 483 (holding that the statute of limitation had run out before the government attempted to enforce its penalty in court).

192. See *id.* at 481 (noting that the administrative proceedings began 13 months after the last violation).

193. See *id.* at 483.

194. See *id.* (reasoning that to do otherwise would give the government too much control). The *Core* court misread cases that it relied on in arguing that the date of the violation was the date when the claim first accrued. See *Meyer*, 808 U.S. at 913 (finding that the relevant case law regarding § 2462 led to a result directly contrary to that reached by the *Core* court). None of the cases cited by the *Core* court made the holdings the *Core* court attributed to them; at most, some of those cases mentioned in *dicta* the assumption that § 2462 began to run on the date of the violation, but most did not even do that. See *infra* Appendix C (discussing cases cited by the *Core* court to support its holding that under § 2462 the date of the violation was the date the “claim first accrued”).

195. See *Meyer*, 808 U.S. at 917.

196. 386 U.S. 503 (1967).

197. See *id.* at 522 (holding that the right to bring a civil action accrued after a final ruling from the administrative board).

198. See *Meyer*, 808 F.2d at 918-19.

It is apparent that a penalty or forfeiture cannot accrue twice—once when the violation of law occurs and again when the penalty is imposed or assessed. Both the *Meyer* and *Old Ben* cases concluded that where the substantive statute entrusts to an administrative agency the assessment of the penalty, § 2462's limitation period is triggered by the later event—the imposition of the penalty—and not by the violation of the substantive statute.<sup>199</sup> That conclusion compels the inference that § 2462 does *not* apply to administrative proceedings. Those proceedings occur prior to the agency's decision assessing a penalty, which is the event the *Meyer* and *Old Ben* courts hold to be the triggering event that *begins* the running of the limitation period.<sup>200</sup>

In addition to the five circuit court decisions discussed above and two subsequent district court opinions that have followed the reasoning of the *Meyer* court,<sup>201</sup> another district court, in an earlier case, reasoned independently that § 2462 did not apply to an administrative proceeding to assess a penalty, but that the limitation period might apply to an action in court to collect a penalty. In *The A/S Glittre v. Dill*,<sup>202</sup> the Southern District of New York affirmed a Board of Immigration Appeals (“BIA”) decision, which held that an administrative proceeding to assess a statutory penalty, commenced over six years after the underlying violation, was *not* barred by § 2462.<sup>203</sup> The BIA distinguished between a suit to collect a fine and a formal finding that a fine should be imposed.<sup>204</sup> The *Glittre* court agreed with the BIA holding, but stated that a suit by the government in court to collect the penalty “*may*, however, be barred by the running of the applicable statute of limitations contained in 28 U.S.C. § 2462.”<sup>205</sup>

Thus, the *3M* holding that an administrative proceeding in which a penalty or forfeiture may be imposed is subject to § 2462, and must be brought within five years of the date of the statutory violation, is

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199. *See id.* at 914 (opining that the five-year limitation period began when the agency assessed a penalty); *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (same).

200. Two district courts have followed the reasoning in *Meyer*. *See United States v. McIntyre*, 779 F. Supp. 119, 122 (S.D. Iowa 1991) (involving a suit by the United States to collect civil money penalties from bank official who violated FDIC order); *United States v. McCune*, 763 F. Supp. 916, 918 (S.D. Ohio 1989) (involving a suit by the United States to recover civil money penalties for violation of Surface Mining Control and Reclamation Act).

201. *See supra* note 200.

202. 152 F. Supp. 934 (S.D.N.Y. 1957).

203. *See id.* at 940 (holding that the statute creating the penalty at issue did not require that the agency assess the penalty within a time limit).

204. *See id.* at 937.

205. *See id.* at 940 (emphasis added).

not well supported. A significant body of case law in the federal courts strongly supports the conclusion that § 2462 does *not* apply to administrative proceedings—the same conclusion that is supported by the plain language of § 2462 and by its legislative and historic context.<sup>206</sup>

*C. There Would be No Anomaly In Interpreting § 2462 to Apply to Court Proceedings That Assess and/or Determine Liability For Penalties But Not to Administrative Proceedings That Do So*

Courts have recognized that when Congress chooses to create a statutory scheme in which liability for violations is determined in administrative proceedings the rights of the accused and the procedures used may differ from those applicable to determinations made in court. In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,<sup>207</sup> the Supreme Court held that there was no right to a jury trial in an administrative proceeding in which liability for a civil monetary penalty was determined, despite the Court's assumption that if Congress assigned the same liability-determining function to a court, the right to jury trial would attach.<sup>208</sup>

The Court reasoned that when Congress creates “new statutory ‘public rights,’” it may assign the fact-finding function and initial adjudication of liability for monetary penalties to an administrative forum, where a jury trial is not available.<sup>209</sup> Similarly, the Court has held that hearsay evidence, generally not admissible in court proceedings, is admissible in proceedings before administrative agencies.<sup>210</sup> These holdings are consistent with the interpretation that § 2462 does not apply to the initiation of administrative proceedings to determine liability for penalties and penalty amounts, even if it

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206. See *supra* Parts I.B.2-4.

207. 430 U.S. 442 (1977).

208. See *id.* at 455. Later, in *Tull v. United States*, 481 U.S. 412 (1987), the Court declared the right to a jury trial in court proceedings to determine liability for a civil monetary penalty. See *id.* at 425.

209. See *Atlas Roofing*, 430 U.S. at 455. This was true, the Court stated, at least under schemes that provided for some oversight by the courts. See *id.* at 455 n.13 (declining to rule on whether Congress may provide for an agency to adjudicate rights without any court involvement at any stage). The statutory scheme at issue in *Atlas Roofing* provided that the administrative determination was subject to substantial evidence review in a court of appeals. See *id.* Furthermore, although not noted by the Court, judicial involvement was required before actual collection of the penalty could occur—that is, similar to the statute involved in the *3M* case, the statute at issue in *Atlas Roofing* provided that to collect the penalty amount after it was no longer subject to review, the Secretary of Labor must bring a civil action in federal court to reduce the penalty to a court judgment and enforce payment. See *id.* at 447.

210. See *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (holding that hearsay may constitute substantial evidence in a social security disability claim hearing).

applies to all court proceedings making similar determinations.

As discussed in Part III of this Article, however, the plain language, history, and context of § 2462 strongly suggest that it does not apply to *all* court proceedings in which a civil monetary penalty is sought. Rather, § 2462 should apply only to those court proceedings of the kind that existed when the 1839 Act version of § 2462 was adopted, i.e., proceedings in the nature of a debt action or forfeiture proceeding to collect a penalty deemed to be due and payable.

## II. THE *3M* AND *JOHNSON* DECISIONS WERE DECIDED INCORRECTLY

### A. *The 3M Decision is Wrong*

In *3M*,<sup>211</sup> the D.C. Circuit reviewed a decision by the EPA Chief Judicial Officer to affirm the decision of an administrative law judge (“ALJ”), who had previously determined that § 2462 did not apply to the administrative proceeding to assess a penalty.<sup>212</sup> Before the circuit court, the EPA chose to abandon this argument and declined to defend that aspect of the ALJ’s decision.<sup>213</sup> The court, presented only with the petitioner’s arguments against the agency decision, reversed the EPA and held that § 2462 applied to administrative proceedings.<sup>214</sup> The court’s reasoning and conclusion, however, are erroneous.

#### 1. *The court erroneously places the burden on the government to demonstrate that the five-year time limitation does not apply to administrative proceedings*

In deciding that § 2462 applied to administrative proceedings, the *3M* court failed to consider the important principle that government suits are not time barred when brought to protect the public interest, unless Congress specifically provided for such a time limitation.<sup>215</sup> Rather than require an affirmative showing that Congress clearly intended § 2462 to apply to administrative proceedings, the court

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211. 17 F.3d 1453 (D.C. Cir. 1994).

212. *See id.* at 1455. The ALJ relied primarily on the fact that § 2462 appears in Title 28 of the Code, which concerns the judiciary. *See id.* at 1456. The ALJ did not consider the argument made in this Article, *see supra* Part I.A-B, based on the fact that § 2462 was enacted as part of a statute designed to revise and reenact code provisions concerning the courts and the judiciary, nor did the ALJ rely on the history and context of § 2462 that is developed in this Article.

213. *See 3M*, 17 F.3d at 1457 (noting that the EPA chose not to argue in support of the ALJ’s decision regarding § 2462’s inapplicability to administrative proceedings).

214. *See id.* (rejecting a court-agency dichotomy in applying § 2462).

215. *See supra* notes 33-47 and accompanying text (discussing principle that a statute of limitation applies to the government only if Congress expressly so provides).

took the opposite approach and questioned whether there were reasons why Congress would *not* have intended for the five-year limitation to apply to administrative proceedings.<sup>216</sup>

The court concluded that it could see no reason not to apply the five-year limitation to administrative proceedings. The court referred to “the reasons why we have statutes of limitations,” identifying those reasons as the inevitable loss of evidence, memories, and witnesses over time, and a defendant’s asserted right to “be secure in his reasonable expectation that the slate has been wiped clean” after sufficient passage of time.<sup>217</sup> The court concluded that these reasons for imposing a time limitation applied equally to administrative and court proceedings.<sup>218</sup> The *3M* court failed, however, to recognize that courts have articulated these reasons for statutes of limitation primarily in cases concerning *private* litigants and that, nevertheless, the Supreme Court has continued to follow the rule that no time limitation applies to the government when it acts in its sovereign capacity, unless Congress clearly imposed a limitation.<sup>219</sup> As the Supreme Court noted in *Costello v. United States*,<sup>220</sup> a proceeding to revoke the naturalization of an individual based on events twenty-seven years earlier, the lapse of time made the government’s burden more difficult and did not violate the respondent’s rights absent an affirmative showing of prejudice.<sup>221</sup>

2. *The court misconstrues Supreme Court law regarding statutes of limitation on government actions in the public interest*

Although the *3M* court failed to consider the principle that there must be clear intent to bind the government to a time limitation, the court did mention the related rule that statutes of limitation that apply to the government must strictly be construed in its favor.<sup>222</sup> The court brushed this rule aside, however, in favor of what it discerned to be “another Supreme Court maxim, older still, a maxim specifically relating to actions for penalties and one pointing in quite

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216. See *3M*, 17 F.3d at 1456 (stating, with respect to the question of whether the limitation period applies to administrative proceedings, “[w]e wonder why not”).

217. See *id.* at 1457.

218. See *id.*

219. See *supra* notes 33-47 and accompanying text.

220. 365 U.S. 265 (1961); see also *supra* notes 38-43 and accompanying text.

221. See *Costello*, 365 U.S. at 283 (“[A]ny harm from the lapse of time was to the Government’s case. . . . We cannot say, moreover, that the delay denied the petitioner fundamental fairness.”).

222. See *3M*, 17 F.3d at 1457 (citing *Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984)). For example, in *Badaracco*, the Court interpreted a tax statute as allowing the government to prosecute a taxpayer for fraud at any time. See *Badaracco*, 464 U.S. at 396; see also *supra* note 44 and accompanying text.

the opposite direction.”<sup>223</sup> The court then quoted out of context the following sentence from *Adams, qui tam v. Woods*:<sup>224</sup> “In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture.”<sup>225</sup>

The *3M* decision fails to explain what the court believed the Supreme Court meant by the quoted sentence from *Adams*—a sentence that in *Adams* is not accompanied by any explanation or citation of authority.<sup>226</sup> The *3M* court’s reliance on the statement suggests that the court assumed that the Supreme Court had established a sweeping presumption that some time limitation *must* apply to any action or proceeding that might result in penalties or forfeitures. That cannot be what the Supreme Court meant by its statement in *Adams*, however, because the long-established rule was just the opposite. As discussed at the outset of the Article,<sup>227</sup> the common law “fixed no time as to the bringing of actions,”<sup>228</sup> and time limitation periods were set in statutes that did not apply to the government unless that result was clearly intended.<sup>229</sup> This principle was established long before the 1805 decision in *Adams*,<sup>230</sup> and no exception to the general principle existed for actions for penalties.<sup>231</sup> There never was any common law principle mandating a time limitation on the collection of a fine, penalty, or forfeiture, any more than there was a principle requiring a time limitation to initiate an indictment for treason. Accordingly, the *3M* court’s apparent interpretation of the quoted sentence in *Adams* is inconsistent with settled law.<sup>232</sup>

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223. *3M*, 17 F.3d at 1457.

224. 6 U.S. (2 Cranch) 336, 342 (1805) (holding that the statute of limitation in the 1790 ancestor of § 2462 applied to a debt action by a private individual to recover monetary penalties imposed under a statute prohibiting slave trading).

225. *3M*, 17 F.3d at 1457 (citing *Adams*, 6 U.S. (2 Cranch) at 342).

226. *See Adams*, 6 U.S. at 342.

227. *See supra* notes 36-43 and accompanying text.

228. *See supra* notes 34-37 and accompanying text.

229. *See supra* notes 33-37 and accompanying text (noting that at common law the king was never included in statutes of limitation “unless expressly named”).

230. *See supra* notes 33-36 and accompanying text (discussing English common law prior to American independence).

231. *See supra* notes 33-36, 41 and accompanying text.

232. The Supreme Court has quoted from that particular passage in *Adams* in only five opinions. Three of the cases involved suits by private individuals for damages under federal statutes that created their right to sue but did not set time limitations on those suits. The Court quotes the *Adams* language in these three cases essentially to bolster its conclusion that no federal policy will be violated by applying to those private damage claims either a state limitation period or a limitation period from another federal statute. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987) (applying the Clayton Act limitation period to a civil suit

The quoted sentence comes at the end of Chief Justice Marshall's opinion in *Adams* and, read in context, cannot reasonably be said to have the meaning the *3M* court seems to have ascribed to it. *Adams* involved a debt action brought to collect a \$2,000 penalty specified by statute as being forfeited by a person who engaged in the slave trade.<sup>233</sup> The only issues in the case were whether the two-year time limitation period in the 1790 Act version of § 2462, which concededly barred a proceeding to collect the penalty if initiated by indictment or information, also barred a debt action for the same penalty and, if so, whether the 1790 Act applied to statutory penalties enacted after that date.<sup>234</sup>

Earlier in the opinion, the *Adams* court had reasoned that debt actions for penalties must be time limited by the 1790 Act because if they were not, then the Act's time limitation would be a virtual nullity. The Court stated:

Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted

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under the Racketeer Influenced and Corrupt Organizations Act ("RICO"); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (applying the state tort limitation period to a 42 U.S.C. § 1983 damages claim); *Campbell v. City of Haverill*, 155 U.S. 610, 616-17 (1895) (applying the state tort limitation period to a patent infringement suit). The other two cases in which the Supreme Court has relied on the passage from *Adams* quoted by the *3M* court are pre-1948 criminal contempt prosecutions in which the Court decided the issue of whether the three-year time limitation period for non-capital criminal prosecutions, then found in R.S. § 1044, applied. The Court quotes the language from *Adams* in the course of refuting the government's argument that the prosecutions, both commenced more than three years after the conduct, were not really criminal in nature and, therefore, were not barred by R.S. § 1044. See *Pendegast v. United States*, 317 U.S. 412, 418 (1943); *Gompers v. United States*, 233 U.S. 604, 612-13 (1914).

It is worth noting that both Chief Justice Rehnquist and Associate Justice Scalia have indicated in dissenting opinions their awareness that the language in *Adams* quoted by the *3M* court either is not applicable to the United States in its sovereign capacity or that the language does not have the broad meaning the *3M* court attributes to it. See *Agency Holding Corp.*, 483 U.S. at 170 n.5 (Scalia, J., dissenting) (noting that the quoted language in *Adams* was relied on in the 1805 case only "as a reason why [the Court] should interpret an arguably ambiguous [statute of limitation] to apply to the claim at issue"); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 375-76 (1977) (Rehnquist, J., dissenting) (quoting *Adams* to support the argument that in "any case not involving the United States in its sovereign capacity" a time limitation period should apply).

233. See *Adams*, 6 U.S. (2 Cranch) at 336. Perhaps because a private party brought the suit in *Adams*, the Supreme Court did not discuss the principle of *nullum tempus occurrit regi* ("time does not run against the king"). See generally *supra* notes 33-47 and accompanying text.

234. See *Adams*, 6 U.S. (2 Cranch) at 340.

for[.]<sup>235</sup>

The Court also decided, before making the statement quoted by the *3M* court, that the 1790 Act applied not only to forfeitures in statutes already existing in 1790, but also to those created afterward, stating that “the words of the [1790] [A]ct of Congress plainly apply to all fines and forfeitures under any penal act, whenever that act might pass.”<sup>236</sup>

In context, the Supreme Court’s final statement,<sup>237</sup> the sentence quoted in *3M*,<sup>238</sup> seems to be no more than a reference to the fundamental principle discussed in Part I.B.1, i.e., the rule that a statute must be interpreted as a whole. The Court appears to be pointing out the incongruity that would result if the Court were to interpret the 1790 Act to permit debt actions to collect penalties to be brought at any time, when the statute clearly limited prosecutions for the serious crime of treason to three years after the offense.<sup>239</sup> The 1790 Act set forth the limitation periods for all federal criminal prosecutions in a single section, including a three-year time limitation on prosecutions for “treason or other capital offence” (except murder and forgery) and a two-year time limitation on prosecutions for “any offence, not capital” or “for any fine or forfeiture under any penal statute.”<sup>240</sup> The Court’s observation with respect to treason makes sense only as a reference to the need to interpret the statute to be internally consistent. Because the serious crime of treason could not be prosecuted after three years, “it could scarcely be supposed” that under the same section of the same statute a defendant would “remain for ever liable” for a pecuniary penalty, a sanction imposed for a much less serious crime than treason.<sup>241</sup> Further, the Court’s statement about the limitation period for prosecutions for treason seems to be an aside, after the Court has already resolved the two issues present in the *Adams* case.<sup>242</sup> It should

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235. *Id.* at 341.

236. *See id.* at 342.

237. *See id.* (discussing the statute of limitation for treason).

238. The sentence from *Adams* quoted by the *3M* court is: “In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture.” *3M Co. v. Browner*, 17 F.3d 1454, 1457 (D.C. Cir. 1994) (quoting *Adams*, 6 U.S. (2 Cranch) at 342, miscited as 341).

239. *See id.*

240. *See* Act of Apr. 30, 1790, ch. 10, § 32, 1 Stat. 119.

241. *See Adams*, 6 U.S. (2 Cranch) at 342.

242. *See id.* (noting that the two issues were whether the limitation applied to debt actions as well as to criminal prosecutions and whether it applied to penalties enacted after the 1790 Act). One is tempted to speculate that perhaps the Court’s statement in *Adams* was intended to express dismay at the fact that the statute set such a short time limitation, only three years, on prosecutions for treason.

be noted that Congress later abolished the time limitation on indictments for treason, and a defendant now, in the words of the *Adams* opinion, “remain[s] for ever liable” for that crime.<sup>243</sup> Thus, under current law, deciding that actions for penalties could be brought without time limitation would no longer result in the inconsistency in statutory interpretation that concerned the Supreme Court in *Adams* in 1805.

3. *The court construes § 2462 in isolation and relies on unpersuasive authorities*

In its analysis of whether § 2462 applies to administrative proceedings, the *3M* court also violated the cardinal principle of statutory construction—to interpret the statute as a whole, in the context of both history and other relevant statutes. Instead, the court interpreted the words “action or proceeding” in isolation and reached the obvious conclusion that an administrative proceeding is a “proceeding.”<sup>244</sup> Although that is true, it begs the relevant question—are administrative proceedings the *type* of proceedings to which Congress referred in § 2462? As demonstrated earlier in this Article, when the plain language of § 2462 is read in context, the word “proceeding” in that section clearly means a court proceeding,<sup>245</sup> such as a libel proceeding in admiralty.

In addition to relying on the literal meaning of “proceeding,” out of context, the *3M* court relied on other authorities to support its holding that § 2462 applies to administrative proceedings, none of which are persuasive. First, the court relied on the government’s stipulation in *Meyer* that § 2462 applied to the initiation of the administrative proceeding.<sup>246</sup> As discussed earlier, however, the government’s stipulation in *Meyer* is neither binding nor persuasive.<sup>247</sup> The *3M* court then relied on three cases that it believed “assumed,

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243. See 18 U.S.C. § 3281 (1994) (allowing indictments for capital offenses without any time limitation); 18 U.S.C. § 2381 (1994) (providing that treason is punishable by death).

244. See *3M*, 17 F.3d at 1457 (“[W]e have held, an administrative proceeding . . . is an action, suit, or proceeding.”) (citations omitted).

245. See *supra* Part I.B.2 (arguing that the statute by its terms applies to judicial proceedings and that nothing in the statute suggests that Congress meant anything other than court proceedings).

246. See *3M*, 17 F.3d at 1455-56 (noting that in *Meyer* the government had “agreed” that § 2462 required that the administrative proceeding be commenced within five years of the offense).

247. See *supra* Part I.B.5 (observing that the *Meyer* court found the government’s stipulation to be based on “wobbly” analysis and that the stipulation concerned an issue not before the court because the administrative proceeding had been commenced less than five years after the offense, and arguing that, in any event, the stipulation is not binding on the government in other cases).

without discussion, that § 2462 covers administrative penalty proceedings.<sup>248</sup> In fact, only two of the cases made this assumption and, because it was merely an assumption, they are no more persuasive than the government concession in *Meyer*.<sup>249</sup> The third case actually came to the opposite conclusion, holding that an administrative proceeding to assess a penalty was *not* subject to § 2462.<sup>250</sup>

The *3M* court further buttressed its assertion that § 2462 applied to administrative proceedings with two 1965 congressional committee reports on unrelated legislation that also assumed without discussion that § 2462 applied to administrative as well as judicial proceedings.<sup>251</sup> Even if these congressional committees had actually considered the issue, their views should have little, if any, value. The Supreme Court often cautions that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”<sup>252</sup>

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248. *3M*, 17 F.3d at 1456 (citing *Williams v. United States Dep’t of Transp.*, 781 F.2d 1573, 1578 n.8 (11th Cir. 1986); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965); *The A/S Glittre v. Dill*, 152 F. Supp. 934, 940 (S.D.N.Y. 1957)).

249. In *Williams*, the court, in rejecting the claim that laches barred a Coast Guard administrative action for a monetary penalty where notice of the charges was issued four months after the violation, merely commented that four months was “well within the five-year statute of limitations.” See *Williams*, 781 F.2d at 1578 n.8. *H.P. Lambert* was later overruled, as discussed below, and relied on obviously flawed reasoning. The case involved a petition for review of a decision by the Secretary of the Treasury to revoke the petitioner’s customhouse broker’s license. See *H.P. Lambert*, 354 F.2d at 822. The substantive statute expressly provided that the agency could “at any time, for good and sufficient reasons, serve notice in writing upon any customhouse broker . . . to show cause why said license [should] not be revoked[.]” *Id.* (emphasis added) (quoting 19 U.S.C. § 1641 (current version at 19 U.S.C. § 1641(d) (1994 & Supp. 1998)). Yet, the court held that § 2462 applied and barred the administrative proceeding because it was commenced more than five years after most of the relevant events. See *id.* (“[T]he general policy of a statute of limitations is so deeply ingrained in our legal system that a period of limitation made generally applicable to such proceedings, such as § 2462, is not to be avoided unless that purpose is made manifestly clear.”). *Lambert* was later implicitly overruled when the Supreme Court held that the term “at any time” in another statute meant that no statute of limitation applied. See *United States v. Badaracco*, 464 U.S. 386, 396 (1984) (holding that the IRS’s authority to assess a tax “at any time” meant that no statute of limitation was intended under the Act).

250. See *Glittre*, 152 F. Supp. at 940; see also *supra* notes 202-05 and accompanying text (discussing the *Glittre* case).

251. See *3M*, 17 F.3d at 1456 (noting that the committee reports (cited, criticized, and rejected by the *Meyer* court) concerned “unrelated legislation” and “assumed” that § 2462 is applicable to administrative as well as judicial proceedings).

252. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)); see also *California Div. of Labor Standards Enforcement v. Dillingham Const.*, 519 U.S. 316, 332 n.8 (1997) (same); *O’Gilvie v. United States*, 519 U.S. 79, 90 (1996) (same); *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) (“[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever.”).

Unsupported assumptions of a subsequent Congress are obviously even less useful in discerning congressional intent.

4. *The 3M court mistakenly rejects the government's argument that § 2462 applies only to actions for the "enforcement" of a penalty*

The 3M decision also rejected the government's contention that § 2462 applied only to actions for the "enforcement" of a penalty and not to those brought to assess a penalty.<sup>253</sup> Both the court and the parties treated this contention as a different question than the "court-agency dichotomy"<sup>254</sup> the court had already rejected. But in the context of the 3M case it was actually the same question. If the EPA was correct that "'enforcement' connotes an action to collect a penalty already imposed"<sup>255</sup> that, in effect, would mean § 2462 would not apply to administrative proceedings because those proceedings "assess" penalties, either formally or informally, and are a preliminary step necessary before an action to "enforce" or collect the penalty may be brought.<sup>256</sup> Administrative agencies generally do not have the power to "collect" a penalty or otherwise compel compliance with their orders without court action.<sup>257</sup> For this reason, the Federal Rules of Appellate Procedure provide for petitions for "enforcement" of agency orders, meaning proceedings to obtain court judgments embodying the orders,<sup>258</sup> and most statutes delegating subpoena power to administrative agencies enable the agencies to enlist court assistance to compel witnesses to testify and to produce documents through "subpoena enforcement" proceedings.<sup>259</sup> Moreover, the

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There are situations, unlike the one here, where a subsequent Congress *in amending the very statutory scheme at issue* has stated its intent that a certain meaning be given to a provision. In such circumstances, Congress's subsequent statement may be given considerable weight by a court in interpreting the statute. *See* *Bufferd v. CIR*, 506 U.S. 523, 530 n.10 (1993) (noting that "while the views of Congress engaged in the amendment of existing law are 'entitled to significant weight,'" in that case a Senate Report was of little value in determining legislative intent because circumstances indicated that the Report may have been colored by the views of the Tax Court) (citing *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980)).

253. *See 3M*, 17 F.3d at 1458-59 (stating that the EPA's reading must be rejected because "[n]o one could have construed § 2462's immediate predecessor to mean what the EPA urges").

254. *See id.* at 1457 (opining that it is unclear whether the EPA's Chief Judicial Officer relied on the court-agency dichotomy in his decision and dismissing it as an issue because the EPA failed to raise any argument in support of it).

255. *Id.*

256. *See supra* Part I.B.4-5.

257. *See supra* note 23 (discussing the rare exceptions where the government may determine liability and collect penalties in summary proceedings).

258. *See* FED. R. APP. P. 15(a)-(b).

259. *See, e.g.*, *ICC v. Brimson*, 154 U.S. 447, 489 (1894) (holding that courts possess constitutional authority to enforce agency subpoenas); *see also, e.g.*, *Shasta*

Supreme Court has referred to an agency-assessed penalty under one statute as being “enforceable only [in] a subsequent judicial proceeding”—clearly using the adjectival form of “enforce” to refer to the function of obtaining a court judgment incorporating the administrative order.<sup>260</sup>

To the extent the question of whether § 2462 applies only to “enforcement” actions is distinct from the question of whether it applies to administrative proceedings, the *3M* court’s reasoning is flawed. The court construed the word “enforcement” in isolation and without regard to the meaning of the version of § 2462 enacted in 1839, although later in the opinion the court acknowledges the 1839 Act language as controlling.<sup>261</sup> In interpreting the word “enforcement,” the court merely concluded cryptically, without adequately considering the 1839 Act language, that “[n]o one could have construed § 2462’s immediate predecessor to mean what EPA urges”—i.e., that § 2462’s limitation period applied only to actions to collect or “enforce” in a court action a penalty that had been assessed.<sup>262</sup>

Although the *3M* court stated that “no one could have construed” the statute to apply solely to actions to collect or enforce penalties, this view is contrary to both the plain text of the 1839 Act and the history of the term “action for a penalty.”<sup>263</sup> The only kind of action Congress could have had in mind when it enacted the 1839 version of § 2462 was an action in debt to recover a statutorily prescribed monetary forfeiture or a proceeding to recover a forfeiture of property—the kinds of court proceedings to recover penalties that existed in 1839, as discussed earlier in this Article.<sup>264</sup> The cause of action that existed in 1839 was one to recover or collect a sum deemed to be due and owing or forfeited property—an “accrued” penalty.<sup>265</sup> Such an action could be brought only in court; its purpose

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Minerals & Chem. Co. v. SEC, 328 F.2d 285, 286 (10th Cir. 1964) (same).

260. See *National Indep. Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 390 (1976) (noting that after administrative assessment of the penalty, “the penalty [was] enforceable only by way of a subsequent judicial proceeding in which the operator is entitled to a trial *de novo* as to the amount of the penalty”) (emphasis added).

261. See *3M Co. v. Browner*, 17 F.3d 1453, 1458-59, 1462 (D.C. Cir. 1994) (concluding that “in light of the legal meaning of the word ‘accrued’ in 1839, . . . we hold that an action, suit, or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty”).

262. See *id.* at 1458.

263. See *supra* Part I.B.1-5 (explaining that the plain language of the 1948 Act, of which § 2462 is a part, the legislative history of the Act, and historic use of the phrase “suit for a penalty” or “action for a penalty” all support the interpretation that § 2462 applies only to court actions to collect existing penalties and forfeitures).

264. See *supra* Part I.B.3-4.

265. See *supra* Part I.B.4, notes 122-26, 148-54 and accompanying text.

was to reduce the debt to a court judgment or to formally condone the seizure of forfeited property.<sup>266</sup>

The *3M* court failed to consider that the word “enforcement” is used widely in the law and has different meanings in different contexts. “Enforcement” is used to refer to actions brought by the prosecutorial branch of an administrative agency before the agency’s adjudicatory body.<sup>267</sup> However, the fact that “enforcement” is sometimes used in that sense does not mean that in the context of § 2462 this is what the word means. A civil proceeding to reduce to a court judgment a penalty set by statute is a proceeding for “enforcement” of a penalty in a different sense—the sense of compelling compliance, as the Supreme Court has used the term.<sup>268</sup> The meaning of the word “enforcement” in the current version of § 2462 must be consistent with the context and history of the provision, particularly the 1839 Act language, because Congress did not intend to change the meaning of the provision when it inserted the word “enforcement” in the 1948 Act version.<sup>269</sup>

A proceeding to reduce a penalty to a court judgment is the kind of “suit or prosecution” that the 1839 Act intended to limit because, as demonstrated earlier in this Article,<sup>270</sup> that is what “suit or prosecution . . . for [a] penalty or forfeiture” meant in 1839. Therefore, contrary to the *3M* court’s holding, the word “enforcement” in current § 2462 should be construed consistently with that meaning—that is, to refer to actions brought to reduce to a court judgment a penalty of a specific amount or specific property. A specific penalty would include one set by statute (as was common before the twentieth century) and one determined after an administrative assessment, either formal or informal (as Congress has provided in most modern statutes).

The *3M* court also believed that “§ 2462’s application to cases in which the court first adjudicates liability and then sets the penalty or fine is unquestioned” and cited numerous cases to support this statement.<sup>271</sup> The cited cases, however, do not support the court’s assertion, and none considered the plain language and history of

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266. See *supra* Part I.B.4, notes 122-26 and accompanying text.

267. See *3M*, 17 F.3d at 1459 (citing case that referred to a TSCA administrative proceeding as an “enforcement action”).

268. See *supra* note 260 and accompanying text.

269. See *supra* note 80 and accompanying text.

270. See *supra* notes 83-132 and accompanying text.

271. See *3M*, 17 F.3d at 1459 & n.12 (citing numerous circuit and district court cases that assertedly support of this proposition).

§ 2462 discussed and evaluated in this Article.<sup>272</sup>

Only three of the cases cited by the *3M* court construed the pre-1948 Act language, before Congress changed the “phraseology” in what is now § 2462.<sup>273</sup> Contrary to the belief of the *3M* court, *United States v. Maillard*<sup>274</sup> was not a case where liability was first determined and the court then “assessed” a penalty. Rather, *Maillard* involved an action to reduce to a court judgment a forfeiture specified by statute.<sup>275</sup> *Maillard* held that the 1839 Act version of § 2462 applied to a suit to recover the value of certain merchandise under § 66 of the 1799 customs law,<sup>276</sup> which provided that if goods were entered on an invoice that did not reflect their actual cost, “all such goods, wares, or merchandise, or the value thereof . . . shall be forfeited.”<sup>277</sup> Unlike the provision at issue in *3M*, this statute represents the type of fixed penalty that “accrued” upon the violation and to which Congress clearly intended the predecessor of § 2462 to apply.<sup>278</sup> In *Maillard*, the specified penalty could be sued for in court as soon as the violation occurred.<sup>279</sup>

*Carter v. New Orleans & N.E.R. Co.*,<sup>280</sup> interpreting R.S. § 1047 (the 1839 version of § 2462, as revised in 1874), was not a “case[] in which the court first adjudicates liability and then sets the penalty or fine.” *Carter* held only that *if* the suit at issue were one for a penalty then the federal limitation period in R.S. § 1047 would apply, rather than the one-year limitation period that the defendant argued barred the suit.<sup>281</sup>

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272. Contrary to the court’s interpretation, the cited cases are generally not cases involving a determination of liability followed by a discretionary court assessment of a penalty. *See id.* at 1459 n.12. Not one of the cited cases supports the court’s assertion that § 2462 applies to administrative proceedings. There is no discussion in any of the cases of the plain text or history of § 2462, which is essential to an accurate understanding of the statute.

273. *See* *United States v. Maillard*, 26 F. Cas. 1140 (C.C.S.D.N.Y. 1871) (No. 15,709); *Carter v. New Orleans & N.E.R. Co.*, 143 F. 99 (5th Cir. 1906); *United States v. Smith, Kline, & French Co.*, 184 F. 532 (E.D. Pa. 1911).

274. 26 F. Cas. 1140 (C.C.S.D.N.Y. 1871) (No. 15,709).

275. *See id.* at 1141 (stating that the government sought to recover the value of merchandise it alleged had been forfeited, as specified in the statute, by the defendants as the consequence of their violations of the customs law).

276. *See* Act of Mar. 2, 1799, ch. 22, § 66, 1 Stat. 627, 677 (1799); *see also* Appendix B.

277. *Maillard*, 26 F. Cas. at 1141 (quoting the 1799 customs statute, cited *supra* note 276).

278. *See supra* note 48.

279. *See Maillard*, 26 F. Cas. at 1141. There is no indication in *Maillard* whether a dispute occurred about the value of the goods. It is possible that the value was easily determined by an inspection or other method that called for little or no exercise of discretion by the court.

280. 143 F. 99 (5th Cir. 1906).

281. The question before the court in *Carter* was whether a suit for damages by a

*United States v. Smith, Kline & French Co.*<sup>282</sup> involved a “suit in assumpsit” to recover the sum of \$1,800 specified in a statute as a special tax on persons engaged in “rectifying, purifying, and refining distilled spirits.”<sup>283</sup> The court stated, without analysis, that R.S. § 1047 barred recovery “beyond five years from the date of the institution of the suit,” a conclusion that seems questionable because the sum at issue was a tax, not a penalty.<sup>284</sup>

The remaining cases cited by the *3M* court are equally unresponsive of its position that § 2462 “unquestionably” applies to cases brought in court to determine liability for a penalty and to assess the penalty. This issue simply was never considered by the cited authorities. Both *United States v. Walsh*<sup>285</sup> and *Sierra Club v. Chevron U.S.A., Inc.*<sup>286</sup> are cases in which a defendant sought to evade liability by asserting that a time limitation period *shorter* than the five-year limitation period provided in § 2462 applied.<sup>287</sup> If § 2462 applied, the actions were timely. In this context, both courts held that § 2462 applied, but neither *Walsh* nor *Sierra Club* recognized or discussed the long history and relevant context of § 2462.<sup>288</sup>

*United States v. Central Soya, Inc.*<sup>289</sup> was a case in which the lower court had held that the government’s action was barred by the three-year time limitation on actions based on common law negligence principles contained in 28 U.S.C. § 2415(b).<sup>290</sup> The *Central Soya* court partially disagreed with the lower court’s decision, holding that to the extent the government sought the pecuniary penalties specified in § 411 of the Rivers and Harbors Act of 1899, the suit was not barred under the longer time limitation period of § 2462.<sup>291</sup> The Rivers and

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private plaintiff against a common carrier under a statute requiring common carriers to charge the same rates for “like and contemporaneous” services was barred by a one-year state limitation period on an “action for a penalty.” *See id.* at 100. The court did not decide whether the suit was one for damages—which it clearly seems to have been, from the language of the substantive statute violated—but ruled that *if* the suit were one for a penalty, then the longer federal limitation period applied rather than the one-year state limitation. *See id.* at 102.

282. 184 F. 532 (E.D. Pa. 1911).

283. *See id.* at 532-33.

284. *See id.* at 534 (discussing the fact that the government sought to recover a special tax on the distillation of alcohol for the preparation of medicinal products).

285. 8 F.3d 659 (9th Cir. 1993).

286. 834 F.2d 1517 (9th Cir. 1987).

287. *See Walsh*, 8 F.3d at 662 (evaluating the argument that a three-year statute of limitation applied); *Sierra Club*, 834 F.2d at 1518 (same).

288. *See Walsh*, 8 F.3d at 662 (concluding that § 2462 applied without analysis of its history or context); *Sierra Club*, 834 F.2d at 1520-23 (same).

289. 697 F.2d 165, 166 (7th Cir. 1982).

290. *See id.* (stating that “[t]he district court concluded that United States’ entire action was time-barred under 28 U.S.C. § 2415(b)”).

291. *See id.* at 168 (citing Rivers and Harbors Act of 1899, 33 U.S.C. § 412 (1994)).

Harbors Act stated a range of penalties between \$500 and \$2,500, rather than a specific amount, as did most eighteenth and nineteenth-century statutes. In all other respects, however, the Rivers and Harbors Act is very similar to the “transitive” type of penal statute with which Congress was familiar in 1839, and to which the 1839 version of § 2462 was intended to apply.<sup>292</sup> The statute is less similar to modern statutory schemes, which authorize a civil suit based on the violation, rather than on a debt for a specific penalty, and leave determination of the penalty amount largely to the discretion of the court.<sup>293</sup>

*United States v. Ancorp National Services, Inc.*<sup>294</sup> involved an action brought under the Federal Trade Commission (“FTC”) Act<sup>295</sup> to recover civil penalties for violations of a prior FTC cease and desist order. The court assumed, without discussion, that § 2462 barred penalties for violations that occurred more than five years before the suit was brought.<sup>296</sup> The other cases cited by the 3<sup>rd</sup> court are all district court or Court of Claims decisions that either contain no discussion of the history and context of § 2462, or merely refer to § 2462 in *dicta*.<sup>297</sup>

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292. See *supra* Part I.B.3 (expanding upon the purpose and effects of the 1839 Act provision).

293. See *infra* Part III. The Rivers and Harbors Act of 1899 has been amended and now provides for fines of up to \$25,000 per day for the obstruction of navigable waterways. See 33 U.S.C. § 411 (1994).

294. 516 F.2d 198 (2d Cir. 1975).

295. 15 U.S.C. § 45(a) (1) (1970).

296. See *Ancorp Nat'l Servs.*, 516 F.2d at 201 n.5 (stating that “recovery for violations based on payments allegedly received prior to December 31, 1965 is barred by the five-year statute of limitations applicable to civil penalty actions”).

297. Several of these remaining decisions cited by the 3<sup>rd</sup> court apply § 2462 rather than a shorter time limitation period and find the actions timely; others bar recovery of only some of the penalties sought, so the wrongdoer is not absolved of all sanctions; still others simply assume that § 2462 applies; and, finally, some involve mandatory, unilaterally imposed statutory penalties recoverable in court actions, actions of the type Congress intended to limit. See, e.g., *Erie Basin Metal Prod., Inc. v. United States*, 150 F. Supp. 561, 564 (Ct. Cl. 1957) (holding that § 2462 barred the government’s counterclaim for double damages under the Contract Settlement Act); *FTC v. Bonnie & Co. Fashions, Inc.*, No. 90-4454 (HLS), 1992 WL 314007, at \*8 n.8 (D.N.J. Sept. 22, 1992) (stating that the action was timely if § 2462 applied, and then holding that it applied, rather than a shorter time limitation period urged by defendant); *United States v. Island Park*, 791 F. Supp. 354, 367-68 (E.D.N.Y. 1992) (holding that § 2462 barred imposition of monetary penalty, but not injunctive relief and declaratory judgment, in action brought under the Fair Housing Act, 42 U.S.C. 3614(a), where facts showed the government had long been aware of violations but failed to take action); *United States v. C. & R. Trucking*, 537 F. Supp. 1080, 1083 (N.D. W. Va. 1982) (holding that an action to assess monetary penalty under the Clean Water Act was timely under § 2462); *FTC v. Lukens Steel Co.*, 454 F. Supp. 1182, 1185 n.2 (D.D.C. 1978) (assuming without discussion that § 2462 barred recovery of civil penalties prescribed in the FTC Act for defendant’s alleged violations of prior FTC order that occurred more than five years earlier); *United States v. Fraser*, 156 F. Supp. 144, 147-49 (D. Mont. 1957) (holding that under one

5. *The court errs in holding that the five-year time limitation period in § 2462 is triggered by the violation, regardless of the government's knowledge*

The third and final error in the *3M* decision is the holding that the five-year time limitation period is triggered by the violation of law that gave rise to the imposition of a penalty, irrespective of whether the government knew of the violation—and even if the violator had taken steps to conceal the conduct.<sup>298</sup> In this respect, the court viewed the 1839 Act version of the statute as controlling,<sup>299</sup> but then failed to consider that under the 1839 version it was the *accrual of the penalty or forfeiture* that triggered the five-year period, not the violation. The *3M* court relied on the holding in *United States v. Core Laboratories Inc.*,<sup>300</sup> as well as cases cited in *Core*, for the proposition that in interpreting § 2462 the date of violation has long been accepted “without question as the date when the claim first accrued.”<sup>301</sup> The reasoning of *Core*, however, is unpersuasive and leads to the anomaly that an agency would have only one five-year period from the date of violation to initiate an administrative proceeding, complete all review proceedings, and bring a collection proceeding in court.<sup>302</sup> Furthermore, as demonstrated in Appendix C, *infra*, the majority of the cases that the *Core* court relied on either fail to support its conclusion or were wrongly decided. Finally, the *3M* court also inexplicably failed to recognize the well-established “discovery rule,” under which a cause of action does not accrue until the plaintiff discovers, or reasonably should have discovered, the facts

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count of nine-count complaint, § 2462 barred recovery of statutory \$1 per head penalty for grazing cattle on Indian lands, prescribed in 25 U.S.C. § 179, but permitting recovery of the same penalty under counts two through five of the complaint), *aff'd*, 261 F.2d 282 (9th Cir. 1958) (not discussing § 2462); *United States v. Covollo*, 136 F. Supp. 107, 108-09 n.2 (E.D. Pa. 1955) (holding that action under Surplus Property Act was timely under § 2462). It should be noted with regard to the last case cited, the *Covollo* case, that in *Rex Trailer Co. v. United States*, 350 U.S. 148, (1956), the Supreme Court held that § 2462 does not apply to actions under the Surplus Property Act because the Act provides for liquidated damages, not penalties.

298. See *3M Co. v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994) (analyzing the meaning of § 2462's language “unless commenced within five years from the date when the claim first accrued”).

299. See *id.* at 1458.

300. 759 F.2d 480, 483 (5th Cir. 1985); see *supra* note 68 and accompanying text; see also Appendix C (discussing cases relied on in *Core*).

301. *3M*, 17 F.3d at 1462 (adopting the Fifth Circuit's view that precedent “clearly demonstrates” that under § 2462 the date of the underlying violation is the date upon which the statute of limitation begins to run).

302. See *supra* notes 124-26 and accompanying text (discussing the *Meyer* court's analysis of the faulty logic of the *Core* decision). This result would give the respondent a strong incentive to draw out the administrative process in hopes of running out the limitation period for bringing the court action, which is an unreasonable result Congress could not have intended.

that form the basis for the action.<sup>303</sup>

*B. The Johnson Decision Is Wrong in Applying § 2462 to the Suspension of a Professional License*

Even if § 2462 did apply to the initiation of administrative proceedings, *Johnson v. SEC*<sup>304</sup> was mistaken in its conclusion that in § 2462 the word “penalty” refers to non-monetary sanctions or remedies such as a professional license suspension.<sup>305</sup> It is true that the meaning of the word “penalty” in appropriate contexts may include any “sanction imposed by the government for unlawful or proscribed conduct which goes beyond remedying the damage caused to the harmed party.”<sup>306</sup> As demonstrated in Parts I.B.2 and 3, however, it is clear that the word “penalty,” as used in § 2462, has a narrower meaning, namely, an amount of money imposed as a forfeiture for a violation of a statute.<sup>307</sup> This narrower meaning is the one used by Blackstone to refer to penalties recoverable in debt actions.<sup>308</sup> This narrow definition of “penalty” is also the last of three given in the 1891 First Edition of *Black’s Law Dictionary*. “The term [penalty] also denotes money recoverable by virtue of a statute imposing a payment by way of punishment.”<sup>309</sup>

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303. See *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874) (holding that the statute of limitation in fraud cases does not begin to run until the discovery of the fraud); *accord* *Exploration Co. v. United States*, 247 U.S. 436, 449 (1918) (applying this “discovery rule” to “suits to vacate and annul patents”); *Delaware State College v. Ricks*, 449 U.S. 250, 262 (1980) (holding that an employee’s discrimination claim accrued when the employer established its official position “and made that position apparent” to the employee); *United States v. Kubrick*, 444 U.S. 111, 120-21 n.7 (1979) (adopting the “discovery rule” for Federal Tort Claims Act cases); *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (noting consensus among the courts of appeals that the “discovery rule is the general accrual rule in federal courts” and “is to be applied in all federal question cases ‘in the absence of a contrary directive from Congress’s’” (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)); see also *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (referring to the “venerable principle” of the discovery rule).

304. 87 F.3d 484 (D.C. Cir. 1996).

305. See *id.* at 492 (finding the suspension and censure of a securities industry supervisor under the Securities and Exchange Act of 1934 to be a “penalty” within the meaning of § 2462 because it was penal in nature in that the SEC’s action was a form of punishment that exceeded compensating customers for their actual loss).

306. *Id.*

307. See *supra* notes 67, 96, 113 and accompanying text; *infra* note 390.

308. See 3 WILLIAM BLACKSTONE, COMMENTARIES 160 (1768) (discussing the history of debt actions for penalties under English common law).

309. BLACK’S LAW DICTIONARY 884 (1st ed. 1891). The first definition given for “penalty” is “[t]he sum of money which the obligor of a bond undertakes to pay . . . [if he fails] to perform . . . the terms imposed on him by the conditions of the bond.” *Id.* at 883. The second definition is more general: “a punishment imposed by statute as the consequence . . . of a certain specified offense.” *Id.* *Black’s* notes under the second definition that “[t]he terms ‘fine,’ ‘forfeiture,’ and ‘penalty’ are often used

As demonstrated below, three Supreme Court decisions relied on by the *Johnson* court to support its conclusion that in § 2462 the word “penalty” has a broader meaning, encompassing, among other things, a professional license suspension, actually do not support that view. In fact, all three cases, in their discussions of the concept of “penal” statutes, indirectly support the conclusion that “penalty,” as used in § 2462, means money recoverable as punishment for a statutory violation. The three cases considered only whether the money sought by the plaintiffs in each case constituted damages or, alternatively, “penalties.” All three cases were decided before the 1938 landmark case of *Helvering v. Mitchell*,<sup>310</sup> which first recognized the concept of a “civil” penalty. Before *Mitchell*, the terms “penalty” and “penal” were synonymous with “criminal,” even though most penalties could be collected through civil procedural means.<sup>311</sup> The distinction made in all three cases cited in the *Johnson* opinion is simply the distinction between damages, a civil remedy that compensates a private party for an individual wrong, and a criminal “penalty” that punishes for a wrong against the public. This distinction is not useful in determining what constitutes a “civil penalty” under § 2462, because by definition the term includes only non-criminal sanctions.

In *Huntington v. Attrill*,<sup>312</sup> the first of the three cases on which the *Johnson* court relied, the Supreme Court considered whether a judgment rendered by a New York court under a New York statute “making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts,” was enforceable in Maryland under the Full Faith and Credit Clause.<sup>313</sup> The resolution of this question depended on whether the statute’s purpose was to punish an offense against the public justice of the state (making it a “penal statute”) or to protect creditors of the corporation.<sup>314</sup> If the statute was “penal,” Maryland would not be obliged to enforce the New York judgment because “[t]he courts of

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loosely, and even confusedly . . . .” *Id.*

310. 303 U.S. 391, 399, 404 (1938) (holding that a money penalty imposed by statute could be remedial and civil, and that this type of penalty could be sought in addition to criminal penalties without violating double jeopardy principles).

311. *See, e.g.*, *Lees v. United States*, 150 U.S. 476, 480 (1893) (holding that though an action to recover a penalty for importing aliens to perform labor is “civil in form, [it] is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself”).

312. 146 U.S. 657 (1892).

313. *See id.* at 666 (stating that the Court has jurisdiction to consider the issue of Full Faith and Credit); *see also* U.S. CONST. art. IV, § 1 (establishing Full Faith and Credit obligations).

314. *See Huntington*, 146 U.S. at 668.

no country [may] execute the penal laws of another.”<sup>315</sup> The Court observed that “[i]n interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word ‘penal’ in our language.”<sup>316</sup> The Court continued:

[T]he words “penal” and “penalty” have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. . . . But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered [for example, punitive damages]. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the “penal sum” or “penalty” of a bond.<sup>317</sup>

The Court decided that the statute was not penal,<sup>318</sup> but rather that it provided protection for creditors of the corporation. Thus, the judgment was one for damages and it was enforceable in other states.<sup>319</sup> Because the more general definition of “penalty,” meaning some form of punishment, sufficed to resolve the issue in *Huntington* and because the then-existing version of § 2462 was not involved, the Court had no occasion to consider what the word “penalty” meant in the context of § 2462. The Court’s observation that the word “penalty” has many meanings in different contexts indirectly supports the argument that its meaning in § 2462 is not the broad, general definition used to resolve *Huntington*, and on which the *3M* court relied, but rather the narrow meaning of a sum of money forfeited under a penal statute, a meaning that was well known in the eighteenth and nineteenth centuries when the statute was first enacted.

The Supreme Court’s decision in *Chattanooga Foundry & Pipe Works v. City of Atlanta*<sup>320</sup> applied the same broad definition of “penal” adopted in *Huntington*. *Chattanooga* involved the pre-1948 version of

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315. *Id.* at 666 (quoting Chief Justice Marshall in *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825)). It was a well-settled principle that neither the federal courts nor the courts of other states would enforce the “penal laws” of a state, including “prosecutions and sentences for crimes” and “all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes . . . and to all judgments for such penalties.” *Id.* at 670-71.

316. *Id.* at 666.

317. *See id.* at 666-67 (citations omitted); *see also supra* note 309.

318. *See id.* at 688 (finding that the statute was not penal and, therefore, recognizable under Full Faith and Credit).

319. *See id.* (holding that other states may recognize judgment of damages).

320. 203 U.S. 390, 397 (1906) (stating that it is undisputed in light of *Huntington* that the meaning of “penalty” in R.S. § 1047 does not include damages).

§ 2462 and held that the statute of limitation did not apply to a claim for damages under a federal antitrust statute.<sup>321</sup> Again, the broad, general definition of “penal” sufficed because the substantive statute provided for damages<sup>322</sup> and damages are not a penalty even under the broad definition. It was unnecessary for the Court to consider the crucial issue in the *Johnson* case: whether “penalty or forfeiture” in the pre-1948 version of § 2462 was limited to money and property.<sup>323</sup>

The third case cited in *Johnson* to support its interpretation of “penalty” was *Meeker v. Lehigh Valley R.R. Co.*,<sup>324</sup> which held that the five-year statute of limitation in the pre-1948 version of § 2462 was inapplicable to a lawsuit commenced to collect money the defendant owed the plaintiff under an “order of reparation” issued by the Interstate Commerce Commission (“ICC”).<sup>325</sup> The Court’s analysis was that the statute’s use of the words “penalty or forfeiture” referred to something “imposed in a punitive way for an infraction of a public law, and did not include a liability imposed solely for the purpose of redressing a private injury.”<sup>326</sup> Because the reparation order at issue was one to compensate a private party for excessive rail rates he had paid, it redressed a private injury and was not penal. In *Meeker*, just as in the other two cases, the general definition of penalty was sufficient to rule out the payment at issue as a form of “penalty” so there was no need to examine the term more closely. The definition used, i.e., “something imposed in a punitive way,” is not inconsistent with the narrower definition used by Blackstone and in the third definition of “penalty” in the 1891 edition of Black’s Law Dictionary, in which the “something” punitive is restricted to money.<sup>327</sup>

The *Johnson* court did not consider the effect of the later-decided *Helvering v. Mitchell*,<sup>328</sup> on the interpretation of “penalty” articulated in

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321. *See id.*

322. *See id.* at 396-97 (stating that Congress has the power to create an action for damages).

323. *See id.* at 397 (dismissing the argument that damages were penalties in the present case because that issue had been decided in *Huntington*).

324. 236 U.S. 412 (1915).

325. *See id.* at 419. The ICC issued an order requiring the defendant to pay reparations for having charged the plaintiff excessive and unreasonable rates for rail shipment of coal. *See id.* The *Meeker* Court cited *Chattanooga* as the basis for § 2462’s inapplicability. *See id.* at 423.

326. *Id.* at 423.

327. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 160 (1768) (a “penal statute[]” was one that inflicted a forfeiture for an offense, which penalty could be collected in a debt action); BLACK’S LAW DICTIONARY 884 (1st ed. 1891) (giving as one of three definitions of “penalty”: “money recoverable by virtue of a statute imposing a payment by way of punishment”).

328. 303 U.S. 391 (1938).

*Huntington, Chattanooga, and Meeker*. *Helvering* essentially made the distinction relied upon in *Huntington, Chattanooga, and Meeker* useless in interpreting § 2462. The Court in *Helvering* held that a fifty percent addition to a tax was not intended as punishment<sup>329</sup> and that, therefore, the sanction was not criminal, but rather a civil sanction of remedial character.<sup>330</sup> As a result, the case was not barred by double jeopardy principles, even though the defendant had previously been acquitted of criminal charges based on the same conduct.<sup>331</sup> In *Helvering*, the Court essentially created the concept of the “civil penalty,” because no case up to then had recognized such a concept, and all earlier cases had considered monetary penalties recovered in civil proceedings to be criminal punishments.<sup>332</sup>

The *Helvering* Court also discussed other “remedial sanctions” it deemed to be nonpunitive, one of which was “revocation of a privilege voluntarily granted,” including “disbarment.”<sup>333</sup> Other “remedial sanctions” the Court referred to were “[f]orfeiture of goods or their value and the payment of fixed or variable sums of money.”<sup>334</sup> The Court regarded these sanctions as *not* essentially criminal in nature *because* they were enforceable by civil procedural means.<sup>335</sup> Under this analysis, *no* sanction imposed in a civil proceeding would constitute a “penalty,” yet pursuant to the 1948 Act, § 2462 applies to “civil” penalties.<sup>336</sup> Because the *Helvering* analysis would make the words “civil penalty” in § 2462 meaningless, some other analysis must be used to determine within the universe of civil sanctions which ones are “penalties” within the meaning of § 2462. The earlier discussion in this Article based on the plain language of the 1948 Act, construed as a whole and in its historic context, provides an analysis that makes sense—§ 2462 applies only to “penalties” in the sense of civil forfeitures of money and property.<sup>337</sup>

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329. *See id.* at 401.

330. *See id.* at 402 (“That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not criminal, sanction.”).

331. *See id.* at 404.

332. *See, e.g.,* *Lees v. United States*, 150 U.S. 476, 479 (1893) (“[T]he recovery of a penalty is a proceeding criminal in nature, yet . . . it may be enforced in a civil proceeding.”).

333. *See Helvering*, 303 U.S. at 399 (noting that revocation of a privilege is characteristically free of the punitive criminal element).

334. *Id.* at 400 (explaining that these sanctions have been enforceable in civil proceedings since 1789).

335. *See id.* (observing that such sanctions have been upheld despite the contentions of their criminal nature).

336. *See* 28 U.S.C. § 2462, as adopted in 1948, 62 Stat. 974 (referring to “civil” fines, penalties, and forfeitures).

337. *See supra* Part I.B.2-3.

### III. SECTION 2462 SHOULD BE APPLIED ONLY TO THE KIND OF COURT ACTIONS CONGRESS INTENDED TO LIMIT IN 1839

Parts I and II of this Article have established that the limitation period in § 2462 applies to court proceedings, not to administrative ones, and only to proceedings involving civil monetary penalties and forfeitures of property.<sup>338</sup> It does not necessarily follow that § 2462 applies to every court action alleging a violation of a federal statute in which the remedy (or one of the remedies) sought is a civil monetary penalty, as several courts have assumed without considering the context and history of § 2462 developed in this Article.<sup>339</sup> As discussed in Part I.A., the limitation period should be applied only to court actions Congress “clearly” intended to limit when it adopted the 1839 version of the statute. Court proceedings that do not meet that test should not be limited by § 2462.

As demonstrated in Part I.B., in 1839, suits and actions “for penalties and forfeitures” were debt actions, namely, actions in court to collect sums prescribed by statute as sanctions for statutory infractions (or proceedings to collect sanctions consisting of property).<sup>340</sup> Usually, private parties, who stood to benefit by receiving part or all of the sums recovered, could bring the actions, which made the suits vehicles for private gain in addition to means for vindicating public purposes.<sup>341</sup> These were the kinds of court actions Congress clearly intended to limit when it first adopted the statute now codified as 28 U.S.C. § 2462. In 1839, Congress could not have intended to apply the limitation to actions under modern statutes, many of which are fundamentally different in nature. Modern regulatory statutes usually authorize civil actions based on the fact of a violation rather than on the existence of a collectible, “accrued” penalty and often authorize the court to order injunctive

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338. See *supra* notes 66, 67, 69, 96, 113 and accompanying text; *infra* note 390.

339. See, e.g., *United States v. Telluride*, 146 F.3d 1241, 1245 (10th Cir. 1998) (holding based on government’s concession that § 2462 applied to government action under the Clean Water Act insofar as the suit sought monetary penalties, but not insofar as it sought injunctive relief, stating without discussion that “[s]ection 2462 clearly applies to ‘action[s], suit[s], or proceeding[s] for the enforcement of any civil fine, penalty, forfeiture, pecuniary or otherwise’” (modifications in original, quoting 1948 Act language of § 2462); *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997) (holding, without analysis, essentially the same as *Telluride* case), *cert. denied*, 522 U.S. 1075, *reh’g denied*, 523 U.S. 1041 (1998); *FEC v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996) (holding that § 2462 barred government action under the Federal Election Campaign Act, both the civil penalties sought and injunctive relief), *cert. denied*, 522 U.S. 1015 (1997).

340. See *supra* notes 66, 67, 69, 96, 113 and accompanying text; *infra* note 390.

341. See *supra* note 109 (discussing “bounty” aspect of *qui tam* actions, which give informer a portion or all of statute’s penalty).

relief in addition to or instead of monetary penalties.<sup>342</sup> Further, modern statutes typically give courts discretion, even if only monetary penalties are authorized, to set the amount of a penalty (perhaps within statutory limits), so that no “penalty” can be said to exist until the court’s decision imposes one.<sup>343</sup>

The limitation of § 2462 should not be applied to court actions brought under federal statutes that authorize actions based on the existence of a statutory violation, rather than the existence of an “accrued” penalty, because Congress did not, and could not have, intended to limit these kinds of actions when it adopted the 1839 statute.<sup>344</sup> The limitation of § 2462 should be applied only to court actions that are similar to the debt actions Congress intended to limit. This would include actions to collect payment of penalties previously assessed by agencies and actions to collect penalties set by statute (under the few remaining provisions of that nature). As discussed below in this Part, to apply § 2462 to regulatory actions under complex modern statutory schemes, each of which is based on important public policies (and in which Congress has *not* specifically provided a time limit on bringing actions)<sup>345</sup> would conflict not only with the general principle that time limits do not apply to the government unless expressly provided,<sup>346</sup> but also, as discussed below, with the public policies Congress sought to further in the regulatory statutes.

When considering whether § 2462 applies to an action in court brought under a modern regulatory statute, courts should carefully consider whether the action is similar to the nineteenth-century proceedings Congress intended to limit and if it is not the limitation should not be applied. Courts should also consider the purposes and policies Congress sought to further in the statutory scheme under which the action is brought, and the extent to which application of

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342. See, e.g., The Federal Election Campaign Act, 2 U.S.C. § 437g(a)(6)(A)-(B) (1994) (authorizing the Federal Election Commission, based on violations of the Act, “to institute a civil action in court for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty [not to exceed specified amounts] . . . .”)); Clean Air Act, 42 U.S.C. § 7413(b) (1994) (authorizing the Administrator of the EPA to “commence a civil action” against an alleged violator “for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day for each violation, or both . . .”).

343. See *infra* note 359 and accompanying text.

344. See *supra* notes 121-206 and accompanying text.

345. As stated *supra* note 30, the question of the applicability of § 2462 arises only in the context of regulatory schemes for which Congress has not provided a specific limitation period.

346. See *supra* Part I.A.

§ 2462 to the action may frustrate Congress's intent to impose consequences on violators of the statute.<sup>347</sup> It is beyond the scope of this Article to consider all the federal statutory schemes that authorize civil actions to be brought in court seeking the imposition of monetary penalties for infractions of their substantive provisions and the extent to which § 2462 should apply to those actions. This Part, however, considers an example of a statutory scheme—the federal securities laws<sup>348</sup>—under which the application of § 2462 to civil actions in court would produce peculiar results, possibly frustrating Congress's purposes in enacting the securities laws. A strong argument, outlined below, can be made that under the securities laws no time limitation applies to the initiation of civil actions except those provided in the statutory scheme itself.

As originally enacted, the securities statutes provided no time limitation on the initiation of any civil action by the SEC.<sup>349</sup> The primary remedies available to the Commission prior to 1990 were forms of injunctive relief: injunctions<sup>350</sup> and disgorgement<sup>351</sup> of illegal proceeds.<sup>352</sup> Under two amendments enacted in 1984 and 1988,

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347. *Cf. Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (instructing that the courts should not attempt to “define for all purposes when a cause of action first accrues” and that “[s]uch words are to be interpreted in the light of the general purposes of the [particular] statutes and of its other provisions, and with due regard to those practical ends which are to be served” by the statute) (quotations and citations omitted).

348. For purposes of this Article, the term “federal securities laws” means the four principal statutes administered by the Securities and Exchange Commission, which include: the Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (1994 & Supp. IV 1998); the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (1994 & Supp. IV 1998); the Investment Company Act of 1940, 15 U.S.C. §§ 80a-80a-64 (1994 & Supp. IV 1998); and the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-80b-18a (1994 & Supp. IV 1998).

349. *See generally* Christopher R. Dollase, Comment, *The Appeal of Rind: Limitations of Actions in Securities and Exchange Commission Civil Enforcement Actions*, 49 BUS. LAW. 1793, 1794 (1994) (noting that as originally enacted the securities laws contained no time limitation on a civil action by the SEC).

350. The four main statutes administered by the SEC specifically authorize the Commission to seek injunctions against future violations. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(1) (1994) (stating under section 21(d)(1) that the Commission has discretion to seek permanent or temporary injunctive relief).

351. Although not specifically authorized in the securities laws, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 863 (2d Cir. 1968), held that district courts have the discretionary power to order disgorgement of illegally obtained proceeds. Since then, the courts have almost routinely ordered such relief in Commission cases. *See, e.g.*, *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (stating that the purpose of disgorgement is to prevent unjust enrichment).

352. The only civil penalty provision in any of the four main securities statutes as originally enacted was section 32(b) of the Securities Exchange Act, 15 U.S.C. § 78ff(b) (1994), which discusses the failure to file information, documents, or reports. This provision sets a \$100 per day penalty for failure to file required information, stating, “[s]uch forfeiture, which shall be in lieu of any criminal

Congress gave the Commission the authority to seek to have the courts impose civil penalties only in insider trading cases.<sup>353</sup> Unlike any other provision of the securities laws, these amendments set a five-year limitation period on actions seeking those penalties,<sup>354</sup> but also expressly stated that the time limitation period “shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this title.”<sup>355</sup>

In 1990, Congress further amended the securities laws by enacting the Securities Enforcement Remedies and Penny Stock Reform Act (“Remedies Act”).<sup>356</sup> The Remedies Act authorizes the Commission to seek the imposition of civil money penalties for violations of the securities laws and to impose civil penalties in administrative proceedings against regulated entities and persons.<sup>357</sup> In adopting the Remedies Act, Congress did not set any time limitation on such actions, nor did Congress comment on whether a limitation period should apply.

Congress designed the Remedies Act to enhance the Commission’s ability to deter unlawful conduct and maintain public confidence in the nation’s securities markets by “increasing the financial consequences of securities law violations.”<sup>358</sup> In a civil action under the Remedies Act, the court determines the amount of the penalty by

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penalty . . . shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.” *Id.* As of 1990, only one case had ever been brought under this section. *See* Laby & Callcott *supra* note 32, at 7 (citing *United States v. Mercantile Properties, Inc.*, SEC Litig., Release No. 360 (S.D.N.Y. Aug. 27, 1946)).

353. Congress enacted the Insider Trading Sanctions Act of 1984, Pub. L. No. 376, 98 Stat. 1264 (codified in scattered sections of 15 U.S.C.) (“ITSA”), which gave the Commission authority to seek civil penalties in insider trading cases. In 1988, Congress strengthened the penalties available for insider trading when it enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.) (“ITSFEA”).

354. When it enacted ITSFEA, Congress provided the five-year limitation period on the imposition of the civil penalties without any explanation. *See* Dollase, *supra* note 349, at 1796 (stating that the legislative history of ITSFEA is silent on the issue). This provision was carried over from the earlier ITSA, which had included such a time limitation. *See id.* at 1796-97. Bar groups lobbied for the imposition of a limitation period in ITSA. *See id.* at 1797. The Commission took no position as to whether a time limitation should be imposed, but observed that “unlike most securities laws violations, ‘insider trading is discovered, if at all, soon after it occurs.’” *Id.* (quoting from Letter from John S.R. Shad, SEC Chairman, to Congressman Timothy E. Wirth (June 29, 1983)).

355. Securities Exchange Act of 1934, 15 U.S.C. § 78uA(d)(5) (1994).

356. Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified in scattered sections of 15 U.S.C.).

357. *See* 15 U.S.C. §§ 78u(d)(3), 78u-2.

358. S. REP. NO. 101-337, at 1-10 (1990).

considering “the facts and circumstances” of each case.<sup>359</sup> The penalties provided by the Remedies Act may be imposed in addition to any injunctive remedy, such as disgorgement.<sup>360</sup> Although the Remedies Act literally authorizes the Commission to bring a separate civil action seeking only civil penalties—*independent of an injunctive action based on the same violation*<sup>361</sup>—as a practical matter, the Commission brings a single suit seeking all the relief it believes appropriate in a case.<sup>362</sup> The suit seeks any combination of injunctions, disgorgement, and civil penalties.<sup>363</sup>

The Commission has long taken the position that no statute of limitation applies to its injunctive actions, a position of which Congress is aware.<sup>364</sup> There can be no question that Commission enforcement actions serve the public interest and therefore are entitled to the presumption against the application of any limitation period without clear congressional intent.<sup>365</sup> Several courts have rejected arguments attempting to apply statutes of limitation to Commission injunctive actions. For example, in *SEC v. Rind*,<sup>366</sup> the Ninth Circuit rejected the argument that either of two statutes of limitation should apply to Commission actions seeking injunctive relief:<sup>367</sup> the time limitation that applies to private securities fraud suits<sup>368</sup> or 28 U.S.C. § 2415(b), which applies to tort claims by the

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359. See Securities Act of 1933, 15 U.S.C. § 77t(d)(2)(A) (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(3)(B)(i) (1994).

360. See Securities Act of 1933, 15 U.S.C. § 77t(d)(3)(C) (1994) (stating that money penalty is not exclusive remedy and that the Commission may in addition seek all other authorized remedies); Securities Exchange Act of 1934, 15 U.S.C. 78u(d)(3)(C)(iii) (1994) (same).

361. See, e.g., 15 U.S.C. § 78u(d)(3)(A).

362. See, e.g., *SEC v. Caserta*, 75 F. Supp. 2d 79, 83 (E.D.N.Y. 1999) (stating that in “this action” the SEC seeks injunctions, disgorgement, and civil penalties).

363. See *id.* It seems likely that were the Commission to attempt to bring separate actions based on the same violations, one seeking civil penalties and another seeking injunctive relief, a district court would require consolidation of the two. See FED. R. Civ. P. 42(a) (providing for consolidation of “actions involving a common question of law or fact”).

364. The Commission submitted comments to Congress on ITSA that stated: “as proposed [ITSA], like the Securities Exchange Act, contains no statute of limitation applicable to Commission actions.” See Dollase, *supra* note 349, at 1797 & n.30 (quoting Letter from John S.R. Shad, SEC Chairman, to Congressman Timothy E. Wirth (June 29, 1983)).

365. See, e.g., *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (stating that Commission enforcement action ensures public rights and advances public interests); *SEC v. Lorin*, 869 F. Supp. 1117 (S.D.N.Y. 1994) (holding that the Commission enforcement action seeking disgorgement serves public interests).

366. 991 F.2d 1486 (9th Cir. 1993).

367. See *id.* at 1492 (stating that to impose any statute of limitation on the Commission would frustrate its duty to implement national policies).

368. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 (1991) (holding that private plaintiffs must bring actions under the securities laws within one year of learning of the violation and, in any event, no later than three

federal government.<sup>369</sup> In *SEC v. Lorin*,<sup>370</sup> the District Court for the Southern District of New York rejected the argument that § 2462 applied to Commission actions seeking injunctive relief.<sup>371</sup> Even the D.C. Circuit, in *Johnson v. SEC*,<sup>372</sup> stated that § 2462 would not bar an action seeking disgorgement,<sup>373</sup> which is a form of injunctive relief.<sup>374</sup>

Application of § 2462 to an SEC action brought more than five years after the violations occurred, seeking both injunctive relief and money penalties, would lead to an anomaly. As shown below, either the purposes of a statute of limitation would not be accomplished or, under the reasoning of the Ninth Circuit in *FEC v. Williams*,<sup>375</sup> all enforcement of the statute would be precluded without the required “clear” indication that Congress intended the limit to apply.

Limiting the civil penalties, but not the whole action, would not accomplish the asserted purposes of a statute of limitation. As the *3M* court noted, when a statute of limitation is provided it is out of concern that “after the passage of time ‘evidence has been lost, memories have faded, and witnesses have disappeared.’”<sup>376</sup> These concerns would be allayed only if the entire proceeding were barred. If one form of relief could be sought without regard to the time limit, the defendant would be subjected to a trial to determine whether he committed the alleged violations despite concerns about the passage of time. If one form of relief may be sought, there is no reason identified by the *3M* court that would justify barring other forms of relief. Time-barring only some relief simply does not address the concerns the *3M* court identified. The result of time-barring only monetary penalties, but allowing a suit to proceed seeking only injunctions and disgorgement, would be to frustrate Congress’s purpose in enacting the Remedies Act, i.e., to provide more flexibility and stiffer consequences in appropriate cases of securities law violations.

If, on the other hand, the approach used in *Williams* were

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years after the violation regardless of their knowledge).

369. See 28 U.S.C. § 2415(b) (1994) (providing a three-year statute of limitation for an action brought by the United States or an agency “founded upon a tort”).

370. 869 F. Supp. 1117 (S.D.N.Y. 1994).

371. See *id.* at 1122 (holding § 2462 inapplicable).

372. 87 F.3d 484 (D.C. Cir. 1996).

373. See *id.* at 491 (stating that § 2462 does not apply to restitution or disgorgement actions as they are remedial and aimed at restoring the status quo).

374. See *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) (holding that disgorgement is a form of injunction in the public interest).

375. 104 F.3d 237, 240 (9th Cir. 1996) (holding that if the legal remedy is barred then so is the equitable remedy).

376. See *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

adopted—barring equitable relief as well as penalties under the asserted rule that “equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy,”<sup>377</sup>—then the SEC injunctive actions that the courts have uniformly held *not* to be subject to any time limitation would be limited simply because money penalties were also sought. This would leave the public without any remedy against even the most egregious perpetrators of securities fraud, without any indication that Congress intended such a result. It should be noted that the controlling 1839 Act language was adopted 100 years before the merger of law and equity.<sup>378</sup> In 1839, Congress could not have envisioned actions seeking both equitable and legal relief and could not have “clearly” intended that § 2462 apply to such actions.

In addition, application of § 2462 to an SEC action seeking a civil penalty would not be consistent with the controlling language of the 1839 Act because the civil penalty itself cannot reasonably be deemed to “accrue” until the court determines liability and decides whether and how much of a civil penalty to impose, within the statutory limits.<sup>379</sup> Moreover, the venue provision of 28 U.S.C. § 1395, which provides in part that a proceeding for the “recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues,”<sup>380</sup> could not sensibly be applied to a Commission action seeking penalties. There would be no “accrued” penalty on which to base venue. In sum, a Commission civil action, even one seeking the imposition of monetary penalties, is not analogous to an eighteenth-century debt action for a sum certain and, therefore, § 2462 should not apply.<sup>381</sup>

Congress has provided time limitation periods on certain Commission actions. Its failure to so provide for injunctive and civil penalty actions (except those seeking penalties for insider trading), despite the Commission’s expressed view that no time limitation applies to actions seeking injunctive relief, at the least does not provide the necessary “clear,” affirmative indication that Congress

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377. See *Williams*, 104 F.3d at 240 (relying on and quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)).

378. See *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2314 (1999) (noting that the merger of law and equity occurred in 1938).

379. See *supra* note 359 and accompanying text (explaining that a court has discretion within wide parameters to determine amount of penalties).

380. 28 U.S.C. § 1395 (1994).

381. In the context of the federal securities laws, the language of § 2462 makes sense only as applied to a civil action brought to collect an administratively assessed monetary penalty and to the single provision that provides for a \$100 per day forfeiture. See *supra* note 352.

intended Commission actions to be limited. In fact, a strong argument can be made that Congress's silence in the face of its knowledge of the Commission's longstanding position that no time limitation applies to Commission actions denotes congressional approval of that position.<sup>382</sup> When Congress first amended the securities laws to permit courts to impose civil penalties in insider trading cases, it provided a five-year time limitation on suits for such penalties, but provided none in the 1990 Remedies Act.<sup>383</sup> This fact weighs against imposing a time limitation. The legislative history of both the 1988 and 1990 amending acts (ITSFEA and the Remedies Act) is silent as to Congress's intent, and Congress's actions could be interpreted in several ways. These amendments cannot be said to manifest "clearly" an intent that the five-year time limitation in § 2462 apply to SEC actions, either to those seeking only civil penalties or to those seeking both penalties and injunctive relief.

Although § 2462 should not apply to court proceedings brought by the SEC based on statutory violations and seeking authorized relief, there may be some statutory schemes under which the limitation would apply to court actions to determine liability for penalties because the penalties are specified by statute and may be considered to "accrue" prior to court determination of liability.<sup>384</sup> Consistent

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382. See Dollase, *supra* note 349, at 1811 (arguing that Congress's failure to adopt as part of the Remedies Act a uniform limitation period applicable to all Commission actions, in light of Congress's awareness at the time of the Commission's and the courts' view that Commission actions were not time-limited, indicates that Congress did not intend for any limitation period to apply except as specifically provided in ITSA and ITSFEA).

383. See Securities Enforcement and Penny Stock Reform Act of 1990, Pub. L. No. 101-42, 104 Stat. 931 (codified in scattered sections of 15 U.S.C.) (lacking a statute of limitation provision).

384. The Supreme Court's decision in *Tull v. United States*, 481 U.S. 412 (1987), is not inconsistent with the analysis in Part III of this Article and does not require that all court actions seeking the imposition of penalties be treated alike. In *Tull*, the Court rejected the government's argument that the right to a jury trial should attach only to cases seeking statutorily specified, nondiscretionary penalties because that was the kind of penalties that existed in the eighteenth century, to which the courts refer to determine whether the right to a jury trial attaches. *See id.* at 420. The Court held in *Tull* that there is a right to a jury trial on the issue of liability in any court action seeking penalties, fixed or discretionary, but no right to a jury trial on the amount of the penalty. *See id.* at 427 (holding that the Seventh Amendment does not require a jury trial to determine the amount of civil penalties). The Court's refusal, however, to distinguish between fixed and discretionary penalty cases for Seventh Amendment purposes does not mean that no such distinction should be made in determining the applicability of § 2462. First, the consequences of requiring a jury trial and of imposing a statute of limitation are markedly different. Requiring a jury trial may be inconvenient for the government, but it does not bar the imposition of penalties altogether. Second, in Seventh Amendment analysis, there is no requirement of clear, affirmative congressional intent that a right to jury trial apply under a modern statute. The Court determines whether the action is analogous to one for which eighteenth century law provided jury trial and, if it is, then the right to

with the Supreme Court's admonition in *Crown Coat Front Co. v. United States*,<sup>385</sup> that each statute must be evaluated in light of its language, context, purpose, and history to determine when a claim under it "accrues,"<sup>386</sup> each statutory scheme to which § 2462 arguably applies must be analyzed in light of its language, context, purpose, and history to determine whether Congress clearly intended actions created by that statute to be so limited.

#### CONCLUSION

Section 2462 appears to impose a time limitation on actions brought by the government in the public interest, so any ambiguity regarding its application to a specific government action must be resolved *against* its application.<sup>387</sup> Section 2462 is part of a statute concerning the federal courts and the judiciary.<sup>388</sup> There is no indication in the statute that Congress intended it to apply to administrative proceedings. Furthermore, § 2462's predecessor was adopted at a time when statutes regulating conduct in the public interest commonly prescribed the forfeiture of a specific sum of money or specific property, which could be recovered in court in a civil action for debt or a forfeiture proceeding. It was these actions and proceedings that Congress "clearly" intended to limit in 1839 when it adopted the provision and specified that the five-year period ran from when the "penalty or forfeiture accrued."<sup>389</sup>

Congress intended no change when it made the revisions in language in 1948, and § 2462 should be applied only to actions and proceedings analogous to those Congress intended to limit in 1839, namely, those brought in court to recover an "accrued" penalty or

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jury trial attaches. But for a time limitation to apply to an action by the government in its sovereign capacity, there must be clear intent on the part of Congress. Thus, it is consistent to conclude that a jury trial is required in all court cases in which liability for a monetary penalty is to be determined, but that Congress's clear intent to apply § 2462 to bar actions for penalties after five years may be discerned only as to actions for penalties previously fixed by statute or assessed by agencies.

385. 386 U.S. 503 (1967).

386. *See id.* at 517 (emphasizing the importance of context when considering in a specific case when a statutorily created cause of action "accrues").

387. *See supra* Part I (explaining plain language, context, and history of statute of limitation on actions for fines, penalties, and forfeitures).

388. *See supra* Part I.B.2; notes 51-75 and accompanying text. Title 28, as enacted in the 1948 Act, governs the judiciary and federal judicial procedure, including the organization of the federal courts, the Department of Justice, federal court employees and officers, the federal courts' jurisdiction and venue, as well as procedure for particular federal court proceedings. *See* 28 U.S.C. as enacted in 1948, 62 Stat. 869-985.

389. *See supra* Part I.B (arguing that plain language, context, and history support the conclusion that § 2462 applies only to court proceedings seeking existing, accrued penalties consisting of money and property).

forfeiture. Court actions to collect monetary penalties set by administrative agencies after informal or formal assessment procedures are among the proceedings that fit that description. There may be some other court actions to determine liability for specific nondiscretionary penalties to which § 2462 also would apply. Civil actions brought under modern regulatory statutes based on statutory infractions which seek the discretionary imposition of civil monetary penalties or other sanctions are not analogous to the actions for “accrued” penalties that Congress intended to limit. The current version of § 2462 should not apply to such actions.

## APPENDIX A

## 28 U.S.C. § 2462 (1994)

“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.”

## R.S. § 1047 (1874)

“No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided*, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.”

## Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322

“*And be it further enacted*, That no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued: *Provided*, The person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.”

## APPENDIX B

1. Section 89 of the Act of March 2, 1799, provided for the appointment of customs officers who would determine unilaterally the value of goods brought into the country, on which duties (specified in detail by Congress) must be paid. *See* Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695-96. The 1799 Act also prescribed, as the consequence for each of various infractions of the law, forfeitures of money, forfeitures of goods, and/or imprisonment. *See* Act of Mar. 2, 1799, § 84 (requiring forfeiture of goods for false entry); Act of Mar. 2, 1799, § 69 (requiring forfeiture and payment of double the value of concealed goods); Act of Mar. 2, 1799, § 82 (requiring imprisonment for those convicted of re-landing export goods). The 1799 Act provided that the penalties prescribed for the violation of its substantive provisions be sued for and recovered in court:

[A]ll penalties accruing by any breach of this act, shall be *sued for, and recovered with costs of suit*, in the name of the United States of America, *in any court competent to try the same*, . . . [a]nd provided, that no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred.

Act of Mar. 2, 1799, § 89 (emphasis added).<sup>390</sup>

2. The Act of Mar. 26, 1804, ch. 40, § 1-2, 2 Stat. 290, provided, first, that persons who committed certain acts on the high seas be punished by death. Section 3 dealt with crimes, fines and forfeitures under the revenue laws stating:

[A]ny person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any *fine or forfeiture* by breaches of the said laws, may be *prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture*, any law or provision to the contrary notwithstanding.

Act of Mar. 26, 1804, § 3 (emphasis added). The 1804 statute does

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390. Reading the statute as a whole, it is apparent that the three-year time limitation period applied only to actions to collect forfeitures of money and property. The 1799 Act further provides that “all fines, penalties and forfeitures, recovered by virtue of this act (and not otherwise *appropriated*) shall, after deducting all proper costs and charges, be *disposed of* as follows . . .” Act of Mar. 2, 1799, § 91 (emphasis added). The 1799 Act then specifies that one “moiety” of such fines, penalties, and forfeitures is to be allocated to the United States, and the other half divided between the customs officials and, if applicable, the informant who provided information leading to recovery of the penalties. *See id.* Obviously, such a division could occur only with respect to penalties consisting of money and property.

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not specify that it was only in federal courts that persons who had incurred a fine or forfeiture under the revenue laws could be prosecuted and punished. However, the Judiciary Act of 1789 gave the federal district courts “exclusive original cognizance . . . of all suits for penalties and forfeitures incurred, under the laws of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

3. Two statutes passed on April 20, 1818, both provided for penalties and forfeitures to be recovered through suits brought in the federal courts. One of the two, the Act of Apr. 20, 1818, ch. 91, § 1, 3 Stat. 450, amended an 1808 statute that prohibited slave trading. The 1818 amendments to the 1808 Slave Trading Act specified that for particular violations of the Act, violators were subject to imprisonment and to forfeiture of specified sums of money and/or specific property. *See* Act of Apr. 20, 1818, ch. 91, §§ 2-3, 3 Stat. 451 (requiring forfeiture of “tackle, apparel, furniture, and lading” and imprisonment up to seven years). The money and property forfeited was to be divided between the United States and the “person or persons who shall sue for said forfeiture . . . .” *See id.* § 3, Stat. at 451. The reference to this slave trading statute in the margin notes to R.S. §1047, the version of § 2462 included in the Revised Statutes of 1874 and 1878, was probably an error, however.<sup>391</sup> The margin notes to the April 20, 1818 Slave Trading Act list several statutes. None of those statutes is among those acknowledged to be ancestors of R.S. § 1047, which indicates that the two did not have common origins.<sup>392</sup>

A different statute enacted on April 20, 1818, is more likely the one meant to be referred to in the margin notes to R.S. § 1047. *See* Act of Apr. 20, 1818, ch. 72, § 20, 3 Stat. 433, “An Act Supplementary to” the 1799 customs law discussed above; *see also United States v. Platt*, 27 F. Cas. 546, 547 (C.C.S.D.N.Y. 1840) (No. 16,054a) (listing this second 1818 Act as one that had amended the 1799 customs law). The 1818 customs act amended the requirements and procedures for importing goods into the country, including the procedures for verifying the value of goods, on which depended the amount of duties to be paid. *See* Act of Apr. 20, 1818, ch. 72, § 11, 3 Stat. at 436 (authorizing collectors of goods to appraise their value).

The statute provided penalties for various infractions (*see, e.g.*, § 10, 3 Stat. 436 (stating that any merchant who refused to perform an appraisal he had been properly appointed to make was “subject to a fine of not more than fifty dollars”)). The 1818 statute further

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391. As discussed in *supra* note 82, the Revised Statutes contained errors.

392. *See* Act of Apr. 20, 1818, ch. 91, § 1, 3 Stat. 450.

provided that:

[a]ll penalties and forfeitures incurred by force of the act, *shall be sued for, recovered, distributed, and accounted for*, in the manner prescribed by the [1799] act . . . and may be mitigated or remitted, in the manner prescribed by [a 1797 statute permitting persons to bring suit in court to seek remission or mitigation of any penalty or forfeiture].

*Id.* § 25, 3 Stat. at 438 (emphasis added). As discussed *supra* Appendix B ¶ 1, the 1799 Act prescribed that “all penalties accruing” by operation of that act be “sued for, and recovered . . . *in any court* competent to try the same . . .” Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627 at 695 (emphasis added).

4. In 1823, the 1799 law on customs duties was further amended but still required that, if not paid voluntarily, penalties and forfeitures were to be sued for in court. *See* Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 729, 739. The provisions regarding “appraisement” of goods by government-appointed appraisers were changed to allow owners dissatisfied with the government appraisers’ opinion to hire two private appraisers who, with the two government-appointed appraisers, would perform a second appraisal of the goods and report this to the customs collector. *See id.* § 18, 3 Stat. at 736. If the owner was dissatisfied with the second appraisal, the statute provided that he could refer the case to the Secretary of the Treasury, who would then decide the value of the goods. *See id.* This provision did not change the fact that if penalties or forfeitures due under the act were not paid voluntarily, they were to be recovered in a suit in court. *See id.* § 35, 3 Stat. at 739 (providing that penalties and forfeitures “incurred by force of this act, *shall be sued for, recovered, distributed, and accounted for*, in the manner prescribed by [the 1799 act]”—that is, by suit in court) (emphasis added). Plainly, the statute referred to suits brought in court and, just as plainly, to sums of money that could be recovered in an action for debt, or property recoverable in a libel proceeding. *See id.*

5. In 1863, Congress enacted a provision to clarify whether actions to recover penalties and forfeitures under the customs and other related laws must be brought within the five-year time limitation period of the 1804 law, the three-year period of the 1799 law, or the five-year period provided in the 1839 statute. *See* Act of Mar. 3, 1863, ch. 76, § 14, 12 Stat. 737, 741-42; *see also* *United States v. Maillard*, 26 F. Cas. 1140, 1141-42 (C.C.S.D.N.Y. 1871) (No. 15,709) (opining that the 1863 Act was intended to eliminate confusion regarding the statute of limitation); *In re Landsberg*, 14 F. Cas. 1065, 1066-67

(C.C.E.D. Mich. 1870) (No. 8,041) (same). Although this statute was enacted after the 1839 Act adoption of what has become § 2462, because it was designed to clarify the scope of the 1839 statute, it provides useful context for interpreting § 2462.

The final section of the 1863 Act repealed those portions of the 1799 and 1804 statutes that set limitation periods on bringing “any action or proceeding for the recovery of any fine, penalty, or forfeiture” incurred for violating a customs law. *See* Act of Mar. 3, 1863, § 14, 12 Stat. at 742. Other sections of the 1863 Act amended the 1823 statute regarding the collection of customs duties (*see supra* Appendix B ¶ 4) to ensure that duties were levied on the true value of goods imported, and provided for fines or imprisonment “*at the discretion of the court*” of those who engaged in conduct designed to thwart that purpose. *See id.* §§ 3, 4, 6, 8, 12 Stat. at 739-40. The reference to the court in this and other sections of the 1863 law make it clear that, just as in the earlier laws discussed above, “any action or proceeding” to recover penalties incurred by violation of the new law referred to proceedings in court.

6. The Act of July 25, 1868, amended the 1790 criminal act (*see supra* notes 97-102 and accompanying text) to provide a five-year statute of limitation on the prosecution of capital crimes, the same period that had been adopted in 1804 for crimes, penalties and forfeitures under the revenue laws. *Compare* Act of July 25, 1868, ch. 236, § 1, 15 Stat. 183, *with* Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290, 290-91. The 1868 Act stated that no one could prosecute a person for a capital crime unless a grand jury indicted the person within five years of committing the crime. *See* Act of July 25, 1868, § 1, 15 Stat. at 183. It is not clear what relevance this statute has to R.S. § 1047, but it is listed in the margin notes to the Revised Statutes.

## APPENDIX C

1. *Smith v. United States*, 143 F.2d 228 (9th Cir. 1944), was a civil suit initiated in 1941 to collect a judgment for a *criminal* fine imposed on the defendant in 1924. The court ruled that the government could “sue upon such a judgment as upon a money judgment obtained in a civil action,” and rejected the claim that § 2462 barred the action, commenting that “[i]t has always been assumed that there is no time limitation for the enforcement of a judgment, whether of fine or imprisonment, rendered upon conviction for a crime.” *Id.* at 229. In *dicta*, the court stated that § 2462 required that “prosecutions [for a fine or forfeiture] must be commenced by indictment, information, or suit” within five years of the violation. *Id.*

2. *United States v. Athlone Industries, Inc.*, 746 F.2d 977, 982 n.1 (3d Cir. 1984), declined to decide “when the statute [§ 2462] begins to run” in the context of an action to assess a civil penalty under the Consumer Product Safety Act. *See id.* The court remanded the case to the district court both to interpret the requirements of the substantive statute allegedly violated and to develop a factual record. *See id.* at 986.

3. *Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280 (9th Cir. 1984), was an action to recover damages arising out of a collision at sea between two ships. The defendant company argued that the plaintiffs had no standing to sue because their ship had been involved in drug dealing and was therefore subject to forfeiture to the government. In rejecting this argument, the court noted that the government had not initiated forfeiture proceedings and referred in passing to the statute of limitation the court assumed would apply to such a proceeding, 28 U.S.C. § 2462. *See id.* at 1287.

4. *United States v. Ancorp National Services, Inc.*, 516 F.2d 198 (2d Cir. 1975), was an action under § 5(l) of the Federal Trade Commission Act, to recover civil penalties for violations of a prior FTC cease and desist order. The court assumed, without discussion, that § 2462 barred penalties for violations that had occurred more than five years before the suit was brought. *See id.* at 201 n.5; *see also supra* note 294-296 and accompanying text.

5. *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954), was an action under the Surplus Property Act to recover liquidated damages for fraudulently obtaining property. The court held that § 2462 barred the claim, assuming without discussion that the five-year period began when the violations occurred. *See id.* at 860-61. *Witherspoon* was overruled when the Supreme Court later held that § 2462 did not apply to Surplus Property Act proceedings because the

Act provides for liquidated damages, not a penalty. *See Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956).

6. *Lancashire Shipping Co. v. Durning*, 98 F.2d 751, 753 (2d Cir. 1938) (*Lancashire II*), did not accept the date of the underlying violation as the date the five-year period begins under § 2462, but rather supports the argument that it begins when the penalty is assessed. The underlying violation was the failure of a ship's master to comply with a notice to detain on board the ship, and to deport, Chinese crew members. *See id.* at 751-52. The "penalty accrued on March 12, 1931," but this was *not* the date of the violation; it was the date of a subsequent notification of liability for the penalty. *See id.* at 753. This is made clear in an earlier Second Circuit decision based on the same events. *See Lancashire Shipping Co. v. Elting*, 70 F.2d 699 (2d Cir. 1934) (*Lancashire I*). In *Lancashire I*, the date of the notice to detain the Chinese crew, the violation of which gave rise to the penalty, is not stated, but circumstances referred to by the court demonstrated that it was some time after January 1931, when the ship arrived in New York, and *before* March 11, 1931, when police raided the ship and discovered that the violation had occurred. *See id.* at 700. March 12, 1931, was the date of "a notice of liability for fine" under the immigration laws that was later served on the ship's agent. *See id.* Thus, *Lancashire II* assumed that the five-year period began *not* on the date of the violation, but rather when the defendant was first notified of liability for the fine. Further, the court did not hold that the version of § 2462 then in effect even applied. *See id.* at 753. The court said that "if" the time limitation applied to a subsequent administrative action against the ship's master personally for the same penalty, the government had acted timely by serving him with a notice of liability within five years of the date the "penalty accrued." *See id.*

7. *Durning v. McDonnell*, 86 F.2d 91, 92-93 (2d Cir. 1936), also did not "accept" the date of the violation as the date when the five-year period in the precursor of § 2462 began to run; the court had no reason to comment on that issue. The case was an action on a bond given to obtain clearance of a ship; without the posting of the bond, the ship would have been held in port pending determination of the ship's agents' liability for fines under the immigration laws. *See id.* The promise of the bond was that the surety would "pay penalties for which the [ship's] agents" were later determined to be liable. *See id.* at 92. The decision recounts as background that the immigration violations occurred some time in 1927 and the fines were "imposed early in 1928." *Id.* The action on the bond was commenced more

than five years later, and the court held that the version of § 2462 then in effect was inapplicable and did not bar the suit, which was not an action on the statutory liability of the agents for the fines. *See id.* at 93.

8. *The Ng Ka By Cases*, 24 F.2d 772 (9th Cir. 1928), were actions for forfeiture of alcoholic beverages brought less than five years after the goods were seized by the government under the National Prohibition Act. The court rejected the claimant's contention that the actions were barred by either laches or a three-year statute of limitation he claimed was applicable, stating that "if any limitation is applicable, we think it is the five-year period prescribed by [R.S. § 1047]." *Id.* at 774 (emphasis added). The court had no need to, and did not, decide that the five-year period in R.S. § 1047 began to run on the date of the violation.

9. All the other cases cited by the court in *Core* to support its holding that the five-year period in § 2462 begins on the date of the underlying violation are district court cases, three of which have already been discussed. *See supra* note 295 (discussing *United States v. C. & R. Trucking Co.*, *FTC v. Lukens Steel Co.*, and *United States v. Fraser*). The other district court cases cited in *Core* do not support that court's conclusion, but rather demonstrate that the courts have often recognized that when a claim for penalties "accrued" for § 2462 purposes depends on interpretation of the underlying statute establishing the penalty or forfeiture. *See United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1089-91 (D. Minn. 1982) (holding that § 2462 did *not* bar an action for penalties under the Consumer Product Safety Act against a manufacturer of a defective machine that caused injuries, even though the violations occurred more than five years before the action was filed; under the Consumer Product Safety Act, the court held, the five-year period did not begin to run until the manufacturer "has actual knowledge that the Commission is adequately informed" of injury complaints); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1038-40 (N.D. Ohio 1981) (holding that the conduct at issue did not violate the Gold Reserve Act of 1934 and that even if it did the defendant could not be held responsible; only peripherally did the *Firestone Tire* court assume, without discussion, that § 2462 barred the government's reliance on some of the alleged violations, *see* 518 F. Supp. at 1036-37); *United States v. Appling*, 239 F. Supp. 185, 194-95 (S.D. Tex. 1965) (holding that under the Agricultural Adjustment Act of 1938 notice of excess rice production must be given in time for producers to avoid penalties; notice given too late to provide this opportunity precluded

imposition of penalties); *United States v. Wilson*, 133 F. Supp. 882, 883 (N.D. Cal. 1955) (finding it unnecessary to determine whether § 2462 applied to a claim under the Surplus Property Act because the action was timely even if § 2462 applied); *United States v. One Dark Bay Horse*, 130 F. 240, 241-42 (D. Vt. 1904) (holding that a condemnation proceeding to confirm forfeiture of a horse imported without paying duties was untimely under the predecessor of § 2462 because under the customs statute the *in rem* forfeiture “was absolute and complete . . . immediately upon the importation in avoidance of the customs office”).